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Drawing the Line Between Taxes and Takings: The Continuous Burdens Principle, and its Broader Application

Eric Kades
William & Mary Law School, eakade@wm.edu

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DRAWING THE LINE BETWEEN TAXES AND TAKINGS: THE CONTINUOUS BURDENS PRINCIPLE, AND ITS BROADER APPLICATION

Eric Kades

I. INTRODUCTION

When government taxes, it takes citizens' property, usually money, to fund various projects. The Takings Clause\(^1\) declares that the government must pay compensation when it takes private property. Requiring compensation for taxation would immediately bankrupt the state, as the state would have to return immediately all tax receipts to meet this compensation duty. This simple argument shows that the Takings Clause cannot reach all taxes.

This Article addresses one fundamental question: What forms of taxation, if any, constitute a "taking" and require compensation? To illustrate this question, consider the example posed by Calvin Massey: "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."\(^2\) This example does not present a novel dilemma. An early critic of the income tax feared ever-increasing exemptions and marginal rates 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 communitistic march goes on for 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]?"\(^3\)

The "communitistic march" of exempting ever-greater incomes and subject-

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\(^1\) U.S. Const. amend. V (providing "nor shall private property be taken for public use, without just compensation").

\(^2\) Calvin 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."

ing the wealthy still taxed to ever-greater tax rates becomes our Bill Gates Tax.

A tax singling out one or a handful of citizens offends the constitutional principle the Supreme Court has repeatedly invoked: the Takings Clause is 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." Thus, the notion that taxes are never takings is inconsistent with foundational takings law; the label "tax" confers no immunity to the principles of the Takings Clause.

Richard Epstein employs this insight with a vengeance. Under his fully articulated theory, the Takings Clause invalidates not just esoteric hypotheticals like the Bill Gates tax, but deems unconstitutional the income tax code's long-standing progressive rate structure. Higher rates on higher incomes, Epstein maintains, take the property of top earners to a disproportionate degree. According to Epstein, only strictly proportional rates (i.e., a "flat" tax) satisfy the demands of the Takings Clause.

Epstein's position is inconsistent with long-standing taxation practices in the United States. Yet, it is perhaps no more extreme than the view undermined above, that taxes are never takings. Numerous critics have attacked Epstein's position. No one, however, has offered a coherent theory of the relationship between taxes and takings; instead, one fits reality by simultaneously holding the "Bill Gate Tax" invalid but progressive income taxation and other common taxes valid.

This Article proposes a novel rule to draw the 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

\[\text{4 Armstrong v. United States, 364 U.S. 40, 49 (1960). A tax on "named individuals or [on] easily ascertainable members of a group" might be 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); U.S. Const. art. I, § 10, cl. 1 (barring state legislatures from passing bills of attainder)). 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. Adm'r of Gen. Servs., 433 U.S. 425, 474 (1977). This Article does not further consider 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 that will be discussed do not identify individuals by name, or do not impact an "easily ascertainable" group of persons, and so would not implicate the bill of attainder clauses in any event.}

\[\text{5 Richard A. Epstein, Takings: Private Property and the Power of Eminent Domain 297-300 (1985).}

\[\text{6 Progressive income taxation is not the only commonly used tax Epstein finds inconsistent with the Takings Clause. His logic also implies that the widespread use of a property tax to fund education is a taking. See discussion infra Part V.}

Drawing the Line Between Taxes and Takings

there are no large jumps—discontinuities, in an imprecise sense—between the burden imposed on any taxpayer and the next-most-burdened taxpayer.\(^8\)

The Article then generalizes the CBP and argues that it applies not just to all forms of taxation but to assessments, fees, zoning, the draft, pension obligations, and other forms of regulation that may amount to a taking. The CBP at its core 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, which is the most frequently recited justification for the Takings Clause.

Before presenting the CBP and its applications in Part IV, Parts II and III of this Article summarize existing commentary on the line between taxes and takings, show that there are no fundamental tensions between tax policy and takings policy, and consider the arguments of Epstein and others on the constitutionality of progressive income taxation. Part IV fully presents the CBP. Part V then considers the CBP’s application to taxes and assessments where, unlike general revenue taxes, beneficiaries are easily identifiable. Finally, Part VI considers the difficult question of what group of measures should be “packaged” together for takings analysis.

II. EXISTING COMMENTARY DISTINGUISHING TAXES FROM TAKINGS

Perhaps the most surprising observation about recent commentary on drawing the line between taxation and takings is its paucity. This is surprising since the issue is so fundamental. The few scholars addressing the issue often stress the difficulty in demarcation. For instance, Walter Blum and Harry Kalven state that the 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.”\(^9\) In other words, Blum and Kalven find no guidance in a Constitution that simultaneously confers the power of taxation yet also contains the Takings Clause. Massey, writing on the constitutionality of

\(^8\) We put to one side certain taxes that cannot violate the Takings Clause. Taxes used to discourage behavior that amounts to a nuisance are not takings; the Supreme Court has long declared and has recently affirmed that the 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. S.C. Coastal Comm’n, 505 U.S. 1003, 1022-23 (1992) (discussing power to regulate “harmful or noxious uses”); see also Epstein, supra note 5, at 285. Similarly, the government may discourage, through taxation, 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 without paying compensation is a difficult question at the core of takings law; the simple point here is that if regulation is not a taking in a given context, then neither is a tax designed to achieve the same ends.

progressive income taxation, likewise describes the "none-too-clear boundary between taxation and taking."\textsuperscript{10} Few scholars have heeded Saul 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."\textsuperscript{11}

At times, judges and legal commentators have declared that Congress' power to tax is beyond constitutional review. Almost two hundred years ago, for instance, Chief Justice Marshall famously declared that "[t]he only security against the abuse of [taxation] is found in the structure of the government itself."\textsuperscript{12} The implication of Marshall's declaration is clear: those dissatisfied with a tax should elect representatives who will repeal the levy. Thomas Cooley, a leading jurist and scholar, echoed Chief Justice Marshall a hundred years later: "[T]he 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 exercises it."\textsuperscript{13}

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 subpart II.B, the quotations in the previous paragraph do not accurately reflect the "classical" nineteenth-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, which could determine when taxation shaded over into takings, this Article first discusses 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, both the modern Supreme Court and many scholars have embraced this highly formal rule. The classical view, focusing much more on the substance of a tax instead of its form, arose during an era commonly perceived as a period of excessively formal legal analysis.

\textsuperscript{10} Massey, supra note 2, at 86.

\textsuperscript{11} Saul 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.

\textsuperscript{12} McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 428 (1819).

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. 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.

Despite this manifest conceptual weakness, and the lack of any precedent even suggesting this view, it appears that the Supreme Court recently embraced the type of distinction proposed by Blum and Kalven.

In Eastern Enterprises v. Apfel, the Court struck down a statute imposing between $50 million and $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 as 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.” Kennedy expanded on this theme at length and concluded that the Supreme Court had always “been careful not to lose sight of the importance of identifying the property allegedly taken.” Kennedy, nonetheless, voted to hold the statute unconstitutional because he believed that such extraordinary retroactivity violated the substantive dimension of the Due Process Clause.

Breyer, in dissent with three other Justices, agreed with Kennedy that the Takings Clause applied only to “specific interests in physical or intellectual property,” as distinguished from the statute at issue in the case, which “involve[d] not an interest in physical or intellectual property, but an ordinary liability to pay money.” Breyer agreed with Kennedy that the proper doctrine to apply was substantive due process, but argued that the statute

14 BLUM & KALVEN, JR., supra note 9, at 4 (arguing that the difference between taxation and takings “appears to reside essentially in the difference between taking money and taking specific property”).
15 Id. at 5.
17 Id. at 540 (Kennedy, J., concurring in judgment and dissenting in part).
18 Id. at 543.
19 Id. at 554 (Breyer, J., dissenting).
satisfied that test. Moreover, he strongly implied 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." 20

Other than O'Connor's plurality opinion that applied 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 to "specific interests in physical or intellectual property." 21

Neither Kennedy nor Breyer offered any precedent or argument for this distinction. As Thomas Merrill notes, "[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 thesis." 22 The only policy justification that Kennedy offered was, in effect, that takings doctrine is in such disarray that we need to limit its applicability as much as possible. 23 This justification is unconvincing, especially given that substantive due process is no model of doctrinal clarity. Breyer seemingly acknowledged the form-over-substance nature of his grounds for distinguishing taxation from takings; he admitted that, economically, the statute in Eastern Enterprises is no different from taking specific plants and equipment worth $50 million to $100 million. 24

Form over substance is not the worst problem with 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. 25 In other words, Breyer's dissent demonstrates profound doctrinal confusion. If Breyer really believed that the Takings 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 noted in

20 Id. at 556 (Breyer, J., dissenting). As discussed infra Part II.B, Breyer ignores a long line of cases that have held that taxes may amount to takings.
21 Id. at 554 (Breyer, J., dissenting).
22 Thomas 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.
23 E. Enters., 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 under a label that is not an oxymoron.
24 Id. at 529.
25 Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978) (articulating the following three part test in deciding takings claims: (i) economic impact on claimant; (ii) extent to which regulation interferes with investment-backed expectations; and (iii) the character of the governmental action).
previous pension cases, in which it applied the Takings Clause, that results were likely to be the same under either theory. It is not surprising, then, in *Eastern* that Justice O'Connor claimed that both her plurality’s Takings Clause analysis and the concurring and dissenting opinions’ substantive Due Process Clause analysis drew on common principles. Even more telling, Kennedy cited 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 bears no legitimate relation to the interests which the Government asserts in support of the statute.” The “demonstration” Kennedy cited with approval is O’Connor’s application of the *Penn Central* takings test. Similarly, Justice Breyer directly applied the same Takings test in his dissent and then stated that substantive due process analysis is similar and merely “put[s] the matter more directly.” 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 plurality opinion is that she fit the facts of the case under the primary purpose of the Takings Clause—avoiding unfair allocation of the burdens of public projects.

“[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.

The legislature should not be able to defeat the primary substantive purpose of the Takings Clause, avoiding “disproportionate” burdens, by the formality of assessing a general liability instead of taking a specific asset.

In a thorough and careful effort to arrange the Supreme Court’s exist-

26 In *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 Guar. Corp.*, 475 U.S. 211 (1986). There is similar language in *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust*, 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. *E. Enters.*, 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 in his dissent when he rhetorically asked, “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.* at 556.

27 *E. Enters.*, 524 U.S. at 529.

28 *Id.* at 549.

29 *Id.* at 567.

30 See *infra* Part II.C (demonstrating that avoiding unfair burden allocation lies at the core of the Supreme Court’s substantive analysis of takings claims).

31 *E. Enters.*, 524 U.S. at 536–38.
ing body of constitutional property precedents—takings, substantive due process, and procedural due process—into some sort of coherent structure, Merrill is constrained to adhere to the holding of Apfel, despite this substantive ground for applying the Takings Clause. He found that the Supreme Court limits the Takings Clause to “discrete assets,” which he defined as follows:

[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.\(^{32}\)

It is beyond the purpose of Merrill’s article to offer any normative justification for the general-liability-specific-asset distinction. He did seem to find some merit, however, in a discrete-asset test, because it “would also eliminate the possibility of using the Takings Clause as an instrument for litigating issues of general distributive justice.”\(^{33}\) He found that this feature has the benefit of at least confining “the Takings Clause to its traditional orbit.”\(^{34}\) According to Merrill, “The implicit understanding has always been that the Takings Clause has no application to legislation that imposes taxes or allocates government spending.”\(^{35}\) Although Merrill’s concept may square with more recent understandings of the Takings Clause, this is not the case as a matter of older tradition. As subpart II.B demonstrates, nineteenth-century courts and commentators repeatedly found that some taxes did, in fact, amount to takings.

To date, only Blum and Kalven, the originators of the idea that taxation differed from takings by imposing a general liability, have offered 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 prin-

\(^{32}\) Merrill, supra note 22, 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. at 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 do so in order 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 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, one has a distinction without a difference.

\(^{33}\) Merrill, supra note 22, at 980.

\(^{34}\) Id.

\(^{35}\) Id. 980-81.
However, Blum and Kalven's repeated use of "perhaps" communicates, at best, a half-hearted belief in the proffered merits of the distinction.

The almost complete absence of a normative justification makes it difficult to plumb the attractiveness of the general-liability–discrete-asset distinction. Perhaps the appeal stems from a mistaken analogy to a seemingly less controversial principle: that it is pointless for the government to take money by condemnation, because the Takings Clause 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, as Cooley noted, "[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." In such a 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 time being sets aside all the rules and protections of private right, shall then prescribe.

Given the government’s undeniable power to define what assets constitute legal tender, however, there is a second way in which the government can take money without delaying "compensation." Specifically, the government can:

(i) declare government bonds (of any term, e.g., principal due in one year, ten years, thirty years, or even perpetual obligations) to be legal tender,
(ii) condemn someone’s money, and
(iii) pay them with government bonds.

36 BLUM & KALVEN, JR., supra note 9, at 4–5.
37 Cooley, supra note 13, at ch. XV, at 759 n.2.
38 Id. at 759; see also Griffin v. Mayor of Brooklyn, 4 N.Y. 419, 424 (1831) ("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.").
39 U.S. CONST. art. I, § 8, cl. 5 (declaring that Congress shall have the 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’s 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).
Circulating as money, such bonds would likely trade at a discount to their face value (i.e., with the principal due at end of term) as the interest rate would be below market rates; otherwise, the government would 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 (e.g., 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 to 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 lack of any incentive to take money stood for the much broader principle that "it is impossible to condemn money." There is no linkage between the futility of condemning money and the definition of a taking. The disincentives to taking money tells us nothing about what forms of taxation, if any, run afoul of the Takings Clause.

B. More Nuanced Classical Views

In contrast with the formalism of Eastern Enterprises, commentary from what I call the "classical" era, the late 1800s and 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.40

This willingness to "carefully scrutinize" measures regardless of the categorical label used by the legislature stands in sharp contrast with Eastern Enterprises, which distinguishes taxation and takings based on the formal notion of fungibility. When the government requires citizens to part with fungible assets by imposing a general liability and taking money, it is taxation according to Eastern Enterprises. When the government requires a specific, nonfungible asset, however, it is deemed a taking.

The "classical" nineteenth-century authority presented in this subsection, however, 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 dimension with the Eastern Enterprises dimension.

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40 Cooley, supra note 13, at ch.14, at 697.
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 label in 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 nonfungible assets of a large portion of the citizenry (the lower right cell). This last category, however, is largely empty: it is hard to imagine the government condemning nonfungible assets en masse. Even in a large land assembly project, such as the construction of a major highway, the government uses the land of a very small percentage of the population. The only exception appears to arise from the *per se* rule that permanent physical invasions are always takings. Thus, in *Loretto v. Manhattan CATV Corp.*, the Supreme Court held that a municipal ordinance barring landlords from interfering with the installation and maintenance of cable TV wiring and junction boxes on their properties amounted to a taking.41 Given that the just compensation ultimately awarded in *Loretto* was trivial,42 and given that compensation will likely be trivial in similar cases, courts and commentators can ignore the lower right cell.

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<tr>
<td><strong>Cash/General Liability (ultimate in fungibility)</strong></td>
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<td><strong>Few Owners’ Property Taken (as % of population)</strong></td>
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<td><strong>Many Owners’ Property Taken (as % of population)</strong></td>
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41 458 U.S. 419 (1982).
42 On 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).
They cannot ignore the upper right cell, however, for it is easy to con­
ceive of general liabilities that impact a narrow band of the population. 
This Article discussed some dramatic hypothetical examples in the Intro­
duction, such as the Bill Gates tax, and will examine some actual examples 
in Parts III, IV, and V. It is here that the fungibility and the "size of group" 
criteria part ways. The classic view suggests that, at some point, a narrowly 
focused tax becomes a taking; however, the discrete-asset model does not 
apply the Takings Clause to such a general liability.

The remaining portion of Part II, along with Parts III and IV, argues 
that the classical test is normatively preferable. After laying out the clas­
cical position, I argue that such a position 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. The Continuous Burdens Principle (CBP) presented 
in Part IV can be understood as refining the crude many/few distinction of 
the classical model.

1. Classical Theories Treated Takings and Taxation as Structurally 
Similar.—Far from seeing taxation and takings as polar opposites, nine­
teenth-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,” 43 and 
got 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.” 44 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 ei­
ther 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 pro­
tection 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 of 
eminent domain, special compensation is made. 45

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, as represented by the just com­
pen­sation requirement. For taxation, the promise is implicit: the govern­
ment will spend tax revenues on projects benefiting most if not all citizens,

43 People v. Mayor of Brooklyn, 6 Barb. 209, 214 (N.Y. Ch. 1849).
44 Id.
45 Griffin v. Mayor of Brooklyn, 4 N.Y. 419, 422 (1851) (upholding special assessment for roads, with 
assessments based on frontage).
especially regarding the protection of life, liberty, and property.

A postbellum court extended this analysis to include special assessments, under which a government charges landowners who particularly benefit by some project, such as a widening of a road, for the costs of that project:

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.  

The 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.

Here, the court focuses 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 separates owners from their property.

Cooley, in a leading treatise on constitutional law, summed up the classical view that taxation and takings 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 posses-

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46 People v. Daniels, 22 P. 159, 162 (Utah 1889).
47 Id. at 163.
sions which comes from the use to which the government applies the money raised by the tax; and these benefits amply support the individual burden. 48

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 Cooley articulated. Epstein argues, “[T]he 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.” 49 He rejects “rigid schemes of classification” designed to blunt the compensation requirement,” maintaining that “[t]axes and regulation are forms of taking, to be examined under principles applicable to all other takings.” 50

2. Classical Grounds To Distinguish Takings from Taxation: The Breadth of the Burdens Imposed.—Despite the fundamental similarity between taxation and takings, it is essential to establish a principle to distinguish them. As intimated in the beginning of this Article, if every tax is considered a taking, then the courts would be buried in taxpayer takings suits—unless the government can show that the taxpayer received some roughly equivalent benefit. 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 regard to the amount, or value exacted from any other individual, or class of individuals.” 51 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. 52

48 COOLEY, supra note 13, at 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. at 678.


50 Id. at 435.

51 Griffin v. Mayor of Brooklyn, 4 N.Y. 419, 420 (1851).

Taxation, then, couples burdens on a broad swath of the population with benefits from the use of tax revenues sprinkled over a similarly large portion of society. Takings, on the other hand, burden one or a relatively narrow subset of property owners for projects with much wider social benefits.

3. Drawing the Line: The Unfair Apportionment Test.—This broad-narrow distinction is the first step of the classical approach to drawing the line between taxation and takings. There will be a gray area of difficult cases. Cooley’s preceding quote thus introduced the second step in 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 often 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.

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 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.

Thus the classical test read Takings Clauses as requiring both a narrow and a disproportionate impact before requiring compensation.

Epstein, in his restatement of the classical position, recognized the danger of allowing 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

53 Id.
54 Booth v. Town of Woodbury, 32 Conn. 118, 130 (1864).
55 Cheaney v. Hooser, 48 Ky. 330, 341 (1 B. Mon. 1848) (holding that expanding town so as to impose town taxes on plaintiff is not a taking).
allowed, or all taxation ... is allowed." Epstein's answer to these difficulties 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." 57

4. Courts Grant Legislatures Wide Latitude.—However, words like "just," "fair apportionment," "equitable," or "disproportionate impact" as employed by courts 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, the progressive income taxation, under which marginal rates increase with income, used by the United States dating back to the Civil War, violates the Takings Clause. 58 Similarly, he argues that a sales tax must fall on all goods, because a selective sales tax places disproportionate burdens on sellers of goods singed out for the tax. 59

Although in many respects similar, Epstein's views part ways with classical doctrine. Classical courts and commentators believed that legislatures have very wide leeway in setting taxes, and judges were encouraged to strike them down only in cases of extreme injustice or 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 extreme unwillingness to interfere; but if abused, the abuse should share the fate of all other usurpations." 60

In the following extended quotation, an antebellum court acknowledges the deference due the legislature in establishing taxes, and the extraordinary facts that need to be present in order 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 conferred upon the legislative department of the government; 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

56 Epstein, supra note 49, at 437.
57 Id. at 437–38.
58 Epstein, supra note 5, 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. See Stanley, supra note 1, at 142 (citing David A. Wells, Is the Existing Income Tax Unconstitutional?, F., Mar. 1895, at 18).
59 Epstein, supra note 5, at 293–94.
60 Cooley, supra note 13, at ch. 14, at 795 (quoting Sedgwick, Constitutional & Statutory Law 414 (1857)).
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 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 burden 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 burden 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 burden is imposed without any view to the interest of the individual in the objects to be accomplished by it.\footnote{Cheaney v. Hooser, 48 Ky. 330, 344-45 (1 B. Mon. 1848) (emphasis added).}

Thus, under classical doctrine, the courts found taxes to be takings only in extreme cases, where the so-called tax impacted a very small portion of the population and provided no specific countervailing benefits to those liable for the tax.

The Supreme Court, at the turn of the century, articulated a similar rule. For instance, in \textit{Henderson Bridge Co. v. Henderson City}, the Court held unconstitutional taxes that are “so clearly and 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.”\footnote{173 U.S. 592, 615 (1899).} In 1921, the Court reaffirmed this principle in upholding a Massachusetts state tax on income from intangibles that admittedly had a disparate impact on some localities. As the Court declared,\footnote{Dane v. Jackson, 256 U.S. 589, 599 (1921) (citation omitted).}

\begin{quote}

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 compensation—to spoliation under the guise of exerting the power of taxing.
\end{quote}

When in 1916 the Supreme Court upheld the first income tax statute enacted after passage of the Sixteenth Amendment, 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 Amend-
ment. In 1934, 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.

In summary, the classical view on the tax/takings line recognized the fundamental similarity between the two mechanisms, and developed a three-step test to distinguish them. First, this doctrine determined whether the burden fell on many (tax-like) or few (takings-like). Second, it tried to further delineate this many/few distinction by declaring that taxes must fairly apportion burdens. Finally, realizing that a large gray area remained, classical doctrine militated 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 demonstrated the deep historical roots of the view that it is the number of burdened parties, as well as the rough apportionment of burdens, which distinguishes taxes from takings. The older pedigree of this classical view, alone, is scant reason to prefer it to the view articulated by the five Justices in Eastern Enterprises that fungibility determines the line between taxes and takings. This subsection, however, shows that the classical view better serves the various goals of the Takings Clause.

In Armstrong v. United States, the Supreme Court interpreted the purpose of the Takings Clause in very concise terms. Here, the Court declared that 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.” Since Armstrong, the Court has repeated this principle verbatim in virtually every takings case; in fact, both the majority opinion and the dissenting opinion, in more than one case, have cited this very same language. And although the Armstrong decision

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64 Brushaber v. Union Pac. R.R., 240 U.S. 1, 24-25 (1916). Note that the challenged tax had a progressive rate structure, and so Epstein would argue that it violated the Takings Clause. Epstein, supra note 5, at 297-300; see also infra Parts III-IV (discussing progressive taxation in more detail).

65 Magnano Co. v. Hamilton, 292 U.S. 40, 44 (1934) (citations omitted) (rejecting due process challenge to a state tax of fifteen cents a pound on margarine). Again, note that Epstein argues that such a selective sales tax is a taking. Epstein, supra note 5, at 297-300.


67 See Palazzolo v. Rhode Island, 533 U.S. 606, 607 (2001); City of Monterey v. Del Monte Dunes at
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."68 I label this the "anti-singling-out" motivation for the Takings Clause, in that it bars the government from singling out one or only a few property owners to bear public burdens.

This anti-singling-out purpose is fairly general in scope. It is consistent with, and captures the essence of, a number of more specific theories regarding the social ends served by the Takings Clause. Some scholars have argued that the compensation requirement was designed to protect a wealthy minority from majoritarian deprivations.69 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), as presented in Part IV, but they share this Article's basic perspective. Glynn Lunney, in articulating 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.70 Although Lunney's concern about minoritarian oppression may be the opposite of the first theory, 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 in contexts where compensation is administratively feasible but not paid.71 Although the meaning of "demoralization"

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68 Monongahela Navigation Co. v. United States, 148 U.S. 312, 325 (1893). The modern Court has cited this language, in addition to the similar quotation from Armstrong, in Keystone Bituminous Coal Ass'n v. DeBenedictus, 480 U.S. 470, 512 (1987), Penn Central Transportation Co. v. New York City, 438 U.S. 104, 146 (1978), and PruneYard Shopping Center v. Robinson, 447 U.S. 74, 83 (1980). In addition, the Court cited Monongahela in Chicago, Burlington & Quincy Railroad v. Chicago, 166 U.S. 226, 238 (1897), the case in which, according to modern precedents, the Takings Clause was incorporated against the states under the Due Process Clause.


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 by the government, 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.\(^72\) Fischel emphasizes disproportionate burdens in his application of Michelman's model to the military draft.\(^73\)

The anti-singling-out purpose encompasses these unintentional government acts, along with their intentional counterparts discussed above; it operates at a higher level of generality that does not distinguish between them.

The anti-singling-out rationale, thus, is common to these seemingly divergent theories and 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*. Rather, 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 Battleground 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 because there are no gray areas or close cases under such an understanding of the Takings Clause. What little scholarship there is primarily centers on whether progressive income taxation violates the Takings Clause. Richard Epstein, author of the earliest and most thorough analysis on the subject, 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.

However, those that defend progressive income taxation clearly constitute the majority of academics and judges. Yet the case made in support of such progressive rates is surprisingly weak. This Part and Part IV, which


presents the Continuous Burdens Principle, make the stronger case that progressive income taxation does not violate the Takings Clause. The Article’s case in favor of progressive rates is tripartite. First, subpart III.A surveys data ignored by both sides of the debate: the long history of progressive tax rates in the United States for both income taxes and other forms of taxation. Subpart III.A also briefly demonstrates that Supreme Court case law supports the constitutionality of progressive taxation. Subpart III.B then evaluates existing normative arguments against and in favor of progressive income taxation.

A. The History of Progressive Taxation and 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.” In 1798, Alexander Hamilton proposed a progressive real property tax with rates increasing from twenty cents per room for log houses to one dollar per room for houses with seven or more rooms. 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.

In 1851, a New York state court explicitly rejected the argument that the Constitution required flat rate taxation. After listing three possible modes of taxation in the form of a head tax or capitation (i.e., 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.” The court stated that the legislatures 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

76 HENRY CARTER ADAMS, TAXATION IN THE UNITED STATES, 1789-1816, at 54-55 (N.Y., Burt Franklin 1970) (1884). In the founding era Congress also enacted at least one “luxury” tax, on carriages used to transport persons. See 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.
77 People ex rel. Griffin v. Mayor of Brooklyn, 4 N.Y. 419 (1851).
78 Id. at 427.
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.”

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. The Court also noted that 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 states had passed an income tax. These state income taxes contained all the progressive features of today’s national income tax: “[H]igh exemption levels, low and even progressive rates—were characteristic of these state laws.” 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 0.2% to 1.3% of the population. 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%.

This progressive structure was no accident. Commenting on the 1862 tax, one scholar noted that “[t]he $600 exemption level reflected the intention to reach only a tiny, wealthy fraction of the population.” Even a leading political opponent of the income tax in general, and progressive rates in particular, admitted that “no one doubts our constitutional power to levy this tax.” Thus, during the time when the classical view on the line between taxation and takings still 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 ex-
emption of $4,000, meant that the tax was very progressive, reaching only 0.13% of the population. However, the Supreme Court struck down the tax one year later, holding that an income tax was a "direct" tax and, hence, had to be apportioned among the states based on population, not income. 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 Sixteenth 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 and 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.

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

Thus, during the era in which the states ratified the Sixteenth Amendment, progressive taxation simply was not controversial. As one scholar explained:

"The 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 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."

Indeed, few questioned progressivity during the proposal and ratification of the Sixteenth 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." Senator Hughes implicitly admit-

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90 Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429, 584–86 (1895). Article I of the Constitution, in two separate sections, requires that "direct" federal taxes be apportioned among the states according to population. See U.S. Const. art. I, § 2, cl. 3; U.S. Const. art. I, § 9, cl. 4.
91 Stanley, supra note 3, at 203–05.
92 See State ex rel. Bolens v. Frear, 134 N.W. 673 (Wis. 1912) (holding that a progressive income tax was not so confiscatory as to violate basic principles of justice and equality).
93 Stanley, supra note 3, at 209.
94 Walter J. Blum & Harry Kalven, Jr., The Uneasy Case for Progressive Taxation 12 (1953).
ted as much. He objected that the Sixteenth Amendment, as proposed, "did not provide for 'uniformity' in taxation—an attack on [the possibility of] graduated rates" under the Amendment as written. The senator's objection, in other words, implied an understanding that, without the word "uniformity," the Sixteenth Amendment permitted progressive income taxation.

Another fact from which we can infer the constitutionality of progressive income tax under the Sixteenth Amendment, is that the first income tax enacted after the Sixteenth Amendment's ratification had progressive rates and relatively high exemptions. Passed in 1913, this income 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. None of these terms raised any hackles. "At the time the tax was accepted as a natural and inevitable culmination of the constitutional amendment."

"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."

2. Positive Legal Doctrine.—Given the long use and acceptance of progressive taxation, coupled with the universal understanding that Congresslikely would enact a progressive income tax under the proposed Sixteenth Amendment, challenges were 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 constitutional objection to the principle of progression." Massey attempts to revive this objection. He argues that the Supreme Court has never directly held that progressive taxes are not a taking. However, Massey's position is difficult to maintain. Although the Court failed to provide a crystal-clear ruling on the issue, this failure may be due more to the fact the plaintiffs were unlikely to raise an issue that everyone thinks is a sure loser. In fact, dicta gleaned from a number of Supreme Court cases uniformly and strongly suggest that progressive tax rates do not violate the Takings Clause.

For instance, the Supreme Court upheld a state inheritance tax containing progressive rates against an equal protection challenge. Two years

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95 STANLEY, supra note 3, at 219 (citing Senate Journal 618 (1911)).
96 WITTE, supra note 89, at 77-78.
97 Id. at 77.
100 SeeMagoun v. Ill. Trust & Sav. Bank, 170 U.S. 283 (1898) (upholding 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. See id. at 301-03.
later it upheld the progressive federal inheritance tax.\textsuperscript{101} 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.\textsuperscript{102} 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.\textsuperscript{103}

The strong implication of the Court's language is that the progressive taxes at issue were not "confiscatory"; moreover, the language suggests that progressive taxation is not \textit{per se} unconstitutional.

The Court repeated these same themes in \textit{Brushaber v. Union Pacific Railroad Co.},\textsuperscript{104} in which it rejected a litany of constitutional objections to the first tax enacted under 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."\textsuperscript{105} 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 invariably lead to the same conclusion.\textsuperscript{106}

Stanley, a leading historian of the federal income tax concludes that the "opinion in \textit{Brushaber} left little room for dispute over the firm tradition of progressive income taxation in the United States."\textsuperscript{107}

\begin{footnotes}
\item[101] See Knowlton v. Moore, 178 U.S. 41 (1900) (upholding federal inheritance tax).
\item[102] Id. at 94.
\item[103] Id. at 109–10.
\item[104] 240 U.S. 1 (1916).
\item[105] Id. at 25.
\item[106] Id. at 24–25.
\item[107] STANLEY, supra note 3, at 229.
\end{footnotes}
### B. Normative Considerations of Progressive Income Taxation

Besides these strong historical and legal grounds supporting the constitutionality of progressive income taxation, this Article is also interested in the social desirability of such a tax, from both an efficiency and fairness perspective. Here, however, the evidence supporting progressive income taxation is much less clear. The following subsections weigh the case for progressive taxation from the perspectives of equity (fairness), efficiency (maximizing social welfare), and a combination of these criteria applicable if the wealthy tend to benefit disproportionately from public services.

1. **Equity.**—Opponents of progressive taxation have used various analogies in arguing 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 date to the writings of 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 estate, who are all obliged to contribute in proportion to their respective interests in the estate.  

   F.A. Hayek proffered substantially the same defense of strict proportionality, stating, "[A] person who commands more of the resources of society will also gain proportionately more from what the government has contributed." More recent scholarship has repeated the mantra of flat-rate taxation as fair taxation.

   Yet other scholars have questioned any *a priori* reason to favor single-rate taxation. Boris Bittker, for instance, declared over thirty years ago that "proportionality is no more entitled to a presumption of fairness than pro-

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108 2 ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS bk. 5, ch. 2, pt. 2, at 350 (Edward Cannan ed., Univ. of Chicago Press 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. at 368.

109 F.A. HAYEK, THE CONSTITUTION OF LIBERTY 316 (1960); see also MILTON FRIEDMAN, CAPITALISM AND FREEDOM 175 (1962).

110 Massey, supra note 2, at 123 ("[T]he tax burdens on incomes... should be an equal proportion of all incomes.").

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.

EPSTEIN, supra note 5, at 298–99.
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. . . . .

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].” Fried pinpoints the “missing piece,” in regard to arguments for strictly proportional taxation, as follows:

I mean only to try 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.

Bankman and Thomas Griffith concur. After questioning the twin assumptions that a proportionate tax is “somehow ‘natural’” while progressive taxes “require justificatory theories,” they maintain that “all rate structures must be premised upon, and measured by, a theory of distributive justice.”

Bankman and Griffith conclude that “it is surprisingly difficult to derive a theory of distributive justice that supports a proportionate tax.”

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

[to 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 the society.]

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114 Id. at 158.
115 Id. at 1907.
116 Id. at 1912.
117 BLUM & KALVEN, JR., supra note 9, at 14-15.
Thus, Blum and Kalven evaluated assumptions about social welfare that are 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 on hobbies or luxuries. If this is true, progressive taxation will increase social welfare, defined as maximizing the sum of all persons’ utility, because such taxation 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 citation and without reasoned argument, that in order “to yield progressive rates of tax . . . the utility curve for money has to decline very sharply.”\footnote{118} Such a statement may have had intuitive appeal at the time it was written, when marginal income tax rates in the United States topped 70%; however, such a statement may be easily challenged today, when the top marginal rate is under 40%\footnote{119}.

This is an important quibble, and yet neither side of the debate can muster convincing, objective evidence in order to support its arguments. But there is a more fundamental objection to flat-rate taxation: it requires rather strong assumptions to rationalize such a narrow choice. Flat tax 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.”\footnote{120} Epstein argues that the assumption that the benefit of public goods increases in proportion to income “gives a respectable matching” and then relies on the assertion, seriously questioned above, that “the flat tax is the most ‘natural’ approach.”\footnote{121}

However, on closer inspection, there is nothing at all “natural” about the assumption that the benefit of public goods increases in strict proportion to income. “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).”\footnote{122} 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

\footnote{118} Id. at 18 (emphasis added).
\footnote{119} For historical tax rates, see The Century Foundation fig. 3b, at http://www.tcf.org/Publications/Basics/Tax/History.html (last visited Nov. 4, 2002).
\footnote{121} EPSTEIN, supra note 5, at 298–99.
\footnote{122} Fried, supra note 120, at 3 (citing FRIEDMAN, supra note 109, at 175).
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.

Fried’s contention, that it is more natural to assume that the benefit of many public goods and services is equal and independent of wealth, seems at least as realistic as the assumption of flat-rate advocates that such benefits increase in strict proportion to income or wealth.

Although this Article will ultimately question the premise that all citizens benefit in equal absolute amounts from public goods, such as police protection, 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?

Further insight into the thinking of flat-tax advocates may be gained by considering income tax exemptions, such as 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 regressive 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.

Blum and Kalven were quite frank in analyzing 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.”

At least one opponent of progressive taxation, Justice Field, had the courage of his convictions and condemned exemptions as illegal forms of progressivity, on par with a progressive rate structure. In the main, however, opponents of progressive taxation, cognizant of this “brute fact,” often seem oblivious to another 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.

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123 Id.
124 See Infra Part IV.B.
125 Fried, supra note 113, at 160–61. Use of the term “degressive” to denote progression achieved by exempting the first $X of income apparently was coined in Blum & Kalven, supra note 9, at 12–13.
126 BLUM & KALVEN, JR., supra note 9, at 11.
128 “We may dismiss a consideration of the size of the exemption.” Hackett, supra note 99, at 430.
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 “[t]he demand for the exemption of the lowest tier of incomes results from the same state of mind as the advocacy of progressive taxation . . .”129

The almost universal support for exemptions among critics of progressive rates “suggests that fairness as well as efficiency grounds underlie their support for proportional taxation.”130 This Article will address efficiency shortly. For present purposes, however, once one admits that some notion of redistributive justice (i.e., notions of fairness or equity), it is difficult to explain why some level of exemption is precisely the correct amount of fairness.131 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.132

2. Efficiency.—Specifying a social welfare function is controversial. There is no consensus on the proper objective function. Perhaps for this reason, “[t]o the extent that supporters of proportional taxation do offer a positive case for their position, the argument is based almost exclusively on efficiency grounds.”133 Flat-tax advocates note that progressive taxation may impose stiff marginal tax rates (i.e., the 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

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129 Fried, supra note 113, at 161–62 (last alteration in original) (quoting FRANK TAUSSIG, PRINCIPLES OF ECONOMICS 499 (1999)).
130 Bankman & Griffith, supra note 112, at 1966.
131 Blum 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, JR., supra note 9, 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 217.
132 See Bankman & Griffith, supra note 112, at 1913.
133 Id. at 1966.
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, Bankman and Griffith describe an efficient income tax that is progressive in its overall structure. Specifically, James 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 so they have less incentive to substitute leisure for work. \footnote{Id. at 1918-21; see also id. at 1945-48; James A. Mirrlees, An Exploration in the Theory of Optimum Income Taxation, 38 REV. ECON. STUD. 175 (1971).}

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; in other words, because taxpayers can reduce their tax bill by working less, both forms of taxation 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." \footnote{Id. at 1913; see also Fried, supra note 113, at 190-91.} As has been noted, however, there is almost universal opposition to head taxes and regressive taxes in general. This opposition 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 a head tax and even from strictly proportionate taxation (i.e., without any low-income exemption).

Blum and Kalven point out a somewhat nonconventional 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." \footnote{BLUM & KALVEN, JR., supra note 94, at 77.} Blum and Kalven cite Henry C. Simons for an extended defense of what might be characterized as extortion:

\begin{quote}
[P]rogressive 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.\footnote{Id. at 71 n.178 (quoting Henry C. Simons, Some Reflections on Syndicalism, 52 J. Pol. Econ. 19 (1944)).}
\end{quote}
Epstein takes a less sanguine view, deeming redistributionary measures designed to buy social peace as "little more than a strategic bribe." \(^{138}\)

It may seem strange to classify this social bribery as an efficient practice because 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, one assumes that the poor are willing and able to inflict costs on their wealthier neighbors, redistributionary taxation may be superior to the alternatives (e.g., 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, both of which revolve 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 countervailing burdens on those benefiting from a safe environment for earning income and imposes such burdens on those forms of wealth that generate income (e.g., stock dividends, bond interest, and patent royalties). Yet, forms of wealth that do not generate income, such as furs, jewelry, and 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. \(^{139}\) In theory, we could impose a separate tax on such wealth, but administratively this might be expensive. However, 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.\(^{140}\)

\(^{138}\) Epstein, supra note 5, at 316.

\(^{139}\) In a future article, the author 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); thus, 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 would not 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. The author argues 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.

\(^{140}\) "\(\Delta\) is 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. 499, 503 (2000) (providing data to support assertion).
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. Arthur Pigou, a leading neoclassical economist, and no radical, suggested as much:

[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. 141

Leo Martinez captured the same idea: "The intangible well-being represented by economic and social stability are perhaps most valuable to the wealthy." 142 These observations are nothing new. As Stanley has noted:

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 most benefits from the government and therefore had the greatest responsibility to pay a tax on the product of those benefits. 143

Arguments that the wealthy benefit disproportionately from goods and services provided by the state thus have a long pedigree.

Implicit in these arguments is the idea that, at least to some extent, we can apportion the benefits of basic governmental services, such as police and courts. Such services certainly have some of the attributes of public goods; accordingly, there is no way to determine market prices (i.e., fees) for their consumption. Blum and Kalven expand on the concept of public goods in order 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. 144

Massey makes many of the same arguments about the military, as well as the 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 propor-

142 Martinez, supra note 98, at 147.
143 Stanley, supra note 3, at 46.
144 Blum & Kalven, Jr., supra note 94, at 77.
tionally with its value... the cost of protecting intangible assets is a fixed cost, unrelated to the assets' value.  

These opinions, that basic peace and order either benefit citizens equally or in strict proportion to wealth, are based on intuition alone; moreover, 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 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 plausible. The greater the wealth at stake, the more others will be willing to expend to expropriate it. For example, valuable patents are more attractive targets for infringement, and thus the state will need to devote more regulatory, police, and judicial resources to protecting such property rights.

Finally, note that using only an income tax 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; 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. Both target ability to pay in a rough way and it is not clear which more precisely serves this standard of fairness. "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... however, a person's wealth appears to be as fair a basis for distributing a tax as her income." 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; however, these arguments are hardly dispositive. As a matter of history and positive law, the case for the legality of progressive taxation is strong. Nonetheless, advocates of progressive taxation have failed to provide guidance on how to determine when taxes turn into takings. Missing is a doctrinal principle that unifies taxation with other sources of potential takings and that demonstrates, under general principles of takings law, that progressive taxation does not violate the Takings

145 Massey, supra note 2, at 106–07.
146 Id.
147 Shakow & Shuldiner, supra note 140, at 500.
148 After 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 an 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 112, at 1914; see also Fried, supra note 113, at 193–95.
Clause, even though other taxes do (e.g., the "Bill Gates Tax"). The classical view’s two-part test (wide impact and fair apportionment) 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. One then confronts the second part of the classical test, whether progressive taxation "unfairly apportions" the burden of taxation. This part of the test provides little guidance, as many divergent definitions exist for unfair apportionment. Moreover, this standard does not exclude arguments, such as Epstein’s, that progressive rates by definition impose disproportionate burdens. Accordingly, the next section, Part 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.

IV. THE CONTINUOUS BURDENS PRINCIPLE

In arguing that all progressive taxation amounts to a taking, Massey complains 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." 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, like the Bill Gates Tax example discussed previously, 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.”

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."
The Continuous Burdens Principle (CBP) developed in this Part provides 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, “How 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?”\(^\text{152}\) The 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.—The CBP can be viewed as no more than a formal, and more rigorous, version of the principle enunciated in Armstrong: 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.”\(^\text{153}\) Instead of looking at absolute burdens to property owners, independent of burdens imposed on other citizens in the condemning jurisdiction, the idea is that the marginal burden imposed on an owner or group of owners must be examined. 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.

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

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If there are discontinuous jumps in the series—any difference that exceeds some minimal threshold—there may be a taking.

In order to explore the virtues of the CBP, I will use burden curves, which are simple graphical devices that encapsulate 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. One constructs a gross burden curve by “lining up” property owners in order on the horizontal axis, from the person least burdened by a

\(^{152}\) Epstein, supra note 49, at 435.

\(^{153}\) Armstrong, 364 U.S. at 49.
governmental measure, to the person most burdened. One then graphs the burden imposed on each person along the vertical axis. Given the ordering of persons along the horizontal axis, the resulting curve can never slope upward; it must be everywhere flat or decreasing. Consider, for instance, a gross burdens curve for the taking of a single house without payment of compensation:

![Diagram of Gross Burdens, Taking of a Single House Without Compensation]

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

One derives 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). Weighing benefits as implicit compensation is an established rule in condemnation law.\(^\text{154}\) When one factors in benefits, one does 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 one is 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, which are violations of the CBP. Consider the net burden curve for the taking of a single house, without compensation, under the assumption that the resulting governmental project, such as a road, benefits all citizens equally:

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, one must carefully specify how one measures burdens and benefits. There are two obvious candidates: absolute dollars and percentages of the property taken by the government. Embedded in this choice between the two alternatives are fundamental issues of fairness of which there is little social consensus. This section makes no attempt to prove that one choice or the other is fairer, based on some axiomatic theory of justice or on a carefully defined social welfare function. Rather, this subsection 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 the argument of this Article, claim that progressive income taxation is a taking.

If one uses 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 one uses absolute dollars due, even a flat tax produces discontinuous burdens:

FIGURE 3

Gross Burdens of Flat Tax
Burdens in Absolute $\
Bill Gates Has Outlier Income

0

2nd Highest Income Bill Gates

Gross Burden
Bill Gates's tax bill will substantially exceed that of the next highest taxed person; 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.\textsuperscript{155}

Using percent burdens 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 fails to eliminate one problem faced by existing takings law: the so-called denominator problem. If one is going to gauge burdens by percentages, one must choose a denominator by which to divide the dollar burden imposed to reach a percent diminution. This is a difficult problem with which courts continue to struggle.\textsuperscript{156} For income, the denominator is relatively uncontroversial: “[A]ll income from whatever source derived,”\textsuperscript{157} less any deductions and credits permitted under the tax code. Similarly, a wealth tax, including all wealth, in whatever form held, seems workable and relatively uncontroversial. For land, and perhaps some forms of personal property, however, the denominator is less clear. Does one include parcels adjacent to a condemned parcel owned by the same person? This Article does not address the denominator problem; rather, it imports without modification those standards that courts have developed to address the issue.

3. Applying the CBP.—This Article begins its 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, so there is no need to redraw them. The net burden curve shows, 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 this is the canonical case of a taking, it is important, if not impressive, that the CBP deems 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.

\textsuperscript{155} It 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 off discontinuously to the 23rd highest income.

\textsuperscript{156} The 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 Constr., Inc. v. Dep’t of Natural Res., 551 N.W.2d 413 (Mich. App. 1996). See generally \textsc{Steven J. Eagle, Regulatory Takings § 11.7 (2d ed. 2001)} (ascertaining the “Takings Fraction” or “Relevant Parcel”).

Raising the gross burden curve by a fixed amount for each person factors in the addition of benefits. 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 immediately above, there is no natural base to use as the denominator in calculating percent net burdens. Thus, there is not a unique ordering of the net burdens imposed on each citizens. Thus, the use of a flat line to model benefits is arbitrary. In studying the CBP, however, one is not so much worried about the precise shapes of the burden curves as with the existence of discontinuous jumps. For instance, it seems unlikely that a new road confers discontinuous benefits on those whose property is not taken for the project. Some landowners will benefit more than others, such as those owning land close to an exit, but these benefits are likely to be continuous, as the owner of land two-hundred feet from an intersection will benefit less, but only slightly less, than the owner of property one-hundred feet from the exit.

Next, consider the gross burdens curve for the two taxes I wish to distinguish. First, the “Bill Gates Tax” gross burden curve looks exactly like the curve for the expropriation of a single parcel. The curve’s similarity to the expropriation of a single parcel captures the intuition that, if focused narrowly enough, a tax looks like a classic example of a taking.
Now consider the gross burden curve for a hypothetical progressive income tax bearing a rough similarity to the current U.S. personal income tax.
This graph reflects a tax, much like current taxation schemes, with an exemption for the lowest earners. The curve depicts burdens for an income tax with three marginal rates, with each rate applied to income above three corresponding 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. 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 or jumps because burdens increase in small increments from the lowest earner to the highest. Thus, before accounting for benefits, this gross burdens curve suggests that a prototypical progressive income tax is not a taking under the CBP.

These gross burden curves, of course, do not account for the 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 phrase "public good" is a technical term that requires some elaboration. 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, such as police, fire, and military protection; roads, canals, ports, airports, and air traffic control; and clean air. The list of such goods and services is endless. 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 nonrivalrous: the fact that Anne "consumes" police services every day does not generally diminish Betty's ability to enjoy police protection. The same, however, cannot be said of a Big Mac. Second, it is difficult or impossible to exclude anyone from consuming the good or service. Nonexclusivity makes it difficult to rely on private parties to supply a good, because an inability to exclude makes it difficult to charge anyone for the good. The state, if anyone, must provide such goods.

But 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, and the same clean air.

The impossibility of charging each citizen a unique price for public benefits undermines simpler assertions that various taxes violate the Takings Clause. As a critic of the first income tax's progressive rates rhetorically asked, "What 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. The post office lacks the attributes of a public good: consumption is rivalrous (if a mailperson delivers my mail, he cannot deliver your mail at the same time) and exclusive (you cannot 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 are not amenable to exact definition.

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

![Figure 7](image)

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159 Hackett, supra note 99, at 440.
In each case, the gross benefits curves shifted upward. The shift is not equal for all points on the curve, as it would have been if one was measuring burdens/benefits in fixed dollars. Here, the curves represent percent burdens/benefits and, hence, a dollar's worth of benefits or burdens has a greater impact the further one goes 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 accordingly, one's 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. The following two diagrams illustrate the net burden curves for the two taxes under this assumption:
FIGURE 9

Net Burdens, Bill Gates Tax, Benefits Proportional to Income

FIGURE 10

Net Burdens, Progressive Income Tax, Benefits Proportional to Income
Because these graphs add percent benefits to gross benefits as a percentage of income, the addition of benefits here simply lifts each curve by a fixed amount. With benefits increasing as income increases, the discontinuous jump in the Bill Gates taxes shrinks 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. In other words, the difference in burden between any two taxpayers remains relatively small; accordingly, progressive income taxation is not a taking under the CBP.

The third and final distribution of benefits considered here is the possibility that public expenditures disproportionately benefit the wealthy.
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 examples (Figures 9 and 10), 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, which explains 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 marginal tax rates more than offset the rate at which benefits increase with income. 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 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 stands in stark contrast to the argument that anything but a flat-rate income tax is unconstitutional, which assumes that the benefits from government programs increase precisely in proportion with income. Given the impossibility of calculating how much governmental expenditures benefit persons across income or other independent variables, like wealth, the need to make such an assumption renders the case for strictly proportionate taxation brittle. The case for flat-rate taxation 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 such a 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. For example, 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 peculiar system; if nothing else, they would simply refuse compensation over $100,000. 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 such an absurd tax regime, while allowing all taxpayers to avail themselves of exemptions, makes it extremely difficult to burden one person or one group heavily while leaving all others untouched. For example, assume that 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, he would bear a discontinuous burden. Such 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, in fact, single these individuals for a unique burden: they pay a tax rate on a significant portion of their income not felt by anyone else.

\[160\] This is not strictly true. Even without the exemption, those with incomes above $200,000 would be better off accepting the compensation.
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.\footnote{Note that the federal income tax during the Civil War, despite its very high exemptions, still reached thousands of citizens. See supra text accompanying notes 85-86.}

4. Applying the CBP to Other Taxes and the Draft.—The progressive taxation of estates and inheritances, by both state and federal government, predates enactment of the Sixteenth Amendment; moreover, the Supreme Court repeatedly rejected constitutional challenges to these taxes.\footnote{Magoun v. Ill., Trust & Sav. Bank, 170 U.S. 283 (1898) (upholding progressive state inheritance tax); Knowlton v. Moore, 178 U.S. 41 (1900) (upholding progressive federal inheritance tax); New York Trust v. Eisner, 256 U.S. 345 (1921) (upholding progressive federal estate tax). An inheritance tax is levied on recipients individually; an estate tax is levied on the decedent’s property before distribution. BLACK'S LAW DICTIONARY 550, 783 (6th ed. 1990).} The Supreme Court’s justification for such taxes, however, is very formal, and, well, un-American. As the Court declared in Magoun v. Illinois Trust & Savings Bank, “[t]he 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 it.”\footnote{Magoun, 170 U.S. at 288.} There is no doubt that this holding reflects
the law of England during the founding era. The rule, however, is rooted in feudalism and the existence of a single overlord. Locke, a primary source of property theory for the founding generation, explicitly rejected the notion that inheritance existed at the pleasure of the king or queen: "Every man is born with . . . a right, before any other man, to inherit with his brethren his father's goods." And at least one state court explicitly rejected the Supreme Court's reasoning in Magoun as inimical 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.

Thus, the Supreme Court's doctrinal justification for progressive estate taxes is questionable. The CBP, however, provides a much firmer defense of progressive estate taxation. For all but extreme cases, where the exemption levels are so high that they impact one or only a few taxpayers, the burdens of the tax are still continuous under the CBP because even those paying the tax get the benefit of the fairly high, but not extraordinarily high, exemption.

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 purpose of applying the CBP, however, the key point is that, in practice, sales taxes are almost always assessed at a single rate; accordingly, 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 savings, which escapes taxation, increase rapidly with income, the wealthy pay much less sales tax, as a proportion of income, than the poor. One would then expect that scholars who argue that any deviation from strictly proportional taxation would oppose a general sales tax, but I could not uncover a single article making this argument. Indeed, Epstein maintains that a general

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164 Blackstone was clear that there was no natural right to inherit under English law; it was permitted at the pleasure of the sovereign: "Wills therefore 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 SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 479 (William Draper Lewis ed., 1900). 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 (1833).


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

167 In this and the following example, one assumes 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.
sales tax is permissible. \(^{168}\) Perhaps Epstein’s argument is that a sales tax is strictly proportional to its base, which is essentially purchases, as a flat-rate income tax is strictly proportional to its base, which is income. 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. \(^{169}\) Would advocates of flat-rate income taxation permit this end-run around their strict proportionality requirement?

One common means of mitigating the regressivity of a general sales tax is to exempt “necessities” like food and rent from the tax. The rationale behind such exemptions rests on the generally acknowledged fact that the poor spend a larger portion of their income than the wealthy on these items. Accordingly, exempting these items lightens the burden of taxation from the poor. An extreme version of this practice is so-called luxury taxation, which is an excise tax levied on a relatively small set of goods, like yachts and expensive jewelry consumed largely by the wealthy. Epstein argues that such luxury taxes, as well as all narrowly based sales taxes, impose disproportionate burdens and, hence, are unconstitutional. He cites two examples in support of his argument. First, in \(\text{Rossmiller} v. \text{State}, 89 \text{N.W. 839 (Wis. 1902)}\), the Wisconsin Supreme Court struck down a statute that declared all ice on lakes state property and that imposed an excise tax on the ice extractors. \(^{170}\) The court reasoned that the statute destroyed citizens’ preexisting profits à prendre\(^{171}\) to remove ice. Epstein defends the court’s holding, noting that the tax imposed disproportionate burdens on certain citizens, like the plaintiff who had made investments in ice removal before passage of the statute. \(^{172}\) Second, Epstein attacked Montana’s severance tax \(^{173}\) on coal, arguing that it reduces the value of Montana coal owners’ property. He generalizes from such cases to argue that any nongeneral sales tax will impose disproportionate burdens on sellers of the taxed item(s). \(^{174}\)

Epstein, however, makes some important exceptions to his rule requiring a sales tax to reach all goods. He states that the government may impose excise taxes on goods that have negative external effects on other property owners, such as nuisances, without paying compensation. In addition, he argues that the government may limit the use of a scarce resource by imposing a tax on an activity affecting the availability of the resource, like fishing for a depleted species. These exceptions Epstein notes are in keeping with accepted doctrine that nuisance regulation and solutions to common pool problems are among

\[^{168}\text{EPSTEIN, supra note 5, at 293–94.}\]
\[^{169}\text{See generally Shakow & Shuldiner, supra note 140.}\]
\[^{170}\text{Rossmiller v. State, 89 N.W. 839 (Wis. 1902).}\]
\[^{171}\text{See BLACK’S LAW DICTIONARY 1211 (6th ed. 1990) (defining profit à prendre).}\]
\[^{172}\text{EPSTEIN, supra note 5, at 222–24.}\]
\[^{173}\text{Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981). Severance is just a fancy name for an excise tax, supposedly assessed at the instant the coal is severed from the earth by mining.}\]
\[^{174}\text{EPSTEIN, supra note 5, at 293–94.}\]
the primary purposes of state regulation and thus not considered takings. 175

Even acknowledging such justifications for 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, namely 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, and in particular the elasticities, of the demand and supply curves. 176 Epstein seems to assume that the incidence is on the suppliers alone. If, however, 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 judicial doctrine. The founding generation singled out carriages, which were a luxury item, for taxation. In addition, the nation imposed tariffs asymmetrically throughout the 1800s, leaving some imports untaxed, others taxed lightly, and yet others taxed heavily. 177 The courts have given states broad latitude in selecting the targets of taxation. In Dane v. Jackson, 178 for instance, the Supreme Court held that a Massachusetts tax on income from intangible property was constitutional despite its admitted effect of transferring tax revenue from some localities to others. Here, the Court clearly deferred to legislative tax base selections:

[S]ince 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. 179

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175 Though Epstein believes that taxation of those imposing costs on society is a not a taking, he would limit the application of this rule. For example, he disagrees with the holding in City of Pittsburgh v. ALCO Parking Corp., 417 U.S. 369 (1974), where the Court upheld a 20% tax on private parking lots against a 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. Id.; see also Epstein, supra note 5, at 140–43. 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; although they are 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.

176 Musgrave & Musgrave, supra note 158, at ch. 15.

177 See supra note 76 (discussing Carriage Tax); Stanley, supra note 3, at 25–27 (discussing asymmetry of tariffs).

178 256 U.S. 589 (1921).

179 Id. at 598–99.
In his treatise, written during this classical period, Cooley concurred with the Court: "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."\textsuperscript{180} Cooley denied that state constitutional provisions decreeing uniformity in taxation limited the legislature's choice of a tax base—a clause facially much more on point than general takings provisions.

As it did with income taxation, the CBP helps distinguish cases in which courts accepted and rejected challenges to specific excise taxes. Consider, for example, the \textit{Rossmiller} and \textit{Dane} decisions. \textit{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. Accordingly, the burden curve for the tax was smooth and did not violate the CBP. Conversely, harvesting ice likely involved relatively few producers, so 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, which is a tax that benefits most citizens, consider the military draft. Others have noted that the draft, in many respects, looks like a taking.\textsuperscript{181} Its net burden curve bears this out:

\begin{figure}[h]
\centering
\includegraphics[width=0.5\textwidth]{draft_net_benefits.png}
\caption{Net Burdens, Draft}
\end{figure}

\textsuperscript{180} \textsc{Cooley, supra} note 13, at ch. 14, at 632.
\textsuperscript{181} \textsc{Blum & Kalven, Jr., supra} note 9, at 7–8; Fischel, \textit{supra} note 73, at 24–28.
Here, the curve has been drawn under 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 the draftees, such as the relinquishment of private-sector wages. The steep jump in net burden between those drafted and everyone else violates the CBP.  

There is little if any doubt, however, that as a matter of current law the draft is not a taking that requires compensation. It thus represents the first example of a measure that violates the CBP yet is not, and has never been, ruled a compensable taking. That said, recognition of the heavy burden imposed by the draft has led legislatures to confer special benefits on soldiers more than once. The post-WWII “GI” bill and veterans’ hospitals are two recent examples. Consider, also, Booth v. Town of Woodbury, a splendid example from the Civil War. The Town of Woodbury, relying on a state statute, passed an ordinance raising, by general taxation, $200 for each of the thirty-two 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.” Some non-draftee taxpayers challenged this additional tax. Counsel for the town, in response to this challenge, 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.

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

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182 Fischel, supra note 73 (arguing that the draft is only a taking when the nation drafts a small percentage of its citizens). This Article will reach the same result—that burdens placed on majorities are almost never takings—but the reasoning here will differ. Fischel, inter alia, borrows Mischel’s “demoralization” model, see discussion supra Part 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. Fischel, supra note 73. 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.

183 32 Conn. 118 (1864).

184 Fischel, supra note 73, at 48 (citing THE DRAFT AND ITS ENEMIES 57–58 (John O’Sullivan & Alan M. Meckler eds., 1974)).

185 Booth, 32 Conn. at 122–23.
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. 186

Based on these arguments, the court rejected an explicit takings challenge to the town ordinance, ruling that this was a tax exacting from each taxpayer “their share of a justly imposed and apportioned general public burden, and the equivalent is presumptively received in the benefits conferred by the government.” 187 In addition, 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 benefiting a broad class of the community—immune from takings challenges. There are, as just acknowledged, a few exceptions to this immunity, namely the Bill Gates tax or a narrowly focused sales tax. These exceptions, however, are consistent with the current, and long-standing, understanding of the legislature’s broad powers to choose a particular mode of taxation. As Cooley noted,

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 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 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 compensation—to spoliation under the guise of exerting the power of taxation.” 188

One straightforward way to interpret Cooley’s phrase “flagrant and palpable inequality between the burden imposed and the benefit received,” 189 which is the point at which the Supreme Court says that taxation can amount to an “arbitrary taking,” 190 is as a violation of the CBP. A large, discontinuous jump in the net burden curve for a tax corresponds well with such language.

186 Id. at 123–24.
187 Id. at 130.
188 COOLEY, supra note 52, at 216 (citing Dane v. Jackson, 256 U.S. 589, 599 (1921)).
189 See id.
190 Dane, 256 U.S. at 599.
5. Applying the CBP to Zoning and Other Forms of Regulation.— Although this Article has developed the CBP as a means to draw the line between taxation and takings, this subpart, and the following subpart IV.B, endeavor to demonstrate that the CBP operates under a general principle embedded in takings law. This section applies the CBP to zoning and other common forms of regulation; subpart IV.B fits the principle into the broader framework of the Supreme Court’s existing takings jurisprudence.

As an example, zoning both benefits and burdens restricted parcels. It benefits each owner by limiting neighbors’ land use, but burdens each owner with roughly symmetric restrictions. Ideally, these benefits and burdens would make every landowner better off, but in practice that is rare. Consider, for instance, the following scenario. Greenacre, a semi-rural area, fifteen miles from any shopping venue, is zoned entirely single-family, and is fully developed. Brownacre, directly across a major road from Greenacre, was unimproved and unzoned until new legislation limited it to single-family use. This zoning will sharply reduce the value of parcels in Brownacre that border Greenacre: the parcels’ closeness to Greenacre, along with their close proximity to a major road, made them ideal locations to satisfy Greenacre’s commercial needs. The farther one travels into Brownacre, however, the smaller the value of such land-use opportunities. Indeed, at some point, one presumes the benefits of restricting neighbors will exceed the burdens on a particular owner.191

Under Euclid v. Ambler Realty, the zoning of Brownacre is undoubtedly constitutional. Those who believe that progressive taxation is a taking naturally argue that so too is such zoning. In both cases, net burdens are not strictly proportional because the “reciprocal benefits” of zoning do not offset, even roughly, disproportionate diminutions in value imposed on those in Brownacre who own land across the street from Greenacre. As Epstein argues, 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. [I]t 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 . . . .192

The result under the CBP, on the other hand, dovetails with existing law and would hold 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 one thinks of parcels as the base for this “zoning tax,” then there are no large

191 The Article discusses the unusual case of laws for which burdens exceed benefits for everyone infra Part IV.C.
192 EPSTEIN, supra note 5, at 273.
jumps in the tax rate, and thus under the CBP, there is no taking.

Although generally valid, zoning, like taxation, can cross the line, violate the CBP, and amount to a taking whenever it burdens certain landowners much more than their neighbors. 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. 193

More generally, the Supreme Court has found zoning a taking where, even though contemplated for general application, the zoning applies only to one parcel. 194

General economic legislation, like zoning, is presumptively valid but such measures may transgress the Takings Clause in extreme cases. For example, the liability for coal miners' health costs at issue in Eastern Enterprises195 was such an extreme case. Although the author disagreed with the Court's 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 the burden imposed on Eastern Enterprises and every other segment of society with similarly loose ties to the miners was huge and there was no 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 Eastern Enterprises 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. 196

The coal industry also supplied, arguably, the most important takings case the Supreme Court ever decided, Pennsylvania Coal Co. v. Mahon. 197 The


194 Neectow v. City of Cambridge, 277 U.S. 183 (1928). In general, as the 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, 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 as a taking.


196 Epstein, supra note 49, at 442.

197 260 U.S. 393 (1922).
Court’s holding 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.\(^{198}\) In an oft-quoted passage, the Court held that the diminution in value to the mining company’s property rights went “too far.”\(^{199}\) This Article will return to the Court’s diminution test in the next section. For present purposes, however, it is clear that the CBP provides an alternative ground for the finding that 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 and Current Takings Doctrine

Although the CBP is thus consistent with the outcome of *Mahon*, it is not consistent with its so-called *diminution* test, which is 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 above, the CBP calls for a relative, contextual comparison, attempting to determine if a plaintiff’s burden significantly exceeds the imposition on the next most burdened person. This is in stark contrast to the absolute, context-free diminution test currently employed by the Supreme Court.

Although Supreme Court takings doctrine is not entirely clear, it appears that the Court has refined *Mahon*’s diminution test for regulatory takings cases into a three-pronged test first applied in *Penn Central Transportation Co. v. New York*. This test considers (1) “the economic impact of the regulation on the claimant,” (2) “the extent to which the regulation has interfered with distinct investment-backed expectations,” and (3) “the character of the government action.”\(^{200}\) The last prong of the test seems to refer to per se rules for specific types of governmental conduct, such as physical invasions, regulating nuisances, and destructions of all value.

One can think of the CBP as a concrete rule to operationalize the vague first and second prongs of the *Penn Central* test, regarding “economic impact” and “interference with investment-backed expectations.” First, the CBP captures the economic impact of a regulation on property owners. Second, investment-backed expectations fit CBP-friendly cases like *Rossmiller*,\(^ {201}\) in which regulation will impact a small group of property owners who have made investments in an activity that has been narrowly targeted for taxation or other forms of regulation.

The majority opinion in *Penn Central*, however, indicates that the

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198 *Id.* at 412–13.
199 *Id.* at 414–15.
201 89 N.W. 839 (Wisc. 1902).
Court did not read its first two prongs in a manner consistent with the CBP. The opinion rejected Penn Central Railroad’s takings challenge to New York City landmarks preservation laws, which 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 admitted that the landmark laws reached only four hundred buildings and thirty-one small districts in New York.\textsuperscript{202} The dissent, however, gives a statistic much more relevant for applying the CBP: the regulations affected only 0.04\% of landowners in the City.\textsuperscript{203} Ignoring the relevant tax base, Justice Brennan’s majority opinion explicitly denied that New York’s landmark preservation laws were “like discriminatory, or ‘reverse spot’ zoning. . . . [T]he New York City law embodies a comprehensive plan to preserve structures of historic or aesthetic interest wherever they might be found in the city.”\textsuperscript{204} Despite the new three-prong veneer, the Penn Central Court seems to have simply applied Mahon’s 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.

Similar reasoning in \textit{Andrus v. Allard}\textsuperscript{205} led to another decision at odds with the CBP’s approach to the first two arms of the \textit{Penn Central} test. In \textit{Allard}, the Court held that a statute banning 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 determined that it was “crucial that appellees retain the rights to possess and transport their property, and to donate or devise the protected birds.”\textsuperscript{206} The Court, in all seriousness, suggested that eagle feather artifact owners could generate income by displaying the items and charging admission. It is extraordinarily doubtful that the income generated by such viewings would even approach the feathers’ retail sale value. For example, witness the ratio of sales to display income for collectibles in general, such as stamps, coins, and autographs. The statute banning 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.\textsuperscript{207}

\textsuperscript{202} \textit{Penn Cent.}, 438 U.S. at 132.
\textsuperscript{203} Id. at 138 n.1.
\textsuperscript{204} Id. at 132.
\textsuperscript{205} 444 U.S. 51 (1979).
\textsuperscript{206} Id. at 66.
\textsuperscript{207} One might argue that the statute in \textit{Allard} imposed a continuum of burdens, because 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 at supra text accompanying notes 144–45. Though the CBP does not solve
The third prong of *Penn Central*, regarding "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 in which 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.²⁰⁸ A number of commentators have attacked this rule as being excessively formal and as lacking any policy justification.²⁰⁹ It is inconsistent with the CBP, because it compensates in cases where burdens are small and continuous. The outcome of *Loretto* illustrates the futility of the rule and its disconnect with the *Armstrong* principle regarding unfair burdens. After all, the 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, under *Lucas v. South Carolina Coastal Council*, government measures that destroy "all economically viable use" of property are takings.²¹⁰ Here, 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 CBP 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.²¹¹

²¹¹ Justice 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.* at 1074. Although the concept of "general application" has some overlap with the CBP, Stevens focuses on geographic generality. The CBP focuses on generality of economic impact. Responding to Stevens's 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.* at 1027 n.14. Whether this statement is at odds with the CBP depends on the meaning of the phrase "plundering landowners generally."
C. Normative Foundations for the CBP

Thus far, the discussion and defense of the CBP has been almost entirely doctrinal. Specifically, the CBP has been shown to be consistent with the "no unfair burdens" principle from Armstrong. Moreover, the CBP provides a coherent guide for drawing the line between takings and taxation and it is consistent with much, though not all, of the existing body of takings case law.

This subpart offers grounds for supporting the CBP as sound social policy. The normative case for the CBP is a political one: the CBP 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: "[T]o 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." 212

For illustration, consider the simplest example 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:

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Pure redistribution adds a significant structural constraint on the net burden curve. If one plotted 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. Because net burden curves show percents instead of absolute dollar amounts, the relationship is not quite so simple and 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 (area A) and the losers (area B). If one thinks 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:

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

Put into words, this equation states 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, as will be demonstrated, makes it difficult for stark “us-them” redistributive laws to satisfy the CBP. The example graphed above obviously violates the CBP. However, 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 the Figure 16 on the next page. The curve in Figure 16 still violates the CBP. Although shrinking the majority coalition and gradating benefits and burdens reduces the “jump” between the last member of the majority and the first member of the minority, a noticeable discontinuity remains.

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213 To 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.

214 For an interesting discussion of the relationship between us/them, majority/minority dichotomies and payment of compensation, see Carol M. Rose, Property & Expropriation: Themes and Variations in American Law, 2000 UTAH L. REV. 1.
If the majority continues with both tactics, namely decreasing the size of the majority that is redistributing wealth from the minority and making gradations in benefits and burdens, it will end up with a perfectly straight line, without any "jumps," that satisfies the CBP.
In political terms, however, it will be difficult to muster a vote for such a tax proposal because the measure no longer enjoys majority support. In other words, the size of the benefiting coalition shrinks so much that the median voter no longer reaps any benefits and has little reason to support the measure. This series of examples, therefore, demonstrates that the CBP places pressure on redistributionary coalitions to shrink their size and to tier benefits and burdens.\textsuperscript{215}

The CBP, however, does not make redistribution entirely illegal; for instance, the example in Figure 17 and the progressive taxation examples discussed above may be redistributionary, depending on the assumptions made about how the benefits of government increase with income/wealth. The CBP does, nonetheless, 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. Undoubtedly, the appeal of this partial curb on redistribution as a matter of social justice is controversial, given divergent notions about inequality, fairness, and justice.\textsuperscript{216}

It is, in fact, possible for a willing majority coalition to redistribute wealth to the minority. Many current social programs do precisely this. Moreover, the courts have long deemed permissible such redistribution, at least for some purposes. “[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.”\textsuperscript{217} Thus, there is no general constitutional barrier to legal measures that redistribute income via taxes, expenditures, and transfer payments.

\textsuperscript{215} Some taxes may mix redistribution with other motivations. Tariffs, discussed in more detail at infra Part 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 Takings 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” (e.g., fostering homegrown industry) which may justify Takings 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.\textsuperscript{216} The leading modern defense of redistribution is JOHN RAWLS, A THEORY OF JUSTICE (rev. ed. 1999); the most thorough reply to Rawls is ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA (1974).\textsuperscript{217} Booth v. Woodbury, 32 Conn. 118, 130 (1864).
The resulting net burden curve for such redistributions may have two sorts of discontinuities. First, there may be a jump between the least-benefitted minority member and the least-burdened majority member.

Figure 18

Although such a redistribution measure facially violates the CBP, normatively it is not troubling because it is self-imposed: the majority has agreed to redistribute some of its wealth to the minority. The solution for unhappy members of the majority is not constitutional; it is political. They merely have to convince their too-generous cohorts in the wealthier group B to reverse the charitable policy. This solution, however, may not always work because other 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 CBP does forbid is targeting a subset of the majority for a distinctly heightened burden. Figure 19 depicts a social subsidy program for a minority that its beneficiaries and a portion of the majority support, thus imposing the costs of the program on other nonbeneficiaries. 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.
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. 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 because a majority that finds the burden heavy enough can elect a government that will reverse course.

Examples 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 Owen, 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 them [the takings clause] with the imposition of large public burdens upon the people of the present without any hope of return to them ... burdens 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
Now drop the assumption that the social measure under consideration simply redistributes wealth. In most cases, one would hope, governmental actions produce social gains so that the benefits (region A in the figures above) will exceed the burden (region B). The Court has never interpreted the Takings Clause to require even rough equality or fairness in the distribution of gains from public projects. The CBP, which is 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, AND SPECIFIC TAXES

The redistributive legislation just analyzed differs from many statutes because, in addition to being able to determine burdens, which one assumes are always identifiable, one could discern the benefits of such legislation with relative precision. This usually is not possible for the general revenue taxes discussed so far because governments use income, estate, sales, and most other tax revenues to fund a broad range of services and goods. Simply put, the benefits cannot be pinpointed in many situations.

For some government taxes, along with special assessments and user fees, however, one can identify beneficiaries and the size of their gains easily. It is especially easy in regard to governmental fees 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. Special assessments are one step removed from fees. They provide a mechanism to compel all members of a group benefited by some project, most typically a road, to pay some “fair share” of the project’s cost, like a share based on each owner’s frontage. As with the simple user fee, the class of beneficiaries is easily identifiable when it comes to special assessments. Compulsion is necessary to avoid free-riding. In addition to fees and assessments, this Part considers what will be called “specific” taxes, meaning those taxes levied to provide a specific benefit to identifiable beneficiaries. Redistributionary taxation is one example of such “specific” taxation and property taxation to fund schools is another.

The basic question, however, remains unchanged: how does one draw the line between acceptable fees, special assessments, and specific taxes on the one hand, and unacceptable variations 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

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Footnotes:

[219] To the extent the “fee” exceeds the government’s cost of delivering the service or good, it includes an implicit tax; presumably, it is used as general revenue and subject to review under the Takings Clause.

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."\(^{221}\) Accounting for benefits as well as burdens is nothing new for takings law; courts have long weighed "reciprocal benefits," as well as implicit or in-kind compensation, in deciding whether or not an owner has suffered a taking.\(^{222}\)

Epstein, applying his strict disproportionate burden standard, generally approves of special assessments because the law governing them requires some proportionality between the benefit conferred and the assessment imposed.\(^{223}\) Yet, the case law's proportionality requirement is extremely loose, which gives the state wide leeway in setting the assessments due from individual property owners. In the early case of *Griffin v. Mayor of Brooklyn*,\(^{224}\) for instance, 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.\(^{225}\) Assessments, the court stated, "shift the burthen of this taxation upon that part, or class . . . whose lands were benefited by the work, and impose[d] it on them in proportion to the benefit they respectively received therefrom."\(^{226}\) The court held 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.\(^{227}\)

The *Griffin* court also went on to note the fundamental similarity between assessments and user fees:

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 burden with the benefit.\(^{228}\)

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\(^{221}\) Fried, *supra* note 113, at 182.

\(^{222}\) Id.

\(^{223}\) *EPSTEIN, supra* note 5, 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.* at 289-90.

\(^{224}\) *4 N.Y. 419* (1851).

\(^{225}\) *Id.* at 425.

\(^{226}\) *Id.*

\(^{227}\) *Id.*

\(^{228}\) *Id.* at 431.
Based on this similarity, the court indicated that holding special assessments invalid would also require holding tolls and other user fees invalid. The court deemed this result absurd, as "[t]he difference is only in the mode in which each tax-payer's share of the burden is ascertained."\textsuperscript{229} The Supreme Court articulated a similar standard in \textit{Houck v. Little River Drainage District}:

[While 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 Fourteenth 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.]\textsuperscript{230}

Another court voiced a similarly adaptive standard:

The burdens of the state never have been, and never can be, distributed with absolute 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.\textsuperscript{231}

The general rule, then, is that even a slight, tenuous correlation between the amount paid in taxes or assessments on the one hand, and the benefits received on the other hand, is sufficient to shield a measure from a takings challenge. Under this standard, unsurprisingly, courts generally uphold special assessments, though a few courts have seemed to require a

\textsuperscript{229} \textit{Id.}. 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, one may be able to measure the benefit to landowners, because it will be capitalized into the price of the parcels. Admittedly, this effect will not always be measurable.

\textsuperscript{230} 239 U.S. 254, 262, 265 (1915) (citations omitted). This deference to the calculation of special assessments originated in \textit{Louisville & Nashville R.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." \textit{Id.} at 434. "[I]f a particular case of hardship arises, that hardship must be borne as one of the imperfections of human things." \textit{Id.}. This case reversed a brief deviation into closer scrutiny of special assessments under \textit{Norwood v. Baker}, 172 U.S. 269 (1898). See ROBERT C. ELICKSON & VICKI L. BEEN, LAND USE CONTROLS 744 (2d ed. 2000).

\textsuperscript{231} \textit{Wood v. Quimby}, 40 A. 161, 165 (R.I. 1898).
somewhat closer matching of benefits with the burden of payment.\textsuperscript{232} Courts are particularly likely to invalidate special assessments found to confer no benefit on a property owner billed for some portion of an improvement.\textsuperscript{233}

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

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.\textsuperscript{234}

The \textit{Wood} court listed common taxes for which benefits and burdens matched up poorly or not at all.\textsuperscript{235} Courts also have noted that school taxes are due whether or not a taxpayer has children.\textsuperscript{236} Likewise, police and fire taxes have been levied, legally, on those owning no property in a jurisdiction.\textsuperscript{237} Summarizing the principles underlying such cases, Cooley declared:

it is almost unanimously 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 benefited by the expen-
diture of the proceeds of the tax or not as much benefited as others. For in-
stance, 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.\textsuperscript{238}

The Supreme Court has concurred with the thrust of such court deci-

\textsuperscript{232} See, e.g., McNally v. Township of Teaneck, 379 A.2d 446 (N.J. 1977); Fluckey v. City of Ply-
mouth, 100 N.W.2d 486 (Mich. 1960).

\textsuperscript{233} Palmer Township Mun. Sewer Auth. v. Witty, 388 A.2d 306 (Pa. 1978) (invalidating assessing on
an owner for two sewer lines).

\textsuperscript{234} COOLEY, supra note 13, at 164.

\textsuperscript{235} The court stated:

[I]nstances are numerous in which the individual taxpayer receives and can receive no direct bene-
fit 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.

\textit{Wood}, 40 A. at 164.

\textsuperscript{236} See Booth v. Woodbury, 32 Conn. 118, 124 (1864) ("[A] person having no children pays an annual
school tax to help educate the children of parents of abundant means."); Union Refrigerator Transit Co. v.
Kentucky, 199 U.S. 194, 203 (1905) ("Every citizen is bound to pay his proportion of a school tax, though
he have no children."); \textit{Wood}, 40 A. at 164 ("A tax for the support of public schools is one from which only
a part of the taxpayers receive any direct benefit ... [because] only a part thereof have children to be edu-
cated therein, and some of those who have children prefer to educate them in private schools.").

\textsuperscript{237} \textit{Union Refrigerator}, 199 U.S. at 203; \textit{Wood}, 40 A. 161 (upholding special assessment for fire-
fighting improvements on an owner whose property lied about a half mile from the nearest proposed hy-
drant).

\textsuperscript{238} COOLEY, supra note 52, at 214.
sions, 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." 239

Thus, it is commonly understood that the state has broad leeway in making assessments and levying taxes. Moreover, 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 and if the program confers few benefits, those paying for it will usually kill it. 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 minimal requirement that only a loose correspondence need exist between benefit and burdens in special assessments and specific taxes. To illustrate this point, one only has to 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, however, 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, a tax that is already omnipresent in America, is not a taking. Under a similar argument, special assessments for roads, irrigation districts, and other projects also pass muster under the CBP. 240

At some point, however, courts have indicated that the state can go too far. The language from the special assessment cases is especially vivid in this regard, albeit not very helpful. In Houck, for instance, the Supreme Court declared 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." 241 The CBP, on the other hand, offers a natural and more precise way to define tax burdens that are "palpably [or flagrantly] arbitrary," "plain abuse," or that amount to "a mere confiscation of particular property." It is those taxes that impose an

239 Union Refrigerator, 199 U.S. at 203.
240 Brauneis notes that "in the paradigm case of taxation revenue raising is separate from appropriations—that is, the tax is not earmarked in advance." Robert Brauneis, Eastern Enterprises, Phillips, Money, and the Limited Role of the Just Compensation Clause in Protecting Property "In 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.
assessment or tax rate that is distinctly more burdensome on one or a few individuals than it is on all others, with no corresponding and roughly offsetting benefit conferred.

VI. PACKAGING AND LOGROLLING

Even under the comparatively small state and national governments of the eighteenth and nineteenth centuries, citizens paid a variety of general and specific taxes, assessments, and fees. In return, they received diverse benefits, directly or indirectly. The number and complexity of both taxes and benefit programs, however, increased dramatically over the last one hundred years. The existence of these numerous, and potentially offsetting, legal regimes raises fundamental and difficult questions: when deciding whether a citizen has suffered a compensable taking, does one focus on each statutory, regulatory, or administrative measure separately? Or does one go to the other extreme and weigh the combined, net effect of all measures on each individual’s welfare? Or, finally, does one 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, after accounting for all benefits and burdens, subject to noticeably larger net 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 perceived unfairness in existing exactions. More generally, different interest groups may engage in “logrolling,” which creates two laws that, taken alone, apportion burdens asymmetrically, but when taken together, satisfy the CBP. After discussing theory and history, however, this Part concludes that, in practical terms, permitting the government to dilute or reject just compensation claims by citing other governmental programs, which provide offsetting benefits, would effectively erase the compensation requirement.

242 For 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 244–49. 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 250–52.
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. If put into practice, this theory might impose a large number of narrowly focused taxes on goods without substitutes, such as the insulin diabetics need. Each such tax, standing alone, imposes 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, however, that it moots the possibility discussed in the previous paragraph. Logrolling, therefore, has been common in both federal and state fiscal policy. This Part will briefly examine two sets of paired taxes from the nineteenth century: tariffs and the income tax at the national level, and real and personal property taxes at the state level. An 1870s advocate of re-instituting 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.” In fact, 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 nineteenth century.

Stanley argues 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.” Prominent politicians repeatedly highlighted the regressive nature of America’s tariffs, which fell “entirely on consumption,” and a tax on consumption “is a tax upon the poor.” 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 and the beer that cheers him and the tobacco that consoles him... [Y]et we are afraid to touch the income of Mr. Astor... [T]he income tax is the only one that tends to equalize these burdens between the rich and the poor.

Motivated by such views, 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, Charles and Mary Beard 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." 248 Populists, in fits and starts, pushed for reinstatement 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." 249 Populist efforts finally bore fruit with the passage of the Sixteenth Amendment in 1913.

A parallel political struggle over taxation occurred at the state level during the same period. Exclusive reliance on real property taxes became increasingly regressive as people held greater proportion of wealth in the forms of untaxed or ineffectively taxed personalty, such as stocks, bonds, and other securities; capital assets; patents and copyrights. 250 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." 251 Subsequent 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 generally underassessed it when it was included in the laws." 252 The government resolved this inequity only when it defined income to encompass the income from personalty.

Thus, advocates justified the national and state income taxes, in part, as remedial measures, designed to address regressive burdens imposed by preexisting 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. Accordingly, Stanley has framed the debate over the first income tax as follows: "[S]upporters [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." 253

Thus, advocates have long understood that a key issue in debating a tax lies in packaging—determining what levies and outlays should be grouped

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248 Id. at 4 (quoting 2 CHARLES A. BEARD & MARY R. BEARD, THE RISE OF AMERICAN CIVILIZATION 99, 105–15 (1949)).
249 WITTE, supra note 89, at 72.
250 Note that all save the homeless pay real property taxes: owners pay directly, while renters pay indirectly through their landlords.
251 STANLEY, supra note 3, at 83 (quotation omitted).
252 Id. at 81.
253 Id. at 34.
together for purposes of analyzing the distribution of burdens and benefits. The possibilities of packaging are literally endless. However, two examples 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. This Article has discussed 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 the example cited by Epstein: depression-era legislation that retroactively gave debtors greater rights in foreclosure. The Supreme Court held that such legislation worked a taking and Epstein concurs.254 He argues that such legislation singles out one group, mortgage lenders, for a material burden, and thus the legislation does seem to violate the CBP. Although the burden will vary continuously, from mortgagees with small loans to those with large loans, the effective rate of this burden is similar for all lenders and zero for all others, except debtors, for whom the legislation bestows a benefit at a rate symmetric with the burden on lenders.

Those that wished to provide depression-era 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, yielding 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, 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 one 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, which measures burdens or benefits, differs, we cannot compare rates directly. Instead, 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, or at least those not 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, however, 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 only a few taxpayers, as compared with the next-most-burdened taxpayers. Thus, such 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, a focus that is 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. The CBP also offers a concrete and workable definition of what it means to be singled out for an unfair portion of public burdens. In fact, the CBP dovetails well with most Supreme Court takings cases and probatively suggests why other cases are troublesome, like the landmark designation of Grand Central Station in Penn Central and the complete ban on sales of eagle feathers in Allard. Thus, the CBP can serve both as a tool to organize and clarify our understanding of takings law and as an aid to avoid such missteps in the future.