

Drawing the Line Between Takings and Taxation: The Continuous Burdens Principle, and Its Broader Application

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I. Introduction

When government taxes, it takes citizens' property, usually money, to fund various projects. The Takings Clause declares that the government must pay compensation when it takes private property. Requiring compensation for taxation would immediately bankrupt the state: it would have to return immediately all tax receipts to meet this compensation duty.

This shows that the Takings Clause cannot reach all taxes. The fundamental question addressed by this article is, what forms of taxation, if any, are a taking and require compensation? To make this question concrete, consider Calvin Massey's extreme example: "Surely an income tax of 100% imposed on a single individual — for example, Bill Gates — would violate the Takings Clause. If that is so, then the problem becomes a matter of degree."¹ This example is nothing new. An early critic of the income tax feared ever-increasing exemptions and marginal rates that would concentrate the burden of income taxation on the wealthy few:

If you approve this law, with this iniquitous exemption of \$4,000, and this communistic march goes on and five years hence a statute comes to you with an exemption of \$20,000 and a tax of 20 percent ... how can you meet it in view of the decision which my opponents ask you now to render [upholding the income tax]?²

A tax singling out one or a handful of citizens offends the Supreme Court's repeated invocation that the primary purpose of the Takings Clause is "to bar the Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."³ Thus the notion that taxes are never takings is untenable; the label "tax" confers no immunity to the principles of the Takings Clause.

¹Calvin R. Massey, *Takings and Progressive Rate Taxation*, 20 Harv. J.L. & Pub. Pol'y 85, 104 (1996). We will call this example the "Bill Gates Tax."

²Robert Stanley, DIMENSIONS OF LAW IN THE SERVICE OF ORDER: ORIGINS OF THE FEDERAL INCOME TAX, 1861-1913, at 152 (1993) (citing Joseph Choate, prominent opponent of progressive income tax in late 1800s).

³*Armstrong v. United States*, 364 U.S. 40, 49 (1960). A tax on a "named individuals or [on] easily ascertainable members of a group" might be an unconstitutional on grounds entirely unrelated to the Takings Clause, as a bill of attainder, if it imposed "punishment." *United States v. Lovett*, 328 U.S. 303, 315 (1946), discussing the Bill of Attainder Clauses, U.S. Const. Art. I § 9 cl. 3 (barring Congress from passing bills of attainder); Art. I § 10 cl. 1 (same for state legislatures). The Supreme Court has stated that "confiscation of property" is a form of punishment for purposes of the rule against bills of attainder. *Nixon v. Administrator of General Services*, 433 U.S. 425, 474 (1977). This article does not consider further the possibility that taxation of one person or a small, identifiable group might amount to a bill of attainder. Note that many of the taxes we will discuss do not identify individuals by name, or impact an "easily ascertainable" group of persons, and so would not implicate the bill of attainder clauses in any event.

Richard Epstein applies this insight with a vengeance. Under his fully-articulated theory, the Clause invalidates not just esoteric hypotheticals like the Bill Gates tax, but outlaws the income tax code's long-standing progressive rate structure.⁴ Higher rates on higher incomes, he maintains, take the property of top earners. Strictly proportional rates (i.e. a "flat" tax) alone satisfy his version of the Takings Clause. His logic also implies that the common use of a property tax to fund education is unconstitutional.⁵

Epstein's position is inconsistent with long-standing taxation practices in the United States. Yet it is perhaps no more extreme than the common view, undermined above, that taxes are never takings. Although numerous critics have attacked Epstein's position, no one has offered a coherent standard that simultaneously hold the Bill Gates invalid but progressive income taxation and other common taxes valid.

This article proposes a novel rule to draw this line between permissible taxes and those that violate the Takings Clause: the Continuous Burden Principle (CBP). To satisfy the CBP, a tax must impose burdens such that there are no large jumps — discontinuities, in an imprecise sense — between the burden imposed on any taxpayer and the next-most-burdened taxpayer.⁶ The article then generalizes the CBP, arguing that it applies not just to taxation but to regulation and other government acts that may amount to a taking. The CBP at bottom is a novel definition of what it means for one or a few property owners to be "singled out" for an unfair share of public burdens — the most frequently recited justification for the Just Compensation Clause.

Before presenting the CBP and its applications in § IV, this article first summarizes existing commentary on the line between taxes and takings, shows that there are no fundamental tensions between tax policy and takings policy, and considers the arguments of Epstein and others on the constitutionality of progressive

⁴RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 297-300 (1985).

⁵See discussion *infra* § V.

⁶We put to one side certain taxes that cannot abrogate the Takings Clause. Taxes used to discourage behavior that amounts to a nuisance are not takings, as the Supreme Court has long declared and recently affirmed that government may completely ban such uses of property. *Hadacheck v. Sebastian*, 239 U.S. 394, 410 (1915) (to extent brickwork constituted nuisance, locality could forbid use without owing compensation); *Lucas v. South Carolina Coastal Comm'n*, 505 U.S. 1003, 1022-23 (1992) (discussing power to regulate "harmful or noxious uses"); see also Epstein, *supra* note 4, at 285. Similarly, the government may discourage via tax other behavior that is illegal, such as antitrust violations. Note that taxes on nuisances and antitrust violators impose relatively narrow burdens, and so without this exception might qualify as compensable takings. If, however, the government has the power to eliminate an activity or regulate it extensively without paying compensation, it may use taxation as a regulatory tool. Deciding exactly what the government may regulate with paying compensation is a difficult question at the core of takings law; our point here is simply that if regulation is not a taking in a given context, then neither is a tax designed to achieve the same ends.

income taxation (§§ II, III). After presenting the CBP (§ IV), the article considers its application to taxes and assessments where, unlike general revenue taxes, beneficiaries are easily identifiable (§ V). Finally, § VI considers the difficult question of what group of measures should be “packaged” together for takings analysis

II. Existing Commentary on Distinguishing Taxes and Takings

Perhaps the most surprising fact about recent commentary on drawing the line between taxation and takings is its paucity. The issue is fundamental. The few scholars addressing the issue often stress its difficulty. Blum and Kalven state that “[T]he difference [between taxation and takings/confiscation] is more troublesome to isolate than one would expect. . . . If the element of coercion makes it easy to distinguish taxation from charity, the same element makes it awkward to distinguish the coercion of taxation from confiscation.”⁷ They find no guidance in a Constitution that simultaneously confers the power of taxation and also contains the Takings Clause. Massey, writing on the constitutionality of progressive income taxation, describes the “none-to-clear boundary between taxation and taking.”⁸ Few have heeded Levmore’s exhortation that “every theory of takings should explain or at least struggle with the question of why the power to tax — without compensation, of course — is not fundamentally inconsistent with the constitutional obligation to compensate condemnees.”⁹

At times judges and commentators have declared Congress’ power to tax beyond constitutional review. In a famous line from a famous case almost 200 years ago, Chief Justice Marshall declared that “[t]he only security against the abuse of [taxation] is found in the structure of the government itself.”¹⁰ The implication is clear: those dissatisfied with a tax should elect representatives who will repeal the levy. Thomas Cooley, a leading jurist and treatise author from 100 years ago echoed Chief Justice Marshall: “the power to impose taxes is one so unlimited in force and so searching in extent, that the courts scarcely venture to declare that it is subject to any restrictions whatever, except such as rest in the discretion of the authority which

⁷Walter J. Blum and Harry Kalven, Jr., *The Anatomy of Justice in Taxation* 4, Occasional Papers from the Law School, University of Chicago (1973).

⁸Massey, *supra* note 1, at 86.

⁹Saul Levmore, *Just Compensation and Just Politics*, 22 CONN. L. REV. 285, 292 (1990). Levmore suggests that expenditures from tax revenues must provide roughly commensurate reciprocal benefits in order to avoid a takings claim, *id.*

¹⁰*McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 428 (1819).

exercises it.”¹¹

Yet this is the same Cooley cited at the beginning of this section for the conflicting proposition that a tax can amount to confiscation (a taking) — in which case an injured property owner has a judicial remedy in addition to any political options. As shown in § II.B *infra*, the quotes in the previous paragraph do not accurately reflect the “classical” (19th-century) view of the line between taxes and takings. Far from holding taxation immune to the Takings Clause (and thus denying the need to draw a line between the two), case law repeatedly held that “unfairly apportioned” taxation could violate the Takings Clause.

Before discussing this relatively sophisticated classical doctrine for determining when taxation shaded over into takings, we begin by discussing a much simpler rule: any measure that imposes a general obligation to make a payment is a tax, while a measure stripping an owner of a specific asset is a taking. Strangely, this highly formal rule has been embraced by scholars and the modern Supreme Court. The classical view, focusing much more on the substance of a tax instead of form, arose during an era commonly perceived as a period of excessively formal legal analysis.

A. A Simple Solution: Taxation’s General Liabilities Versus Taking’s Specific Assets

The idea that taxes and takings can be distinguished by defining taxes as general obligations and takings as deprivations of specific assets is of very recent origin. Blum and Kalven apparently were the first to consider this distinction.¹² They realized the problems inherent in such a formal distinction.

But [this rule] may on occasion fail to keep taxation and confiscation clearly apart. Taxes can be set so high that the taxpayer is forced to dispose of specific property or simply turn it over to government in order to satisfy his tax obligation. This perception is at the core of the notion of confiscatory taxation. Indeed, revolutionary regimes have sometimes used the format of 100 percent taxation as the very vehicle of confiscation.¹³

Despite this manifest conceptual weakness, and the lack of any precedent even suggesting this view, it appears that the Supreme Court recently has embraced Blum

¹¹STANLEY, *supra* note 2, at 82, quoting THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 479, 487-88, 494 (6th ed. 1890) (Alexis C. Angell, ed.).

¹²Blum & Kalven, *supra* note 7, at 4 (arguing that the difference between taxation and takings “appears to reside essentially in the difference between taking money and taking specific property.”)

¹³*Id.* 5.

& Kalven's distinction (without citing their work). In *Eastern Enterprises v. Apfel*,¹⁴ the court struck down a statute imposing \$50-100 million of retroactive liability for workers' health problems on a corporation that exited the coal business decades before Congress enacted the statute imposing the liability.

The justices' voting pattern in *Eastern Enterprises* was messy. O'Connor, writing for a plurality of four, argued that the statute worked a taking. Kennedy, concurring with the result, refused to invoke the Takings Clause because the statute "does not operate upon or alter an identified property interest ... The law simply imposes an obligation."¹⁵ He expands on this theme at length, concluding that the Supreme Court has always "been careful not to lose sight of the importance of identifying the property allegedly taken."¹⁶ Kennedy nonetheless voted to hold the statute unconstitutional because he believed that such extraordinary retroactivity violates the substantive dimension of the Due Process Clause.

Breyer, in dissent with three other justices, agreed with Kennedy that the Takings Clause applies only to "specific interests in physical or intellectual property," as distinguished from the statute at issue in the case, which "involves not an interest in physical or intellectual property, but an ordinary liability to pay money ..."¹⁷ Breyer agreed with Kennedy that the proper doctrine to apply was substantive due process, but argued that the statute satisfied that test. In passing, he strongly implies that taxes can never be takings. "If the Clause applies when the government simply orders A to pay B, why does it not apply when the government simply orders A to pay the government, *i.e.* when it assesses a tax."¹⁸

Despite O'Connor's plurality opinion applying the Takings Clause, the only majority vote to emerge was the combination of Kennedy (concurring) and Breyer (dissenting, with three others) for the proposition that the Takings Clause applies only to deprivations of "identified property interests," or "specific interests in physical or intellectual property."

Neither Kennedy nor Breyer offer any precedent or argument for their distinction. Merrill notes that "[t]he Breyer/Kennedy argument as to why no takings property was implicated by the Coal Act [in *Eastern Enterprises*] was a novel one, in the sense that neither Justice was able to cite any legal authority in support of his

¹⁴524 U.S. 498 (1998).

¹⁵*Eastern Enterprises*, 524 U.S. at 540 (Kennedy, concurring and dissenting).

¹⁶*Id.* 543.

¹⁷*Id.* 554 (Breyer, dissenting).

¹⁸*Id.* 556 (Breyer, dissenting). As discussed *infra* § II.B, Breyer ignores a long line of cases that have held taxes may amount to takings.

thesis.”¹⁹ The only policy justification that Kennedy offers is, in effect, that takings doctrine is such a mess we need to cabin it as much as possible.²⁰ This is unconvincing, especially given that substantive due process, beginning with its oxymoronic label, is no model of doctrinal clarity. Breyer seemingly acknowledges the form-over-substance nature of his grounds for distinguishing taxation from takings; he admits that economically the statute in *Eastern Enterprises* is no different from taking specific plants and equipment worth \$50-100 million.²¹

Form over substance is not the worst of the Breyer dissent. He goes on to quarrel with Justice O'Connor about the “character of the government action” arm of the Takings Clause test from *Penn Central*. This evidences profound doctrinal confusion. If Breyer really believes that the Taking Clause did not apply to the facts of *Eastern Enterprises*, he should have chided O'Connor for invoking a Takings test instead of a substantive due process test.

In the end, the distinction may not matter, as the substantive due process test articulated by Kennedy and Breyer apparently differs little from the *Penn Central* Takings Clause test applied by O'Connor. The Court has noted in previous pension cases in which it applied the Takings Clause that results were likely to be the same under either theory.²² Justice O'Connor claims that both her plurality's Taking Clause analysis and the concurring and dissenting opinions' substantive Due Process Clause analysis draw on common principles.²³ Even more telling, Kennedy cites O'Connor's analysis as a convincing means to reach his conclusion: “The plurality opinion demonstrates in convincing fashion that the remedy created by the Coal Act

¹⁹Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 903 (2000). Merrill nonetheless says that “the argument was presented as an inductive generalization drawn from the holdings of the Court's takings cases, and in this sense was not radical.” *Id.*

²⁰*Eastern Enterprises*, 524 U.S. at 541-42. Of course, the same might well be said about substantive due process, and takings at least has the advantage of beginning the analysis with a label that is not an oxymoron.

²¹*Eastern Enterprises*, 524 U.S. at 529.

²²In *Connolly*, the Court declared that it was not surprising that a Takings claim failed where an earlier (substantive) due process claim had failed, *Connolly v. Pension Benefit Guaranty Corporation*, 475 U.S. 211 (1986). There is similar language in *Concrete Pipe & Products of Cal., Inc. v. Construction Laborers Pension Trust for Southern Cal.*, 508 U.S. 602 (1993) (quoting *Connolly*). As O'Connor makes clear, the definitional distinction between takings and substantive due process is not based on remedy: although takings claims *usually* request damages (“just compensation”) and substantive due process claims *usually* request injunctive relief, the Court has held that takings plaintiffs may request injunctive and declaratory relief. *Eastern Enterprises*, 524 U.S. at 521, *citing* *Duke Power Co. v. Carolina Env. Study Group, Inc.*, 438 U.S. 59, 71 n.15 (1978). Breyer apparently overlooked this passage when in his dissent he rhetorically asks, “could a court apply the same kind of Takings Clause analysis when violation means the law's invalidation, rather than simply the payment of ‘compensation?’” *Id.* 556.

²³*Eastern Enterprises*, 524 U.S. at 529.

bears no legitimate relation to the interests which the Government asserts in support of the statute.”²⁴ The “demonstration” Kennedy cites with approval is O’Connor’s application of the *Penn Central* takings test. Similarly, Justice Breyer’s dissent directly applies the same Takings test, and then states that substantive due process analysis is similar, and merely “put[s] the matter more directly.”²⁵ In the end, then, the substantive due process analysis applied by Kennedy in concurrence and Breyer in dissent is simply a thinly-veiled reworking of takings law.

The greatest strength of O’Connor’s concurrence is that she fits the facts of the case under the primary purpose of the Takings Clause — avoiding unfair allocation of the burdens of public projects.²⁶

[T]he Constitution does not permit a solution to the problem of funding miners’ benefits that imposes such a disproportionate and severely retroactive burden upon Eastern ... While we do not question Congress’ power to address that problem, the solution it crafted improperly places a severe, disproportionate, and extremely retroactive burden on Eastern.²⁷

Merrill, in a thorough and careful effort to arrange the Supreme Court’s existing body of constitutional property precedents — takings, substantive due process, and procedural due process — into some sort of coherent structure, is constrained to adhere to the holding of *Apfel*, despite this substantive ground for applying the Takings Clause. He finds that the Supreme Court limits the Takings Clause to “discrete assets,” meaning

a valued resource that (1) is held by the claimant in a legally recognized property (for example, a fee simple, a lease, an easement, and so forth), and (2) is created, exchanged or enforced by economic actors with enough frequency to be recognized as a distinct asset in the relevant community.²⁸

²⁴*Id.* 549.

²⁵*Id.* 567.

²⁶Section II.C *infra* demonstrates that avoiding unfair burden allocation lies at the core of the Supreme Court’s substantive analysis of takings claims.

²⁷*Eastern Enterprises*, 524 U.S. at 536-38.

²⁸Merrill, *supra* note 18, at 974. Merrill says the discrete asset requirement is closely bound up with the right to exclude. “The discrete asset requirement tells us what it is the owner has a right to exclude others from ...” *Id.* 975. In forming a doctrinal scheme that squares with scattershot Supreme Court precedents, he is then forced to maintain that a bank account is discrete property, *id.*; he must so argue to avoid contradicting *Webb’s Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980) (holding state retention of interest on litigants’ funds held in escrow a taking) and *Phillips v. Washington Legal Foundation*, 524 U.S. 1925 (1998) (holding use of interest from pooled small client trust accounts to fund legal services for poor a taking). This highlights just how formal a system the Supreme Court has created, if *Eastern Enterprises* truly limits the Takings Clause to deprivations of

It is beyond the purpose of Merrill's article to offer any normative justification for the general liability/specific asset distinction. He does seem to find some merit in a discrete-asset test, since it "would also eliminate the possibility of using the Takings Clause as an instrument for litigating issues of general redistributive justice."²⁹ He finds that this feature has the benefit of at least confining "the Takings Clause to its traditional orbit. The implicit understanding has always been that the Takings Clause has no application to legislation that imposes taxes or allocates government spending."³⁰ Although it may square with more recent understandings of the Takings Clause, as a matter of older tradition this is not so: § II.B *infra* demonstrates that during the 19th century courts and commentators repeatedly found that some taxes did amount to takings.

Only Blum and Kalven, the originators of the idea that taxation differed from takings by imposing a general liability, offer any sort of policy justifications for such a distinction. "Perhaps ... the taking of specific property by the state is more intrusive than the creation of obligations to be satisfied in money ... perhaps it is suspected that the taking of property will be not systematic or disciplined by principle."³¹ The repeated use of "perhaps" communicates at best a half-hearted belief in the proffered merits of the distinction.

The general liability/discrete asset distinction's appeal may be the product of mistakenly seeing it as the corollary of a seemingly less controversial principle: there is no point in the government taking money by condemnation, as the just compensation requirement requires its immediate return. Yet even this simple statement requires qualification, as there are two ways to make sense of a taking of money. First, "[t]aking money under the right of eminent domain, when it must be compensated in money afterwards, could be nothing more or less than a forced loan ..."³² In this case, the government exploits the time required for the money's owner to seek compensation. The few authorities on point agree that such forced loans are

only to be justified as a last resort in a time of extreme peril, where neither the credit of the government nor the power of taxation could be made available. It is impossible to lay down rules for such a case, except such as the law of overruling necessity, which for the

specific assets. It is a taking to expropriate a specific bank account, but not to impose a tax for precisely the amount in the account. As argued in the main text, the latter may amount to a substantive due process violation for which the legal standard appears to be very similar to the takings test. Thus, in the end, we have a distinction without a difference.

²⁹Merrill, *supra* note 18, at 980.

³⁰*Id.* 980-81.

³¹Blum & Kalven, *supra* note 7, at , at 4-5.

³²Cooley, *supra* note 10, Ch. XV, at 759 fn.2.

time being sets aside all the rules and protections of private right, shall then prescribe.³³

Given the government's undeniable power to define what assets constitute legal tender,³⁴ however, there is a second way in which the government can take money—without delaying “compensation.” The government can

- (i) declare government bonds (of any term, e.g. principal due in 1 year, 10 years, 30 years, or even perpetual obligations) to be legal tender,
- (ii) condemn someone's cash, and
- (iii) pay them with government bonds.

Circulating as money, such bonds would likely trade at a discount to their face value (principal due at end of term), as the interest rate would be below market rates—otherwise the government could have borrowed through the market for less. In practice, this may well not matter. Outside of those dire emergencies when authority suggests that the government may force loans without the redefinition of legal tender, it seems likely that voluntary transactions (selling bonds to the highest bidder) will be transactionally and administratively cheaper than forced sales under the condemnation power.

Absent extraordinary circumstances that might induce the government to resort forced loans or use of the legal tender power, however, it seems that the government has little incentive to take money under its condemnation power. It is possible that in *Eastern Enterprises* Kennedy and Breyer thought that this truism stood for the much broader principle that ‘it is impossible to condemn money.’ There is no linkage between the pointlessness of condemning money, and the definition of a taking. The material presented in the last three paragraphs tells us nothing about what forms of taxation, if any, run afoul of the Takings Clause.

³³*Id.* 759. See also *Griffin v. Mayor of Brooklyn*, 4 N.Y. 419, 424 (1851) (“The exigencies of a state government can seldom require the taking of money by virtue of this power even in time of war, and never in time of peace.”)

³⁴U.S. CONST., art. I, § 8, cl. 5 declares: “The Congress shall have Power ... to coin Money, regulate the Value thereof, and of foreign Coin ...” The key cases affirming the plenary nature of this power are (i) *The Legal Tender Cases*, 79 U.S. (12 Wall.) 457 (1870) (upholding Congress’ power to declare that treasury notes shall be legal tender, even for debts predating the law making said notes legal tender); (ii) *Norman v. Baltimore & O.R. Co.*, 294 U.S. 240 (1935) (upholding power of Congress to abrogate clauses in private contracts requiring payment in gold); and (iii) *Perry v. United States*, 294 U.S. 330 (1935) (holding, somewhat confusingly, that although it was unconstitutional for the U.S. to repudiate a public promise to pay in gold, bond owners suffered no damages as they received the face amount of the bond in current legal tender).

B. More Nuanced Classical Views

In contrast with the formalism of *Eastern Enterprises*, commentary from what I call the “classical” era (late 1800s into early 1900s) confronted the substantive similarity between taxes and takings.

Everything that may be done under the name of taxation is not necessarily a tax; and it may happen that an oppressive burden imposed by the government, when it comes to be carefully scrutinized, will prove, instead of a tax, to be an unlawful confiscation of property, unwarranted by any principle of constitutional government.³⁵

Eastern Enterprises distinguishes taxation and takings based on some notion of fungibility: when the government requires citizens to part with fungible assets (i.e. imposes a general liability, and will take money in any form: currency, a check, traveler’s check, electronic transfer, ...) it is taxation; when the government requires a specific, non-fungible asset, it is a taking.

The “classical” 19th century authority presented in this subsection focuses on a different dimension: the relative size of the group from whom the government extracts wealth. The following table summarizes the interaction of this classical factor with the *Eastern Enterprises* factor.

	Cash/General Liability (ultimate in fungibility)	Monopoly Asset (ultimate in non-fungibility)
Few Owners’ Property Taken (as % of population)	Bill Gates tax; approaching taking (?)	archetypal Taking
Many Owners’ Property Taken (as % of population)	archetypal Tax	

Table 1

Taxes usually fall on a relatively large portion of the population, and usually require payment in fungible money. This is why the table uses the label “archetypal Tax” in the lower left cell. The archetypal taking is the condemnation of a single piece of land, hence the upper right cell.

Both the fungibility standard from *Eastern Enterprises* and the relative group size of the classical standard correctly classify the archetypal cases. They diverge, however, in their classification of (i) a tax impacting a small group of citizens (the upper left cell), and (ii) the condemnation of non-fungible assets of a large portion of the citizenry (the lower right cell). This last category, however, is largely vacuous: it is hard to imagine the government condemning non-fungible assets en masse. Even in a large land assembly project, e.g. for a major highway, the government uses the land of a very small percent of the population. The only exception appears to arise from the *per se* rule that permanent physical invasions are always takings.

³⁵COOLEY, *supra* note 10, ch.14, at 697.

Thus, in *Loretto v. Manhattan CATV Corp.* the Supreme Court held that an ordinance ordering all landlords to suffer the presence of cable TV wiring and junction boxes effected a taking.³⁶ Given that the just compensation ultimately awarded in *Loretto* was trivial,³⁷ and is quite likely to be in similar cases, generally we can ignore the lower right cell.

We cannot ignore the upper right cell, for it is easy to conceive of general liabilities that impact a narrow band of the population. We discussed some dramatic hypothetical examples in the Introduction, and will examine some actual examples in §§ III, IV and V. It is here that the two criteria part ways. The classic view suggests that, at some point, a narrowly-focused tax becomes a taking; the discrete-asset model does not apply the Takings Clause to such a general liability.

The rest of § II, along with §§ III and IV, argue that the classical test is normatively preferable. After laying out the classical position, I argue that it is much more congruent with both judicial and academic statements about the purpose of the Takings Clause. I then demonstrate that there is no inconsistency between the purposes of taxation and takings. To take a peek further ahead, the continuous burden principle (CBP) presented in § IV can be understood as refining the crude many-few distinction of the classical model.

1. Classical viewed takings and taxation as structurally similar

Far from seeing taxation and takings as polar opposites, 19th century judges and commentators repeatedly noted their similarities. One antebellum judge honestly admitted “that it is by no means easy to trace the dividing line between the two kinds of taking private property,”³⁸ and went on to observe that “the two appear in principle to be somewhat blended. Both are exercises of the sovereign power over individual property, and in both cases the individual is presumed to receive, or does in fact receive some equivalent for the contribution.”³⁹

A contemporary concurred.

The right of taxation and the right of eminent domain rest substantially on the same foundation. Compensation is made when private property is taken in either way. Money is property. Taxation takes it for public use; and the tax-payer receives, or is supposed to receive his just compensation in the protection which government affords to his life, liberty and property, and in the increase of the value of his possessions by the use to which the government applies the money raised by the tax. When private property is taken by right

³⁶458 U.S. 419 (1982).

³⁷On remand, the New York Court of Appeals ratified the state legislature’s determination that just compensation for suffering the presence of cable TV wiring and appliances amounted to a token \$1. *Loretto v. Teleprompter Manhattan CATV Corp.*, 446 N.E. 428 (N.Y. 1983).

³⁸*People v. Mayor of Brooklyn*, 6 Barb. 209, 214 (N.Y. Ch. 1849).

³⁹*Id.*

of eminent domain, special compensation is made ...⁴⁰

The principle articulated is straightforward. Government uses both taxation and condemnation to provide public goods. Both cases, under this classical view, involve a promise of recompense, in one form or another. For condemnation, the promise is explicit: the just compensation requirement. For taxation, the promise is implicit: government will spend tax revenues on projects benefitting most if not all citizens, especially protection of life, liberty, and property.

A postbellum court extended this analysis to include special assessments, where the government charges landowners particularly benefitted by some project, such as charging adjacent parcels for the widening of a road.

The government may appropriate the property of the individual, when necessary, in one of three ways: First, by taking in the mode prescribed, after paying the owner for it; second, by estimating the benefits to the owner's property from the improvements to be made, and taking the amount estimated in money; third, by taking the property in the form of money by the methods of taxation for which the benefits of protection and other advantages are furnished by the government. The same principle underlies all these methods. When the property is taken under the right of eminent domain, the public pays the owner in money; when money is exacted by means of a special assessment, the owners are compensated in special benefits to their property by public improvements made in its expenditure; and when money is exacted by a general tax the payer is compensated in the benefits received from the government in any and all of the ways that a government may benefit society.⁴¹

The same court made it quite clear that a 'deeper principle' required a court to ensure that those paying taxes and assessments received some form of compensation.

[The unifying] principle requires compensation in all cases, whether real estate, money, or any other kind of property is involved; whether it is taken by the methods adopted under the right of eminent domain, or under the right of taxation, or by any other means. The principle lies deeper than mere forms or methods. It would be unreasonable to say that the authors of the [Takings Clause] intended to forbid the taking under one right without just compensation, and intended to allow such appropriation under another right; that they intentionally closed one gap, but intentionally left another down by which the same wrong, in effect, could be accomplished.⁴²

Note the court's focus on substance over form, in stark contrast to the *Eastern Enterprises* principle. It reads the Takings Clause to bar uncompensated contributions regardless of the formal mechanism by which the government uses to separate owners from their property.

⁴⁰*Griffin*, 4 N.Y. at 422 (upholding special assessment for roads, with assessments based on frontage).

⁴¹*People v. Daniels*, 22 P. 159, 162 (Utah Terr. 1889).

⁴²*Id.* 163.

Michigan Supreme Court Justice Thomas Cooley, in a leading treatise on constitutional law, summed up the classical view that taxation and taking differ in degree, not in kind.

Taxation and eminent domain indeed rest substantially on the same foundation, as each implies the taking of private property for public use on compensation made; but the compensation is different in the two cases. When taxation takes money for the public use, the taxpayer receives, or is supposed to receive, his just compensation in the protection which government affords to life, liberty, and property, in the public conveniences which it provides, and in the increase in the value of possessions which comes from the use to which the government applies the money raised by the tax; and these benefits amply support the individual burden.⁴³

Richard Epstein's reading of the Takings Clause is in some respects (though not all, as we shall see shortly) a modern-day revival of the classical view. He argues that "the differences between [taxation and takings] all go to matters of detail and technique, rather than to basic principle. ... both may be used as instruments of confiscation."⁴⁴ He rejects "rigid schemes of classification ... designed to blunt the compensation requirement ...," maintaining that "[t]axes ... are forms of taking, to be examined under principles applicable to all other takings."⁴⁵

2. Classical grounds to distinguish takings from taxation: breadth of burdens imposed

Despite this fundamental similarity, it is essential to establish a principle to distinguish between taxation and takings. As intimated in the first paragraph of this article, if every tax is a taking unless the government can show that the taxpayer received some roughly equivalent benefit, the courts would be buried in taxpayer takings suits.

The classical grounds for the distinction was simple: "Taxation operates upon a community or upon a class of persons in a community and by some rule of apportionment. The exercise of the right of eminent domain operates upon an individual, and without reference to the amount, or value exacted from any other

⁴³COOLEY, *supra* note 10, ch. 14, at 715-16. Cooley offers a striking explanation for why it is preferable that governments rely on taxation, as opposed to uncompensated takings of whatever goods it required, to finance their operations: "no arbitrary government without regular and steady taxation could be anything but an oppressive and vexatious despotism, since the only alternative to taxation would be a forced extortion of the needs of government from such persons or objects as the men in power might select as victims." *Id.* 678.

⁴⁴Richard A. Epstein, *Taxation, Regulation, & Confiscation*, 20 OSGOODE HALL L.J. 433, 434 (1982).

⁴⁵*Id.* 435

individual, or class of individuals.”⁴⁶ Taxes fall on a broad swath of the community, with “some rule of apportionment”; takings are burdens concentrated on one or a few citizens owning assets needed for some public project. In his treatise, Justice Cooley restated this rule.

When the state has need of the property of citizens for its sovereign purposes, it may lawfully appropriate it against the will of the owner either under the power to tax or the right of eminent domain. There is a difference in the two cases which is vital. *When property is appropriated under the right of eminent domain, a particular item or parcel is taken, because for public purposes there is a special need of it, and the state takes it under proceedings which amount, so far as the owner is concerned, to a forced sale. But taxation is based upon the idea of calling upon the people for equal and proportional contributions to the public wants, that the burdens of govt. may fall ratably upon all who in justice should bear them.*⁴⁷

3. Drawing the line: the unfair apportionment test

This broad/narrow distinction immediately implies that there will be a gray area of difficult cases. The preceding quote introduces a second part of the classical test for distinguishing takings from taxation: there is no taking if “the burdens ... fall *ratably* upon all who *in justice* should bear them.” Courts admitting the fundamental similarity of taxation and takings used words like “just,” “equitable,” or “fairly apportioned” to determine when compensation was or was not required for the application of a particular tax.

Exacting money by taxation and taking private property for public use, are different things. Both, it is true, are in one sense the exercise of a right to take the property of individuals for public use, but there is a broad distinction between them. Taxation exacts money from individuals as their share of a justly imposed and apportioned general public burthen, and the equivalent is presumptively received in the benefits conferred by the government. Property taken for public use from one or more individuals only, by right of eminent domain, is taken not as his or their share of an apportioned public burthen, but as something distinct from and more than his or their share of the public burthens, and therefore the justice and necessity of a constitutional provision for compensation.⁴⁸

Courts applying this ‘fair apportionment’ test explicitly cited the Takings Clause as the source of the rule that constrained the power of taxation.

There being no express constitutional declaration or prohibition directly applicable to the

⁴⁶*Griffin, supra* note 32, at 420.

⁴⁷THOMAS M. COOLEY, A TREATISE ON THE LAW OF TAXATION, INCLUDING THE LAW OF LOCAL ASSESSMENTS § 30 (3d ed., Chicago, Callaghan & Co. 1903) (quoting in full section entitled “Eminent domain distinguished [from taxation]”) (emphasis in original).

⁴⁸*Booth v. Woodbury*, 32 Conn. 118, 130 (1864).

power or subject of taxation, and none which in terms secures equality or uniformity in the distribution of public burthens, either general or local, there is no clause to which the citizen can, with certainty, appeal for protection against an oppressive and ruinous discrimination under color of the taxing power, unless it be that which prohibits the taking of private property for public use, without compensation.⁴⁹

Epstein, in his restatement of the classical position, recognizes the danger of allowing either takings to swallow up taxation, or vice versa. “The question is whether these difficulties make it necessary to retreat to one of two extremes, both of which seem quite untenable. Either *no* taxation ... is allowed, or *all* taxation ... is allowed.”⁵⁰ His answer echoes the sources just cited: “the central insight is contained in a principle of American eminent domain law, whereby the *disproportionate impact* of a tax or regulation functions as an indirect measure of the adequacy of compensation.”⁵¹

4. Courts grant legislatures wide latitude

Words like “just,” “fair apportionment,” “equitable,” or “disproportionate impact,” still do not define the line between taxation and takings with any precision. Epstein solves this imprecision for income taxation by asserting a close correspondence between income and benefits derived from governmental services and goods. Based on this tight correlation, he argues that only an income tax with one rate (a so-called flat tax) satisfies the Takings Clause. For Epstein, progressive income taxation (for which marginal rates increase with income) used by the United States dating back to the Civil War, violates the Takings Clause.⁵² Similarly, he argues that a sales tax must fall on all goods, since a selective sales tax places disproportionate burdens on sellers of goods singled out for the tax.⁵³

Although in many respects similar, Epstein’s views here part way with classical doctrine. Classical courts and commentators believed that legislatures have very wide leeway in setting taxes, and directed judges to strike them down only in cases of extreme injustice (or, synonymously, in cases of “inequity,” or “unfair apportionment”). In the words of an early treatise writer, “[t]he power of taxation is a great governmental attribute, with which the courts have very wisely shown

⁴⁹Cheaney v. Hooser, 48 Ky. 330, 341 (Ky.App. 1848) (holding that expanding town so as to impose town taxes on plaintiff not a taking).

⁵⁰Epstein, *supra* note 41, at 437.

⁵¹*Id.* 437-38.

⁵²EPSTEIN, *supra* note 4, at 297-300. Epstein’s opinion is not entirely novel. In commenting on the federal income tax in the 1890s, one commentator argued that the levy’s progressive rate structure went beyond the power of taxation and amounted to a taking. STANLEY, *supra* note 2, at 142, citing David A. Wells, *Forum*, March 1895.

⁵³EPSTEIN, *supra* note 4, at 293-94.

extreme unwillingness to interfere; but if abused, the abuse should share the fate of all other usurpations.”⁵⁴

In the following extended quotation, an antebellum court makes clear the deference due the legislature in establishing taxes, and the extraordinary facts necessary to justify judicial intervention.

[The Takings Clause] was not intended to exclude or even to restrict the ordinary power of general or local taxation inherent in the legislative function ... and that there must necessarily be vested in that department, a wide range of discretion, not only as to the objects for which a tax, general or local, may be enforced, as to which its judgment would seem to be conclusive, but also as to the particular subjects or species of property which shall be liable to taxation, and as to the extent of territory within which a local tax shall operate. It would, therefore, be a task of extreme delicacy, for the judiciary to decide upon its own mere judgment, with respect to any of the particulars referred to, that the Legislature has exceeded the limits of the discretionary power with which it is invested. ... That limit can only consist in the discrimination to be made between what may with reasonable plausibility be called a tax, and for which it may be assumed that the objects of the taxation are regarded by the Legislature as forming a just compensation, and that which is palpably not a tax, but is, under the form of a tax, or in some other form, the taking of private property for the use of others or of the public, without compensation. Exact equality in the distribution of public burthens, and especially of such as are local, is perhaps unattainable, and cannot form the test of the distinction referred to. *There must be a palpable and flagrant departure from equality in the burthen as imposed upon the persons or property bound to contribute, or it must be palpable that persons or their property are subjected to a local burthen for the benefit of others, or for purposes in which they have no interest, and to which they are, therefore, not justly bound to contribute. The case must be one in which the operation of the power will be at first blush, pronounced to be the taking of private property without compensation, and in which it is apparent that the burthen is imposed without any view to the interest of the individual in the objects to be accomplished by it.*⁵⁵

Early 20th century Supreme Court cases articulated a similar rule, declaring unconstitutional taxes that are “so clearly & palpably an illegal encroachment upon private rights as to leave no doubt that such taxation by its necessary operation is really spoliation under the guise of exerting the power to tax.”⁵⁶ Citing this language, a later decision upheld a Massachusetts state tax on income from intangibles that admittedly had a disparate impact on some localities. The Court declared that

a state tax law will be held to conflict with the Fourteenth Amendment only where it proposes, or clearly results in, such flagrant and palpable inequality between the burden imposed and the benefit received, as to amount to the arbitrary taking of property without

⁵⁴COOLEY, *supra* note 10, ch. 14 at 795 (quoting SEDGWICK, CONSTITUTIONAL & STATUTORY LAW, at 414).

⁵⁵Cheaney, *supra* note 46, at 345.

⁵⁶Henderson Bridge Co. v. Henderson, 173 US 592, 614 (1899).

compensation—to spoliation under the guise of exerting the power of taxing.⁵⁷

In upholding the first income tax statute enacted after passage of the 16th Amendment to a variety of challenges, the Court said that it would strike down a tax statute only if it was “so arbitrary as to constrain to the conclusion that it was not the exertion of taxation but a confiscation of property, that is, a taking of the same in violation of the Fifth Amendment.”⁵⁸ The Court used similar language in upholding Oregon’s steep sales tax on margarine.

Except in rare and special instances, the due process of law clause contained in the Fifth Amendment is not a limitation upon the taxing power conferred upon Congress by the Constitution. ... That clause is applicable to a taxing statute ... only if the act be so arbitrary as to compel the conclusion that it does not involve an exertion of the taxing power, but constitutes, in substance and effect, the direct exertion of a different and forbidden power, as, for example, the confiscation of property.⁵⁹

To sum up, the classical view on the tax/takings line recognized the fundamental similarity between the two mechanisms, distinguished them by examining whether the burden fell on many or few, tried to further delineate this many/few distinction by declaring that taxes must fairly apportion burdens, and finally, realizing that a large gray area remained, stated that courts should strike down tax legislation as a taking only in the most extreme cases of disproportionate impact.

C. The Policy Goals of Takings Favor the Classical View

The previous subsection established the deep historical roots of the view that it is the number of burdened parties and the rough apportionment of burdens that distinguishes taxes from takings. The older pedigree of this classical view, alone, is scant reason to prefer it to the view articulated by five justices in *Eastern Enterprises* that fungibility determines the line between taxes and takings. This subsection shows that the classical view better serves the various policy goals of the Takings Clause.

As a matter of Supreme Court doctrine, the Takings Clause “was designed to bar the Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”⁶⁰ Since *Armstrong* declared this nutshell summary of takings law’s purpose in 1960, the

⁵⁷Dane v. Jackson, 256 US 589, 599 (1921) (citation omitted).

⁵⁸Brushaber v. Union Pacific, 240 U.S. 1, 25-26 (1916). Note that the challenged tax had a progressive rate structure, and so Epstein would argue that it violated the Takings Clause, *supra* note 4. We discuss progressive taxation in detail *infra* §§ III and IV.

⁵⁹Magnano Co. v. Hamilton, 292 US 40 (1934) (rejecting due process challenge to a state tax of 15 cents a pound on margarine). Again, note that Epstein argues that such a selective sales tax is a taking, *supra* note 4.

⁶⁰Armstrong v. United States, 364 U.S. at 49 (1960)

Court has repeated it verbatim in virtually every takings case; more than once both the majority and a dissent have cited this language.⁶¹ And although the *Armstrong* decision did not reference it, the Court had made a similar declaration of purpose in 1893: requiring payment of just compensation “prevents the public from loading upon one individual more than his just share of the burdens of government.”⁶² I label this the “anti-singling-out” motivation for the Takings Clause, since it bars the government from singling one or a few property owners to bear public burdens.

This anti-singling-out purpose is fairly general. It is consistent with, and captures the essence of, a number of more specific theories of the social ends served by the Takings Clause. Some have argued that the compensation requirement was designed to protect a wealthy minority from majoritarian deprivations.⁶³ Proponents of this view might define the range of governmental acts that unconstitutionally single out the wealthy more broadly than the Continuous Burdens Principle (CBP) presented *infra* § IV, but share this article’s basic perspective. Glynn Lunney, in a theory seemingly diametrically opposed to minority exploitation, argued that concentrated minority interest groups have excessive political power and would block socially desirable legislation if not guaranteed compensation under the Takings Clause.⁶⁴ This worry about minoritarian oppression may be the opposite of the first theory, but the root evil that requires remedying is the same: avoiding singling out the few to bear the burdens of all. Frank Michelman argues that the Takings Clause minimizes the demoralization that results when the government concentrates losses

⁶¹*Palazzolo v. Rhode Island*, 533 U.S. 606, 607 (majority), 617 (concurrence) (2001); *City of Monterey v. Del Monte Dunes, Ltd.*, 526 U.S. 687, 702 (1999); *Eastern Enterprises*, *supra* note 13, 177, at 522 (majority), 554 (dissent); *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1071 (1992) (dissent); *Pennell v. San Jose*, 485 U.S. 1, 9 (majority), 19 (dissent) (1988); *Nollan v. California Coastal Com.*, 483 U.S. 825, 836 (1987); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 319 (1987); *Connolly v. Pension Ben. Guaranty Corp.*, 475 U.S. 211, 227 (1986); *United States v. Locke*, 471 U.S. 84, 107 (1985); *Webb’s Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 163 (1980); *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 82 (1980); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 123 (majority), 140 (dissent) (1978).

⁶²*Monongahela Navigation Co. v. United States*, 148 U.S. 312, 325 (1893). The modern Court has cited this language in addition to the similar quote from *Armstrong*, in *Keystone Bituminous*, *Penn Central*, and *Pruneyard*. In addition, the Court cited it in *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226 (1897), the case in which, according to modern precedents, the Takings Clause was incorporated against the states under the Due Process Clause.

⁶³*See, e.g.*, William Fischel & Perry Shapiro, *A Constitutional Choice Model of Compensation for Takings*, 9 INT. REV. L. & ECON. 115 (1989); Douglas W. Kmiec, *The Original Understanding of the Taking Clause Is Neither Weak Nor Obtuse*, 88 COLUM. L. REV. 1630 (1988); EPSTEIN, *supra* note 2.

⁶⁴Glynn S. Lunney, Jr., *A Critical Reexamination of the Takings Jurisprudence*, 90 MICH. L. REV. 1892 (1992). Lunney draws directly on *Armstrong*.

in contexts where compensation is administratively feasible but not paid.⁶⁵ Although the meaning of “demoralization” is somewhat obscure, the primary reason Michelman would require compensation is that losses are concentrated on one or a few citizens.

Other models focus not on any intentional acts, but on random losses inflicted by governmental measures. Under this view, the compensation requirement is analogous to insurance coverage: all citizens pay premiums in the form of a portion of their taxes, and the government makes indemnification payments to those property owners inordinately burdened by governmental programs.⁶⁶ Fischel emphasizes disproportionate burdens in his application of Michelman’s model to the military draft.⁶⁷ The anti-singling-out purpose encompasses these unintentional along with their intentional counterparts discussed in the previous paragraph; it operates at a higher level of generality that does not distinguish between them.

Anti-singling-out, then, common to these seemingly divergent theories, appears to be at the core of the purpose of the Takings Clause. It has nothing to do with the distinction between general monetary liabilities and specific goods embraced by a majority of the justices in *Eastern Enterprises*. It has much to do with the classical view that takings and taxation should be distinguished based on the number of parties burdened by the exaction. *Armstrong’s* oft-repeated anti-singling-out principle is inconsistent with that aspect of *Eastern Enterprises*. Thus it is on policy grounds, more than pedigree grounds, that this article rejects the money/specific asset distinction for drawing the line between taxes and takings.

III. The Primary Battle Ground to Date: Legality of Progressive Taxation

There is very little modern commentary on how to distinguish taxation from takings. If *Eastern Enterprises* accurately represents modern thinking on the question, the lack of analysis is not surprising: there are no gray areas or close cases. What little scholarship there is centers on whether progressive income taxation violates the Takings Clause. Richard Epstein, author of the earliest and most thorough analysis, maintains that progressive income tax rates—marginal rates increasing with income—impose disproportionate burdens on the wealthy and hence violate the classical view of the constraints the takings Clause imposes on taxation.

⁶⁵Frank I. Michelman, *Property, Utility, & Fairness: Comments on the Ethical Foundations of “Just Compensation” Law*, 80 HARV. L. REV. 1165 (1967)

⁶⁶Lawrence Blume & Daniel L. Rubinfeld, *Compensation for Takings: An Economic Analysis*, 72 CAL. L. REV. 569 (1984); William A. Fischel & Perry Shapiro, *Takings, Insurance, and Michelman: Comments on Economic Interpretations of “Just Compensation” Law*, 17 J. LEGAL STUD. 269 (1988); Louis Kaplow, *An Economic Analysis of Transitions*, 99 HARV. L. REV. 509 (1986).

⁶⁷William A. Fischel, *The Political Economy of Just Compensation: Lessons from the Military Draft for the Takings Issue* 20 HARVARD J. L. & PUB. POL’Y 23 (1996).

The other side, defending progressive income taxation, clearly appears to command the majority of academics and courts. Yet the case made in support of progressive rates is surprisingly weak. This and the following section (on the continuous burdens principle) in large part aim to make a stronger case that progressive income taxation does not violate the Takings Clause. The case in favor of progressive rates is tripartite. First, § III.A surveys data ignored by both sides of the debate: the long history of progressive tax rates in the United States (for other taxes as well as for income taxes). We then briefly examine judicial doctrine on the question. Section III.B then evaluates existing normative arguments against and in favor of progressive income taxation.

In the end, the historical evidence that progressive taxation does not violate the Takings Clause is strong. Missing, however, is a doctrinal principle, unifying taxation with other sources of potential takings (e.g. regulation) and demonstrating that, under general principles of takings law, that progressive taxation does not violate the Takings Clause, even though other taxes do (e.g. the Bill Gates tax). The next section, IV, explains the continuous burdens principle (CBP), a rule of general application that illustrates why progressive income taxation is not a taking, though the Bill Gates tax is.

A. History & Positive Legal Doctrine

1. History

Progressive taxation dates back to the founding of the Republic. Politicians across the political spectrum endorsed it. Thomas Jefferson explicitly supported progressive taxation, declaring that “a means of silently lessening the inequality of property is to exempt all from taxation below a certain point, and to tax the higher portions of property in geometrical progression as they rise.”⁶⁸ In 1798, Alexander Hamilton proposed a progressive real property tax with rates increasing from 20 cents per room for log houses, to one dollar per room for houses with seven or more rooms.⁶⁹ Although Congress did not enact Hamilton’s proposal, it did pass a similar progressive property tax, with rates starting at 0.2% for houses valued from \$100 to \$1000, and rising up to 1% for houses valued at more than \$30,000.⁷⁰

An antebellum state court explicitly rejected the argument that the Constitution

⁶⁸Thomas Jefferson, Letter to James Madison (10/28/1785), in *THE PAPERS OF THOMAS JEFFERSON* 681, 682 (Julian P. Boyd ed., 1953)

⁶⁹GLENN W. FISHER, *THE WORST TAX?: A HISTORY OF THE PROPERTY TAX IN AMERICA* 40 (1996).

⁷⁰HENRY CARTER ADAMS, *TAXATION IN THE UNITED STATES, 1789-1816*, at 54-56 (NY, Burt Franklin 1970) (1884). In the founding era Congress also enacted at least one ‘luxury’ tax, on carriages used to transport persons. Act of June 5, 1794, ch. XLV, 1 Stat. 373 (1794). Though not formally progressive, taxes on luxuries are fundamentally similar to income taxes with high exemptions: both impact only the wealthy.

required flat rate taxation. After listing three possible modes of taxation, a head tax or capitation (fixed amount per person), a flat rate tax, and a progressive tax, the court gave the legislature the flexibility inherent in the classical view. “The application of any one of these rules or principles of apportionment, to all cases, would be manifestly oppressive and unjust. Either may be rightfully and wisely applied to the particular exigency to which it is best adapted.”⁷¹ The court said that the legislation had mixed and matched these techniques in a variety of ways, all apparently consistent with New York’s Takings Clause. “Taxation is sometimes regulated by one of these principles, and sometimes by another; and very often it has been apportioned without reference to locality or to the tax-payer’s ability to contribute, or to any proportion between the burthen and the benefit.”⁷² Discussing one of the highest grossing taxes of its day, the court noted that some tariffs fell on a broad range of citizens, while others fell on a relatively narrow part of the community. Congress imposed some of these tariffs simply to raise revenue, while it imposed others to protect domestic industries. All of these taxes, the court maintained, were consistent with the federal Takings Clause.

States began to enact income taxes in the 1800s, before the national government first imposed such a tax during the Civil War. By the 1850s, at least seven had an income tax.⁷³ These taxes contained all the progressive features of today’s national income tax: “high exemption levels, low and even progressive rates — were characteristic of these state laws.”⁷⁴ Thus it was no surprise that the first national income tax, enacted during the Civil War, contained these same features. The exemption ranged from \$600 to \$2000 in annual income; this meant that the tax reached only from 0.2% to 1.3% of the population.⁷⁵ Congress changed the rates frequently, but the structure was always progressive. Initially rates ranged from 3% to 5%; by the end of the war they ranged from 5% to 10%.⁷⁶

This progressive structure was no accident. Commenting on the 1862 tax, one scholar says that “[t]he \$600 exemption level reflected the intention to reach only a tiny, wealthy fraction of the population ...”⁷⁷ Moreover, even a leading opponent of

⁷¹*Griffin, supra* note 32, at 427.

⁷²*Id.*

⁷³Alabama, both Carolinas, Florida, Maryland, Pennsylvania, and Virginia. EDWIN R.A. SELIGMAN, *THE INCOME TAX* 388-406 (1914); DELOS O. KINSMAN, *THE INCOME TAX IN THE COMMONWEALTHS OF THE UNITED STATES* 39 (1903).

⁷⁴STANLEY, *supra* note 2, at 38.

⁷⁵*Id.* 40-41, Table 1-5, 1-6.

⁷⁶*Id.* 41, table 1-6.

⁷⁷*Id.* 30.

the income tax in general and progressive rates in particular admitted that “no one doubts our constitutional power to levy this tax.”⁷⁸ Thus during the time when the classical view on the line between taxation and takings prevailed, even opponents of progressive income taxation conceded its constitutionality.

The national income tax disappeared in 1872, but Congress reinstituted it in 1894. Although it had a single rate, 2%, its extraordinarily high exemption, \$4,000, meant that it was very progressive, reaching only 0.13% of the population.⁷⁹ The Supreme Court soon struck down the tax, holding that an income tax was a “direct” tax and hence had to be apportioned among the states based on population, not income.⁸⁰

The People soon initiated the amendment process to reverse the Supreme Court’s invalidation of an income tax. During this period, from 1896 when the Court struck down the income tax, to 1913 when the states ratified the 16th Amendment authorizing a national income tax without apportionment among the states, progressive taxation was ubiquitous at the state and local levels of government.

Since at least 1890 the climate within the state legislatures toward progressive taxation had grown increasingly favorable. The states had exhibited in their tax legislation widespread acceptance of the premises underlying congressional recourse to income taxation; specifically, they had enacted inheritance and income tax laws which revealed their belief in the utility of the taxation of accumulated wealth, at very low but progressive rates, using very high exemption levels ... In 1890, only six states maintained inheritance taxes ... by 1913, 35 of the 48 states had enacted such laws ... Of the taxes in use in 1911, at the peak of action over the ratification of the [federal] income tax amendment, about 60 percent were progressive in nature.⁸¹

During this period, one state court upheld a progressive income tax against, *inter alia*, a charge that it was confiscatory.⁸²

Thus, during the era in which the states ratified the 16th Amendment, progressive taxation simply was not controversial.

[T]he widespread existence of inheritance taxation, and of judicial approval of the whole progressive package, eroded the plausibility of the old litany of evils which opponents of

⁷⁸*Id.* 33, quoting Senator Stephens in debates over tax bill in 1864. Senator Stevens did go on to label progressive taxation as “no less than a confiscation of property,” but his earlier admission of the measures legality indicates that he used “confiscation” as a rhetorical as opposed to a legal term.

⁷⁹JOHN F. WITTE, *THE POLITICS AND DEVELOPMENT OF THE FEDERAL INCOME TAX* 72-73 (1985).

⁸⁰*Pollock v. Farmers’ Loan & Trust Co.*, 157 U.S. 429 (1895). Article I, § 2, cl. 3 and § 9 cl. 4 both require that “direct” federal taxes be apportioned among the states according to population.

⁸¹STANLEY, *supra* note 2, at 203-205.

⁸²*Bolens v. Frear*, 134 N.W. 673 (Wis. 1912).

such taxation had marshaled since the 1890s: that progressive taxation meant a war of poor against rich, that it constituted ‘confiscation,’ and that it represented the majority run amok through the law.⁸³

Indeed, progressivity was never questioned during proposal and ratification of the 16th Amendment. Debate “was concerned chiefly with the propriety of income as a tax base. Again there was some subsidiary concern with progression and it was well-recognized that it would be possible to have a graduated tax under the Amendment.”⁸⁴ Senator Hughes implicitly admitted as much. He objected that the 16th Amendment, as proposed, “did not provide for ‘uniformity’ in taxation — an attack on [the possibility of] graduated rates ...” under the Amendment as written.⁸⁵ This objection implies an understanding that, without the word ‘uniformity,’ the 16th Amend. permitted progressive income taxation.

Similarly, the progressivity of the first income tax enacted after ratification of the Amendment is further evidence of a common understanding that progressive taxation was constitutional. Passed in 1913, this tax exempted the first \$3,000 of income (or \$4,000 for married couples), and imposed marginal rates starting at 1% and rising to 7% for income over \$500,000.⁸⁶ None of these terms raised any hackles. “At the time the tax was accepted as a natural and inevitable culmination of the constitutional amendment.”⁸⁷ “If progressive taxation were so patently offensive to the democratic ideal that it could be characterized as an unconstitutional taking, at least a hint of that should have appeared in the legislative history. There is none.”⁸⁸

2. Positive Legal Doctrine

Given this long use and acceptance, coupled with the universal understanding that Congress likely would enact a progressive income tax under the proposed Sixteenth Amendment, challenges far from common. According to Blum and Kalven, a short, vociferous challenge to progressive rates that appeared in 1916 was “perhaps most noteworthy because it appears to have been virtually the last gasp of

⁸³STANLEY, *supra* note 2, at 209.

⁸⁴WALTER J. BLUM & HENRY KALVEN, JR., *THE UNEASY CASE FOR PROGRESSIVE TAXATION* 12 (1953).

⁸⁵STANLEY, *supra* note 2, at 219, citing Senate Journal (1911) I: 618.

⁸⁶WITTE, *supra* note 76, at 77-78.

⁸⁷*Id.* 77.

⁸⁸Leo P. Martinez, *To Lay & Collect Taxes: The Constitutional Case for Progressive Taxation*, 18 YALE L. & POL’Y REV. 111, 126 (1998).

constitutional objection to the principle of progression.”⁸⁹

Massey attempts to revive this objection. He argues that the Supreme Court has never directly held that progressive taxes are not a taking. His position is difficult to maintain. Although the Court may not have made a crystal-clear ruling, this failure may be due more to the failure of plaintiffs to raise an issue that everyone thinks is a sure loser. Evidence that can be gleaned from dicta in a number of cases uniformly and strongly suggests that progressive tax rates do not violate the Takings Clause.

The Supreme Court upheld a state inheritance tax containing progressive rates against an equal protection challenge.⁹⁰ Two years later it upheld the progressive federal inheritance tax.⁹¹

The Court explicitly relied on historical practice to buttress the constitutionality of progressive taxation, noting that such levies “were enacted without question from the very beginning, and have continued in an unbroken line to the present time, sanctioned by the founders of our institutions and approved in practical execution by all the illustrious men who have directed the public destinies of the nation.”⁹² Consistent with the classic view of the distinction between taxation and takings, the *Knowlton* Court did concede that in extreme cases taxes could amount to confiscation.

If a case should ever arise, where an arbitrary and confiscatory exaction is imposed bearing the guise of a progressive or any other form of tax, it will be time enough to consider whether the judicial power can afford a remedy by applying inherent and fundamental principles for the protection of the individual.⁹³

The strong implication is that the progressive taxes at issue in the case were not “confiscatory” and, more generally, that progressive taxation is not *per se* unconstitutional.

The Court repeated these same themes in *Brushaber v. Union Pacific*⁹⁴ in the course of rejecting a litany of constitutional objections to the first tax enacted under

⁸⁹BLUM & KALVEN, *supra* note 81, at 6, citing Frank Warren Hackett, *The Constitutionality of the Graduated Income Tax*, 25 YALE L.J. 427, 440 (1916). Though Massey does not cite Hackett’s article, he elaborates many of the same arguments.

⁹⁰*Macoun v. Illinois Trust*, 170 US 283 (1898) (on Illinois inheritance tax). Justice Brewer, in dissent, argued that such unequal taxation violated the Constitution, though it is unclear what clause he thought the tax violated.

⁹¹*Knowlton v. Moore*, 178 US 41 (1900).

⁹²*Knowlton*, 178 U.S. at 94.

⁹³*Knowlton*, at 109-110.

⁹⁴240 U.S. 1 (1916).

the Sixteenth Amendment. The Court again emphasized the long tradition of progressive taxation in the United States, declaring that all challenges raised “disregard[] the fact that in the very early history of the Government a progressive tax was imposed by Congress and that such authority was exerted in some if not all of the various income taxes enacted prior to 1894”⁹⁵ And once again the Court embraced the classical view that, in extreme cases, asymmetric taxation might violate the Takings Clause.

a seeming exercise of the taxing power, [if] the act complained of was so arbitrary [that it was] ... not the exertion of taxation, but a confiscation of property; that is, a taking ... in violation of the Fifth Amendment; or what is equivalent ... so wanting in basis for classification as to produce a gross and patent inequality as to inevitably lead to the same conclusion.⁹⁶

A leading historian of the federal income tax concludes that the “opinion in *Brushaber* left little room for dispute over the firm tradition of progressive income taxation in the United States.”⁹⁷

B. Normative Considerations of Progressive Income Taxation

Beside these strong historical and legal grounds supporting the constitutionality of progressive income taxation, we are also interested in the social desirability of such a tax, from both an efficiency and a fairness perspective. Here, unsurprisingly, the evidence is much less clear.

1. Equity

Opponents of progressive taxation have used various analogies to argue that single-rate income taxation (also called strictly proportional taxation, or a flat tax) is a “neutral” and hence fair alternative. The roots of this idea go back at least to Adam Smith, who analogized a nation’s citizens to co-owners of realty. Under the common law, joint owners contribute to necessary expenses in proportion to their interest in the estate.

The subjects of every state ought to contribute towards the support of government, as nearly as possible ... in proportion to the revenue which they respectively enjoy under the protection of the state. The expence of government to the individuals of a great nations, is like the expence of management to the joint tenants of a great state, who are all obliged

⁹⁵*Id.* 25.

⁹⁶*Id.* 24-25.

⁹⁷STANLEY, *supra* note 2, at 229.

to contribute in proportion to their respective interests in the estate.⁹⁸

Hayek proffered substantially the same defense of strict proportionality, saying that “a person who commands more of the resources of society will also gain proportionately more from what the government has contributed.”⁹⁹ More recent scholarship has repeated the mantra of flat rate taxation as fair taxation.¹⁰⁰

Yet others have questioned any *a priori* reason to favor single-rate taxation. Boris Bittker declared over 30 years ago that “proportionality is no more entitled to a presumption of fairness than progression,”¹⁰¹ and scholars have continued to question this premise.

Perhaps the most significant and pervasive assumption is that the burden of proof lies on supporters of progressivity. A proportionate tax is often seen as ‘natural’ or ‘neutral,’ and therefore is thought to require no justificatory theory. ... The belief that progressive and regressive taxes must meet affirmative burdens operates as a default assumption in favor of a proportionate tax. ...¹⁰²

Barbara Fried highlights the intellectual weakness of the presumption in favor of a flat tax, finding that “[v]irtually all defenses of proportionality ultimately boil down to some variant of ... ‘I know fairness when I see it,’ claim, or [are tautologies].”¹⁰³

Fried pinpoints the missing piece in arguments for strictly proportional taxation.

⁹⁸ADAM SMITH, AN INQUIRY INTO THE NATURE & CAUSES OF THE WEALTH OF NATIONS bk. V, ch. II, pt. 2, at 350 (University of Chicago Press, 1976) (Edward Cannan ed. 1904) (1776). Opponents of progressive taxation citing this passage either overlook or decline to cite Smith’s comments in support of progressive taxation a few pages later. “A tax upon house-rents, therefore, would in general fall heaviest upon the rich; and in this sort of inequality there would not, perhaps, be any thing very unreasonable. It is not very unreasonable that the rich should contribute to the public expence, not only in proportion to their revenue, but something more than in that proportion.” *Id.* 368.

⁹⁹FRIEDRICH A. HAYEK, THE CONSTITUTION OF LIBERTY 316 (1960); *see also* MILTON FRIEDMAN, CAPITALISM & FREEDOM 175 (1962).

¹⁰⁰Massey, *supra* note 1, at 123 (“the tax burdens on incomes ... should be an equal proportion of all incomes”). EPSTEIN, *supra* note 4, at 298-99 (“The flat tax certainly gives a respectable matching [of burdens and benefits] ... In addition, a flat tax dispenses with the need to choose one of an infinite set of arbitrary progressive schedules. Some other baseline ... might well be part of a more comprehensive constitutional scheme, but in its absence, the flat tax is the most ‘natural’ approach.”)

¹⁰¹Boris Bittker, *The Income Tax: How Progressive Should It Be?*, in BORIS BITTKER, COLLECTED LEGAL ESSAYS, 229, 233 (1989).

¹⁰²Joseph Bankman & Thomas Griffith, *Social Welfare and the Rate Structure: A New Look at Progressive Taxation*, 75 CAL. L. REV. 1905, 1911 (1987).

¹⁰³Barbara H. Fried, *The Puzzling Case for Proportionate Taxation*, 2 CHAPMAN L. REV. 157, 189 (1999).

I mean only to dislodge the apparently intractable notion that [proportionate taxation] deserves to be adopted because it is ‘fair’ in itself, or because it is an obvious instantiation of some other fairness principle. I am not arguing in favor of progressivity, regressivity, or any other rate structure on fairness grounds. The deeper moral is that no sensible theory of distributive justice would fix on rate structures themselves as fair or unfair. Rate structures are just a means to operationalize other prior, moral commitments about the proper role of government.¹⁰⁴

Bankman and Griffith concur. After questioning the twin assumptions that a proportionate tax is “somehow ‘natural’” while progressive taxes “require justificatory theories,” they maintain that “[i]n fact, all rate structures must be premised upon, and measured by, a theory of distributive justice.”¹⁰⁵ They conclude that “[i]t is surprisingly difficult to derive a theory of distributive justice that supports a proportionate tax.”¹⁰⁶

Not all commentators have ignored this requirement. Blum and Kalven noted that

[t]o pass a judgment on whether a given schedule of graduated rates achieves ‘tax justice’ from a redistributive perspective, we must resort to criteria that lie altogether outside the province of taxation ... What is at stake, and all that is at stake, is the central and formidable question of distributive justice in society.¹⁰⁷

Thus they evaluated assumptions about social welfare necessary to justify a progressive tax. For example, one common justification is that money has diminishing marginal utility for all or almost all people: the first dollars spent, on housing and shelter, yield much more satisfaction than the last dollars spent, e.g. on hobbies. If true, progressive taxation will increase social welfare, defined as maximizing the sum of all persons’ utility, since it will take money from those who used it for relatively lower-utility luxuries and subsidize those lacking higher-utility necessities. Measuring the marginal utility of money individually or across persons, however, is not possible. Blum and Kalven assert, without any citation or argument, that “[t]o yield progressive rates of tax ... the utility curve for money has to decline *very sharply*.”¹⁰⁸ This unsupported statement may have had intuitive appeal at the time written, when marginal income tax rates in the United States topped 70%, but the lack of rigorous support may pose more substantial problems today, when the top

¹⁰⁴*Id.* 158.

¹⁰⁵Bankman & Griffith, *supra* note 99, at 1907.

¹⁰⁶*Id.* 1912.

¹⁰⁷Blum & Kalven, *supra* note 7, at 14-15.

¹⁰⁸*Id.* 18.

marginal rate is under 40%.¹⁰⁹

This is an important quibble, and neither side of the debate can muster convincing, objective evidence. But there is a more fundamental objection to flat rate taxation: it is a strong assumption, selecting one tax structure out of an uncountable number of alternatives that are either progressive or regressive. It requires rather strong assumptions to rationalize such a narrow choice. Advocates typically invoke benefits theory, which justifies taxation based on benefits conferred. As Fried pointedly notes, however, “benefits theory leads to proportionate taxation if and only if the quantity of publicly supplied goods that people consume is proportionate to income.”¹¹⁰ Epstein argues that the assumption that the benefit of public goods increases in proportion to income (or wealth?) “gives a respectable matching” and then relies on the assertion, seriously questioned above, that “the flat tax is the most ‘natural’ approach.”¹¹¹

But, on closer inspection, there is nothing at all ‘natural’ about this assumption. “As even proponents of proportionate tax concede, that premise is highly implausible (a ‘not clearly inappropriate assumption’ is the best that Milton Friedman can do).”¹¹² Fried makes a strong case that, for many public goods, benefits theory suggests not a flat tax rate, but a flat dollar tax, independent of income, a so-called capitation, or head tax.

[The presumption of proportionality] is doubtful for many publicly provided goods, such as roads, fire protection, garbage collection, and schools. It is clearly wrong for others, such as clean air, defense, and broadcast spectra, that are true ‘public goods’ in the technical economic sense ... As public goods, of course, everyone consumes the exact same good — in which case, a far more plausible outcome of benefits taxation would seem to be a highly regressive tax, at the extreme, a head tax, in which Bill Gates and Joe Dishwasher each pay the same fixed fee for access to a fixed package of public goods ...¹¹³

Although this article will question the premise that all citizens benefit in equal absolute amounts from public goods such as police protection (*infra* § IV.B), the power of Fried’s point is that the premises of flat tax advocates naturally lead to a head tax rather than a flat tax. Why are they so hesitant to follow their premises to their logical conclusion?

¹⁰⁹For historical tax rates, see the web site of The Century Foundation, <http://www.tcf.org/Publications/Basics/Tax/History.html>, figure 3b (visited July 18, 2001)

¹¹⁰Barbara H. Fried, *Why Do Libertarians Love Proportionate Taxation? The Case of Gauthier’s Morals by Agreement* 3, Stanford Public Law & Legal Theory Working Paper Series, no. 12 (June 2000).

¹¹¹EPSTEIN, *supra* note 4, at 298-99.

¹¹²Fried, *supra* note 107, at 3, citing FRIEDMAN, *supra* note 96, at 175.

¹¹³Fried, *supra* note 107, at 3.

We may gain further insight into the thinking of flat tax advocates by considering income tax exemptions — exempting the first \$X of income from any taxation at all. Surprisingly,

almost none of the proponents of proportionality ... have in fact supported proportionate taxation. ... Instead, they have supported a so-called degressive version of a progressive tax, in which the first x dollars of income or consumption, sufficient to cover basic needs, is taxed at a zero rate, and all income or consumption above that is taxed at the same positive rate.¹¹⁴

Blum and Kalven were quite frank about the motivation for this exception. “One obstacle that confronts this aspiration toward tax neutrality ... arises from the brute fact that there is poverty ... Under these circumstances, a fully neutral tax just does not work.”¹¹⁵

At least one opponent of progressive taxation, Justice Field, had the courage of his convictions and condemned exemptions as illegal forms of progressivity on a par with a progressive rate structure.¹¹⁶ In the main, however, opponents of progressive taxation, cognizant of this “brute fact,” often seem oblivious to the fact that introducing an exemption into the income tax results in a type of progressive tax. An article challenging the constitutionality of progressive taxation dismissed this problem in one blithe sentence.¹¹⁷

Yet the inconsistency of exemptions with a flat tax is manifest.

It is hard to overstate, however, the difficulties that [conceding the necessity of an exemption for the poor] entails for those whose opposition to any greater degree of progressivity via a graduated rate structure is based on the fact that such progressivity is motivated by purely redistributive concerns. ... why stop there? ... why not raise the exemption level [higher]? ... Surely, Frank Taussig was right in declaring many years ago that ‘the demand for the exemption of the lowest tier of incomes results from the same state of mind as the advocacy of progressive taxation.’¹¹⁸

The almost universal support for exemptions among critics of progressive rates “suggests that fairness as well as efficiency grounds underlie their support for

¹¹⁴Fried, *supra* note 100, at 160-61. Use of the term “digressive” to denote progression achieved by exempting the first \$X of income apparently was coined in Blum & Kalven, *supra* note 7, at 12-13.

¹¹⁵Blum & Kalven, *supra* note 7, at 11.

¹¹⁶*Pollack*, 157 US at 599-600, 607-08 (Field, concurring).

¹¹⁷“We may dismiss a consideration of the size of the exemption.” Hackett, *supra* note 86, at 430.

¹¹⁸Fried, *supra* note 100, at 161-62 (1999).

proportional taxation.”¹¹⁹ We will address efficiency shortly. But once we admit that some notion of redistributive justice, i.e. some notion of fairness (or equity), it is difficult to explain why some level of exemption is precisely the correct amount of fairness.¹²⁰ Most advocates of strict proportionality in taxation simply fail to specify what social benefit function they aim to maximize; without providing a metric to compare results, there is simply no basis for choosing one tax policy over another.¹²¹

2. efficiency arguments for a flat tax instead support a head tax

Specifying a social welfare function, of course, is controversial. There is no consensus on the proper objective function. Perhaps for this reason, “[t]o the extent that supporters of proportional do offer a positive case for their position, the argument is based almost exclusively on efficiency grounds . . .”¹²² Flat tax advocates note that progressive taxation may impose stiff marginal tax rates (that rate applied to the last dollars earned) on high-income earners, many of whom are society’s most productive members. These taxes encourage substitution of leisure for cash income, and result in the deadweight loss inherent in all forms of taxation avoidable by substitution. A similar argument applies to savings decisions: as the income tax applies to dividends, interest, and other investment income, higher marginal rates will impose suboptimal substitution away from taxed activities.

In rebuttal, Bankman and Griffith first note that it is not progressivity itself that imposes deadweight loss, but rather high rates. Thus a progressive set of rates with a moderate top rate will impose less deadweight loss than a flat tax at a high rate. Moreover, drawing on formal models of optimal taxation, they describe an efficient income tax that is progressive in its overall structure. Specifically, Mirrlees has shown that, in a simple model making minimal assumptions, the optimal tax structure is (1) a cash transfer payment to lower wage workers (called a “demogrant”), coupled with (2) *declining* marginal tax rates on higher incomes. Declining rates mean that the marginal rate for very productive workers is relatively low, and so they have less

¹¹⁹Bankman & Griffith, *supra* note 99, at 1966.

¹²⁰Blum and Kalven offer one possible standard. They maintain that there is universal support for an exemption that takes the truly poor off the tax rolls; “[t]he much more fundamental question . . . is whether society should concern itself with redistribution only insofar as it is necessary to deal with poverty, or whether it should extend its concern to inequalities of ‘surplus’ income.” Blum & Kalven, *supra* note 7, at 14. Defining the poverty level may be tractable. Note that this is consistent with the classical view, under which taxation to support true paupers was permissible. See *infra* text accompanying note 196.

¹²¹Bankman & Griffith, *supra* note 99, at 1913.

¹²²*Id.* 1966.

incentive to substitute leisure for work.¹²³

There is a deeper problem for advocates of strict proportionality arguing against progressivity on efficiency grounds. Flat rate income taxation causes deadweight losses similar to progressive taxation: since taxpayers can reduce their tax bill by working less, both involve deadweight losses. Thus, “the same efficiency-based reasoning that rejects a progressive tax in favor of a proportionate tax would, if applied consistently, reject a proportionate tax in favor of a lump-sum head tax ... an exclusive concern for economic efficiency implies a regressive, rather than proportional, tax.”¹²⁴ As we have seen, however, there is almost universal opposition to head taxes, and regressive taxes in general. This implies that even flat tax supporters do not rely on efficiency alone in selecting a desirable tax policy. They implicitly try to satisfy some equity concerns, and those equity concerns force them to deviate from both a head tax and even from strictly proportionate taxation (without any low-income exemption).

Blum and Kalven point out a somewhat non-conventional efficiency argument for progressive taxation: it may be the least-cost way for the wealthy to quiet social disorder among the poor. They observe that “it may be that there are limits to the peaceful tolerance by the mass of the population of great disparities in wealth and that a closer approximation to equality is important insurance against revolution.”¹²⁵ They cite Simons for an extended defense of what appears akin to extortion:

progressive taxation is a workable democratic method for dealing with inequality. The alternative of unionists is to send workers out in packs to exploit and expropriate by devices which resemble those of bandit armies. The one device is inherently orderly, peaceful, gradualist, and efficient. It is the device of law. The other is inherently violent, disruptive, and wasteful in the extreme. One calls for debate, discussion, and political action; the other for fighting and promiscuous expropriation.¹²⁶

Epstein takes a less sanguine view, deeming redistributionary measures designed to buy social peace as “little more than strategic bribes.”¹²⁷

It may seem strange to classify this social bribery as an efficient practice. The reason is that economics usually assumes that all actors are law-abiding, or that the police and courts effectively can curtail extortion instead of indulging it. If, however,

¹²³*Id.* 1918-1921. The formal model they discuss is from Nobel laureate James A. Mirrlees, *An Exploration in the Theory of Optimum Income Taxation*, 38 *Rev. Econ. Stud.* 175 (1971).

¹²⁴*Id.* 1913. See also Fried, *supra* note 100, at 190-91 (1999).

¹²⁵Blum & Kalven, *supra* note 81, at 77.

¹²⁶*Id.* 71 fn.178, quoting Simons, *Some Reflections on Syndicalism*, 52 *J. POL. ECON.* 19 (1944)

¹²⁷EPSTEIN, *supra* note 4, at 316.

we assume that the poor are willing and able to inflict costs on their wealthier neighbors, redistributionary taxation may be superior to the alternatives (social unrest, or expensive expansion of the police force).

3. progressivity as a proxy for disproportionate benefits of law and order to the wealthy

This subsection briefly explores a couple of closely related justifications for progressive taxation, all revolving around benefits to law and order that accrue disproportionately to the wealthy. The first justifies progressivity as an implicit wealth tax on non-income-producing property. The legal system creates an environment that not only enhances the ability to generate income, but also protects accumulated wealth. The income tax imposes burdens on those benefitting from the former, and the latter for those forms of wealth that generate income (e.g., stock dividends and bond interest, patent and copyright royalties). Yet forms of wealth that do not generate income (e.g. furs, jewelry, vintage wine) escape taxation despite the fact that their owners benefit from legal protection of such property every bit as much as generators of income and owners of income-producing wealth.¹²⁸ In theory, of course, we could impose a separate tax on such wealth, but administratively this might be expensive. Progressivity in income taxation may achieve a similar allocation of burdens at a lower administrative cost. The key assumption behind using progressivity to mimic a tax on non-income-producing wealth is that, as income increases, wealth in general increases disproportionately. There is strong empirical evidence for this relationship.¹²⁹

For similar reasons, law and order may be a luxury good disproportionately desired by those with the most to lose from radical change or chaos. Pigou, a leading neoclassical economist and no radical, suggested as much.

¹²⁸In a future article, I will explore a *self-reporting* wealth tax that may be administratively cheap. The key idea is that citizens who do not report some form of wealth will not be eligible for most forms of legal protection. The law would still protect simple possession (to prevent chaos), so, for example, the police would always prevent someone from ripping jewelry off the owner's body. The courts would also entertain a private suit for recovery if the owner could identify the thief. For an owner who did not report the jewelry on his wealth tax return, however, the police would not help recover property once stolen. The tax would exclude those forms of wealth that generate income or capital gains that present national and state income taxes reach. It would also exclude wealth subject to separate taxation, e.g. real property. For administrative simplicity, the tax would include a relatively large exemption, so that most people wouldn't have to file to obtain full protection for their wealth. To encourage voluntary reporting, insurers would be obligated to report all personal property insured above the exempted amount. I argue that a special excise tax on such property is less workable, as it is relatively easy to buy most forms of personal property out of the taxing jurisdiction and import them without paying such a "use" tax.

¹²⁹"as adjusted gross income (AGI) — the primary measure of income in the current income tax—increases, wealth increases disproportionately." David J. Shakow & Reed Shuldiner, *A Comprehensive Wealth Tax*, 53 TAX L. REV. 503 (2000) (citing data to support assertion).

[P]eople's economic well-being depends on the whole system of law, including the laws of property, contract and bequest, and not merely upon the law of taxes. To hold that the law about taxes ought to affect different people's satisfactions equally, while allowing that the rest of the legal system may properly affect them very unequally, seems not a little arbitrary.¹³⁰

Martinez captured the same idea: "The intangible well-being represented by economic and social stability are perhaps more valuable to the wealthy."¹³¹ These observations are nothing new. "Proponents of the renewal of the [income] tax [in the early 1870s] generally voiced support on two grounds: that those with the greatest wealth had the greatest ability to pay, and, more important, that they received the greatest benefits from the government and therefore had the greatest responsibility to pay a tax on the product of those benefits."¹³²

Implicit in these arguments is the idea that, at least to some extent, we can apportion the benefits of basic governmental services like police and courts. Such services certainly have some of the attributes of public goods and hence there is no way to determine market prices (fees) for their consumption. Blum and Kalven expand on the concept of public goods to question whether the wealthy benefit disproportionately from the existence of law and order.

Although admittedly many expenditures of government cannot be traced directly, there is, as was suggested in the discussion of benefit theory, some plausibility to the assumption that all citizens benefit equally from such expenditures. The clearest instance is that of military expenditures for exterior security. Here the life and freedom of everyone in the community are equally at stake, and in this sense everybody equally benefits from the protection.¹³³

Massey makes much the same arguments about the military and police. "A national defense that is adequate to protect Americans from external harm to their persons will also protect their property at no extra cost. Moreover, the level of protection necessary to defend tangible property does not vary proportionally with its value ... the cost of protecting intangible assets is a fixed cost, unrelated to the assets' value."¹³⁴

These opinions, that basic peace and order benefit citizens equally, or in strict proportion to wealth, are based on intuition alone, and there are equally plausible arguments to the contrary. The wealthy have much more to lose from either a foreign invasion or a radical change in the internal legal system. The poor rationally might

¹³⁰ARTHUR C. PIGOU, A STUDY OF PUBLIC FINANCE 44 (3rd rev. ed. 1951).

¹³¹Martinez, *supra* note 85, at 147.

¹³²STANLEY, *supra* note 2, at 46.

¹³³Blum & Kalven, *supra* note 81, at 77.

¹³⁴Massey, *supra* note 1, at 106-107.

well favor little or no national defense. Massey's assertion that "the cost of protecting intangible assets [by far the largest component of wealth] is a fixed cost, unrelated to the assets' value," is not even plausible. The greater the wealth at stake, the more others will be willing to expend to expropriate it. Thus protecting greater accumulations of wealth may require raising the expected costs of stealing it—i.e. greater expenditures on regulation and policing.

Finally, note that the selection of income as the tax base enables non-income-bearing wealth to escape taxation. There are other feasible bases for a broad-based tax that could yield revenues equal to the present income tax, and a wealth tax is one such alternative. It is difficult to determine whether such a tax would be more efficient, but it appears no less equitable. "The classic equitable justification for the income tax is that a tax should be based on ability to pay and income is the best measure of ability to pay. On the face of it, however, a person's wealth appears to be as fair a basis for distributing a tax as her income."¹³⁵ And, to reiterate a point made above, to the extent that wealth, especially non-income-bearing wealth, increases more than proportionately with income, a *flat-rate* wealth tax would impose burdens similar to a progressive income tax.

In summary, there are good policy arguments in favor of progressive income taxation though they are hardly dispositive. As a matter of history and positive law, we saw that the case for the legality of progressive taxation is strong.¹³⁶ What advocates of progressive taxation have failed to provide is guidance on how, in general, to determine when taxes go so far as to be takings. The classical view is a starting place: since our current progressive income tax impacts a large percentage of the population, it passes the first part of the classical standard. We then confront the second part of the classical test, whether progressive taxation 'unfairly apportion[s]' the burden of taxation. This standard provides little guidance, and does not, facially at least, exclude arguments like Epstein's that progressive rates by definition impose disproportionate burdens. The next section attempts to flesh out the classical standard with a more specific rule.

IV. The Continuous Burdens Principle (CBP)

In arguing that all progressive taxation amounts to a taking, Massey complains

¹³⁵Shakow & Shuldiner, *supra* note 126, at 500.

¹³⁶After reviewing the evidence, it is somewhat difficult to understand the attraction of strictly proportionate tax rates. Two articles have suggested that flat rates may be a sort of *focal point*, a solution that stands out for its simplicity and uniqueness as a intermediate position between regressive and progressive rates. "Because it is so simple, a tax structure that imposes the same rate on all individuals is more 'prominent' than any of the countless rate structures that impose different rates on individuals of different rate classes." Bankman & Griffith, *supra* note 99, at 1914; *see also* Fried, *supra* note 100, at 193-95.

that fellow professors dismissed Epstein's *Takings* book "because it stated a conclusion that was unpalatable to the orthodoxy of the political left that dominates academia."¹³⁷ Although it is difficult to verify such an imputation of collective state of mind, my problem with Epstein's thesis is less colorful: it deems unconstitutional existing practices and programs long viewed as beyond challenge. In particular, the thesis that progressive income taxation violates the Takings Clause is counter to longstanding and continuing practice.

Current doctrine that must justify progressive taxation, however, has its own problems. For our purposes, its biggest shortcoming is its absolute rule that taxation is never a taking. Thus, for example, a steep tax aimed at the single richest person in the nation (the 'Bill Gates Tax' example discussed *supra*) does not violate the Takings Clause under current doctrine. This is in tension with the Supreme Court's oft-repeated language from *Armstrong* that the core purpose of the Takings Clause is "to bar the Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."¹³⁸ Such a steeply progressive tax is also in acute tension with the Supreme Court's foundational declaration that when diminution "reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act."¹³⁹

The continuous burdens principle (CBP) developed in this section is designed to provide a doctrinal middle ground, a rule under which progressive taxation generally is deemed not a taking, but under which the extreme progressivity of the Bill Gates tax is deemed a taking. This undertaking has surprising similarity to Epstein's work. He aimed to develop rules that avoided the extremes of declaring that either no tax was a taking, or that every tax was. He asked, "[h]ow can we avoid this extreme result, steer a middle course, and identify those forms of taxation ... that should survive, and those that should be condemned?"¹⁴⁰ This continuous burdens principle (CBP) draws the line between taxation and takings at a different location than does Epstein, but it shares his view that at some point taxation surely can shade over into a taking.

A. The Continuous Burdens Principle

1. basic idea

¹³⁷Massey, *supra* note 1, at 85-86.

¹³⁸*Armstrong*, 364 U.S. at 49 (1960).

¹³⁹*Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922). Holmes restated this rule in the context of regulation: "The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Id.* 415. Nothing in *Mahon* suggests that this principle applies to regulation and regulation only.

¹⁴⁰Epstein, *supra* note 41, at 435.

The continuous burdens principle (CBP) developed here can be viewed as no more than a formal, more rigorous version of the famous sentence from *Armstrong* declaring that the Takings Clause “bar[s] the Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”¹⁴¹ The idea is that, instead of looking at absolute burdens to property owners, independent of burdens imposed on other citizens in the condemning jurisdiction, we examine the *marginal* burden imposed on an owner or group of owners. By marginal burden I mean the amount by which the burden imposed on an owner (or group of owners equally burdened) exceeds the burden imposed on the *next most burdened* owner. As long as there is no discontinuous jump in this “marginal” burden, there is no taking.

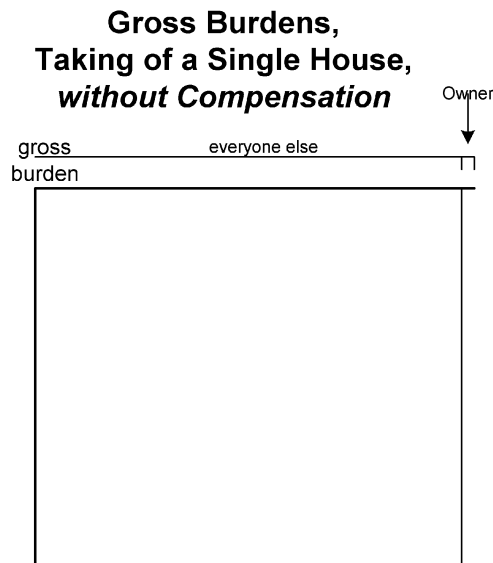
Applying this standard to every owner in the jurisdiction yields the CBP: if a governmental measure imposes costs such that there are no discontinuous ‘jumps’ in marginal burdens, there is no taking. One way to picture its application is to imagine a chain of comparisons, from burden imposed on the least burdened person (B[1]) to the most burdened (B[N]). The CBP requires that each difference in the series

$$B[2]-B[1], B[3]-B[2], \dots, B[N]-B[N-1]$$

be relatively small. If there are discontinuous jumps in this series, i.e. any difference exceeds some minimal threshold, there may be a taking.

In order to explore the CBP, we will use burden curves, a simple graphical device that encapsulates marginal benefits pictorially. Burden curves come in two varieties: gross burden curves, which do not include any offsetting benefits; and net burden curves, which include such benefits. We construct a gross burden curve by ‘lining up’ property owners in order on the horizontal axis, from the person least burdened by a governmental measure, to the person most burdened. We then graph the burden imposed on each along the vertical axis. Given the ordering of persons along the horizontal axis, the resulting curve cannot ever curve upward; it must be everywhere flat or decreasing. Here is a gross benefits curve for the taking of a single house *without payment of compensation*:

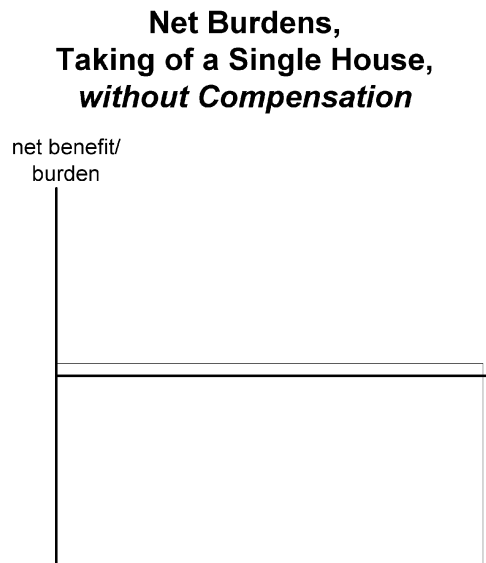
¹⁴¹*Armstrong*, 364 U.S. at 49 (1960).

**Figure 1**

The large jump in this curve is our graphical clue that compensation is required under the CBP. More generally, a gross or net benefit curve violates the CBP when its slope becomes excessively steep along any interval.

We derive *net* burden curves from gross benefit curves by raising each point to reflect the benefit that each person received as a result of the governmental program (e.g. from taking a property, spending tax revenues, regulating, etc...). Weighing benefits as implicit compensation is an established rule in condemnation law.¹⁴² When we factor in benefits, we do not reorder people; on a net burden curve they remain in the order established for gross burdens. This is done to retain information about the structure of the tax or other burden imposed. Note, then, that net benefit curves need not be flat or downward sloping; they can and at times will have positive slopes over some range of persons. Ultimately we are interested in net benefit curves, as they reflect true burdens borne. Sharp jumps, or kinks in a net burden curve correspond to *discontinuous* marginal burdens — violations of the continuous burdens principle (CBP). Here is the net burden curve for the taking of a single house, without compensation, under the assumption that the resulting governmental project (e.g. a road) benefits all citizens equally:

¹⁴²Pennsylvania Coal. Co. v. Mahon, 260 U.S. 393, 422 (1922) (stating that “average reciprocity of advantage” in a public measure can excuse obligation to pay just compensation); Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1017 (1992); Hodel v. Irving, 481 U.S. 704, 715 (1987).

**Figure 2**

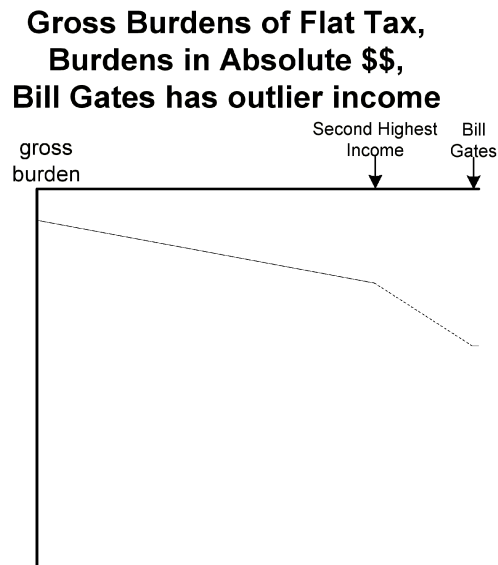
This curve starkly illustrates that taking a single piece of property for a social benefit, without compensation, imposes a discontinuous burden on the owner of the taken parcel.

Sometimes, especially for general revenue taxes, the allocation of benefits is far from clear. In order to draw net burden curves in such cases, we must start with the gross burdens curve, and derive a net burdens curve by making assumptions about the allocation of benefits from governmental use of resources gleaned from the people.

2. defining burdens

Before proceeding, we must specify more carefully how we are measuring burdens and benefits. There are two obvious candidates: actual dollars, or percentages of the property taken by the government. Embedded in this choice are fundamental issues of fairness — issues on which there is nothing like a social consensus. This subsection makes no attempt to prove that one choice or the other is more fair based on some axiomatic theory of justice or a carefully defined social welfare function. Rather, it endeavors to show that using percent burdens as the relevant metric for takings analysis is consistent with widely-held assumptions about fairness. Most importantly, it is consistent with the assumptions of those who, contrary to this article, argue that progressive income taxation is a taking.

If we use absolute dollars to measure burdens, discontinuity in the distribution of the asset being taxed/taken will affect the continuity of burdens in ways that almost nobody seems to find relevant. For example, consider a flat-rate income tax that almost no mainstream theorists find objectionable. Assume that Bill Gates has a substantially higher income than the next highest income taxpayer. If we use absolute dollars due, even a flat tax produced discontinuous burdens.

**Figure 3**

Bill Gates' tax bill will substantially exceed that of the next-highest-taxed person, and thus using absolute dollar burdens leads to a result inconsistent with the near-universal view that a flat income tax does not violate the Takings Clause.¹⁴³

Using percent burdens obviously avoids this difficulty, as the gross burden curve for a flat income tax is a horizontal line without such discontinuous jumps. The next subsection, by marching through a series of applications, shows that the percent CBP classifies a wide variety of governmental measures just as existing takings law does.

Unfortunately, using percent burdens does preserve one problem faced by existing takings law, the so-called denominator problem. If we are going to gauge burdens by percentages, we must choose a denominator by which to divide the dollar burden imposed to reach a percent diminution. This is a difficult problem, one with which courts continue to struggle.¹⁴⁴ For income, the denominator is relatively uncontroversial: "all income from whatever source derived," less any deductions and credits permitted under the tax code.¹⁴⁵ For a wealth tax, similarly, including all wealth in whatever form held seems workable and relatively uncontroversial. For

¹⁴³It is possible that there will be many discontinuous jumps in income: the income of the second highest earner may be much higher than the third; or incomes might be continuous from the highest to the 22nd highest, and then drop discontinuously to the 23rd highest income.

¹⁴⁴The Supreme Court has not given definitive guidance on the denominator problem, and thus the lower federal and state courts continue to struggle with the problem. *See, e.g., Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171 (Fed. Cir. 1994); *K&K Construction, Inc. v. Dept. Natural Resources*, 551 N.W.2d 413 (Mich. App. 1996). *See generally* Steven J. Eagle, *Regulatory Takings* § 11.7 (2nd ed. 2001) ("Ascertaining the 'Takings Fraction' or 'Relevant Parcel'").

¹⁴⁵26 U.S.C. § 61(a) ("Gross income defined").

land (and perhaps some forms of personal property), however, the denominator is less clear. Do we include parcels adjacent to a condemned parcel owned by the same person? This article does not address the denominator problem; it in effect imports without modification those standards courts are developing to address the issue.

3. applying the CBP

We began our study of the CBP by drawing gross and net burden curves for the canonical case of a taking: state expropriation of a single parcel of land. The choice between absolute and percent burdens has no effect on the shape of either curve, and so there is no need to redraw them. The net burden curve shows that, under plausible assumptions about the benefits of the government's use of the parcel, that there is a huge jump — a discontinuity — in burdens between everyone else and the owner of the taken parcel (as long as the state pays no compensation). As this is the canonical case of a taking, it is important (if not impressive) that the CBP does deem this a taking requiring compensation. With proper compensation, the singled-out landowner is placed on equal footing with everyone else, remedying the unconstitutional discontinuity that violated the CBP.

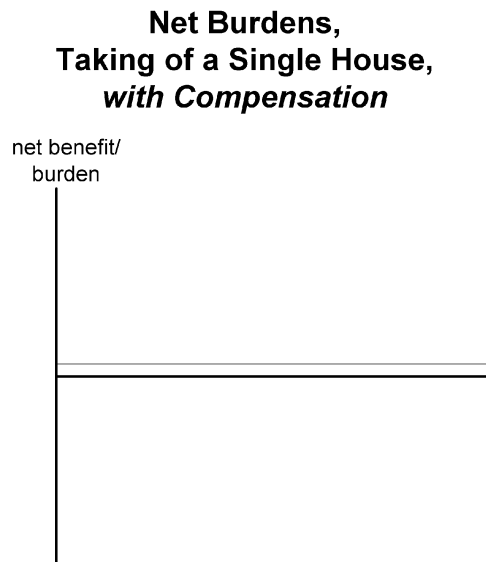


Figure 4

We factor in the addition of benefits in this case by raising the gross burden curve by a fixed amount for each person. In the case of the taking of a particular piece of land, there is no natural way to calculate percent gains; unlike the case of the taxes considered *infra*, there is no natural base. Thus there is no way to order the group of all citizens except the condemnee, and the use of a flat line to model benefits is arbitrary. In studying the CBP, however, we are not so much worried about precise shapes of the burden curves as with the existence of discontinuous jumps. It seems unlikely that, e.g., a new road confers discontinuous benefits on those whose property

is not taken for the project. Some landowners will benefit more than others (e.g. those owning land close to an exit), but these benefits are likely to be continuous (e.g. the owner of land 200 feet from an intersection will benefit less, but only slightly less, than the owner of property 100 feet from the exit).

Next consider the gross burdens curve for the two taxes we wish to distinguish. First, the “Bill Gates Tax” gross burden curve looks exactly like the curve for the expropriation of a single parcel.

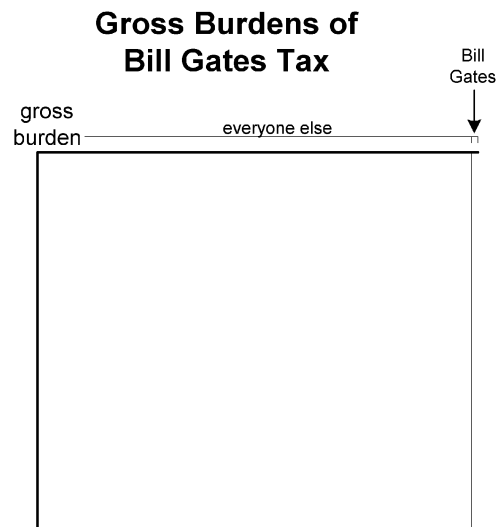
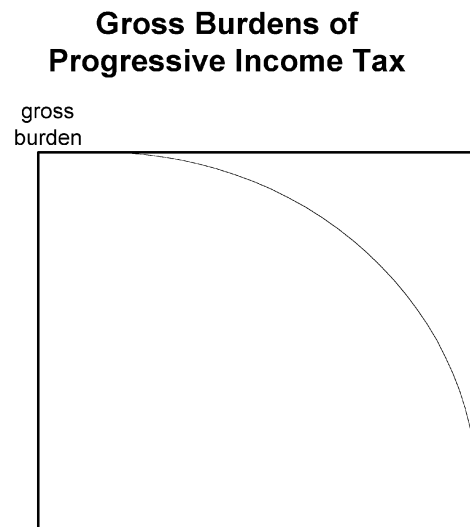


Figure 5

This curve’s similarity to the expropriation of single parcel captures the intuition that, if focused narrowly enough, a tax looks like a classic example of a taking.

Second, consider the gross burden curve for a hypothetical progressive income tax that bears a rough similarity to the current personal income tax of the United States.

**Figure 6**

Like current law, this graph reflects a tax with an exemption for the lowest earners. The remainder of the curve depicts burdens for an income tax with three marginal rates — the rate applied to income above the three specified income levels. The actual percent burden on taxpayers subject to a given marginal rate is always less than that marginal rate, as they pay lower rates on income below each threshold. Note that, by definition, the gross burden curve orders taxpayers by income, from lowest to highest. The key observation about this curve is that there are no discontinuities, no jumps, in it; burdens increase in small increments from the lowest earner to the highest. Thus, at least before we try to account for benefits, this gross burdens curve suggests that under the CBP a prototypical progressive income tax is not a taking.

These gross benefits curves, of course, do not account for benefits received by taxpayers under either tax. Calculating the benefits received by each person is not possible. Beyond the number and complexity of governmental expenditures, many of the goods provided by the state are public goods that in practice are impossible to price.

The government levies the income tax, in the main, to provide benefits to a large portion of the citizenry in the form of goods and services, e.g. police, fire, and military protection; roads, canals, ports, airports and air traffic control; clean air; segregating users of the electromagnetic frequencies. The list could go on and on. Many, though not all, goods provided by the government are *public goods*, at least in part. Public goods differ from private goods in two key respects. First, their consumption is non-rivalrous: the fact that Anne consumes police services every day does not generally diminish Betty's ability to enjoy police protection. The same cannot be said of a Big Mac. Second, it is difficult or impossible to exclude anyone

from consuming the good or service.¹⁴⁶ Non-exclusivity makes it difficult to rely on private parties to supply a good, since inability to exclude makes it difficult to charge anyone for the good. The state, if anyone, must provide such goods.

What apportionment of the cost of such public goods is fair? Unfortunately there is no single theoretically pleasing and practically feasible mechanism to determine a single general revenue tax that defines how much each citizen should contribute toward the cost of public goods. All citizens, roughly, consume the same police services, the same military protection, the same clean air.

The impossibility of assigning unique prices to charge each citizen for public benefits undermines simpler assertions that various taxes violate the Takings Clause. A critic of the first income tax's progressive rates rhetorically asked, "[w]hat sound reason, we inquire, can be brought forward for treating the payment of taxes after a different manner than payment for anything else that is received from the hands of the government, — service of the post, for example."¹⁴⁷ The post office lacks the attributes of a public good: consumption is rivalrous (if a mailperson delivers my mail, he can't deliver your mail at the same time), and exclusive (you can't get your letters delivered unless you pay postage). Thus it makes sense for the government to run the postal service on a fee-for-service basis. Yet there is no such pricing mechanism available to apportion the cost of true public goods. Generally, then, benefits that accrue to individual citizens from public programs is not amenable to exact definition.

That said, there are three assumptions about the allocation of benefits that provide baselines. First, assume that all governmental projects benefit each person by the same absolute amount. Under this assumption we can draw the net burdens curves for the Bill Gates tax and for a progressive income tax.

¹⁴⁶RICHARD A. MUSGRAVE & PEGGY B. MUSGRAVE, PUBLIC FINANCE IN THEORY & PRACTICE 41-45 (5th ed. 1989).

¹⁴⁷Hackett, *supra* note 86, at 440.

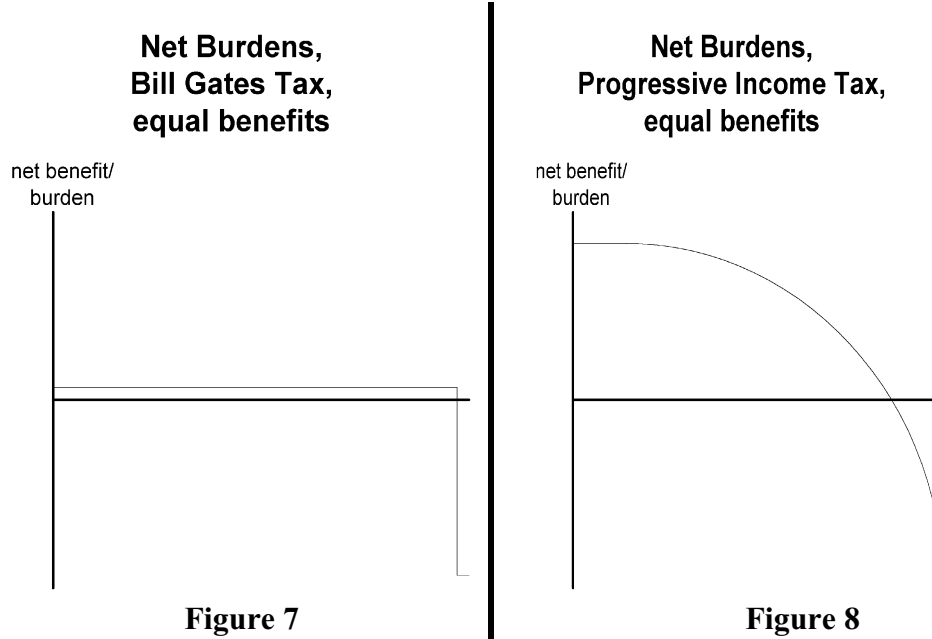


Figure 7

Figure 8

In each case, we have shifted the gross benefits curves upward. The shift is not equal for all points on the curve, as it would have been if we were measuring burdens/benefits in fixed dollars. Our curves represent percent burdens/benefits (here, percent of income), and hence a dollar's worth of benefits (or burdens) has a greater impact the further we go to the left, as the base level of income is decreasing in that direction. This shift has no effect on the continuity of burdens between taxpayers, and hence our conclusions remain unchanged under the assumption of equal benefits. The small benefit of public programs to Bill Gates is swamped by the inordinate burden imposed, and, under the CBP, he still has a takings claim. Including benefits in the progressive tax case does not single anyone out for much worse treatment than their neighbor, and there remains no discontinuity that would evidence a taking.

The second baseline assumption about benefits is that they increase proportionately with wealth; this is the assumption made by advocates of flat rate taxation. Here are the net burden curves for the two taxes under this assumption.

**Net Burdens,
Bill Gates Tax,
*benefits proportional to income***

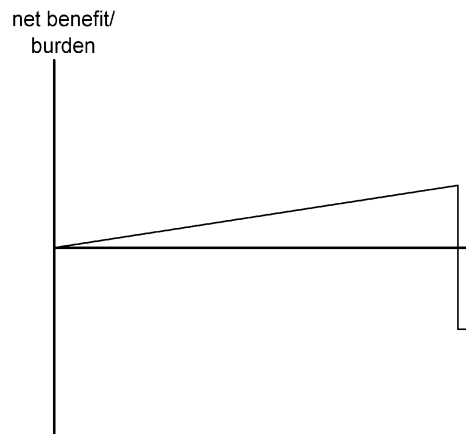


Figure 9

**Net Burdens,
Progressive Income Tax,
*benefits proportional to income***

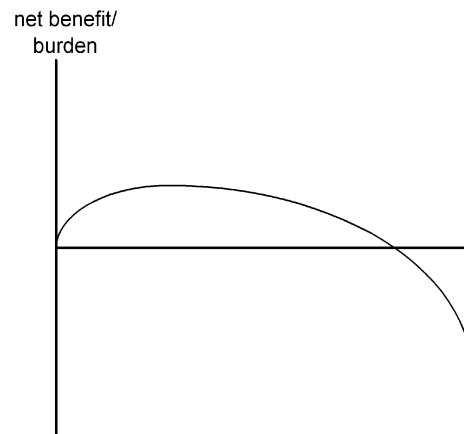


Figure 10

Since we are adding percent benefits to gross benefits as a percent of income, the addition of benefits here does simply lift each curve by a fixed amount. With benefits increasing as income increases, the discontinuous jump in the Bill Gates taxes does shrink, and under extreme assumptions could disappear. In general, however, the gap between the net burden on Bill Gates and the person with the next highest income will be noticeable, as Gates alone is subject to the tax. Thus the CBP suggests that even if benefits increase with wealth, a tax on the wealthiest person alone is still a taking. Similarly, factoring in benefits from a progressive income tax under this assumption does not change the key features of the curve: the difference in burden between any two taxpayers remains relatively small and hence under the CBP progressive income taxation is not a taking.

The third and final distribution of benefits we will consider is the possibility that public expenditures disproportionately benefit the wealthy.

**Net Burdens,
Bill Gates Tax,
disproportionate benefits to
wealthy**

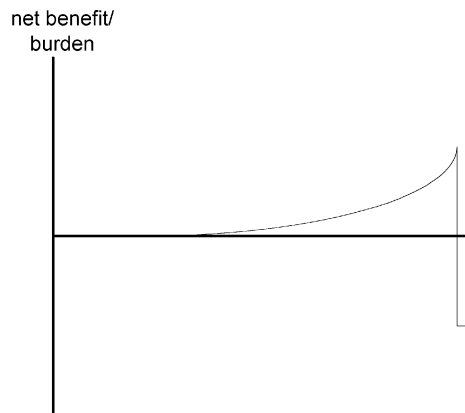


Figure 11

**Net Burdens,
Progressive Income Tax,
disproportionate benefits to
wealthy**

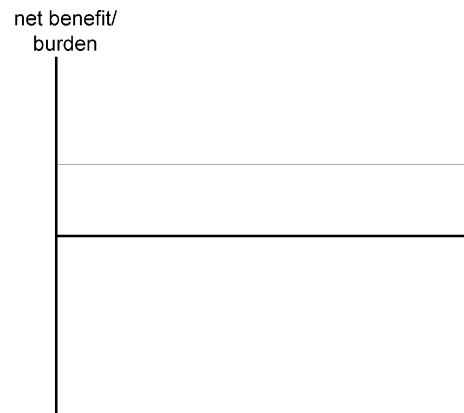


Figure 12

For the Bill Gates tax, benefits from governmental spending that increase disproportionately with income translate into quickly rising benefits for wealthier taxpayers—except for Gates. More so than in the previous example, benefits here cut into the burden imposed on him and him alone. Still, unless benefits increase dramatically at higher incomes, there will be a noticeable gap between the burden imposed on Gates and on the next highest earner. Thus, even under an assumption very favorable to the constitutionality of the tax, its discontinuous burdens violate the CBP.

For the progressive income tax, the curve is drawn under the assumption that the disproportionately increasing benefits eventually outweigh increasing marginal rates; this is why the curve begins to move upward at the highest incomes. It seems just as likely that this net burdens curve will slope downward everywhere — the outcome if the rate at which benefits increase with income never catches up with rising marginal tax rates. In either case, however, the application of the CBP yields the same results as it did under the two previous assumptions on the distribution of benefits: there are no discontinuous jumps in the net benefits curve, and hence there is no taking.

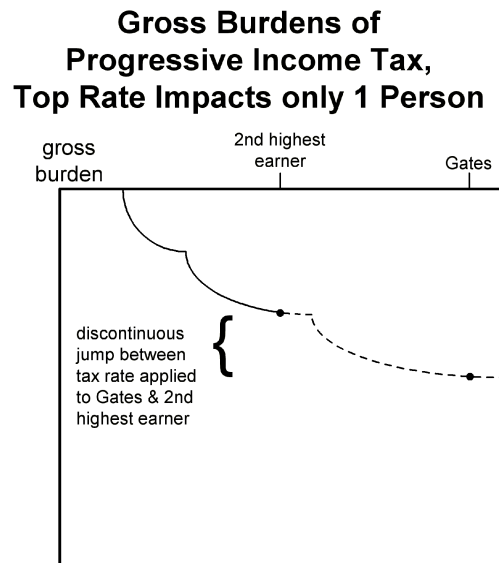
Under each of these assumptions about the distribution of benefits, then, the CBP validates the constitutionality of progressive income taxation, and conversely suggests that the Bill Gates tax is a taking. Although we have noted that under special conditions these results might not always hold, they do seem robust to quite a wide variety of assumptions about the distribution of benefits from government projects. This is in stark contrast to the argument that anything but a flat-rate income tax is unconstitutional; an implicit assumption of that argument was that the benefits from government programs increased precisely in proportion with income. Given the

impossibility of calculating how much governmental expenditures benefit persons across income or other independent variables (e.g. wealth), the need to make such an assumption renders the case for strictly proportionate taxation brittle. It stands or falls with a dubious assumption. The results of applying the CBP, however, are robust: they survive under a wide variety of assumptions about the distribution of benefits from governmental expenditures.

In one sense, the Bill Gates tax can be thought of as an extreme case of progressive taxation. Yet it is important to realize how the tax, as illustrated above, differs radically from the structure and practice of income taxation in America. Income tax rules in the United States have always allowed all potential taxpayers to claim exemptions. To do otherwise creates bizarre incentives. If a 50% tax has a \$100,000 exemption, but those making over \$100,000 were not entitled to the exemption, someone making \$100,001 would pay \$50,000.50 in taxes, reducing their after-tax income far below those making \$99,000. Taxpayers would respond in a wide variety of ways to such a bizarre system; if nothing else, they would simply refuse compensation over \$100,000.¹⁴⁸ Paying \$50,000 in taxes on the marginal dollar of income at \$100,000 is precisely the kind of discontinuous jump in liability that the CBP deems a taking.

Avoiding the absurd and allowing all taxpayers to avail themselves of exemptions makes it extremely difficult to burden one person or one group heavily while leaving all other untouched. For example, assume Bill Gates is the only person with an income over \$1 billion. The obvious way to limit the tax's application to him is to set the exemption level at \$1 billion. Yet this tax will only impose a discontinuous burden on Gates if his income is *much higher* than \$1 billion. If his income is \$1 billion and one, he would pay at most \$1 more in tax than the next highest earner. If his income is \$2 billion, then he would bear a discontinuous burden. These examples demonstrate that a top marginal tax rate that applies to only one or a few individuals will violate the CBP if there is a discontinuous jump between these top incomes and those of everyone else. Under these assumptions, a progressive income tax with a top rate that affects one or a handful of individuals does single these individuals for a unique burden: they pay a tax rate on a significant portion of their income not felt by anyone else.

¹⁴⁸This is not strictly true. Even without the exemption, those with incomes above \$200,000 would be better off accepting the compensation.

**Figure 13**

A similar discontinuity occurs if the highest marginal rate applies to a handful of taxpayers in addition to Gates, but they are all clustered in the very low end of the tax bracket. In order to avoid such discontinuities and comply with the CBP, the highest marginal tax rate must apply to a significant number of taxpayers, some of whose income extends past the lower bound of the rate, where the effective tax rate increases most rapidly.¹⁴⁹

4. Applying the CBP to other taxes, and the draft

State and federal progressive taxation of estates and inheritances predates enactment of the 16th Amendment, and the Supreme Court repeatedly has rejected constitutional challenges to these taxes.¹⁵⁰ The Supreme Court's justification for such taxes, however, is very formal, and, well, un-American: "The right to take property by devise or descent is a creature of the law, and not a natural right—a privilege, and therefore the authority which confers it may impose conditions upon

¹⁴⁹Note that the federal income tax during the Civil War, despite its very high exemptions, still reached thousands of citizens, *supra* text accompanying notes 72-73.

¹⁵⁰*Magoun v. Illinois Trust & Savings Bank*, 170 U.S. 283 (1898) (upholding progressive state inheritance tax); *Knowlton v. Moore*, 178 U.S. 41 (1900) (same for federal inheritance tax); *New York Trust v. Eisner*, 256 U.S. 345 (1921) (same for federal estate tax). An inheritance tax is levied on recipients individually; an estate tax is levied on the decedent's property before distribution.

it.”¹⁵¹ There is no doubt that this was the law of England during the founding era¹⁵² The rule, however, seems rooted in feudalism and the existence of a single overlord, the King or Queen. Locke, a primary source of property theory for the founding generation, explicitly rejected the notion that inheritance existed at the pleasure of some sovereign. “Every man is born with ... a right, before any other man, to inherit with his brethren his father’s goods.”¹⁵³ And at least one state court explicitly rejected the Supreme Court’s reasoning as a mistake unsuited to American property ideology.

That element of unadaptability under our conception of inherent rights in place of privileges by grace was hardly understood when the idea took root which obtained quite generally for a century after our American system was established, that there is no natural right to inherit ... which this court has seen fit to reject as heresies, viewed from the standpoint of our conception of such rights.¹⁵⁴

Thus the Supreme Court’s doctrinal justification for progressive estate taxes is questionable. The CBP provides a firmer defense of such taxation. For all but extreme cases analogous to those discussed *supra* for the income tax — exemption levels so high that they impact one or only a few taxpayers — the burdens of the tax are still continuous since even those paying the tax get the benefit of the fairly high (but not extraordinary) exemption.¹⁵⁵

A general sales (excise) tax on all goods is the primary alternative to the income tax (or a wealth tax) as a practical source of revenue sufficient to meet the needs of the modern state. The fundamental difference between a sales tax and an income tax is that a sales tax reaches only consumption; it leaves savings untaxed. For the

¹⁵¹Magoun, 170 U.S. at 288.

¹⁵²Blackstone was clear that there was no natural right to inherit under English law; it was permitted at the pleasure of the sovereign: “will and testaments, rights of inheritance and succession, are all of them creatures of the civil or municipal laws, and accordingly are in all respects regulated by them.” 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND ch. 1 (Draper ed., Philadelphia 1897). Justice Story said the same rule held in America: “Nothing, therefore, can be clearer than that the rules of descent are subject to be changed by legislative authority.” 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 670 (Boston: Hilliard Gray, 1833).

¹⁵³JOHN LOCKE, SECOND TREATISE OF GOVERNMENT § 190 (1690) (from <http://www.ilt.columbia.edu/academic/digitexts/locke/second/locke2nd.txt>; scanned from “John Locke Second Treatise of Government”, Edited, with an Introduction, By C.B. McPherson, Hackett Publishing Company, Indianapolis and Cambridge, 1980).

¹⁵⁴Owen v. Donald, 151 N.W. 331, 367 (Wis. 1915).

¹⁵⁵In this and the following example, we assume equal benefits from the expenditure of the estate tax. As with the income tax, this assumption is not critical; our results are robust to a very wide variety of assumptions about the distribution of benefits from the expenditure of this general revenue tax.

purpose of applying the CBP, however, the key point is that in practice sales taxes are almost always assessed at a single rate, and so there is no possibility for a discontinuous jump in percent burdens on consumption. Given a flat rate, sales taxation clearly satisfies the CBP.

One common objection to a sales tax is that it is effectively regressive in income: since saving, which escapes taxation, increases rapidly with income, the wealthy pay much less sales tax, as a proportion of income, than the poor. One would then expect that those who argue that any deviation from strictly proportional taxation (e.g. progressive taxation) would oppose a general sales tax, but my research uncovered not a single commentator making this argument. Indeed, Epstein maintains that a general sales tax is permissible.¹⁵⁶ Perhaps the argument is that a sales tax is strictly proportional to its base, purchases, as a flat-rate income tax is strictly proportional to its base. This argument, however, admits that the strict proportionality requirement is quite manipulable based on the choice of a tax base. A flat-rate tax on wealth, for example, would likely mimic a progressive income tax;¹⁵⁷ would advocates of flat-rate income taxation permit this end-run around their strict proportionality requirement?

One common means used to mitigate the regressivity of a general sales tax is to exempt 'necessities' like food and rent from the tax. The idea is that the poor spend a large portion of their income on these items, the wealthy spend a smaller proportion of their income on these items, and so exempting them lifts some of the burden of sales taxation from the poor.

An extreme version of this practice is so-called luxury taxation: excise taxes on a relatively small set of goods consumed largely by the wealthy (e.g. yachts, jewelry, ...). Epstein argues that such taxes and, more generally, all narrowly-based sales taxes, do impose disproportionate burdens and hence are unconstitutional. He gives two examples. In the *Rossmiller* case, the court struck down a statute declaring all ice on lakes state property and imposing an excise tax on ice extractors.¹⁵⁸ The court reasoned that the statute destroyed citizens' pre-existing profits à prendre to remove ice. Epstein defends this result, noting that the tax imposed disproportionate burdens on those parties like the plaintiff that had made investments in ice removal before passage of the statute.¹⁵⁹ Similarly, Epstein attacks Montana's severance tax¹⁶⁰ on coal, arguing that it reduces the value of Montana Coal owners' property. He

¹⁵⁶EPSTEIN, *supra* note 4, at 293-94.

¹⁵⁷See generally Shakow & Shuldiner, *supra* note 126.

¹⁵⁸*Rossmiller v. State*, 89 N.W. 839 (1902).

¹⁵⁹EPSTEIN, *supra* note 4, at 223-24.

¹⁶⁰*Commonwealth Edison v. Montana*, 453 U.S. 609 (1981). Severance is just a fancy name for an excise tax, supposedly assessed at the instant the coal is severed from the earth by mining.

generalizes from such cases to argue that any non-general sales tax will impose disproportionate burdens on sellers of the taxed item(s).¹⁶¹

Epstein makes some important exceptions to this rule. He says that the government may impose excise taxes on goods that have negative external effects on other property owners (i.e. nuisances) without paying compensation. In addition, he argues that the government may limit the use of a scarce resource by imposing a tax on some activity, e.g. on fishing for a depleted species. This is in keeping with accepted doctrine, that nuisance regulation and solutions to common pool problems are not viewed as takings. Each goes to one of the primary purposes of government: nuisance regulation to protect property rights from abusive acts of others, and fees to economize on the use of scarce resources, to avoid tragedies of the commons.¹⁶²

Even with these exceptions, there are some problems with Epstein's argument that specific excise taxes are takings. The first is the complex issue of tax incidence — who ultimately bears the burden of a levy. Just because consumers nominally pay a sales tax at the time of purchase does not mean that they bear the entire burden of the tax, or indeed any of it. Incidence is complex, and depends on the shapes (in particular the elasticities) of the demand and supply curves.¹⁶³ Epstein seems to assume that the incidence is on the suppliers alone. If, however, as is quite possible the tax falls mainly on purchasers, and the group of such purchasers form a high proportion of the population in the jurisdiction, there is no disproportionate burden imposed on anyone, and thus no violation of the CBP.

Another problem with Epstein's opposition to narrowly-targeted sales taxation is that, like his opposition to progressive taxation, it is inconsistent with both longstanding historical practice and doctrine. The founding generation singled out carriages (a luxury item) for taxation, and the nation imposed tariffs asymmetrically throughout the 1800s, leaving some imports untaxed, others taxed lightly, and yet others taxed heavily.¹⁶⁴ The courts have given states broad latitude in selecting the

¹⁶¹EPSTEIN, *supra* note 4, at 293-94.

¹⁶²Though Epstein believes that taxation of those imposing costs on society is not a taking, he would limit the application of this rule. For example, he disagrees with the holding in *Pittsburgh v. ALCO Parking Co.*, 417 US 369 (1974), where the Court upheld a 20% tax on private parking lots against a (substantive?) due process challenge. The Supreme Court upheld the tax based in large part on the City's justification: the tax was designed to charge suburbanites for the use of city roads. Epstein argues that the tax was seriously overinclusive, maintaining that taxes on those imposing costs must be narrowly tailored. Under Epstein's standard, it is not clear that federal and state gasoline taxes are legal. This is a worrisome result, as although it is not perfect, gasoline taxes are an administratively inexpensive way to internalize the congestion, road wear, and pollution costs imposed by vehicles. Practically speaking, there may be no better alternative.

¹⁶³MUSGRAVE & MUSGRAVE, *supra* note 142, ch. 15.

¹⁶⁴For Carriage Tax, see note 67 *supra*; for discussion of asymmetry of tariffs, see Stanley, *supra* note 2, at 25-27.

targets of taxation. In *Dane v. Jackson*¹⁶⁵, the Supreme Court held that a rather involved Massachusetts tax on income from intangible property was constitutional despite its admitted effect of transferring tax revenue from some localities to others. The key language clearly gives legislatures a free hand in selecting a tax base:

since the system of taxation has not yet been devised which will return precisely the same measure of benefit to each taxpayer or class of taxpayers, in proportion to payment made, as will be returned to every other individual or class paying a given tax, it is not within either the disposition or power of this court to revise the necessarily complicated taxing systems of the states for the purpose of attempting to produce what might be thought to be a more just distribution of the burdens of taxation than that arrived at by the state Legislatures.¹⁶⁶

In his treatise written during the classical period, Cooley concurred. “The legislature must also, except when an unbending rule has been prescribed for it by the Constitution, have power to select in its discretion the subjects of taxation.”¹⁶⁷ Cooley denied that state constitutional provisions decreeing “uniformity: in taxation limited the legislature’ choice of a tax base — a clause facially much more on point than general takings provisions.

As with income taxation, the CBP provides a tool that may help distinguish cases in which courts have accepted and rejected challenges to specific excise taxes. Consider the *Rossmiller* and *Dane* decisions *supra*. *Dane*’s tax on income from intangibles undoubtedly impacted a broad range of the citizenry, whose intangible property ranged in value from almost nothing to very large amounts. Thus the burden curve for the tax was smooth and did not violate the CBP. Conversely, harvesting ice likely involved relatively few producers, and imposing the tax on their product (questions of incidence aside) imposed relatively heavy burdens on a small group. Thus the CBP suggests that Epstein was correct in adjudging the selective tax on ice removal a taking.

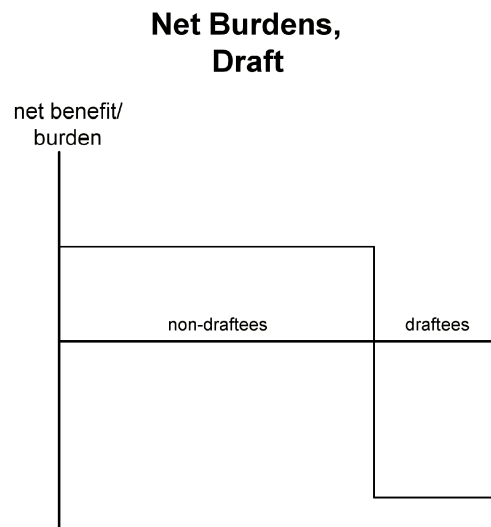
As a final application of the CBP to general revenue tax (i.e. one used for purposes that benefit most citizens), we consider the military draft. Others have noted that the draft in many ways looks like a taking.¹⁶⁸ Its net burden curve bears this out.

¹⁶⁵256 US 589 (1921).

¹⁶⁶*Dane*, 256 U.S. at 598-99.

¹⁶⁷COOLEY, *supra* note 10, Ch. XIV, at 739.

¹⁶⁸Blum & Kalven, *supra* note 7, at 7-8; Fischel, *supra* note 64, at 24-28.

**Figure 14**

This curve has been drawn with the baseline assumption that all citizens benefit equally from the services performed by the conscripted military. The downward slope of the curve among draftees reflects the differing opportunity costs to draftees with differing opportunity costs (private-sector wages). The steep jump in net burden between those drafted and everyone else violates the CBP.¹⁶⁹

There is little if any doubt, however, that as a matter of current law the draft is not a taking that requires compensation. It is thus our first example of a measure that violates the CBP yet is not and has never been ruled a compensable taking. That said, realization of the heavy burden imposed by the draft more than once has led legislatures to confer special benefits on soldiers. The post-WWII “GI” bill and veterans’ hospitals are two examples of recent vintage. *Booth v. Town of Woodbury*¹⁷⁰ is a splendid example from the Civil War. The Town of Woodbury, with an explicit state statute to authorize the act, passed an ordinance raising, by

¹⁶⁹Fischel, *supra* note 64, argues that the draft is only a taking when the nation drafts a *small percentage* of its citizens. We will reach the same result — that burdens placed on *majorities* are almost never takings — but our reasoning will differ. Fischel *inter alia*, borrows Michelman’s “demoralization” model, discussed *supra* § II.C and argues that (i) marginal demoralization costs fall as the percent of the citizenry drafted increases, and (ii) marginal settlement costs increase as the state must impose more and more taxes, and thus deadweight losses, to compensate the draftees. The problem with this model is that at some point marginal settlement costs begin to fall: as the size of the group drafted approaches 100%, the group itself appropriates all the benefits of its efforts, and these implicit benefits begin to obviate the need for explicit compensation. In the limit, everyone fights to save the nation, and there is no point to taxing everyone just to write each a check equal to their tax bill.

¹⁷⁰*Booth*, 32 Conn. 118.

general taxation, \$200 for each of the 32 soldiers that made up the town's quota under the national draft law. The would-be soldiers could either use the \$200 to hire a replacement, or serve in the Union army and take the sum as a 'bounty.'¹⁷¹ Some non-draftee taxpayers challenged this additional tax.

Counsel for the town directed the court's attention to the allocation of benefits.

It was for the common benefit of the inhabitants of Woodbury that the town quota should be filled, and that common benefit justifies a general taxation. The common welfare of the town might demand that substitutes should be hired for drafted men, who would serve the government equally well, and leave good farmers and good mechanics at their labor. The town could better afford to pay the money than lose the men, and the government is in either case equally assisted.¹⁷²

He then contrasted this broad allocation of benefits with the draft's narrow burdens.

Is it in opposition to natural right and justice that property, three quarters of which is probably in the hands of persons not liable to a draft, should bear its fair share of the burden of the present exigency? Those over forty-five years of age have an equal interest in the stability of our institutions. The drafted man pays his share of all taxes, and in addition, whichever of the legal alternatives he chooses, service, either personal, by substitute, or the commutation. Is it unjust that this extra burden should be assumed by all, and the entire community be permitted to pay what the great majority esteem it a privilege to pay? It is not taxing A to put money into the pocket of B; it is taxing all to meet the requirements of a peremptory law.¹⁷³

Based on these arguments, the court rejected an explicit takings challenge to the statute, ruling that this was a tax exacting from each taxpayer "their share of a justly imposed and apportioned burthen, and the equivalent is presumptively received in the benefits conferred by the government."¹⁷⁴ The court noted that the state could impose a "serve or pay" obligation on all citizens instead of just younger men, and that the municipal tax measure imposed a lesser burden on non-draftees.

To summarize, the CBP holds most forms of general taxation (taxation applied to projects benefitting a broad class of the community) immune from takings challenges. There are, as we saw, a few exceptions (the Bill Gates tax; narrowly-focused sales taxes). This is consistent with current, long-standing understanding of the legislature's wide powers to choose the mode of taxation.

¹⁷¹Fischel, *supra* note 64, at 48, *citing* JOHN O'SULLIVAN & ALAN M. MECKLER, *THE DRAFT & ITS ENEMIES* 57-58 (1974).

¹⁷²*Booth*, 32 Conn. at 121.

¹⁷³*Id.* 123.

¹⁷⁴*Id.* 130.

No system of taxation has yet been devised which will return precisely the same measure of benefit to each taxpayer or class of taxpayers in proportion to payment made, as will be returned to every other individual or class paying a given tax; and it follows that neither the federal nor the state courts have power to revise the taxing system of a state for the purpose of attempting to produce a more just distribution of the burdens of taxation than that arrived at by the legislature. A state tax law will be held to conflict with the 14th Amendment “only where it proposes, or clearly results in, such flagrant and palpable inequality between the burden imposed and the benefit received, as to amount to the arbitrary taking of property without compensation — ‘to spoliation under the guise of exerting the power of taxation.’”¹⁷⁵

One straightforward way to interpret the phrase “flagrant and palpable inequality between the burden imposed and the benefit received” — the point at which the Supreme Court says that taxation can amount to an “arbitrary taking”¹⁷⁶ — is as a violation of the CBP. A large, discontinuous jump in the net burden curve for a tax fits this language well.

5. Applying the CBP to zoning and other forms of regulation

Although we have developed the CBP as a means to draw the line between taxation and takings, this and the following section endeavor to demonstrate that it is a general principle embedded in takings law. This section applies the CBP to zoning and other common forms of regulation; the next section fits the principle into the broader framework of the Supreme Court’s existing takings jurisprudence.

Zoning both benefits and burdens restricted parcels. It benefits each owner by limiting neighbors’ land use, but burdens her with roughly symmetric restrictions. Ideally these benefits and burdens would balance perfectly, but in practice that is rare. Consider the following scenario. Greenacre, a semi-rural area 15 miles from any shopping, is zoned entirely single family and is fully developed. Brownacre, right across a major road from Greenacre, was unimproved and unzoned until new legislation limited it to single-family use. This act will reduce sharply the value of parcels in Brownacre that border Greenacre: their closeness to Greenacre along with their direct access to a major arterial road made them ideal locations for more convenient commerce for the many residents of Greenacre. The farther one goes into Brownacre, however, the smaller the value of such opportunities; indeed at some point we presume the benefits of restricting neighbors will exceed the burdens on an owner.¹⁷⁷

Under *Euclid v. Ambler Realty*, the zoning of Brownacre is undoubtedly constitutional. Those who believe that progressive taxation is a taking naturally

¹⁷⁵COOLEY, *supra* note 44, § 89, citing *Dane v. Jackson*, 256 U.S. at 599.

¹⁷⁶*Dane*, 256 U.S. at 599.

¹⁷⁷*Infra* § IV.C we discuss the hopefully unusual case of laws for which burdens exceed benefits for everyone.

argue that so too should such zoning require compensation: in both cases, net burdens are not strictly proportional; the “reciprocal benefits” of zoning do not offset even roughly disproportionate diminutions in value imposed on those in Brownacre owning land across the street from Greenacre. Epstein argues that

unless all land in the area is subject to the restriction, there is still an enormous disproportionate impact ... The restrictive rules are a government-sponsored restraint of trade ... it is immaterial that the owners “share” in the benefits of the [zoning ordinance]. The issue is the extent of benefits they receive ... A nickel’s compensation will not discharge a hundred dollar obligation. To treat the mere existence of some benefits as an adequate measure of their value is to indulge in a conclusive presumption that is known to be wrong ...¹⁷⁸

The result under the CBP, on the other hand, dovetails with existing law by finding such zoning constitutional. The burdens in Brownacre look almost exactly like a progressive income tax, with burdens increasing as one gets closer to Greenacre, (where opportunities for retailing are more attractive). If we think of parcels as the base for this ‘zoning tax,’ then there are no large jumps in the tax rate, and thus under the CBP there is no taking.

Although generally valid, zoning, like taxation, can go over the line, violate the CBP, and amount to a taking when it singles out landowners for burdens far greater than anyone else. So-called “reverse spot zoning,” for example,

occurs when a zoning ordinance prevents a property owner from utilizing his or her property in a certain way, when virtually all of the adjoining neighbors are not subject to such a restriction, creating, in effect, a veritable zoning island or zoning peninsula in a surrounding sea of contrary zoning classification. Reverse spot zoning is invalid, as it is confiscatory.¹⁷⁹

More generally, the Court has found zoning a taking where, even though written in general language, it applies only to one parcel.¹⁸⁰

¹⁷⁸Epstein, at 273.

¹⁷⁹*City of Miami Beach v. Robbins*, 702 So.2d 1329, 1330 (Fla. App. 1997). The label “reverse spot zoning” was derived from the term “spot zoning,” where a landowner is singled out for *favorable* treatment (as opposed to unfavorable treatment in cases of reverse spot zoning). See generally DANIEL R. MANDELKER, *LAND USE LAW* § 6.37 (1997).

¹⁸⁰*Nectow v. Cambridge*, 277 U.S. 183 (1928). Perhaps Blum & Kalven were thinking of cases like this, and reverse spot zoning, when they asserted that zoning tends to concentrate burdens narrowly. Blum & Kalven, *supra* note 7, at 7-8. In general, as our hypothetical with Greenacre and Brownacre showed, this is not so. More difficult to explain is their assertion that inflation focuses burdens narrowly, *id.* Under the likely assumption that there is a continuum from large-magnitude creditors, to those who are neither borrowers nor lenders, to large-magnitude debtors. If so, inflation has a continuum of effects: from great harm to large creditors to great benefit to large debtors (the converse applies for deflation). Thus, under the CBP, it is quite difficult to paint inflation or deflation

General economic legislation, like zoning, is presumptively valid, but in extreme cases may transgress the Takings Clause. The liability for coal miners' health costs at issue in *Eastern Enterprises*¹⁸¹ was such an extreme case. Although we disagreed with its grounds for distinguishing taxes from takings, the result in *Eastern Enterprises* is entirely consistent with the CBP. The statute struck down by the Court attempted to impose a significant fraction of the unexpected health costs of former miners on an entity with tenuous ties to the mining industry in general and the sick miners in particular. The difference in burden between *Eastern Enterprises* (and a handful of other entities) and everyone else was huge, and there was no fault or other justification for this deviation from the CBP. The *Eastern Enterprises* opinion vindicated Richard Epstein's contention that the Black Lung Compensation Program, similar in many respects to the legislation struck down in *Eastern Enterprises*, was a taking. His argument was quite similar to the logic of the Court: taxing new mine owners for the health expenses of miners that they never employed, and concentrating the burden of those expenses on a "narrow segment" of the population violated the CBP.¹⁸²

The coal industry also supplied perhaps the most important takings case ever, *Mahon v. Pennsylvania Coal*, which is also consistent with the CBP. *Mahon* involved a Pennsylvania statute barring mining companies from the removal of coal pillars that might cause the surface to subside despite the fact that the mining company had specifically bargained for the right to cause such subsidence.¹⁸³ In oft-quoted language, the Court held that the diminution in value to the mining company's property rights went "too far."¹⁸⁴ We will return to this diminution test in the next subsection. The CBP provides an alternative ground for finding the Pennsylvania statute effected a taking. Under the plausible assumption that few owners' land contained significant coal pillars, the statute simulated a narrowly-focused excise tax, concentrating burdens on a small group.

B. The Continuous Marginal Burdens Principle & Current Takings Doctrine

Although the CBP is thus consistent with the outcome of *Mahon*, it is not consistent with its so-called *diminution* test: the idea that a regulation or other government act that destroys more than some percent of property values is a taking. As explained and illustrated *supra*, the CBP calls for a relative, contextual

as a taking.

¹⁸¹524 U.S. 498 (1998).

¹⁸²Epstein, *supra* note 41, at 442.

¹⁸³*Mahon*, 260 U.S. 393, 415.

¹⁸⁴*Id.* 415.

comparison: how much was the plaintiff burdened compared to the next most burdened person, and, more generally, is there a jump in (percent) diminution between any two property owners? This is in stark contrast to the absolute, context-free diminution test.

Although Supreme Court takings doctrine is not entirely clear, it appears that the *Mahon*'s diminution test for regulatory takings cases has been refined by a three-pronged test from *Penn Central Trans. Co. v. New York* that considers (1) "the economic impact of the regulation on the claimant," (2) "the extent to which the regulation has interfered with investment-backed expectations," and (3) "the character of the government action."¹⁸⁵ The last prong seems to refer to *per se* rules for specific types of governmental conduct (physical invasions, regulating nuisances, and destructions of all value).

We can think of the CBP as a concrete rule to operationalize the vague first and second prongs of *Penn Central*, "economic impact" and "interference with investment-backed expectations." The principle clearly captures the economic impact of regulation on property owners. Investment-backed expectations fits cases like *Rossmiller*,¹⁸⁶ where regulation will impact a small group of property owners who have made investments in an activity narrowly targeted for taxation or other forms of regulation.

The majority opinion in *Penn Central*, however, indicates that the Court did not read its first two prongs in a manner consistent with the CBP. The decision rejected Penn Central Railroad's takings challenge to New York City landmarks preservation laws that prevented it from building a skyscraper on top of Grand Central Station. Under the CBP, landmarks preservation laws are quite likely takings. Those owning landmarks, a relatively small group, bear the entire burden of satisfying a society-wide desire to preserve noteworthy buildings and sites. The majority admits that the landmark laws reached only 400 buildings and 31 small districts in NY, but the dissent gives a statistic more relevant for applying the CBP: the regulations affected only 0.04% of landowners in the City.¹⁸⁷ Ignoring the relevant 'tax' base (parcels), Brennan explicitly denied that New York's landmark preservation law were "like discriminatory, or 'reverse spot' zoning ... the New York City law embodies a comprehensive plan to preserve structures of historic or aesthetic interest wherever they might be found in the city ..."¹⁸⁸ Despite the shiny new 3-prong veneer, the *Penn Central* Court seems to have applied *Mahon*'s simple diminution test: the Railroad suffered, but it still could earn a "fair return" on Grand Central Station, and hence did not suffer a diminution severe enough to trigger compensation.

¹⁸⁵438 U.S. 104 (1978)

¹⁸⁶*Supra* notes 154-155 and accompanying text.

¹⁸⁷*Penn Central*, 438 U.S. at 131-32 (majority), 138 fn.1 (dissent).

¹⁸⁸*Penn Central*, 438 U.S. at 132.

Similar reasoning in *Andrus v. Allard*¹⁸⁹ led to another decision at odds with the CBP's approach to the first two arms of *Penn Central*. In *Allard* the Court held that a law barring the sale of eagle feathers did not amount to a taking of the property of those owning such feathers. Although the statute did destroy the right-to-alienate stick in the bundle of property rights, the Court said that it was "crucial that appellees retain the rights to possess and transport their property, and to donate or devise the protected birds."¹⁹⁰ The Court, in all seriousness it appears, suggested that eagle feather artifact owners could generate income by displaying the items and charging admission. It is extraordinarily doubtful that the demand for such viewings is sufficient to even approach their retail sale value — witness the ratio of sales to display income for collectibles in general (stamps, coins, autographs, etc.). The statute barring sales of eagle feathers likely does reduce illegal poaching of the endangered eagles, but the law imposed most of the costs of this measure on a very small group of dealers in eagle feather artifacts.¹⁹¹

The third prong of *Penn Central*, "the character of the government action," seems to refer to three *per se* rules. First, the government need not pay compensation when regulation of a nuisance reduces a property's value. Property rights generally do not include the right to impose costs on neighbors, and the CBP has no application in such cases: owners enjoined from maintaining nuisances simply bear no compensable burden.

Second, if the character of the government action involves any sort of physical invasion, there is a taking and the state must pay compensation.¹⁹² A number of commentators have attacked this rule as excessively formal and as lacking any policy justification. It is inconsistent with the CBP, since it compensates in cases where burdens are small and continuous. The outcome of the *Loretto* case illustrates the pointlessness of the rule, and its disconnect with the *Armstrong* idea of unfair burdens: plaintiff landlords collected \$1 in compensation for being obligated under state law to suffer the presence of cable TV wiring and switching boxes on their premises.

Third, government measures that destroy "all economically viable use" are a

¹⁸⁹444 U.S. 51 (1979).

¹⁹⁰*Id.* 66.

¹⁹¹ One might argue that the statute in *Allard* imposed a continuum of burdens, since ownership of eagle feather artifacts probably form a continuum: many own none, many own a few, many own a few more than a few, etc., up to the largest owners. Each artifact, however, is a discrete property right, just as each parcel of land is a discrete unit for takings analysis. This is but another manifestation of the difficult "denominator" problem of takings law discussed *supra* text accompanying notes 140-141. Though the CBP does not solve the denominator problem, the problem poses no greater problem for it than for other theories about defining takings.

¹⁹²*Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

taking under *Lucas v. South Carolina Coastal Comm'n.*¹⁹³ In that case, regulation designed to prevent beach erosion barred Lucas from building anything on two beachfront parcels. The Supreme Court held that the state had to compensate Lucas for such a complete ban on improving his tracts. The CBP might concur with the outcome of the case, if not the reasoning. South Carolina's scheme to prevent beach erosion may well have harmed Lucas and a small handful of other owners of beachfront property far more than others; if so, there was a taking under the CBP. Yet as noted repeatedly above, the principle requires significant empirical findings about the class of burdened owners. In general, the *Lucas* rule is not consistent with the CBP; it is permissible to burden some owners, say 100% of the value of some parcel, if another is burdened by 99%, another by 98%, and so on, *in small, continuous steps*, all the way up to the parties burdened least by the regulation.¹⁹⁴

C. Normative Foundations for the CBP

Thus far our discussion and defense of the CBP has been almost entirely doctrinal. We have argued that it is consistent with the 'no unfair burdens' language from *Armstrong*, that it provides a coherent guide to drawing the line between takings and taxation, that it does the same for the takings|regulation line, and that it is consistent with much, though not all, of the existing body of takings case law.

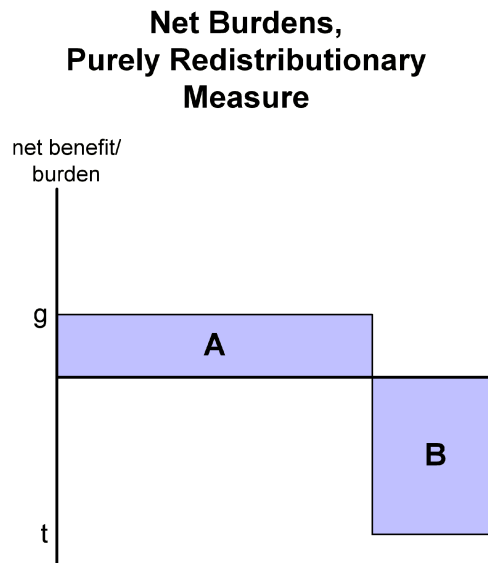
This subsection offers grounds for supporting the CBP as sound social policy. The normative case for the CBP is political: the rule places a significant obstacle in the path of any majority block of voters attempting to redistribute wealth from the remaining minority by imposing an "unfair" portion of public burdens on them. The CBP, then, is a means to achieve the ends articulated in *Armstrong*: "to bar the Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."¹⁹⁵

We will begin by studying the simplest examples of unfair burdens in public measures: naked redistribution from a minority to a majority that divides society into two markedly divergent camps. Here is a generic net burden curve for such a maneuver.

¹⁹³505 U.S. 1003 (1992).

¹⁹⁴Justice Stevens, dissenting in *Lucas*, stressed that the *generality* of the statute — the fact that it applied to all of the numerous beachfront property owners along South Carolina's shore — weighed heavily against the majority's determination that a taking likely occurred. *Id.* 1074. Although the concept of "general application" has some overlap with the CBP, Steven's focuses on *geographic* generality. The CBP focuses on generality of *economic impact*. Responding to Stevens' use of generality in his majority opinion, Justice Scalia stated that "a regulation specifically directed to land use no more acquires immunity by plundering landowners generally than does a law specifically directed at religious practice acquire immunity by prohibiting all religions." *Id.* 1027 fn.14. Whether this statement is at odds with the CBP depends on the meaning of the phrase "plundering landowners generally."

¹⁹⁵*Armstrong*, 364 U.S. at 49.

**Figure 15**

Pure redistribution adds a significant structural constraint on the net burden curve. If we were plotting absolute dollar benefits and burdens, area A would equal the dollar amount paid to winners, and area B would equal the dollar amount paid by losers.¹⁹⁶ Because our net burden curves model percent burdens, the relationship is not quite so simple; it will depend on the distribution of income, wealth, or whatever comprises the tax base. Still, there will be a fixed mathematical relationship between the winners (horizontal axis below area A) and the losers (horizontal axis above area B). If we think of a redistributive income tax, with grants to the less wealthy (individuals *a* in group A) of *g*% of income, and a flat tax of *t*% on a wealthy minority (individuals *b* in group B), then the following accounting identity must hold:

$$\sum_{a \in A} g * Income(a) = \sum_{b \in B} t * Income(b)$$

In words, this says that the sum of cash payments to winners must equal the sum of taxes levied on the losers. The important point is that, although the areas A and B are not equal, there is a fixed relationship between them determined by the distribution of income (or other tax base), along with the grant and tax rates. This zero-sum nature of redistribution, we will see, makes it difficult for starkly “us-them”

¹⁹⁶To the extent that redistribution involves administrative and transactions costs, it is a negative sum game. This will make it even more difficult than suggested by these examples to assemble a coalition to implement redistribution.

redistributive laws to satisfy the CBP.¹⁹⁷

The example graphed above obviously violates the CBP. To come into compliance with the CBP given the budget constraint, while still channeling some wealth from the minority, the majority can (i) reduce the size of their coalition, and (ii) make both benefits and burdens vary somewhat with the tax base. Adopting moderate versions of both of these measures yields a net burden curve that looks something like this:

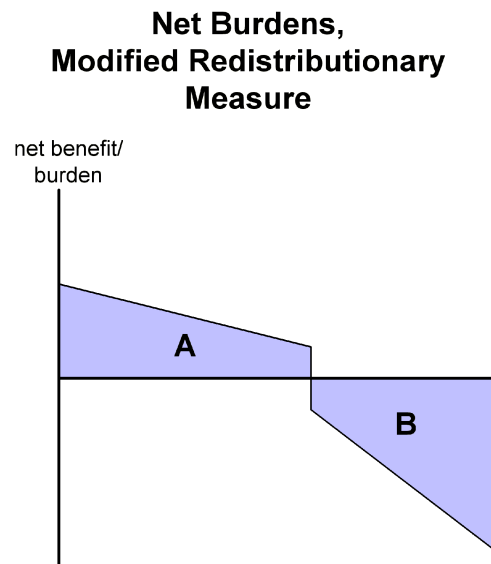


Figure 16

This still violates the CBP. Although shrinking the majority coalition and gradating benefits and burdens has reduced the ‘jump’ between the last member of the majority and the first member of the minority, a noticeable discontinuity remains.

If the majority continues with both tactics (decreasing size of majority redistributing wealth from the minority; making gradations in benefits and burdens), in the limit they end up with a perfectly straight line, without any jumps, that satisfies the CBP.

¹⁹⁷For an interesting discussion of the relationship between us/them, majority/minority dichotomies and payment of compensation, see Carol M. Rose, *Property & Expropriation: Themes & Variations in American Law*, 2000 UTAH L. REV. 1 (2000).

**Net Burdens,
Redistribution Satisfying the
CMBP**

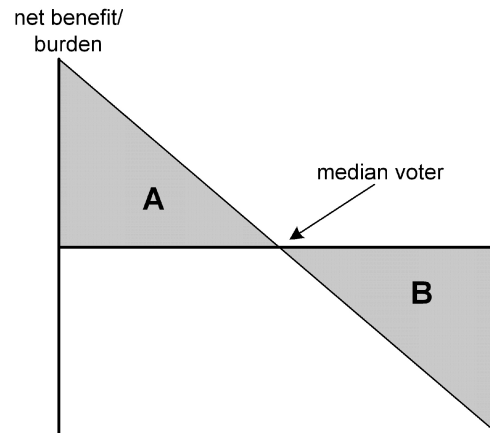


Figure 17

Politically, it will be difficult to muster a vote for this proposal. The measure no longer has majority support; the size of the benefitted coalition has shrunk so that the median voter no longer reaps any benefits and has little reason to support the measure. This series of examples demonstrates that the CBP places pressure on redistributionary coalitions to shrink their size and to tier benefits and burdens.¹⁹⁸

It does not make redistribution entirely illegal; the example in Figure 17 and the progressive taxation examples discussed *supra* may be redistributionary (depending on the assumptions made about how the benefits of government increase with income/wealth). The CBP does, however, place significant limits on any majority coalition's ability to redistribute. Since redistribution likely has some undesirable effects, such as reducing incentives for productive behavior and encouraging socially wasteful rent-seeking (e.g. resources spent on forming and maintaining a coalition to enact the measure), the CBP is normatively desirable for efficiency reasons. The appeal of this partial curb on redistribution as a matter of social justice (or synonymously, equity, or fairness) is controversial, given divergent notions about

¹⁹⁸Some taxes may mix redistribution with other motivations. Tariffs, discussed in more detail *infra* § VI, were the primary source of national government revenue until the 1900s, and so might be classified as a general revenue tax. Yet they had another purpose: protecting domestic enterprise from foreign competition. Foreign competition is not a nuisance. It is possible, however, that protecting domestic industries is a privileged legislative purpose. If so, the courts should not review tariffs under the Taking Clause. On the other hand, tariffs often impose severe burdens on a relatively small group of citizens (e.g. domestic importers) to achieve a public 'good' (fostering homegrown industry) which may justify Taking Clause review. This is simply another difficult issue in drawing the line between legitimate exercises of the states' police power requiring no compensation, and government measures that go too far and amount to a taking.

inequality and justice.¹⁹⁹

It is possible for a majority coalition willingly to redistribute wealth to the minority. Many current social programs do precisely this. Moreover, such redistribution, at least for some purposes, has long been permissible. “[G]ifts to unfortunate classes of society, as the indigent, blind, the deaf and dumb, or insane, or grants to particular colleges or schools, or grants of pensions, swords or other mementoes for past services, involving the general good indirectly and in slight degree, are frequently made and never questioned.”²⁰⁰

The resulting net burden curve may have two sorts of discontinuities. First, there may be a jump between the least benefitted minority member and least burdened majority member.

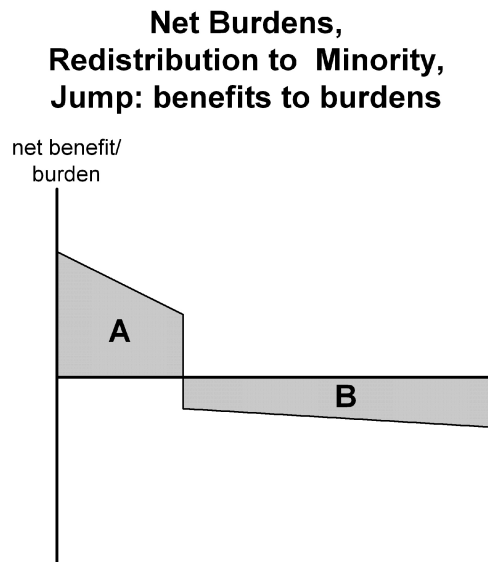


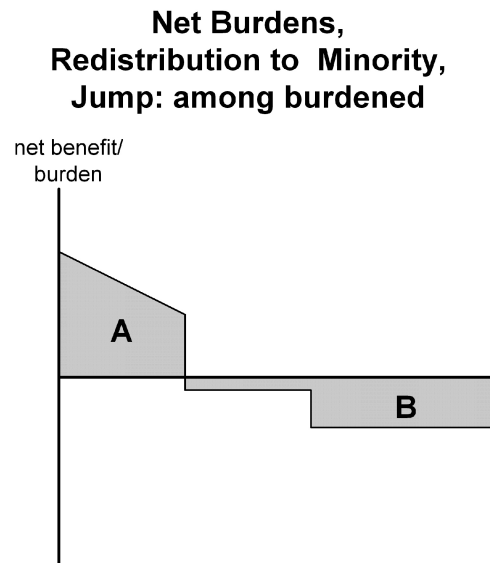
Figure 18

Although this measure facially violates the CBP, normatively it is not troubling as it self-imposed: the majority has agreed to redistribute some of its wealth to the minority. The solution for members of the majority unhappy with such a measure is not constitutional, it is political: convince a majority to reverse the charitable policy. This may not always work; some members of the majority may feel charitable toward the minority and in effect form a coalition with the minority, to their own pecuniary detriment.

What the principles behind the CBP forbid is targeting a subset of the majority for a distinctly heightened burden.

¹⁹⁹The leading modern defense of redistribution is JOHN RAWLS, *A THEORY OF JUSTICE* (1971); the most thorough reply to Rawls is ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974).

²⁰⁰*Booth*, 32 Conn. at 128.

**Figure 19**

This example depicts a social subsidy program for some minority supported by its beneficiaries and a portion of the majority who impose the costs of the program on other non-beneficiaries. Those in the majority supporting the program bear a modest burden, while placing most of the burden on others. This differs little in substance from simple redistribution, and the CBP's limit on such legislation, as discussed above, is desirable for efficiency reasons (justice/fairness/equity, again, will be controversial).

The limiting cases of social programs that benefit only a minority are measures that burden everyone. Under a popularly elected government, one suspects that there must be some unaccounted-for benefit to explain such cases. That said, as a matter of policy such cases are analogous to the situation illustrated in Figures 18 and 19 *supra*. If there is a discontinuous jump in net burdens, then the allocation of burdens is unconstitutional. As long as there is no discontinuous jump in the net burdens curve, the measure is not a taking under the CBP. Again, the solution is political: a majority must find the burden heavy enough to elect a government that will reverse course.²⁰¹

²⁰¹Examples of legislation by popularly elected officials that harm all citizens obviously are rare. In *Owen v. Donald*, 151 N.W. 331 (Wis. 1915), the court thought it faced such a case, but failed to realize that the solution to such a problem is political. In *Owens*, the court held unconstitutional a tax to establish forest reserves that would benefit future generations. Although the opinion is difficult to decipher, the grounds for striking the statute appear to have been special provisions in the Wisconsin Constitution on budgeting and public improvements. The court went on, however, to suggest that the statute was a taking of property from the living for the benefit of future generations.

But how to square [the takings clause] with the imposition of large public burdens upon the people of the present without any hope of return to them ... burdens

We now drop the assumption that the social measure under consideration simply redistributes wealth. In most cases, hopefully, governmental actions produce social gains — the benefits (region A in the figures above) will exceed the burden (region B). The Takings Clause has never been interpreted to require even rough equality (or fairness) in the distribution of gains from public projects. The CBP, by its title limited to sharp jumps in *burdens*, does not rule out any distribution that burdens no one. As long as the line in the net burdens curve never dips below the horizontal axis, there cannot be a takings claim.

V. Fees, Special Assessments, & Specific Taxes

The redistributive legislation just analyzed differs from the general case because, in addition to being able to determine burdens (which we assume are always identifiable), we could discern benefits with relative precision. This usually is not possible for the general revenue taxes discussed so far; governments use income, estate, sales, and most other tax revenues to fund a broad range of services and goods.

For some government taxes, along with special assessments and user fees, however, we can identify beneficiaries and the size of their gain easily. This is clearest for governmental fees, e.g. for the use of a park, for a driver's license and plates, or for public garbage collection. In such cases, the main beneficiary is the fee payer.²⁰² Special assessments are one step removed from fees. They provide a mechanism to compel all members of a group benefitted by some project (most typically, a road) to pay some 'fair share' of the project's cost (most typically for a road, based on each owner's frontage). As with the simple user fee, the class of beneficiaries is easily identifiable. Compulsion is necessary to avoid free-riding.²⁰³

imposed with the avowed purpose of accumulating benefits for generations yet unborn, is somewhat puzzling. The mind naturally reaches out to grasp some sort of present equivalent moving to the tax payer for the property taken from him, and, seemingly, closes upon a shadow. There must be some present benefit. It is not sufficient that the forced contribution will be a boon to some future generation. The state has no right to take the property of individuals presently and afford them no possible return, merely because the storehouse, being filled, will be opened some time, depending upon Providence and the majority as to when, for the enrichment or comfort of the people then in being in which the tax payer had no special interest which reasonably demands any such sacrifice.

Id. 336. This strange rule would make even the most popular environmental measures (to insure future generations clean air, clean water, e.g.) unconstitutional. The court failed to understand that the Takings Clause does not constrain *self-imposed* burdens.

²⁰²Of course, to the extent the "fee" exceeds the government's cost of delivering the service or good, it includes an implicit tax, presumably is used as general revenue and subject to review under the Takings Clause.

²⁰³See generally ROBERT COOTER & THOMAS ULEN, *LAW & ECONOMICS* 42 (3d ed. 2000).

In addition to fees and assessments, this section considers what I call “specific” taxes, meaning those levied to provide a specific benefit to identifiable beneficiaries. Redistributionary taxation was our first example; property taxation to fund schools is another.

Our basic question has not changed: how do we draw the line between acceptable fees, special assessments, and specific taxes on the one hand, and unacceptable variants that concentrate net burdens too narrowly and thus amount to a taking? Again, what distinguishes fees, assessments, and specific taxes from general revenue taxes is the ability to factor the benefits of the government’s expenditures into *net* burden curves. As Fried has noted, “[i]t is operationally incoherent to isolate the tax side of fiscal affairs . . . for the simple reason that we can undo any tax distribution on the transfer side.”²⁰⁴ Accounting for both sides of the ledger (benefits as well as burdens) is nothing new for takings law, where courts have long weighed “reciprocal benefits” and implicit or in-kind compensation in deciding whether or not an owner has suffered a taking.²⁰⁵

Epstein, applying his strict disproportionate burden standard, generally approves of special assessments since the law governing them requires some proportionality between the benefit conferred and the assessment imposed.²⁰⁶ Yet the case law’s proportionality requirement is extremely loose, giving the state very wide leeway in setting the assessments due from individual property owners. In the early American case of *Griffin v. Mayor of Brooklyn*,²⁰⁷ the plaintiff landowner argued that, since regrading a road would benefit some who owned no land along the route, the state was obligated to pay for the project with proceeds from a general tax. The court, in rejecting this contention, declared that, by matching benefits and burdens more closely than a general tax, special assessments were not just legal, but positively desirable. Assessments “shift the burthen of this taxation upon that part, or class . . . whose lands were benefitted by the work, and [imposed] it on them in proportion to the benefit they respectively received therefrom.”²⁰⁸ The court said that the assessment “was obviously made for the purpose of avoiding the injustice of general taxation for a special local project,” and that it exacted “no more than his just share” from any landowner.²⁰⁹

²⁰⁴Fried, *supra* note 100, at 182.

²⁰⁵See note 138 *supra*.

²⁰⁶EPSTEIN, *supra* note 4, at 286-89. He does note that if the state funds some type of project by special assessment, it must do so for all such projects; otherwise those localities assessed will disproportionately fund that type of improvement. *Id.* 289-90.

²⁰⁷4 N.Y. 419 (1851).

²⁰⁸*Id.* 425.

²⁰⁹*Id.*

The *Griffin* court went on to note the fundamental similarity between assessments and user fees (tolls).

The same principle of apportionment has been applied to bridges and turnpike roads. The money paid for their construction and maintenance is reimbursed by means of tolls. Tolls are delegated taxation; and this taxation is charged and apportioned upon those only who derive a benefit from the original expenditure, and in proportion to that benefit. General taxation upon a town or county for the building of a bridge is valid and lawful, but obviously unjust; because it compels one to pay for the benefit of another. Tolls are more equitable, because they equalize the burthen with the benefit.²¹⁰

Based on this similarity, the court said that holding special assessments invalid would also require holding tolls and other user fees invalid — a result that seems absurd. “The difference is only in the mode in which each tax-payer’s share of the burthen is ascertained.”²¹¹

The Supreme Court articulated a similar standard in *Houck v. Little River Drainage Dist.*

[W]ith respect to [special assessment] districts thus formed, whether by the legislature directly or in an appropriate proceeding under its authority, the legislature may itself fix the basis of taxation or assessment; that is, it may define the apportionment of the burden, and its action cannot be assailed under the 14th Amendment unless it is palpably arbitrary and a plain abuse. ... unless the exaction is a flagrant abuse, and by reason of its arbitrary character is mere confiscation of particular property, it cannot be maintained that the state has exceeded its taxing power.²¹²

Another court voiced a similarly adaptive standard.

The burdens of the state never have been, and never can be, distributed with absolute

²¹⁰*Id.* 431.

²¹¹*Id.* 431. The Court’s economics appear dated, as the decision predates the study of public goods for which there is no natural (market) measure of costs or benefits. Tolls make sense as a price for (rivalrous) congested roads, but not for uncongested roads. Thus, although use of public goods is correlated with benefits, the relationship is far from exact. In its defense, the Court was weighing fairness, not efficiency.

In the case of special assessments for projects that increase the value of neighboring property, however, we may be able to measure the benefit to landowners, since it will be capitalized into the price of the parcels. Admittedly, this effect will not always be measurable.

²¹²239 U.S. 254, 262 (1915) (citations omitted). This deference to the calculation of special assessments originated in *Louisville & Nashville R. v. Barber Asphalt Paving Co.*, 197 U.S. 430 (1905), where Justice Holmes approved of assessments that are “generally fair” and that do “as nearly equal justice as can be expected.” “[I]f a particular case of hardship arises ..., that hardship must be borne as one of the imperfections of human things.” *Id.* This case reversed a brief deviation into closer scrutiny of special assessments rooted in *Norwood v. Baker*, 172 U.S. 269 (1898). See Robert C. Ellickson & Vicki L. Been, *Land Use Controls* 744 (2nd ed. 2000).

equality and fairness among the citizens thereof. Some taxes will bear a very unjust relation to the benefits received, while others will bear a very fair relation thereto; but this is doubtless owing in a large degree to the necessary imperfections incident to every system of taxation which has yet been devised, and all that can be reasonably expected is that the greatest good of the greatest number will be secured by the system adopted; or, in other words, that the system shall be as fair and equitable as it can reasonably be made.²¹³

Although courts generally uphold special assessments, some states do seem to require a somewhat closer matching of benefits with the burden of payment.²¹⁴ Courts are particularly likely to invalidate special assessments found to confer *no benefit* on a property owner billed for some portion of an improvement.²¹⁵

The weight of classical authority endorsed a similarly flexible standard for specific taxation. Cooley argued that

There is no imperative requirement that taxation shall be equal. If there was, the operations of government must come to a stop, from the absolute impossibility of fulfilling it. The most casual attention to the nature and operation of taxes will put this beyond question. No single tax can be apportioned so as to be exactly just, and any combination of taxes is likely in individual cases to increase instead of diminishing the inequality.²¹⁶

The Wood court listed common taxes for which benefits and burdens matched up poorly or not at all.²¹⁷ Courts frequently noted that school taxes were due whether or not a taxpayer had children.²¹⁸ The same applied to police and fire taxes legally

²¹³Wood v. Quimby, 40 A. 161, 165 (R.I. 1898).

²¹⁴See, e.g., McNally v. Township of Teaneck, 379 A.2d 446 (N.J. 1977); Fluckey v. City of Plymouth, 100 N.W.2d 486 (Mich. 1960).

²¹⁵Palmer Tshp. Munic. Sewer Auth. v. Witty, 388 A.2d 306 (Pa. 1978) (invalidating assessing an owner for two sewer lines).

²¹⁶COOLEY, supra note 44, at 164.

²¹⁷

instances are numerous in which the individual taxpayer receives and can receive no direct benefit from the public improvement or institution to be paid for and supported by the tax, and yet he is called upon, and undoubtedly legally called upon, to contribute towards the expense of erecting and maintaining the same.

Wood v. Quimby, 40 A. at 164.

²¹⁸“a person having no children pays an annual school tax to help educate the children of parents of abundant means.” *Booth*, 32 Conn. at 124; “every citizen is bound to pay his proportion of a school tax, though he have no children,” *Union Refrigerator Transit Co. v. Commonwealth of Kentucky*, 199 U.S. at 203 (1905); “A tax for the support of public schools is one from which only a part of the taxpayers receive any direct benefit, for the reason that only a part thereof have children to be educated therein, and some of those who have children prefer to educate them in private schools. *Wood v. Quimby*, 40 A. at 164.

levied on those owning no property in a jurisdiction.²¹⁹

Summarizing these cases, Cooley declared that

it is almost universally held that it is no defense to the collection of a tax for a special purpose that a person liable for the tax is not benefitted by the expenditure of the proceeds of the tax or not as much benefitted as others. For instance, every citizen is bound to pay his proportion of a school tax although he has no children, or is not a resident, and this also applies to corporations; of a police or fire tax, although he has no buildings or personal property; or of a road tax although he never used the road.²²⁰

The Supreme Court concurred, noting that “there are doubtless many individual cases where the weight of a tax falls unequally upon the owners of the property taxed. This is almost unavoidable under every system of direct taxation. But the tax is not rendered illegal by such discrimination.”²²¹

Thus the state has quite wide leeway in making assessments and levying taxes. There is a strong policy reason for this loose standard. Generally, it is efficient to make it relatively easy for the government to use special assessments or specific taxes to fund projects for identifiable groups of beneficiaries. Even a rough correspondence between burdens and benefits will reduce waste; if the program confers few benefits, those paying for it will kill it (there being no political opposition). If courts required strict correspondence between assessments or specific taxes and benefits, governments would have incentives to avoid litigation by simply funding everything out of general revenue taxes.

The CBP implements the requirement of only a loose correspondence between benefit and burdens in special assessments and specific taxes. To illustrate, we will apply the CBP to the ubiquitous use of a real property tax to fund local public schools. For parents of a dozen school-age children owning (or renting) a low-value property, the benefits of the tax far exceed the costs. For a childless individual owning a high-value property, the reverse is true. Between these two extremes there will be a range of cases; in the end, the net burden curve for this tax almost assuredly will be free of any large jumps. Thus under the CBP, a property tax used to fund local schools, omnipresent in America, is not a taking. Under a similar argument, special assessments for roads, irrigation districts, and other projects pass muster under the CBP.²²²

²¹⁹*Union Refrigerator*, 199 U.S. at 203; *Wood v. Quimby*, 40 A. 161 (R.I. 1898) (upholding special assessment for fire-fighting improvements on an owner whose property lied about a half mile from the nearest proposed hydrant).

²²⁰COOLEY, *supra* note 44, § 89.

²²¹*Union Refrigerator*, 199 U.S. at 203.

²²²Brauneis notes that “in the paradigm case of taxation revenue raising is separate from appropriations — that is, the tax is not earmarked in advanced.” Robert Brauneis, *Eastern Enterprises, Phillips, Money, and the Limited Role of the Just Compensation Clause in Protecting Property* “In

At some point, however, courts have indicated that the state can go too far. The language from the special assessment cases is vivid, declaring an assessment valid “unless it is palpably arbitrary and a plain abuse. . . . unless the exaction is a flagrant abuse, and by reason of its arbitrary character is mere confiscation of particular property, it cannot be maintained that the state has exceeded its taxing power.”²²³ The CBP offers a natural way to define burdens that are “palpably [or flagrantly] arbitrary,” “plain abuse,” that amount to “a mere confiscation of particular property:” those taxes that impose an assessment or tax rate on one or a few individuals distinctly more burdensome than on all others, with no corresponding and roughly offsetting benefit conferred.

VI. Packaging & Logrolling

Even under the comparatively small state and national governments of the 18th and 19th centuries, citizens paid a variety of general and specific taxes, assessments, and fees; and received diverse benefits, directly or indirectly. The number and complexity of both taxes and benefit programs has increased dramatically over the last 100 years. The existence of these numerous and potentially offsetting legal regimes raises a fundamental and difficult questions: when deciding whether a citizen has suffered a compensable taking, do we focus on each statutory, regulatory, or administrative measure separately? Or do we go to the other extreme and weigh every measure’s burdens and benefits to an individual? Or, finally, do we look at some intermediate ‘package’ of measures that are closely related based on some relevant criteria?

Traditionally takings law has focused narrowly on single, discrete issues. Thus when taking a parcel of land, the state may reduce compensation based on offsetting benefits directly tied to the reason for the taking (e.g. the new highway will raise the value of an adjacent parcel owned by the same person), but it may not cite benefits that the landowner reaps from other governmental programs (e.g. the state cannot cite the benefits Bill Gates derives from the copyright and patent laws to reduce the compensation due for taking a parcel of land he owns).

In theory it may seem that there is no reason not to throw all benefits and burdens into one grand equation and require payment of compensation only to those, net-net, subject to noticeably larger burdens under the CBP. Indeed, experience suggests that many seemingly unrelated legal measures are the product of political horse trading. History provides examples of taxes passed in large part to offset

Its Larger and Juster Meaning, 51 Ala. L. Rev. 937, 946 (2000). This does not hold for, *inter alia*, local property taxes “earmarked” for education.

²²³*Houck*, 239 U.S. at 262.

perceive unfairness in existing exactions.²²⁴ More generally, different interest groups may engage in “logrolling”—‘you vote for our bill, and we’ll vote for yours’—that creates two laws that, taken alone, apportion burdens asymmetrically, but when taken together satisfy the CBP. After discussing theory and history, however, this section concludes that, in practical terms, permitting the government to dilute or reject just compensation claims by citing other governmental programs that provide offsetting benefits would effectively erase the compensation requirement.

In the abstract, efficient tax theory suggests that the government assess levies so as to minimize the deadweight loss caused when taxation alters consumers’ decisions.²²⁵ If put into practice, this might impose a large number of taxes, each of which standing alone imposed asymmetric, discontinuous burdens in violation of the CBP. Yet, *ex ante*, even risk-averse citizens might support this efficient tax regime if (i) the reduction in deadweight loss was significant, and (ii) the number and variety of taxes was high enough that, after accounting for all of them, few or no citizens were singled out for discontinuously large burdens.

The disconnect between efficient taxation and taxation in practice is so great as to moot the possibility discussed in the previous paragraph. Logrolling, however, has been common in both federal and state fiscal policy. We will briefly examine two sets of paired taxes from America’s 19th century: tariffs and the income tax at the national level; real and personal property taxes at the state level. An 1870s advocate of reinstituting the national income tax nutshelled the regressive nature of traditional taxation in America at both levels. “[I]n the context of federal and state taxation, the poor and middle classes already paid the most due to the regressive aspects of the tariff and the heavy burden of land taxes.”²²⁶ Advocates of the income tax and taxes on personalty relied in large part on the unfairness of tariffs and real property taxes to sell the new taxes in the latter half of the 1800s.

A leading historian of the federal income tax finds that “the income tax originated as an apology for the aggressive manipulation of other forms of taxation, especially the tariff, during the Civil War. It was maintained as a shield against attack upon the expanding system of protection, whose regressive implications troubled even its authors ...”²²⁷ Prominent politicians repeatedly highlighted the regressive nature of America’s tariffs, which fell “entirely on consumption,” and a

²²⁴For example, one of the main arguments for a progressive federal income tax was that existing tariffs imposed disproportionate burdens on lower income taxpayers. *See infra* text accompanying notes 219-224. Similarly, a major motivation for state taxes on personalty was the perception that land taxes unfairly burdened those with relatively little wealth. *See infra* text accompanying notes 225-227.

²²⁵MUSGRAVE & MUSGRAVE, *supra* note 159.

²²⁶STANLEY, *supra* note 2, at 65, quoting Rep. Burchard.

²²⁷*Id.* 13.

tax on consumption “is a tax upon the poor.”²²⁸ The tone was caustic.

We tax [via tariffs] the tea, the coffee, the sugar, the spices the poor man uses. We tax every little thing that is imported from abroad, together with the whiskey that makes him drunk, the beer that cheers him and the tobacco that consoles him ... yet we are afraid to touch the income of Mr. Astor ... the income tax is the only one that tends to equalize these burdens between the rich and the poor.²²⁹

Based in part on this view, the federal government’s first income taxes, imposed during the Civil War, had high exemptions, and thus impacted only the relatively wealthy. Yet after the War, the Beards sardonically note that “the beneficent government ... crowned its generosity to capitalists by abolishing the moderate tax on incomes and shifting the entire fiscal burden on goods consumed by the masses.”²³⁰ Populists in fits and starts pushed for reinstitution of a progressive income tax as a counterweight to the ever-present high tariffs on necessities. William Jennings Bryan argued that it “was fair that the main burden of the income tax fell on the wealthy, since the tariff, twenty times greater, fell disproportionately on the working man.”²³¹ Their efforts finally bore fruit with the passage of the 16th Amendment in 1913.

A parallel political struggle over taxation occurred in the several states during the same period. Exclusive reliance on real property taxes became more and more regressive as a greater and greater proportion of wealth was held in the forms of untaxed or ineffectively taxed personalty — stocks, bonds, and other securities; capital assets; patents and copyrights.²³² Judge Cooley, no radical, argued that “state tax systems ... were in practice unequal and oppressive because of the prevalence of undervaluation and the failure successfully to tax personalty.”²³³ Later empirical work has proven Cooley’s assessment accurate. “Some 72 percent of state revenues came from general property taxation as late as 1890, and contemporaries were unanimous in their observation that these taxes failed to reach personal property, and

²²⁸*Id.* 18, quoting Sen. Sherman.

²²⁹*Id.* 19, quoting Sen. Sherman. Similarly, Senator Trumbull argued “that a flat rate of taxation on sugar meant that the poor man paid a much greater proportion of his income in the price than did his wealthy counterpart, and that ‘that is not equal ... it is not according to the property of the individual.’” *Id.* 34.

²³⁰*Id.* 4, quoting 2 CHARLES A. BEARD & MARY R. BEARD, *THE RISE OF AMERICAN CIVILIZATION* 99, 105-15 (1949).

²³¹WITTE, *supra* note 76, at 72.

²³²Note that all save the homeless pay real property taxes: owners pay directly, renters pay indirectly, via their landlords.

²³³STANLEY, *supra* note 2, at 83, quoting COOLEY, *supra* note 44, at 160-61.

generally underassessed it when it was included in the laws.”²³⁴ Only when income was defined to encompass the income from personalty (dividends, interest, capital gains, royalties, etc.) was this inequity solved.

Thus the national and state income taxes were justified in part as remedial measures to address regressive burdens imposed by pre-existing levies. Opponents of these fiscal innovations realized that one way to challenge the new taxes was to limit discussion to the new tax in isolation, not as part of a larger context. Thus one historian has framed the debate over the first income tax as follows: “supporters [of the Civil War era income tax] tended to portray the tax as a balance wheel in the context of a predominantly regressive system, while opponents located inequities in the income tax law itself.”²³⁵

Thus advocates have long understood that a key issue in debating a tax lies in packaging — deciding exactly what levies (and outlays) should be grouped together for purposes of analyzing fairness. The possibilities are literally endless; we will consider two examples to illustrate the wide scope of packaging arguments possible.

First, there are any number of plausible packaging stories that might be used to justify progressive taxation. We have seen two already: the possibility that many publicly-provided goods benefit the wealthy disproportionately (packaging benefits from outlays with the progressive income tax); and the use of a progressive income tax as a counterweight to regressive tariffs (packaging the two taxes together).

Second, consider Epstein’s more complicated example: Depression-era legislation that retroactively gave debtors greater rights in foreclosure is a taking of creditors’ rights.²³⁶ Epstein argued that such legislation violated the Takings Clause. Such legislation does single out one group, mortgage lenders, for a material burden, and thus does seem to violate the CBP. Although the burden will vary continuously, from mortgagees with small loans to large, the effective ‘rate’ of this burden is similar for all lenders (and zero for all others, except debtors, for whom the

²³⁴*Id.* 81.

²³⁵*Id.* 34.

²³⁶Epstein, *supra* note 41, at fn.12, at 438, citing, inter alia, *Louisville Bank v. Radford*, 295 U.S. 555 (1935) (striking down federal bankruptcy statute granting mortgagors, inter alia, 5-year term of possession after default before foreclosure). *Radford*’s current status is unclear. A recent bankruptcy decision, *In re Yi*, 219 B.R. 394 (E.D. Va. 1998), stated that it “has been all but overruled by *Wright v. Vinton Branch of Mountain Trust Bank*, 300 U.S. 440, 81 L. Ed. 736, 57 S. Ct. 556 (1937),” but Shepards and a close read suggest that *Vinton Branch* distinguished *Radford*. The same bankruptcy opinion also said that *Helvering v. Griffiths*, 318 U.S. 371, 401 n.52, declared that *Vinton Branch* corrected the “error” of *Radford*, and the cited footnote does suggest strongly that the Court saw *Vinton Branch* as correcting “error” in *Radford*. Only three years ago, however, *Eastern Enterprises* cited *Radford* with approval. *Eastern Enterprises v. Apfel*, 524 U.S. 498, 534 (1998). One leading constitutional law treatise does not cite either *Vinton Branch* or *Griffiths*, LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* (2nd ed. 1986) (topic not discussed in volume of 3rd ed. available); another cites *Vinton Branch* and says that it “modified” *Radford*. John E. Nowak & Ronald D. Rotunda, *Constitutional Law* § 11.9 (6th ed. 2000).

legislation bestows a benefit at a rate symmetric with the burden on lenders).

Defenders of providing debtors with some relief could have argued that such measures should have been packaged with the macroeconomic policy of deflation. Federal monetary policy allowed prices to fall, a benefit to creditors and a burden to debtors. Considered in tandem with deflation, reforming foreclosure to aid debtors arguably restored some balance to a set of policies that otherwise unfairly favored creditors.

The bottom line of this section is that if we permit the government to defeat taking claims by such packaging arguments, the just compensation requirement must disappear. If the government may cite monetary policy in this case, it can cite fiscal policy, government contracts, the building of roads, Social Security, or any of the thousands of other government programs in the next case. There is no limiting principle for courts to apply in deciding what is the proper package in deciding takings claims.

Even if we could decide how to define the relevant package of measures, the CBP highlights further difficulties. In order to satisfy the CBP, the combined *percent* burdens must offset each other so that there are no discontinuities. Since the ‘base’ that each measure burdens or benefits differs, however, we cannot compare rates directly; we need to filter one measure to make it comparable with the other. Moreover, different programs generally “line up” taxpayers in radically different net burden orders, making it generally impossible to calculate the net impact of the measures when stuck together as a package.

Thus takings laws’ traditional refusal to consider additional burdens or offsetting benefits not very closely tied to a given measure seems justified, as there is no way for courts to conduct such an inquiry. In the *abstract*, there is no reason not to weigh all benefits and burdens; in *practice* this is impossible. Administrative measures, regulations, taxes, and other potential takings must stand or fall on their own.

VII. Conclusion

The progressive income tax, standing alone, is not a taking under the CBP developed in this article. Given the use of marginal rates that apply to ranges of income, the percent burdens imposed on taxpayers is assuredly continuous. This doctrinal principle, combined with the historical record and the plain language of the relevant constitutional clauses, makes a virtually unassailable case for the constitutionality of progressive taxation.

Conversely, the Bill Gates Tax and other levies of its ilk impose starkly different percent burdens on a few taxpayers as compared with the next highest incomes or wealth. Thus these taxes violate the CBP. The CBP, then, achieves the doctrinal challenge described in the introduction: it provides a standard that justifies progressive taxation in general, yet does not justify extreme cases like the Gates Tax. The CBP focuses on substantive burdens (and, when possible, benefits), altogether at odds with the Supreme Court’s highly formal “specific asset” grounds for distinguishing taxes and takings in *Eastern Enterprises*.

There is no reason to limit application of the CBP to the possibility that taxes are takings. It offers a concrete definition of what it means to be singled out for an unfair portion of public burdens. The CBP dovetails well with most Supreme Court takings cases, and suggests why other cases are troublesome (e.g. the landmark designation of Grand Central Station in *Penn Central*; the complete ban on sales of eagle feathers in *Allard*). Thus it can serve both as a tool to organize our thinking about takings law, and as an aid to avoid such mis-steps in the future.