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ESSAY

VALUING INTEREST: NET HARM AND FAIR MARKET VALUE IN *BROWN V. LEGAL FOUNDATION OF WASHINGTON*

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ABSTRACT

Courts have long held that takings are to be valued by the fair market value of the property taken. While this standard is easy to articulate, its application in specific cases is often less straightforward leading courts, on occasion, to adopt new compensation rules to supplement or replace fair market value. The Supreme Court's recent opinion, *Brown v. Legal Foundation of Washington,* is just such a case. In *Brown*, the Court preserved the State of Washington's IOLTA program by holding that takings are to be valued by the property owner's net harm. Applied literally in future cases, the Court's net harm rule threatens to create even greater inconsistency within already convoluted takings law. This Essay argues instead that the Court's net harm rule should be read as a species of fair market value. Properly understood, *Brown's* holding is consistent with numerous valuation cases, an insight that demonstrates the breadth of the fair market value standard.

INTRODUCTION

Just compensation for a governmental taking of private property is measured by the fair market value of the property taken.[1] While this standard is easy enough to articulate, its application in specific cases is often less straightforward leading courts, on occasion, to adopt new compensation rules supplementing or replacing fair market value. Because the relationship between the Takings Clause

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1. *E.g.*, United States v. 50 Acres of Land, 469 U.S. 24, 25 (1984); Ala. Power Co. v. FCC, 311 F.3d 1357, 1368 (11th Cir. 2002); Palm Beach Isle Assocs. v. United States, 231 F.3d 1354, 1363 (Fed. Cir. 2000). This rule is subject to two narrow and seldom-applied exceptions. Fair market value does not apply where it would be too difficult to measure, or where manifest injustice would result. *E.g.*, Kirby Forest Indus. v. United States, 467 U.S. 1, 10 n.14 (citing United States v. Commodities Trading Corp., 339 U.S. 121, 123 (1950)).

and valuing just compensation is not well understood, a new compensation rule can create inconsistencies within current takings doctrine and interfere with efforts to bring coherence to this area of law.[2] The Supreme Court's most recent takings decision, *Brown v. Legal Foundation of Washington*,[3] threatens these very results by minting a new compensation rule that takings are to be measured by property owners' net harm. Applied as a new rule, "net harm" is inconsistent with other cases and may create unintended effects in the future. This Essay, therefore, offers an alternative interpretation, suggesting that net harm, as applied in *Brown*, is little more than a fact-specific application of fair market value.

At the most basic level, the fair market value of any property is the price a willing buyer would pay to a willing seller in a hypothetical transaction.[4] Appraisers can generally arrive at consistent fair market value determinations for many types of property, including private homes, small-scale commercial properties, and goods with a ready market for trading.[5] Whatever differences may exist between appraisals can be resolved through the normal course of litigation. Courts and legal scholars therefore usually write as though the fair market value of a particular property can be determined with a reasonable degree of precision through the mechanical application of fixed rules.

Outside these paradigmatic cases, however, contingent decisions about what to include in the valuation analysis dramatically affect a given property's fair market value. This is particularly true of takings where the property confiscated by the government is often real property without a ready market, or abstract property, like development rights, or the right to lease or use property in a specific way. The fair market value of undeveloped land, for example, includes judgments about the highest and best possible use for the property, the likelihood of a proposed commercial venture's success, the impact of permissible regulations, the chance of obtaining funding, the anticipated development costs, and the market conditions at the time of the governmental action. Divisive issues may include whether to value the property by its pre- or post-regulation value,

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2. *Cf.* Almoto Farmers Elevator & Warehouse Co. v. United States, 409 U.S. 470, 486 (1973) (Rehnquist, J., dissenting) (criticizing majority for "cutting loose the notion of 'just compensation' from the notion of 'private property' that has developed under the Fifth Amendment").

3. 123 S. Ct. 1406 (2003).

4. *E.g.*, United States v. 564.54 Acres of Land, 441 U.S. 506, 511 (1979) ("[T]he owner is entitled to receive 'what a willing buyer would pay in cash to a willing seller' at the time of the taking . . . . [though] such an award does not necessarily compensate for all values an owner may derive from his property.").

5. Appraisers employ a number of different techniques to arrive at the theoretical transaction price. Where the property itself—or comparable property—has recently been sold, that actual sale price is usually strong evidence of the present fair market value. If comparable sales cannot be found, appraisers can use any of a number of substitute methods, including a discounted cash flow or cost analysis. *See* RICHARD B. PEISER, PROFESSIONAL REAL ESTATE DEVELOPMENT 69 (2d ed. 2003); *cf. also* Thomas Merrill, *Incomplete Compensation for Takings*, 11 N.Y.U. ENVTL. L.J. 110, 117 (2002) (identifying alternative means of assessing fair market value).

whether to offset the value of the property taken by any increase in value of the owner's remaining property, and many other determinations that arise naturally from the facts of a particular case. Ultimately at stake in these kinds of fundamental valuation decisions is the extent of protection provided by the Takings Clause.

There is, unfortunately, little agreement about how much the Constitution should protect private property because the Takings Clause's central normative goals are deeply contested. Leading economic accounts claim the Takings Clause should be interpreted to prevent fiscal illusion, forcing the government to internalize the costs of its actions.[6] Others, however, focus on the incentive effects on property owners or view takings as a form of public insurance against government actions.[7] Still others argue for interpretations of the Takings Clause that protect deeply personal property[8] or that advance progressive goals,[9] while still others view takings as a political battleground influencing the government's appetite to impose legislated instead of free-market solutions to myriad problems.[10] In the traditional takings debate, advocates of these various perspectives argue about when the government must compensate property owners. These disagreements, however, affect more than just when compensation is due but also how much the government must pay. It is therefore not surprising that compensation inquiries suffer from a similar coherence deficit. *Brown* is no

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6. *See, e.g.*, WILLIAM FISCHEL, REGULATORY TAKINGS 141-83 (1995); Abraham Bell & Gideon Parchomovsky, *Takings Reassessed*, 87 VA. L. REV. 277, 290 (2001); Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509, 527-36 (1986); Frank Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1172-84 (1967). There is some evidence that concerns of economic efficiency were part of the original justification for the Takings Clause. *See* Michael H. Schill, *Intergovernmental Takings and Just Compensation: A Question of Federalism*, 137 U. PA. L. REV. 829, 853 n.91 (1989) ("Madison's inclusion of the just compensation clause in the Bill of Rights may also reflect concerns of economic efficiency. Madison viewed protection of property rights as essential to productive investment.").

7. *E.g.*, Lawrence Blume & Daniel L. Rubinfeld, *Compensation for Takings: An Economic Analysis*, 72 CAL. L. REV. 569 (1984); *see also* Steve P. Calandrillo, *Eminent Domain Economics: Should "Just Compensation" Be Abolished, and Would "Takings Insurance" Work Instead?*, 64 OHIO ST. L.J. 451 (2003); Eric Kades, *Avoiding Takings "Accidents": A Tort Perspective on Takings Law*, 28 U. RICH. L. REV. 1235 (1994). In response to this tension between regulatory and investment incentives, Heller & Krier have proposed their innovative takings regime. *See generally* Michael A. Heller & James E. Krier, *Deterrence and Distribution in the Law of Takings*, 112 HARV. L. REV. 997 (1999).

8. *E.g.*, MARGARET JANE RADIN, REINTERPRETING PROPERTY 146-66 (1993); Radhika Rao, *Property, Privacy and the Human Body*, 80 B.U. L. REV. 359, 387-90 (2000); Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 965 (1982).

9. *E.g.*, Hanoch Dagan, *Takings and Distributive Justice*, 85 VA. L. REV. 741, 767-92 (1999).

10. *E.g.*, Robert Jerome Glennon, *Taxation and Equal Protection*, 58 GEO. WASH. L. REV. 261, 276 n.81 (1990).

exception.

Under the State of Washington's Interest on Lawyer Trust Account ("IOLTA") program, at issue in *Brown,* attorneys are required to deposit client funds in interest-bearing accounts with the interest payable to organizations providing legal services to the poor. Petitioners filed suit claiming Washington's IOLTA program took their property, some $4.96—truly, four dollars and ninety-six cents—without providing just compensation as required by the Takings Clause. The Supreme Court disagreed and held that, while a taking had occurred, just compensation amounted to zero.[11] In so holding, the Court saved states' preferred means of funding legal services for the needy, a system providing over $200 million per year to fund legal services,[12] but contributed to the morass of takings law by glossing over complicated valuation issues.

In its decision, the Court announced two compensation rules that it treated as unexceptional: (1) takings are to be valued by the property owner's harm and not the government's gain; and (2) the property owner's harm consists of the "net" loss to the value of her property.[13] There are two distinct bases for criticizing this holding. Most profoundly, adopting any new compensation rule before resolving the fundamental conflicts in takings law is potentially counterproductive, like a doctor prescribing medicine before she knows what's wrong with her patient. Subsequent courts may find that compensation rules departing from the broad fair market value standard are at odds with the interests actually implicated in the cases before them. By failing to appreciate the relationship between compensation and takings law's normative goals, courts are letting the medication dictate their diagnosis, or simply prescribing the wrong medication altogether. Until the relationship between compensation and underlying takings theories is better understood, fixed rules constraining courts' valuation decisions can only lead to greater incoherence.

This short Essay, however, does not begin the interesting but difficult task of reconciling compensation with different conceptions of takings law but instead takes the net harm rule essentially on its own terms, arguing that it is problematic both doctrinally and under the familiar economic account of the Takings Clause.[14] Specifically, *Brown*'s net harm rule interferes with efficient regulatory incentives, is inconsistent with other cases, and elevates to constitutional status fees and other administrative expenses that may, on their own, lie far outside the reach of takings challenges. In short, applying net harm as a new valuation rule in future cases may have far broader consequences than the Court intended.

This Essay seeks to avoid these problems by arguing that *Brown* is better understood as a particular application of the fair market value standard. If,

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

12. *Id.* at 1412.

13. *Id.* at 1419-20, 21 ("Any pecuniary compensation must be measured by . . . net losses rather than the value of the public's gain.").

14. This is not to privilege an economic account of the Takings Clause, but the goal of encouraging efficient regulatory incentives is familiar in the literature and provides a ready basis for judging the Court's rule.

instead of valuing the interest in the IOLTA accounts itself, the Court was valuing the more abstract right to earn interest—i.e., one stick in the bundle of property rights associated with clients' principal in the IOLTA accounts—*Brown* stands for the unremarkable proposition that takings are to be measured by the fair market value of the property taken.[15] Ultimately, this Essay argues that the fair market value standard is broad enough to encompass the net harm rule. This Essay's surprising conclusion is that *Brown*, seemingly one of the most important valuation cases in recent years, is actually quite prosaic. It is perhaps an unusual project to argue that a Supreme Court opinion is far less interesting than it purports to be, but it is a critical project if courts are to retain the flexibility necessary to award appropriate compensation in the future. Instead of eliciting from *Brown* some new compensation rule, courts valuing takings should recognize that fair market value is a flexible standard permitting a variety of approaches, all of which—including the net harm rule in *Brown*— may constitute just compensation.

Part I of this Essay examines the Court's decision in *Brown* and traces the negative economic and doctrinal consequences of applying the Court's net harm rule literally in other takings contexts. Part II proposes an alternate interpretation of *Brown*, focusing on the nature of the property at issue and demonstrating that net harm is, in fact, better understood as a species of fair market value.

I. The Problem with Net Harm

A. Brown v. Legal Foundation of Washington

Following changes in federal banking laws permitting federally insured banks to pay interest on demand deposits by individuals and charitable organizations, every state in the nation adopted some form of an IOLTA program requiring attorneys to deposit client funds in interest-bearing accounts, with the interest payable to charitable organizations providing legal services to the poor.[16] Washington's IOLTA program is typical. The Court in *Brown* identified its four essential features:

> (a) the requirement that *all* client funds be deposited in interest-bearing trust accounts, (b) the requirement that funds that cannot earn net interest for the client be deposited in an IOLTA account, (c) the requirement that the lawyers direct the banks to pay the net interest on the IOLTA accounts to the Legal Foundation of Washington (Foundation), and (d) the requirement that the Foundation must use all funds received from IOLTA accounts for tax-exempt law-related charitable and educational purposes.[17]

This program was challenged by two plaintiffs whose funds on their own would

15. *See* cases cited *supra* note 1.

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

17. *Id.* at 1413.

not have earned positive net interest and were therefore deposited into an IOLTA account.

Brown was the Supreme Court's second substantive review of a state's IOLTA program. In a prior opinion, *Phillips v. Washington Legal Foundation*,[18] the Court addressed the question of whether interest accruing in IOLTA accounts was the clients' property.[19] The Court in *Phillips* held that "interest follows principal" and "regardless of whether the owner of the principal has a constitutionally cognizable interest in the *anticipated* generation of interest by his funds, any interest that *does* accrue attaches as a property right incident to the ownership of the underlying principal."[20] In short, yes. Interest actually accruing in IOLTA accounts belongs to the client.

Phillips was a peculiar case procedurally. There, the Court addressed only who owns the interest in IOLTA accounts and did not reach the underlying takings issue. A dissent by Justice Souter pointed out that the Court's decision did not adjudicate a case or controversy within the meaning of Article III.[21] The Court's ownership determination had no effect on the rights of the parties without a resolution of the takings issue motivating the dispute. The Court in *Phillips* appeared to hold simply that interest on IOLTA accounts was the property of the client. Nevertheless, this holding set the stage for the constitutional challenge in *Brown*. If interest in the IOLTA accounts was the property of the owners of the principal, then it would seem naturally to follow that the government may not take that interest without paying compensation.

Washington State's IOLTA program, however, was carefully crafted with the takings issue in mind. An essential feature of the program was its applicability only to funds that would not have generated sufficient interest to pay for the administrative expenses of maintaining a separate interest-bearing account.[22] In other words, but for the IOLTA program and the pooling of clients' funds in large interest-bearing accounts, the value of the net interest generated by an individual client's funds was zero. In a very real sense, then, Washington's IOLTA requirements only deprived clients of money they would not have received but for the IOLTA program. As the Washington Supreme Court found in rejecting

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18. 524 U.S. 156 (1998).

19. *Id.* at 160 ("The question presented by this case is whether interest earned on client funds held in IOLTA accounts is 'private property' of either the client or the attorney for purposes of the Takings Clause of the Fifth Amendment.").

20. *Id.* at 168.

21. *Id.* at 172 (Souter, J., dissenting) ("I do not join in today's ruling because the Court's limited enquiry has led it to announce an essentially abstract proposition.").

22. The Supreme Court quoted Washington's findings:

> In conformity with trust law, however, lawyers usually invest client trust funds in separate interest-bearing accounts and pay the interest to the clients whenever the trust funds are large enough in amount or to be held for a long enough period of time to make such investments economically feasible, that is, when the amount of interest earned exceeds the bank charges and costs of setting up the account.

Brown v. Legal Found. of Wash., 123 S. Ct. 1406, 1413 (2003).

a similar takings challenge, the "program creates income where there had been none before, and the income thus created would never benefit the client under any set of circumstances."[23]

Relying on the reasoning in *Phillips*, the Court found that forcing the transfer of interest from the IOLTA account to the Legal Foundation of Washington constituted a *per se* taking of the plaintiffs' property.[24] In the Court's view, *Phillips* left no doubt that a taking had occurred. The only question—and the issue at the heart of the Court's decision—was "whether any 'just compensation' is due."[25]

Turning to the problem of valuing the plaintiffs' takings claim, the Court observed:

> All of the Circuit Judges and District Judges who have confronted the compensation question, both in this case and in *Phillips*, have agreed that the "just compensation" required by the Fifth Amendment is measured by the property owner's loss rather than the government's gain. This conclusion is supported by consistent and unambiguous holdings in our cases.[26]

The Court then reasoned as if its ultimate conclusion followed necessarily from this observation. Because attorneys were required to deposit client funds in a non-IOLTA account "whenever those funds could generate net earnings for the client,"[27] those clients whose funds would not generate net earnings were unharmed when forced to deposit their money in IOLTA accounts. Therefore, according to the *Brown* majority, while a taking had occurred, the property owners were not entitled to compensation.[28] As the Court noted in its final footnote, "just compensation for a net loss of zero is zero."[29]

The opinion in *Brown* was written over a biting dissent. Justice Scalia, joined by Chief Justice Rehnquist, and Justices Kennedy and Thomas, objected to the majority's reasoning and principally to the majority's focus on net damages. The dissenters characterized the majority's opinion as "a novel exception to our oft-

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23. IOLTA Adoption Order, 102 Wash. 2d 1101, 1108, *quoted in Brown*, 123 S. Ct. at 1414.

24. *Brown*, 123 S. Ct. at 1419 ("We agree that a *per se* approach is more consistent with the reasoning in our *Phillips* opinion than *Penn Central*'s ad hoc analysis."). This distinction dates back to *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 115-18 (1978), in which the Court identified essentially *ad hoc* factors for courts to consider in order to determine whether a taking had occurred.

25. *Brown*, 123 S. Ct. at 1419.

26. *Id.*

27. *Id.* at 1421.

28. Conceptually, there is no reason not to separate the question of when a taking has occurred from the calculation of damages. However, not all courts have acknowledged the possibility of such a distinction. *See, e.g.*, A.A. Profiles, Inc. v. Fort Lauderdale, 253 F.3d 576, 582 (11th Cir. 2001) (holding that district court was not free "to revisit, in the guise of determining the proper damages, the issue of whether a taking occurred").

29. *Brown*, 123 S. Ct. at 1421 n.11.

repeated rule that the just compensation owed to former owners of confiscated property is the fair market value of the property taken."[30]

According to Justice Scalia, the majority's opinion was motivated purely by its desired outcome. He wrote:

> Perhaps we are witnessing today the emergence of a whole new concept in Compensation Clause jurisprudence: the Robin Hood Taking, in which the government's extraction of wealth from those who own it is so cleverly achieved, and 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.[31]

Properly understood, however, the Court's net harm rule is both less novel than the dissent admits, and less straightforward than the majority claims. By arguing about which bright-line compensation rule to apply, the Court as a whole obscured what might otherwise have been a relatively straightforward application of fair market value. Taken at face value, the Court's rule creates problems both by requiring takings to be valued by harm instead of gain, and by valuing that harm by the property owner's *net* harm.

B. Harm Versus Gain

According to the Court, its "consistent and unambiguous" precedent established that takings are to be measured by the property owner's harm and not the government's gain.[32] To cast the choice in more familiar legal terms, the Court adopted a damages remedy as opposed to a restitutionary remedy.[33] In fact, the precedent is neither unambiguous nor consistent. When the government is functioning in a commercial or quasi-commercial capacity, courts have been willing to consider a gain-based award.[34] The Court's choice was therefore less

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30. *Id.* at 1422 (Scalia, J., dissenting).

31. *Id.* at 1428. Despite Justice Scalia's dismissiveness, is it so surprising that courts' application of the Takings Clause might depend on their view of the legitimacy of the governmental purpose? *See* John C. Cooke & Christine Carlisle Odom, *Judicial Deference to Local Land Use Decisions and the Emergence of Single-Class Equal Protection Claims*, 30 ENVTL. L. REP. 11049 (2000) (identifying cases in which courts focused on governmental bad faith).

32. *Brown*, 123 S. Ct. at 1419.

33. *See generally* Daniel Friedmann, *Restitution for Wrongs: The Measure of Recovery*, 79 Tex. L. Rev. 1879 (2001). For an examination of the significance of this distinction, see HANOCH DAGAN, UNJUST ENRICHMENT 2-22 (1997). *See also* Michael Heller & Christopher Serkin, *Revaluing Restitution: From the Talmud to Postsocialism*, 97 MICH. L. REV. 1385, 1396 (1999) (reviewing Dagan's work).

34. *See* Tenn. Valley Auth. v. Pawelson, 319 U.S. 266, 281-82 (1943) ("[T]he sovereign must pay only for what it takes, not for opportunities which the owner may lose."); *see also* Francini v. Town of Farmington, 557 F. Supp. 151, 157 (D. Conn. 1982) ("[I]t is well-settled that a constitutionally cognizable 'taking' requires the sovereign to pay for what it actually gains, not for what the plaintiff has lost."); Whitney Benefits, Inc. v. United States, 18 Cl. Ct. 394, 407 (1989)

obvious than it might seem and, if interpreted as a concrete compensation rule, will eliminate compensation that might actually lead to more efficient regulatory incentives.[35]

Viewed systemically in terms of its incentive effects, a harm-based (damages) award encourages only efficient governmental actions. Where the government's gain exceeds the property owner's harm, i.e., where it creates more benefit to the government than harm to the property owner, a harm-based award permits the government to capture the excess benefit created by its action. Conversely, where the government acts inefficiently, and the property owner's harm is greater than the government's gain, the government will have to pay more than it benefits. This is the standard economic justification for the Takings Clause offered by countless commentators.[36]

A gain-based (restitutionary) award, on the other hand, would seem to over-deter governmental actions. Forcing the government to disgorge all of the benefits of an undertaking will create an *ex post* damage award that functions as an *ex ante* disincentive to take the property in the first place.[37] If, in other words, the government will be unable to reap any benefit from its action—whatever those benefits may be in a particular case—its incentive to act will be greatly diminished. The government will be better off operating in the open market and negotiating for some division of the anticipated gain with the present owner than it will be if it has to repay the full value of the benefits generated by its action.

These preliminary analyses only hold true, however, if compensation calculations include an economically full measure of harm and gain. Many courts and commentators have observed this often is not the case.[38] For example, most

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("The sovereign must pay for what it takes, not for opportunities the owner loses.").

35. There is no doubt that restitution, like full indemnification, has largely been rejected by the federal courts as a basis for recovery. *See* Merrill, *supra* note 5, at 118. Nevertheless, gain-based awards have persisted explicitly in some limited circumstances. *See supra* note 34. In addition, some commentators have noted that limiting compensation to the property's fair market value, instead of indemnifying the property owner for the full value of her loss, amounts to compensating based on the government's gain and not the property owner's loss. *See* Schill, *supra* note 6, at 890 n.245.

36. *See, e.g.*, Bell & Parchomovsky, *supra* note 6, at 290. While there is reason to be skeptical of this account, it captures a straightforward and familiar intuition. *See* Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 346 (2000) (arguing that governments do not internalize costs the same way that private actors do).

37. *See* DAGAN, *supra* note 33, at 15. Dagan has examined how damage awards can create a systemic pressure that serves as an *ex post* property rule.

38. *See, e.g.*, Ga. Pac. Corp. v. United States, 640 F.2d 328, 361 n.43 (Ct. Cl. 1980) ("For example, spoilation of inventory and equipment, reduction in loss of goodwill and profits, expenses incurred in having to readjust manufacturing operations, frustration of contract or business, loss of business, and incurrence of relocation expenses incident to a taking are deemed non-recoverable consequential damages."); Richard A. Epstein, *Whose Democratic Vision of the Takings Clause? A Comment on Frank Michelman's Testimony on Senate Bill 605*, 49 WASH. U. J. URB. &

takings impose a number of costs that are not included in any harm-based measure of compensation actually applied by courts. The Supreme Court has expressly forbidden compensation for a property owner's subjective harm.[39] Likewise, damage awards for takings do not include compensation for consequential damages or other costs imposed on the property owner as a result of the government's action.[40] Limiting compensation to the property owner's objective, non-consequential damages, then, may not actually promote efficient governmental actions. Where, on the facts of a particular case, the benefit to the government is less than the *non*-compensable harm imposed on the property owner, harm-based compensation may result in tacitly encouraging inefficient regulatory incentives.

To concretize this discussion, imagine a public project, like the creation of a new park, that is worth $100 to the government. In order to create the park, the government will have to condemn a home with a fair market value of $75. On its face, this appears to be an efficient project, creating a net societal benefit of $25, even if the government must pay to fully compensate the property owner's objective harm. If, however, real but non-compensable harms, like moving expenses or subjective value attached to the home, impose an additional $40 worth of harm to the property owner, the park will create a net inefficiency of $15. The government is still likely to pursue the project, however, because it must only internalize the property owner's objective harm. Therefore, where non-compensable damages are particularly high, a harm-based award may, in fact, permit some measure of fiscal illusion and actually encourage inefficient regulatory incentives.[41]

Similarly, most benefits to the government are too difficult to measure for courts to include in restitutionary awards.[42] It is no simple task, for example, to

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CONTEMP. L. 17, 19 (1996) (identifying reasons why market value of the property taken fails to compensate property owners for additional "real" damages they suffer); Merrill, *supra* note 5, at 111 ("[J]ust compensation means incomplete compensation.").

39. *See* Kimball Laundry Co. v. United States, 338 U.S. 1, 5 (1949). This rule excludes compensating for any private property owner's unique use of her property. However, state courts may sometimes award replacement value for certain unique-use property. Replacement value is expressly approved as an award for so-called special use property. *See, e.g.*, Grammercy Boys' Club Assoc. v. City of New York, 141 A.D.2d 365 (N.Y. App. Div. 1988) (awarding replacement value for clubhouse); City of Rochester v. Ryan & McIntee, Inc., 56 A.D.2d 715 (N.Y. App. Div. 1977) (funeral parlor); Sons of Israel v. State, 54 A.D. 2d 794 (N.Y. App. Div. 1976) (synagogue).

40. *See, e.g.*, United States v. 50 Acres of Land, 469 U.S. 24, 33 (1985); Yuba Natural Res., Inc. v. United States, 904 F.2d 1577, 1581 (Fed. Cir. 1990).

41. This entire discussion assumes, as do most property theorists, that governmental actors are moved by fiscal considerations. *See* Schill, *supra* note 6. This assumption has recently been problematized, at least at the margin, in a recent article. *See* Levinson, *supra* note 36; *see also* Schill, *supra* note 6, at 859-60 (suggesting a similar critique but also offering some empirical refutations).

42. *See* Merrill, *supra* note 5, at 129 ("Determining the value to the taker would be difficult, because the takings power is often used for public projects, such as highways, parks, or a clean

measure the value to the government of an environmental regulation. Even where the government is functioning in a commercial or quasi-commercial capacity, the full extent of its gains may not be reflected in the going concern value of the enterprise.[43]

These observations are not intended to suggest that present compensation rules are necessarily inadequate. Different accounts of the Takings Clause that do not focus on the government's incentives would, presumably, result in a qualitatively different understanding of the adequacy of current compensation practices. The impracticality of, and inefficiencies associated with measuring subjective harm or gain, also justify their exclusion from just compensation in most cases. But even under a straight economic account the possibility of asymmetrical, non-compensable harms or gains means that the most effective compensation regime is one in which courts have discretion to shift between harm and gain-based awards, depending on the facts of a particular case. A harm-based award is the presumptive norm—courts apply it in most cases, especially where the government's gain is difficult to value and the property owner's objective harm is likely to be the most significant portion of her total harm. But a restitutionary award may be appropriate where the government's gain is easy to measure as, for example, when the government is functioning in a commercial capacity and it seems, because of the nature of the property at issue, the property owner's subjective harm or consequential damages may lead to inefficient incentives if excluded. In fact, some courts have at least acknowledged this possibility.[44] The Court's decision in *Brown* threatens to eliminate this kind of inquiry by holding that compensation for takings is to be measured exclusively by the property owner's harm.

C. Net Harm

Not only does the Court's rule in *Brown* require compensation to be measured by the property owner's harm instead of the government's gain, it also requires compensating only for net harm. This is in tension with other Supreme Court precedent. In the famous case of *Hodel v. Irving*,[45] the Court could have

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environment, that have no commercial measures of value.").

43. For example, in *Minneapolis Community Development Agency v. Opus Northwest, LLC*, 582 N.W.2d 596 (Minn. Ct. App. 1998), the City of Minneapolis condemned two prime, downtown lots which it then conveyed to the operator of a Target Store. "The city wanted to locate a . . . Target store [downtown] to attract shoppers." *See* John Windrow, *Downtown Target Store OK'd [sic] Without Office Tower*, STAR TRIB., June 27, 1998, at A1, *quoted in* Note, *Can Government Buy Everything?*, 87 MINN. L. REV. 543, 556 n.86 (2002). The value to the city of attracting shoppers would not have been included in the market value of the two condemned lots.

44. *See* United States v. 0.88 Acres of Land, 670 F. Supp. 210 (W.D. Mich. 1987) ("[D]amages for the loss of goodwill or loss of the going-concern value of a business are not compensable *unless the government has condemned the business property with the intention of carrying on the business.*") (emphasis added).

45. 481 U.S. 704 (1987).

rejected the plaintiffs' takings claims by redefining their damages in terms of net harm. Its decision not to do so demonstrates both the limits of the Court's reasoning in *Brown*, and the impracticability of adopting a one-size-fits-all valuation rule in takings cases generally.

In *Hodel*, the Supreme Court struck down as unconstitutional a law seeking to remedy fractionated ownership interests in Indian-owned land. In a series of land acts from the early Nineteenth Century, the United States allotted certain lands to individual members of Indian tribes.[46] Under this scheme, allotted lands were held in trust by the government for the benefit of the individual tribe-members.[47] Presumably to prevent exploitation, those beneficial interests were made non-saleable and could only be transferred, by will or intestacy, at the death of the tribe-member.[48] The property interests, often leased to third parties, were therefore passed down to multiple offspring through the generations and quickly became so fractured that "'numerous cases exist[ed] where the shares of each individual heir from lease money may be 1 cent a month.'"[49] In order to overcome the inefficiencies resulting from fractured ownership, Congress, in 1983, passed a law applying to property interests that had become so diffuse they were no longer valuable to the individual tribe members. Such property, according to the statute, would escheat to the state.[50] In other words, Congress sought to re-aggregate property interests that had grown inefficiently fractured over time.[51]

The Court in *Hodel* concluded that the statute effected a taking of the allottees' property without just compensation despite recognizing that the administrative costs associated with the highly fractionated tracts were higher, and sometimes much higher, than the value of the tracts themselves.[52] In other words, the net value of the interest produced by many of the allottees' property was zero. While the Court did not expressly consider the compensation question in *Hodel*, it nevertheless struck down the statute and reaffirmed its holding ten years later in *Babbitt v. Youpee*.[53]

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46. *Id.* at 707.

47. *Id.* ("In order to protect the allottees from the improvident disposition of their lands to white settlers, the Sioux allotment statute provided that the allotted lands were to be held in trust by the United States.").

48. *Id.*

49. *Id.* at 708 (quoting 78 CONG. REC. 11728 (1934)).

50. In order to accomplish its goals, Congress provided that no fractional interest in the allotted land could be passed down through intestacy or devise "if such interest represents 2 per centum or less of the total acreage in such tract and has earned to its owner less than $100 in the preceding year before it is due to escheat." *Id.* at 709 (quoting 96 Stat. 2519).

51. For an excellent analysis of the problem Congress was attempting to solve, see Michael Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621, 685-88 (1998).

52. *See Hodel*, 481 U.S. at 713 (describing one tract valued at $8000 with yearly administrative costs in excess of $17,000).

53. 519 U.S. 234 (1997).

The failure of the Court in *Brown* to cite *Hodel* is perhaps surprising.[54] *Hodel* and *Brown* have a lot in common. In both cases, the Government was seeking to overcome barriers to combining property into more efficient parcels. In *Brown*, the barriers included various forms of transaction costs.[55] In *Hodel*, the barrier was a law, namely the original allotment scheme. But in both cases, the government was aggregating property where private markets could not.[56] In both cases, too, the government only deprived owners of property that was worth less to them than the administrative costs imposed by the property.

There is one obvious distinction between these two cases. In *Hodel*, the government bore the administrative costs. The allottees therefore received their share of rent from their property without any reduction for those costs. In the IOLTA program at issue in *Brown*, any client wishing to receive interest from her funds would herself be responsible for the fees associated with an interest-bearing account. But this difference—who bore the administrative costs prior to the taking—should be a difference without constitutional significance.

Where the administrative costs happened to lie in *Hodel* is a contingent historical fact. But for a political bargain struck towards the end of the Nineteenth Century, the allottees' interests could have been paid net of any administrative costs associated with the allotment. Under the Court's reasoning in *Brown*, and all else being equal, Congress today would be able to eliminate the allottees' interests without paying compensation if the administrative costs had been allocated differently. *Brown* therefore threatens to constitutionalize administrative costs.

It is well established that administrative fees, taxes and other exactions are not compensable takings of private property.[57] If Congress could shift the administrative costs of the land acts to the allottees without effecting a taking, either by passing on the costs directly, or by imposing some nominal service charge,[58] then Congress could subsequently eliminate the allottees' smaller

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54. The failure of *Hodel* to discuss compensation is also interesting. Instead of ordering the case transferred or remanded to the Court of Claims for a valuation inquiry, the Court struck down the statute in its entirety, the remedy the plaintiffs in *Brown* were surely seeking.

55. Transaction costs here include both actual bank fees and free-rider, holdout, and collective action problems.

56. Some might object that a private party could also overcome transaction costs and create, in effect, a private IOLTA program. It is ultimately an empirical question whether the market for interest on escrow accounts is such that a private actor could not create a private IOLTA program. It is sufficient for this Essay to note that the absence of any privatized IOLTA plans is at least evidence that such plans could only be created by the government.

57. *See, e.g.*, United States v. Sperry Corp., 493 U.S. 52 (1989) (finding no taking where federal government imposed fee on tort award as reimbursement for its costs); Student Loan Mktg. Assoc. v. Riley, 104 F.3d 397 (D.C. Cir. 1997) (holding imposition of fee on student loans is not a taking); Commercial Builders v. City of Sacramento, 941 F.2d 872 (9th Cir. 1991) (finding no taking where city ordinance conditioned non-resident building permits on payment of fee).

58. The result of a taking analysis is by no means a foregone conclusion, and courts might be willing to find such exactions to be a taking. But Congress at least could make a credible

interests altogether under a literal interpretation of *Brown*'s net harm rule. But, if switching who bears fees is not an act of constitutional significance, it is difficult to see why this should convert an impermissible law into legislation for which no compensation is due. Has *Brown* therefore implicitly overruled *Hodel*? Surely the Court in *Brown* did not believe it was reversing its own recent precedent *sub silentio*. But the Court's rule, applied literally, elevates to constitutional status fees and other administrative expenses that may, on their own, lie far outside the reach of takings challenges.

An additional problem with valuing takings by *net* harm is posed by the question, "net of what?" What fees, costs, or expenses are offset against the value of the property taken? Future courts could draw the rule narrowly, including only administrative expenses associated with extracting value from the property.[59] Or, if the rule is construed more broadly, its reach could include deductions for taxes associated with the property, or any other fees imposed from whatever source. As the dissent admonished, however, "if the Federal Government seizes someone's paycheck, it may not deduct from its obligation to pay just compensation the amount that state and local governments would have taxed, on the ground that it need only compensate the 'net loss' to the former owner."[60] What costs should courts include in determining net harm? The Court in *Brown* did not even begin to answer this question.

Perhaps principled lines could be drawn around the net harm rule, but courts have not proven particularly adept at linedrawing in this area.[61] While this Essay contends that flexibility is important in valuing takings claims, unprincipled and under-theorized flexibility can only further destabilize takings law. In short, taken literally, the Court's net harm rule is difficult to apply, improperly limits courts' flexibility, and is inconsistent with other Supreme Court precedent.

II. NET HARM AS A SPECIES OF FAIR MARKET VALUE

A. Redefining the Property at Issue

Net harm, read as a new compensation rule, raises all of the difficult problems identified in the previous section. To avoid these problems, the Court's rule should be understood instead as nothing more than a fact-specific application

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argument that imposing such costs on the allottees as a group is not a taking, either under the *Penn Central* diminution of value test, or under the theory that the government may impose special use taxes without effecting a taking.

59. As the dissent pointed out, the narrowest construction of the Court's net harm rule would offset only the value created by the government itself, but this interpretation is squarely at odds with recent Supreme Court precedent. *See Brown*, 123 S. Ct. at 1425 (Scalia, J., dissenting) (citing Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980)).

60. *Id.* at 1426-27 (Scalia, J., dissenting) (internal quotation marks omitted).

61. For an excellent treatment of the problems associated with such linedrawing, see generally Daryl J. Levinson, *Framing Transactions in Constitutional Law*, 111 YALE L.J. 1311 (2002).

of the traditional fair market value standard. Because both the majority and the dissent in *Brown* chose to characterize the rule as something new and different, however, they obscured its close relationship with other cases valuing just compensation and its relatively benign precedent for future cases.

The confusion may come in part from a hidden controversy over the nature of the property at issue. As the dissent observed, the majority's opinion is potentially ambiguous about the property it is purporting to value. According to Justice Scalia, the majority adopted two inconsistent approaches to measuring just compensation. Either "just compensation is the interest petitioners *would have earned* had their funds been deposited in *non-IOLTA* accounts,"[62] or "just compensation is the amount of interest *actually earned* in petitioners' IOLTA accounts, minus the amount that would have been lost in transaction costs had petitioners sought to keep the money for themselves."[63]

There are strong arguments suggesting that either characterization is seriously flawed. If the property taken was the actual interest earned in the IOLTA accounts, then its fair market value could not seriously have been in question. The value of $4.96 is, by definition, $4.96. For the Court to conclude that zero compensation was due, it must therefore have offset bank fees and administrative expenses from the apparently concrete fair market value of the interest itself. The Court, in other words, must have identified the value of the property and then, in a discrete second step, calculated the owners' net harm. This approach implicates all of the problems identified in Part I of this Essay.

But as the dissent correctly observed, the alternative interpretation fares no better because "just compensation is not to be measured by what would have happened in a hypothetical world in which the State's IOLTA program did not exist."[64] In other words, the clients' funds did, in fact, earn interest in the IOLTA accounts and that interest was taken at the moment it was transferred to the Legal Foundation of Washington. In this situation, it seems entirely beside the point to value the taking by the interest the clients' funds would have earned if they had been placed in a non-IOLTA account.

There is, however, a third option. If, instead of valuing the interest itself, the Court was valuing the *right to earn interest*, a right that was categorically taken by the IOLTA program, the net harm rule becomes a fact-specific application of the fair market value standard. There is no doubt the Court believed it was doing something different than this Essay proposes. The Court's focus on the actual expropriation of specific property is arguably inconsistent with recharacterizing the property as the right to earn interest.[65] This presents a difficult choice. Either *Brown* was correct about the nature of the property it was valuing but announced

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62. *Brown*, 123 S. Ct. at 1423 (Scalia, J., dissenting) (emphasis in original).

63. *Id.* (Scalia, J., dissenting) (emphasis in original).

64. *Id.* at 1424 (Scalia, J., dissenting).

65. *Brown* held specifically that the IOLTA program effected a taking when interest from the IOLTA accounts was transferred to the Legal Foundation of Washington. *See id.* at 1419 (citing, inter alia, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), for the proposition that permanent physical occupations are *per se* takings).

a new valuation rule that is inconsistent with existing case law and leads to anomalous results in the future, or *Brown* misunderstood the property it was valuing but, once properly understood, followed an uncontroversial valuation approach. The latter option is not only preferable as a means of synthesizing *Brown* with prior cases, it is essential if courts are to avoid the problems identified in Part I and retain the discretion necessary to award compensation responsive to the Takings Clause's contested goals.[66]

B. Valuing the Right to Earn Interest

At first glance, it may seem wholly facile to suggest any meaningful distinction between the value of the interest itself and the value of the right to earn interest. Put another way, why should the underlying value of the property be affected by its characterization either as a Blackstonian "res"[67] or a modern-day stick in a bundle of property rights?[68] Redefining the property at issue is a familiar rhetorical move in property law, but what difference does it make to the actual valuation of the property? As it turns out, it can make a significant difference.

In contrast to the value of the interest actually earned in an account, the value of the right to earn interest cannot be measured directly. It is dependent upon interest rates, the length of time for which the money must be held, as well as expenses associated with setting up and maintaining the account. If a client's funds would not have been capable of generating net positive interest for the client, she will assign zero value to the right to earn interest. The right to earn interest will, in other words, have a fair market value of zero. As one of the dissenters wrote in the Ninth Circuit's review of Washington's IOLTA program: "The fair market value of *a right to receive* \$.55 by spending perhaps \$5.00 to receive it would be nothing."[69]

A simplified example demonstrates this basic insight. Imagine a client, with \$100 to be deposited for ten days, choosing between two bank accounts. One

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66. *See supra* text accompanying notes 6-10.

67. Kenneth J. Vandevelde, *The New Property of the Nineteenth Century: The Development of the Modern Concept of Property*, 29 BUFF. L. REV. 325, 331 (1980) (discussing the physicalist conception of property and attributing this concept to Blackstone).

68. *See generally* Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913). Hohfeld is widely credited with providing the legal conception of property responsible for this metaphor. *See, e.g.*, Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 YALE L.J. 357, 364-65 (2001).

69. Wash. Legal Found. v. Legal Found. of Wash., 271 F.3d 835, 883 (9th Cir. 2001) (en banc) (Kleinfeld, J., dissenting) (emphasis added), *quoted in*, *Brown*, 123 S. Ct. at 1420. The *Brown* majority did not identify the potential significance of this language but focused on it instead to criticize Justice Scalia, noting that, under his view, "the client should recover the \$.55 of interest earned on a two-day deposit even when the transaction costs amount to \$2.00." *Brown*, 123 S. Ct. at 1420 n.10.

account, call it Account X, earns no interest, and the other, Account Y, earns 5% interest over those ten days. At the end of ten days, Account X will still have \$100 while Account Y will be expected to have \$105. Putting aside the time value of money, the value of the right to earn interest on \$100 of principle is \$5.00 over the ten-day period and a client should be willing to pay up to \$4.99 for that right. If, however, the client would have to pay \$1.00 to withdraw money from Account Y at the end of the ten days, the value of the right to earn interest is reduced to \$3.99. Other bank fees associated with Account Y—such as periodic maintenance fees or other fees associated with accounting for the money—might reduce the fair market value of the *right to earn interest* to zero although the amount of *interest actually earned* would remain \$5.00. That is to say, a client would not be willing to pay any money for the right to earn interest on her \$100 in client funds even though the funds would generate \$5.00 in interest.

This difference between valuing the interest itself and valuing the right to earn interest determines whether fees and other expenses are included in the fair market valuation of the property or whether they must be subtracted in a second, distinct step to determine the property owner's net harm. The result is the same, but where fees fit in the calculation of damages is different. In other words, on the facts of *Brown*, the Court could have reached its same conclusion by applying a fair market value analysis that included fees and administrative expenses instead of crafting a novel net harm rule. Reconstrued as a case about valuing rights instead of an identifiable, discrete pool of money, *Brown* stands only for the proposition that takings are to be valued by the fair market value of the property taken.

Not only is *Brown* uncontroversial under this interpretation, but reconstruing net harm as part of the fair market value inquiry also makes the Court's approach consistent with a long line of cases that have valued undeveloped real property. Where the highest and best use of property would, for example, be the development of a shopping mall, just compensation for a taking or condemnation of that property is not simply the as-developed value of the property. Instead, it is the as-developed value minus the cost of developing the property.[70] Naturally, any market price for the undeveloped property would incorporate the anticipated expenses of developing the property into its highest and best use.[71]

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70. *See* United States v. 125.07 Acres of Land, 667 F.2d 243 (1st Cir. 1981). The court described fair market value determinations to include

> first, the hypothetical value of the property when developed to and sold at its highest and best use (the "gross value"); second, the costs of developing the land from its present state to the highest and best use (the "development costs"); and, third, the present fair market value of the tract, determined by subtracting the development costs from the gross value.

Id. at 249.

71. *See* Loveladies Harbor, Inc. v. United States, 28 F.3d 1171 (Fed. Cir. 1994). In *Loveladies*, a Claims Court entered judgment for the plaintiff in the amount of \$2,658,000 for a denial of a permit by the Army Corps of Engineers to fill in 11.5 acres of wetlands. Plaintiffs

Compensating for the as-developed value of the presently undeveloped property, without any reduction for the costs the owner would have borne to develop the property, would make the property owner far better off than if she had actually developed the property herself. Fair market value, in other words, is net of the costs required to develop the property.

When courts value undeveloped land by the property's highest and best use, minus development costs the property owner would have incurred, there is considerable debate about what costs to include. The higher the development costs a court will award, the lower the property owner's recovery. This tracks the commonsense intuition that the value of a piece of property will decline as the costs of developing it increase.[72] But courts have a difficult time determining what costs to include in their valuations. Should they include only the building costs themselves, or also insurance costs, permitting fees, and perhaps architectural plans? Should the costs be increased to reflect the possibility of permit denials or other risks? Is the cost of borrowing funds included in development costs, because the property owner would not have paid cash for her project?[73]

The answer, in short, is that courts retain flexibility to determine what expenses to include but are ultimately governed by the fair market value standard. In reality, the allocation of development costs between the buyer, the seller, the building contractor and the financial lender, and any other relevant parties to a building project, is dependent on the specific market. But too individualized an assessment of these costs can run counter to the Supreme Court's admonition not to base just compensation on the subjective damages of the individual property owner. So, for example, if a specific developer, like Wal-Mart, would in fact have faced increased development costs because of local public opposition to

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claimed that the highest and best use of the property was as a 40-lot residential development, the gross value of which was estimated at $3,720,000. *See id.* at 155. The court reduced this amount by costs the landowner would have incurred to develop the property. *See id.*

72. If there is any doubt about the relationship between the undeveloped value of land and the costs of developing it, environmental remediation provides a ready real-world example. If undeveloped land is found to be contaminated, such that expensive remediation would be required before it could be developed, the value of that land will be reduced by the anticipated costs of remediation resulting. Where environmental liabilities are sufficiently high, property owners may sometimes be willing to forfeit the property, or even pay someone to acquire the property, in exchange for the "buyer" assuming remediation costs. *Cf.* Housing Auth. of New Brunswick v. Suydam Investors, L.L.C., 826 A.2d 673, 688 (N.J. 2003).

73. *E.g.*, Bontrager v. Siskiyou County Assessment Appeals Bd., 118 Cal. Rep. 2d 182, 186 (Ct. App. 2002). Courts have included various combinations of these costs in valuing undeveloped property. *See* Herrington v. County of Sonoma, 790 F. Supp 909 (N.D. Cal. 1991) (reducing value of as-developed property by the chance that regulatory approvals would have been permissibly denied); Cooley v. United States, 46 Fed. Cl. 538, 551 (Fed. Cl. 2000) (reducing as-developed value of property by (1) "cost of sales, promotion and advertising"; (2) direct development costs; (3) indirect costs including real estate taxes and liability insurance; and (4) holding costs, including interest and financing).

Wal-Mart building a new store, a Court may exclude those considerations when identifying development costs. Likewise, the ability of a particularly powerful developer to extract concessions from local contractors may be ignored by courts, thus increasing the development costs of a project and limiting compensation.[74]

This same nuanced inquiry applies equally to the kinds of administrative expenses and fees that constitute net harm. Viewed as part of the fair market value standard, instead of as a new compensation rule, net harm includes generally those expenses and fees that are factored into the fair market value of specific property.[75] This is no more controversial than to suggest that the property tax assessment on a building will affect the price a buyer would be willing to pay to acquire it. But courts should also retain discretion to exclude expenses and fees that too closely resemble subjective harm—i.e., expenses and fees that are unique to the individual property owner. The answer to the question posed in Part I, then, is that compensation after *Brown* is net of those expenses that would have an impact on the fair market value of the property taken. While the outlines of this boundary may not be easily defined, focusing on fair market value provides courts with a principled basis for distinguishing between different kinds of fees and expenses, distinctions that are not necessarily available under a literal application of *Brown's* net harm rule.[76]

Whether or not *Brown* represents an appropriate application of the fair market value standard is a question that cannot be answered without a better understanding of the relationship between compensation and underlying takings theories. As a preliminary foray into the field, this Essay does not suggest where exactly to draw principled lines around the fees and expenses courts should include in their fair market value calculations. This will depend on the substantive constitutional interests at stake and how best to vindicate them. It is enough for now to recognize that the fair market value standard is sufficiently flexible to provide a framework for evaluating the valuation problems presented in any particular case. Keeping the compensation analysis focused on the fair market value standard will at least bring consistency to the terms of the valuation

74. *See Cooley*, 46 Fed. Cl. at 551. There, plaintiff objected to the inclusion of certain development costs because the local market "is comprised of developers who would not have to pay for most of these costs, and these developers would accordingly value the property at a much higher price." *Id.* The Court rejected plaintiff's argument and allocated all of the development costs to the property owner, including insurance costs.

75. This Essay saves for another day a normative justification of net harm as an appropriate application of fair market value on the facts of *Brown*. If flexibility is important, as this Essay argues, courts must be able to justify their application of fair market value on the facts of a particular case. This, presumably, requires something more principled than the dissent's so-called Robin Hood taking. Developing a framework for evaluating the specific application of fair market value in a specific case is a project requiring more space than this short Essay provides.

76. How this would affect subsequent attempts by Congress to revise the Indian allotment schemes discussed in Part II is unclear. But this more sophisticated understanding of *Brown* at least provides a framework for analyzing the compensation problem and drawing principled distinctions between *Brown* and *Hodel*.

debate.

The dissent's exhortation that takings are to be measured by the fair market value of the property taken are ultimately correct but misdirected. The fair market value of the right to earn interest is, in fact, the property owner's net harm. *Brown's* result, in other words, should be characterized as an application of the broad fair market value standard. Reconceiving the nature of the property in *Brown* both aligns the case with a legion of precedent and limits its application in other cases. Future courts should not interpret *Brown* as creating some new valuation rule, but should instead cite *Brown* for the uncontroversial proposition that takings are to be valued by the fair market value of the property taken.

Conclusion

On the facts of *Brown*, net harm is a species of fair market value. Any alternative interpretation threatens to elevate fees and other exactions to constitutional status. This would contravene long-established precedent, and it would also create facile mechanisms for governmental actors to avoid genuine takings problems. *Brown's* holding should instead be limited to the uncontroversial rule that takings are to be valued by the fair market value of the property taken.