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# The Natural Property Rights Straitjacket: The Takings Clause, Taxation, and Excessive Rigidity

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*Natural property rights theories have become the primary lens through which conservative jurists and scholars view the Constitution's main property rights provision, the Takings Clause. One of their most striking arguments is that progressive income taxation — applying higher tax rates to higher incomes — is an unconstitutional taking of wealthy taxpayers' property. This has become part and parcel of well-established battle lines between conservative property rights advocates and their liberal counterparts. What has gone unnoticed is that the very same argument deployed against progressive taxation also deems regressive taxation — applying lower tax rates to higher incomes — an unconstitutional taking of poorer taxpayers' property. Combined with the stricture against progressive taxation, this means that natural property rights theory maintains that there is one and only one constitutional income tax: a "flat" that applies the same rate to incomes at all levels.*

*The first and most novel contribution of this Article is the contention that the cardinal sin of natural property rights theories is not excessive protection of the propertied class but rather the imposition of a straitjacket on policymaking. This problem is not limited to taxation. Natural property rights strictures against debtor relief, combined with a symmetric argument against creditor relief, end up imposing similarly binding shackles on the monetary authorities. Indeed, natural property rights theories categorically reject redistribution even if it helps the wealthy as well as the poor.*

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The second thesis of this Article is that the natural property rights case against progressive taxation has foundational faults. It fails to address the fact that charity is a public good that is undersupplied by “the market” — that is, private charity. It also fails to offer any explanation of how to choose the proper tax basis, for example income, sales, wealth, etc. There are some real quandaries here. The fact that a flat wealth tax likely approximates a progressive income tax seriously undermines the case against progressive taxation in general.

The last section of the Article does identify one point of agreement with natural property rights theorists: the Takings Clause does impose some constraints on legislatures’ power to tax. The common ground ends, however, with that basic observation. This Article suggests that a very modest “Continuous Burdens Principle” does bar tax laws that impose dramatically different tax burdens on taxpayers of similar economic circumstances. This principle forbids only relatively extreme taxes that single out individuals or small groups for particularly outsized tax burdens, and thus in stark contrast to natural property rights theory does not straitjacket tax policy.

#### TABLE OF CONTENTS

INTRODUCTION .....	1353
I. TAXATION AND THE NATURAL PROPERTY RIGHTS	
STRAITJACKET .....	1357
A. <i>A Natural Property Rights Model of Takings</i> .....	1357
B. <i>The Natural Property Rights Case Against Progressive Taxation</i> .....	1363
C. <i>The Symmetric Natural Property Rights Case Against Regressive Taxation</i> .....	1367
1. <i>Nearly Universal Regressive State Taxation</i> .....	1368
2. <i>The Natural Property Rights Case Against Regressive Taxation</i> .....	1370
D. <i>An Unbearable Taxation Straitjacket</i> .....	1373
E. <i>Debtor Relief and a Surprising Straitjacket for Monetary Policy</i> .....	1377
F. <i>Barring (Pareto) Efficient Redistribution</i> .....	1381
II. FAILINGS OF THE NATURAL PROPERTY RIGHTS CASE AGAINST REDISTRIBUTION .....	1383
A. <i>Public Goods in General and Charity in Particular</i> .....	1383
1. <i>How Are the Benefits of Public Goods Distributed Across Income Levels?</i> .....	1383
2. <i>Charity Is a Public Good — No Different from Others</i> .....	1386

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2018]	<i>The Natural Property Rights Straitjacket</i>	1353
	B. <i>Is There One “Right” Tax Base?</i> .....	1390
	1. The Dubious Presumption in Favor of an Income Tax.....	1390
	2. The Long List of Potential Tax Bases.....	1391
	3. The Strong Case for a Wealth (General Property) Tax — Under Natural Property Rights Assumptions.....	1393
	4. The Strong Case for an Inheritance Tax.....	1395
	C. <i>Utterly Unattainable Super-Pareto Efficiency</i> .....	1401
	D. <i>Natural Rights in Historical Context</i> .....	1411
	E. <i>An Overarching Status Quo Bias</i> .....	1418
	III. A MORE WORKABLE APPROACH TO POLICING TAXATION.....	1421
	CONCLUSION.....	1425

Of a natural right who has any idea? I, for my part, I have none: a natural right is a round square or an incorporeal body. . . . A natural right is a son that never had a father. By natural right is meant, a sort of a thing which is to have the effect of law, which is to have an effect paramount to that of law, but which subsists not only without law, but against law: and its characteristic property, as well as sole and constant use, is the being and everlasting and irreconcilable enemy of law. . . . A natural right is a species of cold heat, a sort of dry moisture, a kind of resplendent darkness.<sup>1</sup>

#### INTRODUCTION

Natural property rights theories have enjoyed a significant renaissance over the last thirty-odd years. Two leading lights of this movement have been Richard Epstein and the late Justice Antonin Scalia, the former for his scholarship<sup>2</sup> and the latter for his judicial opinions.<sup>3</sup> Based largely on their work, natural rights theory has become the dominant framework for conservative interpretations of

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<sup>1</sup> Jeremy Bentham, *Supply Without Burthen, or Escheat Vice Taxation*, in 1 JEREMY BENTHAM’S ECONOMIC WRITINGS 279, 334-35 (Werner Stark ed., 1952).

<sup>2</sup> See RICHARD A. EPSTEIN, *TAKINGS, PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985); ROBERT NOZICK, *ANARCHY, STATE AND UTOPIA* (1974); Eric R. Claeys, *Jefferson Meets Coase: Land-Use Torts, Land and Economics, and Natural Property Rights*, 85 NOTRE DAME L. REV. 1379 (2010) [hereinafter *Jefferson Meets Coase*].

<sup>3</sup> See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992) (inventing the “total taking” rule); *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825 (1987) (requiring nexus between substance of regulation and state’s public purpose for regulation).

the key constitutional provision on property rights, the Takings Clause.<sup>4</sup> With the election of Donald Trump as President, conservatives can expect to maintain a majority on the Supreme Court for some time.

Thus, the influence of natural rights theories on Takings Clause jurisprudence is likely to consolidate and expand in coming years. This Article argues that the natural property rights paradigm has two elemental flaws: it constrains public policymakers to a far greater extent than previously realized, and its case against any and all forms of redistribution is built on analytic errors. To the extent that the Supreme Court does continue to apply a natural property rights lens to the Takings Clause, policymaking will be excessively constrained and erroneously biased against all forms of redistribution in an age of spiking socioeconomic inequality.

Like virtually all contested constitutional issues, disputes over property rights and the Takings Clause tend to fall into conservative versus liberal perspectives. Those on the right argue for strong private property rights and hence an expansive reading of the Takings Clause that significantly limits the state's regulatory powers.<sup>5</sup> Those on the left, in contrast, argue that the government has robust authority to regulate and that property rights must sometimes yield to larger social needs.<sup>6</sup>

One of the core debates between left and right is over redistributory policies like the progressive income tax and welfare programs. On the right, some leading natural rights theorists have argued that property rights in labor mean that the government simply cannot tax labor income at all.<sup>7</sup> Less extreme, more practical natural rights theorists have argued that although the state may tax labor income, it cannot impose a progressive<sup>8</sup> income tax because such disproportionate taxation of the wealthy violates the Takings Clause.<sup>9</sup>

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<sup>4</sup> U.S. CONST. amend. V (“[N]or shall private property be taken for public use, without just compensation.”).

<sup>5</sup> See, e.g., EPSTEIN, *supra* note 2; NOZICK, *supra* note 2; Claeys, *Jefferson Meets Coase*, *supra* note 2.

<sup>6</sup> See, e.g., Gregory S. Alexander, *A Statement of Progressive Property*, 94 CORNELL L. REV. 743, 744 (2009); Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law*, 80 HARV. L. REV. 1165, 1257-58 (1967); Joseph W. Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611, 702-06 (1988).

<sup>7</sup> NOZICK, *supra* note 2, at 169.

<sup>8</sup> A progressive income tax imposes higher actual (average) tax rates as income rises.

<sup>9</sup> See EPSTEIN, *supra* note 2, at 262-69; *infra* Part III.

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An overlooked and important corollary to the natural rights case against progressive income taxation is a precisely symmetric argument that regressive income taxation<sup>10</sup> is an unconstitutional taking from the poor. Note that regressive taxation is no theoretical oddity: the tax system of each state in the Union is regressive.<sup>11</sup> Under a natural rights reading of the Takings Clause, the federal income tax is an unconstitutional taking from the wealthy and the overall tax system in each state is an unconstitutional taking from the less affluent.

Natural property rights theories, then, permit exactly one type of tax: so-called “flat” taxes that impose the same percent rate on all income, purchases, or wealth. Caught up in the partisan battles over redistribution, scholars have overlooked natural property rights theories’ astoundingly constrictive implications for tax policy. The first major thesis of this paper, in section I.D, is that the biggest strike against natural property rights theory is not that it is anti-redistributory, but rather that it places those making tax policy into a straitjacket: they have no degrees of freedom with which to address a complex and changing world. Given knotty issues of efficiency, fairness, and their interplay, limiting a modern state to precisely one tax is extraordinarily limiting. It is vanishingly unlikely that one-size-fits-all flat taxes are optimal for all times, places, and circumstances.

The straitjacket imposed by natural property rights readings of the Takings Clause is by no means limited to taxation. This Article offers two additional examples. First, the natural property rights *per se* rule against any form of debtor (or creditor) relief turns out to constrain monetary policymakers (e.g., the Federal Reserve Board in the United States) every bit as tightly as it constricts tax policy. Unanticipated *inflation* is deemed a taking from creditors and unintended *deflation* is a taking from debtors. Thus, just as the only flat taxes pass muster, the single permissible monetary policy under natural property rights is one that not only announces target inflation/deflation rates, but also achieves them. Not only is such a singular target difficult for monetary authorities to achieve, it may also be suboptimal.

Second, natural property rights theory bars redistributory policies even if there is clear evidence that such measures benefit the wealthy as well as the rest of society. Many might think that this is a purely theoretical point based on the observation that redistribution cannot possibly benefit the affluent from whom money is being taken. Recent

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<sup>10</sup> Regressive income taxation is simply the opposite of progressive taxation — an income tax under which actual tax rates fall as income increases. See *supra* note 8.

<sup>11</sup> See *infra* Section I.C.1.

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scholarship, however, suggests that inequality may impose real costs on the rich as well as the poor: it produces social unrest and unpleasant interactions that may raise stress levels of rich and poor alike.<sup>12</sup> That natural property rights theories disallow redistribution that benefits those all along the income distribution is deeply troubling.

These examples motivate this Article's first thesis, that natural property rights theory's cardinal sin is that it imposes far too tight a straitjacket on policymakers in a number of areas. Rejecting the school's reading of the Takings Clause provides the Federal Reserve with enough maneuvering room to deal with the variegated surprises of macroeconomics, from financial panics to foreign currency market disruptions to increasing prices of imports. It enables the legislature to address inequality that threatens the health of the wealthy and the poor alike.

This last example justifies redistribution based on its benefits to wealthier as well as less affluent citizens. It does not address the natural property rights case that "pure" redistribution — policies that transfer wealth from rich to poor without any benefits to the rich — violates the Takings Clause. Part I of this Article turns back to the long-standing, partisan debate over progressive taxation, welfare, and other redistributory policies. It identifies four serious flaws in natural property rights arguments against pure redistribution.

First and foremost, natural rights theories fail to acknowledge that charity, like the police force, is a public good: because of free-riders and hold-outs, markets will undersupply it. The usual provider of public goods is of course the government. Thus, redistribution is simply delivery of charity by state action, necessitated by suboptimal private charity.

Second, natural property rights theories have devoted far too little time explaining the factors that should be used to select the tax base. For example, a *flat tax using wealth* as a base (as opposed to income) approximates a *progressive tax on income*. Not all flat taxes are equivalent, and natural property rights theory provides no grounds on which to select one tax base (e.g., income) over another (e.g., wealth).

Third, some natural property rights theorists seem to advocate a new efficiency standard that is even more infeasible than the usually unachievable Pareto efficiency.<sup>13</sup> This new standard's advocates do not

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<sup>12</sup> RICHARD WILKINSON & KATE PICKETT, *THE SPIRIT LEVEL: WHY GREATER EQUALITY MAKES SOCIETIES STRONGER* 31-43 (2009).

<sup>13</sup> A Pareto-efficient action is one that does not decrease the welfare of anyone and increases the welfare of at least one person. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF*

seem to have realized that they have invented a new efficiency standard, and commentators as well have not focused on this important innovation. The standard requires that all public projects benefit each citizen in proportion to their pre-existing wealth. In pedestrian terms, when government policies increase the size of the social pie, the *relative* size of each slice must remain the same. Whatever appeal this new standard might have, its patent unattainability makes it a fool's foundation for policymaking.

Finally, in a soft echo of the straitjacket thesis of Part I, natural property rights theory has an excessive bias in favor of the status quo. As tastes (driving demand for goods and services) and technologies (driving supply) evolve ever more rapidly, the need for some flexibility and evolution in property rights becomes ever more important. As the United States faces such a dynamic future, we face the specter of a Supreme Court majority wedded to interpretations of the Takings Clause that will prevent the legislative and executive branches from responding to change nimbly and effectively.

The twin theses of (i) the policy straitjacket imposed by natural property rights theories and (ii) the fundamental defects in its case against pure redistribution might create the impression that the Takings Clause imposes no limitations on the state's power to tax. Part III draws on prior scholarship to dispel any such notion. It argues that the Takings Clause requires that tax burdens make no large jumps between taxpayers whose wealth or incomes differs by only a small amount. This imposes quite modest restrictions on the taxation power of the legislature, providing ample room for a wide range of progressive (and regressive) tax policies.

## I. TAXATION AND THE NATURAL PROPERTY RIGHTS STRAITJACKET

### A. *A Natural Property Rights Model of Takings*

Natural (property) rights theories at their root attempt to build a wall against legislative encroachment on private property rights by very expansive readings of constitutional clauses in general and the Takings Clause in particular. This distinguishes natural property rights theory from most contemporary property scholarship, which adopts the positivist view that property rights exist only when created by the sovereign (be it a King or a legislature elected by a majority of voters).<sup>14</sup> This Article does not delve into the extensive efforts to

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LAW 12-13 (7th ed. 2014).

<sup>14</sup> See *supra* note 6.

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justify natural property rights. At root, such arguments are rooted in purported universal notions of justice. To give one example from the towering leader of the natural property rights school, Richard Epstein observes that “the state should prohibit murder because it is wrong; murder is not wrong because the state prohibits it.”<sup>15</sup> Eric Claeys expands on the theme, arguing that cornerstones of America’s constitutional order instantiate natural rights. His “American natural-rights morality”

refers to a common political morality that amalgamates Anglo-American law and several different philosophical and religious theories of liberty. The amalgamation is restated explicitly and generally in the Declaration of Independence and many Founding Era state constitutions. [He] hypothesizes here that it served as a common political morality until at least the end of the first third of the twentieth century.<sup>16</sup>

Natural property rights thus are conceptually antecedent to the formation of the state. This means that natural law analogs to the common law torts like battery, trespass, and nuisance existed even before governments formed and established courts to vindicate the natural rights protected by these remedies. When individual property owners do come together to form a state under fundamental law like a constitution, Anglo-American natural rights theorists, dating back to at least Sir Edward Coke, have maintained that the common law simply embodies natural rights and that the state by force of logic cannot obtain rights any greater than those of the owners ceding some of their natural rights.<sup>17</sup> If private parties have no right to batter each other, trespass on neighbors’ land, or maintain nuisances on their own, then the government similarly has no such rights.

Natural rights theories hold that the key power that citizens and property owners confer on the state is the power to force various exchanges. To give the most important examples, the government can force the populace to

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<sup>15</sup> EPSTEIN, *supra* note 2, at 5-6.

<sup>16</sup> Claeys, *Jefferson Meets Coase*, *supra* note 2, at 1394.

<sup>17</sup> See Steven G. Calabresi & Sofia M. Vickery, *On Liberty and the Fourteenth Amendment: The Original Understanding of the Lockean Natural Rights Guarantees*, 93 TEX. L. REV. 1299, 1305 (2015) (“Sir Edward Coke would have identified such rights with the common law of England and with the ancient constitution, which had produced it.”); see also *id.* at 1310 (stating that state constitutional guarantees of rights were likely “inherent in the common law”).



- pay taxes in return for public services;
- live with regulations of property rights in return for regulation of others; and
- sell their property in return for “just compensation” — the Takings Clause.<sup>18</sup>

In his still-preeminent articulation of natural property rights,<sup>19</sup> one of Epstein’s central analytic moves is the assertion that the Takings Clause applies to all three of these examples (and many more), not just the last one. There is very little historical or textual support for this reading of the clause,<sup>20</sup> but Epstein says that it reflects bedrock principles in the Lockean system of property rights that he maintains the Founders intended to create.<sup>21</sup>

In perhaps an even bolder expansion of the Takings Clause’s application, natural property rights theorists argue that all public laws and projects must provide compensation such that everyone’s *share* of the economic pie<sup>22</sup> remains the same. As Claeys puts it, “[b]ecause the social compact creates a partnership for the mutual improvement of morally equal partners, its laws must work to enlarge the advantage of every partner.”<sup>23</sup> In a simple case where a house is taken to build a highway, this means that just compensation must equal the market value of the home. In the much more complex case of a tax, it means

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<sup>18</sup> U.S. CONST. amend. V.

<sup>19</sup> Other natural property rights advocates cite Epstein liberally and positively. *See, e.g.,* Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 CORNELL L. REV. 1549 *passim* (2003) [hereinafter *Takings, Regulations, and Natural Property Rights*]. Although Claeys has some quibbles with Epstein’s version of natural property rights, he states clearly that “[s]till, Epstein’s . . . approach[] would generate results satisfactory to most natural-right-minded jurists.” *Id.* at 1647.

<sup>20</sup> For a finding, based on a comprehensive survey of antebellum state constitutional law precedents, that rights declarations had “less practical legal significance with respect to property regulation,” see Calabresi & Vickery, *supra* note 17, at 1311-12.

<sup>21</sup> Eric Claeys, another consistent advocate for a natural rights theory of property, concurs that the Founding Fathers embraced the doctrine. “When Epstein defends his reading of the Takings Clause in light of contemporary principles of constitutional interpretation, his defense accords with this understanding of ‘original meaning’ methodology.” Claeys, *Takings, Regulations, and Natural Property Rights*, *supra* note 19, at 1564.

<sup>22</sup> It is unclear from various accounts whether this rule applies to income or wealth. *See infra* Section II.B. I argue that it makes much more sense, within the system of natural property rights, to apply this rule to wealth. *Id.*

<sup>23</sup> Claeys, *Takings, Regulations, and Natural Property Rights*, *supra* note 19, at 1572.

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that the benefits from state provision of public goods must be as close as possible to the taxes imposed on each citizen.

This surprising powerful element of natural property rights theory has received far less attention than it deserves. As discussed *infra* section I.C, this goes far beyond the practical Kaldor-Hicks standard for efficiency (policies that increase in net national income)<sup>24</sup> and even beyond the demands of the impractical Pareto standard (policies that make no one worse off and at least one person better off)<sup>25</sup> by requiring every state act to increase everyone's wealth by the same percentage. I label this standard "super-Pareto efficiency." Whenever the government acts, it must compensate every property owner who suffers a disproportionate loss.<sup>26</sup>

To determine exactly when the government must compensate those suffering losses from governmental action, Epstein articulates a four-part natural property rights standard:<sup>27</sup>

- (i) Did the government *take* some property right of an owner?
- (ii) Was the property taken for a *public use*?
- (iii) Did the government have a *justification* for the taking that obviates the obligation to pay compensation?
- (iv) Did the government pay compensation implicitly, in the form of in-kind benefits to property owners who suffered some loss of property rights?

Although much of the key vocabulary in this natural rights schema is in keeping with current Takings Clause doctrine, the doctrinal interpretation of these elements as natural rights diverges significantly from common understandings. We will consider each of these four elements in turn.

Natural property rights theories must define "taking" much more broadly than current doctrine. To contemporary lawyers, a taking is either an exercise of the power of eminent domain (a forced sale of property) or excessive regulation (a so-called regulatory taking). Natural property rights theorists, true to their axiom that governmental powers are no more than the sum of ceded individual

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<sup>24</sup> POSNER, *supra* note 13.

<sup>25</sup> *Id.*

<sup>26</sup> Although Epstein does not consider the matter, his model also implies that those who *benefit* disproportionately must pay special taxes to disgorge their excessive gains. This is the only way to maintain the relative size of each citizen's wedge of the societal pie. See *infra* Section II.C.

<sup>27</sup> EPSTEIN, *supra* note 2, at 31.

powers, treat any state act that would amount to conversion if done by a private actor as a taking. This means that any governmental act that decreases the wealth of a property owner is a taking. Thus, in addition to eminent domain, it is “natural” for natural rights theorists to define taxes, adverse changes in tort law rules, and imposition of workmen’s compensation statutes on employers, among other things, as takings. As this is only the first step in a property owner’s Takings suit, deeming all of these state acts as takings does not mean that the government must pay compensation. The government has two “outs.” First, by the ceded powers of the citizenry the government may have a justification for taking without paying (element 3 in the list above). Second, the very same state act that reduces a citizen’s wealth in one way may enhance it in another way (element 4).

Before fleshing out these last two elements, we briefly consider the second element, the “public use” requirement. In line with current doctrine, natural rights theorists argue that the government cannot exercise its takings power unless the property taken is for such a public use. However, the natural rights definition of that phrase is much narrower than federal case law. Under Supreme Court doctrine, the public use requirement means only that the government must make a minimal case that the taking rationally serves some social goal and is not a taking from private party A for the benefit of private party B.<sup>28</sup> Thus the state can take property from one private party and transfer it to another private party based on public uses such as urban renewal,<sup>29</sup> or transitioning from a rental market for residences to an ownership market.<sup>30</sup>

Natural rights theorists, however, believe that such an expansive reading of the public use requirement encourages rent-seeking citizens to invest in efforts to have the state use its eminent domain powers to help them obtain land for less than the owner’s reservation price.<sup>31</sup> Based on this concern, they argue that courts should construe “public use” to mean a *public good* in the economic sense. Such goods meet

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<sup>28</sup> See *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798) (“[A] law that takes property from A[] and gives it to B: It is against all reason and justice, for a people to entrust a Legislature with SUCH powers; and, therefore, it cannot be presumed that they have done it.”).

<sup>29</sup> See *Kelo v. City of New London*, 545 U.S. 469, 481 (2005); *Berman v. Parker*, 348 U.S. 26, 33 (1954).

<sup>30</sup> *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 230-32 (1984).

<sup>31</sup> See, e.g., EPSTEIN, *supra* note 2, at 161-81; Eric R. Claeys, *Public Use Limitations and Natural Property Rights*, 2004 MICH. ST. L. REV. 877, 889-92; James W. Ely, Jr., *Can the “Despotic Power” be Tamed? Reconsidering the Public Use Limitation on Eminent Domain*, 17 PROB. & PROP. 31, 33-36 (2003).

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two conditions. First, the consumption of public goods is *non-rivalrous*. Abel's consumption of police services does not prevent Baker from consuming the exact same services. This is not true for a hamburger. Second, public goods tend to be *non-exclusive*. It is hard to prevent any citizen from sharing in the consumption of police services. It is easy to exclude others from personally owned cars, books, computers, and hamburgers. Public goods are available for all to consume and hence governmental provision poses no risk of private rent-seeking. This Article shows that natural property rights theorists define public goods too narrowly by excluding charity (see section II.A.2 *infra*). This is a serious oversight.

Questions about natural rights theories of justification and implicit compensation loom even larger. These two issues lie at the core of the most difficult issues in takings law. First, we consider justification. Remaining steadfastly true to the natural law view that state power can come only from the powers granted by individuals, the main justifications for taking property rights without compensation are analogs to private law doctrines akin to self-defense and consent. Property owners who interfere with their neighbors' use and enjoyment of their land are committing nuisances. Their neighbors may invoke nuisance law to either shut down the offending use or obtain damages; the state may act in defense of all such harmed neighbors by regulating or even prohibiting offending land uses in defense of those harmed. Under broad natural rights conceptions of property rights, such state action is a taking, but it is justified (i.e., no compensation is due) as defense of the property of others. Government takings may also be justified by consent or assumption of the risk. Property owners who took title with clear notice of restrictions on the use of property have consented to the enforcement of such restrictions. Similarly, property owners aware that some property is subject to heavy and variable regulation (e.g., liquor-manufacturing machinery) have *assumed the risk* that the legislature may change the rules of the game.

Finally, and of greatest importance for this Article, a law or other state action may simultaneously burden and benefit a property owner. If the benefits are roughly equal to the burden, natural property rights theorists concede that compensation has been made for the otherwise unjustified taking of property. Epstein calls this "implicit in-kind compensation" ("IIC").<sup>32</sup> Some zoning provisions qualify, such as

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<sup>32</sup> This is precisely the same thing as Justice Holmes' "average reciprocity of advantage" in *Pa. Coal v. Mahon*, 260 U.S. 393, 415 (1922).

restrictions on the size of lawn signs: each owner loses some use value of her own property but obtains rights to restrict all of her neighbors' land use in return. Other examples abound. The "automatic stay" barring creditors from initiating collection actions after a debtor has filed for bankruptcy certainly diminishes the rights of each creditor, but also preserves the bankrupt entity from inefficient dismantling by piecemeal foreclosures by all other claimants.<sup>33</sup> Oil and gas "unitization" statutes do force owners of gas and oil deposits to participate in extraction of resources that they might disfavor, but they protect them from both races to extract these common pool resources and from holdouts who might block all mining efforts.<sup>34</sup>

The central inquiry in determining whether IIKC exists is *disproportionate impact*. As noted above, forbidding *all* property owners from posting large signs appears to create benefits and burdens that are roughly equal across landowners. At the other extreme, a provision barring all improvement of a single lot in a city while permitting homes on every other lot in the jurisdiction has a starkly disproportionate impact on the sole disfavored property owner. The Supreme Court has deemed this the essence of a taking: "to bar 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."<sup>35</sup>

Having presented all of the components of natural rights models of takings, we can nutshell the doctrine in one sentence. If the state has taken property rights without police power justification and without notice (inherent limitations on title), and does not provide IIKC, it must pay the owner just compensation for the loss.

#### B. *The Natural Property Rights Case Against Progressive Taxation*

The expansive nature of the property rights postulated by natural rights theories mean that takings law applies not just to formal exercises of eminent domain and to regulations, but to all governmental actions — including taxation: "All the elements found in the analysis of takings re-emerge in the taxation context: takings, justification [police power] . . . , public use, and implicit compensation."<sup>36</sup> This assertion likely surprises many property rights scholars on first read, as traditional takings analysis usually applies to

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<sup>33</sup> See 11 U.S.C. § 362 (2018).

<sup>34</sup> See, e.g., OKLA. STAT. ANN. tit. 52. §§ 287.1-287.15 (2018).

<sup>35</sup> *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

<sup>36</sup> EPSTEIN, *supra* note 2, at 285.

government action that imposes large losses on one or a small group of property owners — so-called “narrow deep” takings. Natural property rights version of takings, however, applies as well to takings that are “broad and shallow.”<sup>37</sup>

Taxes have the potential to inflict relatively modest losses on a broad swath of the population. Applying the four-step natural rights doctrine of takings to taxation, we begin by noting that taxes are takings — private citizens cannot tax their fellow citizens and so they cede such power, uninhibited, to the government. Second, we assume that the government uses tax proceeds to fund public goods, satisfying the public goods interpretation of the public use requirement. Third, there is no police power justification for collecting taxes from “innocent” citizens. The mere possession of money is not, after all, anything akin to a nuisance or a crime.

The final and critical inquiry involves compensation. In the famous words of Justice Holmes, “[t]axes are what we pay for civilized society . . . .”<sup>38</sup> In return for paying taxes, citizens receive a wide range of services (and occasionally some goods) from the government. In line with natural rights views of the Public Use clause, these are typically *public goods* — non-rivalrous and non-excludable goods that markets either undersupply or do not supply at all. The basket includes, *inter alia*, police protection, the judicial system, national defense, managing relations with foreign nations, road construction and maintenance, copious amounts of data, and other valuable information, regulating the supply of money, and environmental protection.

The difficulty lies in trying to determine whether this broad basket of public services provides value at least roughly equivalent to taxes paid. In considering whether a tax is potentially a taking, Epstein and Calvin Massey take their cue from modern American practice and focus on the income tax.<sup>39</sup> It is by far the largest tax assessed by the federal government<sup>40</sup> and plays an important role in many states.<sup>41</sup>

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<sup>37</sup> *Id.* at 94.

<sup>38</sup> *Compania Gen. de Tabacos de Filipinas v. Collector of Internal Revenue*, 275 U.S. 87, 100 (Holmes, J., dissenting).

<sup>39</sup> EPSTEIN, *supra* note 2, at 295-303; Calvin R. Massey, *Takings and Progressive Rate Taxation*, 20 HARV. J.L. & PUB. POLY 85, 104 (1996).

<sup>40</sup> Personal income taxes account for about 45% of federal revenues; the next largest source of revenues is the Social Security payroll tax, which accounts for only 24%. OFFICE OF MGMT. & BUDGET, FISCAL YEAR 2016 BUDGET OF THE UNITED STATES 96-97 (2016), <https://www.gpo.gov/fdsys/pkg/BUDGET-2016-BUD/pdf/BUDGET-2016-BUD.pdf>.

<sup>41</sup> *Briefing Book, State (and Local) Taxes*, TAX POLICY CTR., <http://www.taxpolicycenter.org/briefing-book/what-are-sources-revenue-state-governments> (last

Income taxes come in three flavors, depending on whether and how marginal tax rates vary with income. Only the first two seem politically plausible.<sup>42</sup> First, from the inception of the modern American income tax, the nation has had a *progressive* income tax. Progressive means that marginal rates increase with income, so that the overall percent of income paid in taxes also increases with income.<sup>43</sup> For example, a progressive tax might assess a tax of \$2,500 on incomes of \$25,000 (10%), \$20,000 on incomes of \$100,000 (20%), and \$120,000 on incomes of \$400,000 (30%).

Critics of progressive taxation suggest instead a flat tax, under which every household pays the same percent of income in taxes. To use the income levels from the previous paragraph paired with a flat tax of 20%, those earning \$20,000 would pay \$4,000; those earning \$100,000 would pay \$20,000, and those earning \$400,000, \$80,000. Clearly, and by design, a progressive tax imposes lighter burdens than a flat tax at the bottom of the income distribution and heavier burdens at the top.

Under natural rights interpretations of the Takings Clause, the key question in deciding whether a tax is a taking is the match between amounts paid to the government and benefits received from the government. The greater the positive difference between taxes paid and benefits received, the greater the disproportionate impact. At some point, the disparity becomes a taking under a natural rights understanding of the Takings Clause.

Measuring the burden on an income tax is trivial. Measuring the benefits of government services, however, is extraordinarily difficult. To calculate the extent to which such benefits vary with income, we must answer difficult questions about the many acts that a state might undertake, such as:

- Are the benefits of police services the same dollar amount for each household regardless of income, or do they vary proportionately with income, or are such services much more valuable to the wealthy than the poor?

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visited Jan. 22, 2018).

<sup>42</sup> The third alternative is a regressive income tax, which would impose tax rates that *decline* with income. The United States has never had a regressive income tax, and none of the many states with income taxes have such a rate structure. We will see, *infra* Section I.C.1, that every state's tax system, *overall*, is regressive.

<sup>43</sup> *Federal Individual Income Tax Rates History*, TAX FOUND., [https://files.taxfoundation.org/legacy/docs/fed\\_individual\\_rate\\_history\\_nominal.pdf](https://files.taxfoundation.org/legacy/docs/fed_individual_rate_history_nominal.pdf) (last visited Dec. 30, 2017).

- Do trade agreements with foreign nations help all Americans, or do they enhance the value of capital and skilled labor while eroding wages of unskilled laborers?
- Does low inflation serve the interests of all citizens, or does it advantage creditors at the expense of debtors?

If police services are worth the same amount to each household, then to match burdens with benefits calls for a *head tax* — a fixed dollar assessment on each taxpayer. This is a regressive tax: levying, for example, \$1,000 from each household for police services would impose a burden of 5% for households with incomes of \$20,000, 1% for households with incomes of \$100,000, and only 0.25% on households with \$400,000 incomes. If the benefits of police services truly are the same absolute amount for each household, Epstein's canonical model of natural property rights proffers (to my knowledge) the first fairness justification for regressive taxation.<sup>44</sup> A fairness argument for taxing the poor more heavily than the wealthy is, to say the least, unsettling. Even Massey, who believes progressive taxation is an unconstitutional taking, recoils at this prospect. He notes in passing that, “no one seriously advocates regressive rate taxation.”<sup>45</sup>

At the other extreme, it might be that the benefits from police services increase sharply as income rises. Epstein concedes that this is possible. “In principle, the proper tax could be progressive if the benefits from government operations increased more steeply than private income.”<sup>46</sup> Of course, the police are only one of the vast array of government services funded with tax revenues — for example, national defense, environmental protection, and road construction, to name a few. Each of these services might have a different profile in the manner in which benefits vary with income. In order to decide whether a progressive income tax is a taking, we would need to aggregate the benefits of all of these services by income.

This is an incredibly difficult inquiry. Neither Epstein nor other natural rights scholars make any effort to address it, perhaps assuming that it is simply impossible. Based on little if any evidence, however, they generally reject the possibility that the benefits from public services might increase disproportionately with income. Noting that

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<sup>44</sup> There is a powerful efficiency justification for regressive “head taxes” that impose equal dollar tax liability on all citizens regardless of income or wealth: such taxes do not distort choices that actors make. See *Lump-sum Tax*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Lump-sum\\_tax](https://en.wikipedia.org/wiki/Lump-sum_tax) (last visited Mar. 13, 2018).

<sup>45</sup> Massey, *supra* note 39, at 87.

<sup>46</sup> EPSTEIN, *supra* note 2, at 297-98.



demand for most regular (non-public) goods rises with income, Epstein opines that “[a] similar assumption sees equally plausible in the context of public goods.”<sup>47</sup> This likely is true: most taxpayers prefer more public goods to less. This innocuous assumption, however, says nothing about the possibility that the wealthy enjoy proportionally greater benefits when the state increases the supply of various public goods. Nevertheless, Epstein goes on to baldly assert that

the flat tax seems better able to [minimize any mismatch between taxes paid and benefits received] than any other possible candidate. . . . The flat tax certainly gives a respectable matching, and it is clearly superior to a highly progressive tax, where the redistributive motive is powerful evidence of redistributive effects. . . . The flat tax is the most “natural” approach.<sup>48</sup>

Natural property rights theorists do maintain that the motive behind a tax is an important factor in deciding whether it constitutes a taking. In the absence of solid data on the distribution of the benefits of public spending, Epstein offers this along with two additional proxies:

- (i) economic theory, and
- (ii) extent of disproportionate impact.<sup>49</sup>

Of these three, however, he singles out disproportionate impact as being “of central importance.”<sup>50</sup> There is no question that a progressive income tax has a disproportionate impact on the wealthy *if* natural rights theory is correct and the benefits from public services increase in lockstep proportion with income. This lies at the heart of the natural property rights argument that progressive taxation is a taking.

### *C. The Symmetric Natural Property Rights Case Against Regressive Taxation*

This raises a question that natural property rights theorists do not ask: what of regressive taxation — taxation under which the share of income paid in taxes declines as income increases? Under the assumption that the benefits of public services increase in lock step

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<sup>47</sup> *Id.* at 297.

<sup>48</sup> *Id.* at 298-99.

<sup>49</sup> *Id.* at 201-02.

<sup>50</sup> *Id.* at 204.

with income, regressive taxation must be deemed a taking from poorer households. This is a non-issue for the federal government as the federal income tax is progressive and its progressivity swamps the effects of other taxes that it imposes. It is an issue, however, for state taxation. The first section below documents the fact that the sum of major taxes (income taxes, property taxes, and sales taxes) in every state is regressive. The second section shows that an argument precisely parallel to the previous section on progressive taxes shows that under a natural rights interpretation of the Takings Clause, the taxation system of virtually every state in the Union is an unconstitutional taking of the property of less affluent Americans.

### 1. Nearly Universal Regressive State Taxation

States and their localities raise almost all of their revenue from some mix of income, property, and sales taxes. State income taxes tend to be progressive, though much less so than the federal income tax.<sup>51</sup> Indeed, a number of states have a flat income tax — one rate for all incomes — and others have only the mildest of progression in rates.<sup>52</sup> It is unclear whether property taxes are progressive or regressive. Although property taxes are assessed at a flat rate, the difficulty comes in trying to figure out how much of this tax landlords are able to pass on to renters. Renters tend to be much poorer than landlords, so the true incidence of the tax depends on this difficult empirical question.<sup>53</sup>

It is the sales tax that makes overall taxation regressive in most states.<sup>54</sup> Like the property tax, it is assessed at a uniform rate, making

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<sup>51</sup> For state income tax rates, see Nicole Kaeding, *State Individual Income Tax Rates and Brackets for 2016*, TAX FOUND. (Feb. 8, 2016), <https://files.taxfoundation.org/legacy/docs/TaxFoundation-FF500.pdf>. For federal rates, see *Federal Individual Income Tax Rates History*, *supra* note 43.

<sup>52</sup> Kaeding, *supra* note 51 (Colorado, Illinois, Indiana, Massachusetts, Michigan, North Carolina, Pennsylvania, and Utah have flat income tax rate structures; Alabama, Georgia, Kansas, Mississippi, New Mexico, Oklahoma, South Carolina, and Virginia all have slightly progressive rates, but the top rate kicks in at such a low income level, often less than \$20,000, making these income taxes virtually flat).

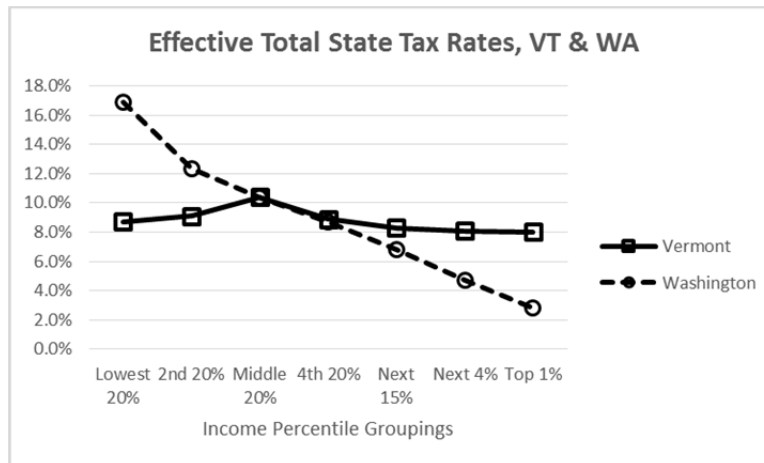
<sup>53</sup> See, e.g., Robert J. Carroll & John Yinger, *Is the Property Tax a Benefit Tax? The Case of Rental Housing*, 47 NAT'L TAX J. 295, 310-11 (1994); George R. Zodrow, *Who Pays the Property Tax?*, 18 LAND LINES 14, 14 (2006); Jack Goodman, *Houses, Apartments, and Property Tax Incidence* 1-23 (Harvard Univ. Joint Ctr. for Hous. Studies, Working Paper No. W05-2, 2005), <http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/w05-2.pdf>.

<sup>54</sup> See CARL DAVIS ET AL., INST. ON TAXATION & ECON. POLICY, WHO PAYS? A DISTRIBUTIONAL ANALYSIS OF THE TAX SYSTEMS IN ALL 50 STATES 1-2, 8-13 (5th ed. 2015), <https://itep.org/wp-content/uploads/whopaysreport.pdf>.

it sound like a flat tax. The rub, however, is that it is a consumption tax and the wealthy devote a smaller percentage of their income to consumption than do the poor.<sup>55</sup> Put another way, the wealthy save at higher rates than the poor and the sales tax leaves those savings untouched. Thus, the poor tend to pay the “flat” sales tax on 100% of their income while a wealthy family might pay the flat sales tax on only 75% of their income if they save 25% of it. This translates into a sales tax rate that decreases when income increases — the definition of a regressive tax.

The sales tax plays such a prominent role in state revenue systems that it tends to dominate the other components (income tax; property tax).<sup>56</sup> The state of Washington relies almost entirely on a sales tax and has one of the most regressive taxation systems in the nation. Even Vermont, which arguably has the most poor-friendly tax system, still has a slightly regressive rate structure. The following figure shows the effective tax rates for these two extreme states across a range of incomes.

Figure 1<sup>57</sup>



The extent of regressivity in Washington State is truly astonishing. The bottom quintile of the population pays about 17% of its income in taxes; the top percentile only about 3%. This means that the poorest

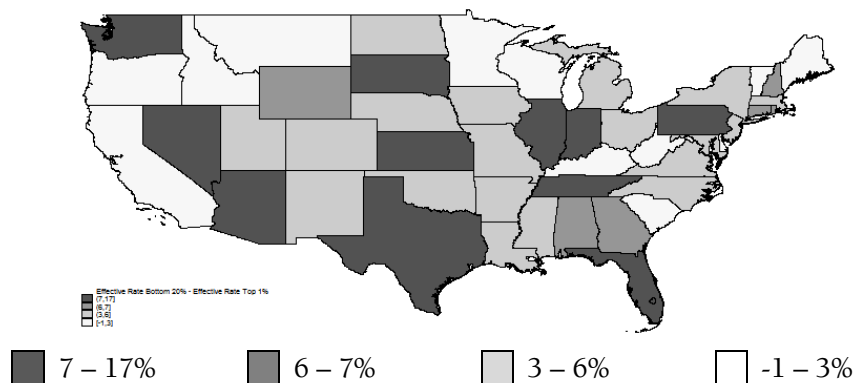
<sup>55</sup> See Karen E. Dynan, Jonathan Skinner & Stephen P. Zeldes, *Do the Rich Save More?*, 112 J. POL. ECON. 397, 398 (2004).

<sup>56</sup> DAVIS ET AL., *supra* note 54, at 8-13.

<sup>57</sup> Data for graph from Institute on Taxation & Economic Policy (ITEP). *Id.* at 119, 123.

households bear a tax burden almost six times as large as wealthiest households. It should come as no surprise that this violates Epstein's disproportionate impact test (*infra* section II.B). The following figure illustrates the nationwide phenomenon of regressive state taxation by mapping the difference in tax rates between the bottom quintile and the top 1%.

Figure 2<sup>58</sup>: Effective Tax Rate, Bottom 20% – Top 1%



## 2. The Natural Property Rights Case Against Regressive Taxation

Natural property rights theorists' defense of a "flat tax" instead of a non-progressive tax is no accident. Although they do not make the case, a precise mirror image of the argument that progressive taxation is a taking from wealthier households under natural rights axioms demonstrates that regressive taxation is a taking from poorer families.

The argument is almost a carbon copy of the argument against progressive taxation. Each of the four elements of the natural rights theory test<sup>59</sup> is exactly the same:

- (i) taxes are a taking under the expansive definition of natural property rights;
- (ii) we assume that they are used to deliver public goods;
- (iii) the state has no police power justification for taking the money without any form of recompense; and

<sup>58</sup> *Id.* at 23.

<sup>59</sup> For the four-part natural rights standard for takings, see *supra* text accompanying note 27.

- (iv) under the assumption that the benefits of public services rise in proportion with income, a regressive tax does not provide the poor with roughly equivalent benefits for their tax burden.

As with the effect of progressive taxation on the wealthy, the public services that the poor receive as implicit in-kind compensation (IIC) in return for their tax payments are insufficient. Thus, a regressive tax has a disproportionate impact on the poor and violates natural property rights interpretations of the Takings Clause.

There is a formal distinction between the progressive federal income tax and regressive state sales taxes. Federal income tax rates are progressive in form as well as in substance: the rates in the statute explicitly call for tax burdens that increase in percent terms as incomes rise.<sup>60</sup> State sales taxes, on the other hand, are formally flat. In form, if not in substance, state sales taxes are not regressive.<sup>61</sup>

Natural rights theorists, however, cannot rely on this formal distinction to asymmetrically condemn progressive federal income taxation while permitting *substantively* regressive state sales taxes. Tax is the ultimate realm in which clever lawyers and accountants can use form to defeat substance.<sup>62</sup> Indeed, this is part of the meat and potatoes of tax practice. If natural rights theory raises form above substance in determining whether a tax is a taking, it will have given up the game entirely. Just as a formally flat sales tax is substantively regressive, it is quite possible to design formally flat taxes that are substantively progressive.

The most obvious (and feasible) examples involve selecting a different tax base. If state sales taxes can tax only consumption, the government instead could choose to tax only savings. As the wealthy save a much larger share of their wealth than the poor, a flat tax on savings would result in a substantively very progressive tax. Even more vividly, a flat tax on wealth, which is distributed much more unequally than income, would result in a quite progressive levy.

Moreover, natural property rights scholars explicitly embrace substance over form. Epstein's discussion of price controls proves this point. Specifically, Epstein notes that "[p]rice controls pass muster only if one looks to their neutral form — that everyone labors under

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<sup>60</sup> 26 U.S.C. § 1 (2018) ("Tax imposed.").

<sup>61</sup> Scott Drenkard & Jared Walczak, *State and Local Sales Tax Rates in 2015*, TAX FOUND. (Apr. 8, 2015), <https://taxfoundation.org/state-and-local-sales-tax-rates-2015>.

<sup>62</sup> See, e.g., Linda D. Jellum, *Codifying and "Miscodifying" Judicial Anti-Abuse Tax Doctrines*, 33 VA. TAX REV. 579, 595-624 (2014).

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the same . . . price restriction — and ignores their economic effects . . . .”<sup>63</sup> “Economic effects” of course is simply a synonym for “substance” as opposed to “form.”

The disproportionate impact test itself directs us to examine substance, not form. Throughout his chapters on regulation and taxation,<sup>64</sup> Epstein discusses disproportionate impact time and again. He does note that motivations can play a role in ferreting out taxes that violate the Takings Clause, but he explicitly states that “the more important arguments run to impact.”<sup>65</sup> Still, some might argue that the progressive federal income tax is motivated by the desire to redistribute while state sales taxes are not. Under a natural rights reading of the Takings Clause this is a critical distinction, as redistribution is always a taking given the theory’s requirement that taxpayers receive services roughly equivalent to their tax bills.<sup>66</sup>

Motivation, however, is not easy to pin down. There are some good reasons to think that redistribution is one of the motivations for the progressive federal income tax, but there are other motivations that might well predominate. For example, another frequently-cited motivation for progressive taxation is ability to pay. Charging a poor family making, for example, \$10,000, 10% under a flat income tax might well drive them to the wall of starvation and homelessness. Under a natural rights reading of the Takings Clause, however, the state cannot avoid this outcome by, for example, creating a tax exemption for the first \$10,000 of income. Such exemptions produce a disproportionate impact on wealthier citizens that translates into insufficient implicit compensation and thus an illegal taking.

In addition, there may be more of a regressive motive behind state sales taxes than natural property rights theory permits. When Washington State voted on a ballot initiative to legalize income taxation that an old state supreme court decision deemed a violation of the state’s constitution, the largest contributor to the opposition came from Microsoft CEO and billionaire Steve Ballmer. Amazon founder and billionaire Jeff Bezos was another top donor.<sup>67</sup> They may

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<sup>63</sup> EPSTEIN, *supra* note 2, at 278.

<sup>64</sup> *Id.* at 263-305 (chapters 17 (Regulation) & 18 (Taxation)).

<sup>65</sup> *Id.* at 297.

<sup>66</sup> There is an important caveat to this statement: it does not hold to the extent that (i) wealthy taxpayers either attach value to helping the less fortunate, or (ii) equalizing income provides benefits across all incomes. See *infra* text accompanying notes 100–103, 117–123.

<sup>67</sup> *Washington Income Tax, Initiative 1098*, BALLOTEDIA (2010), [https://ballotpedia.org/Washington\\_Income\\_Tax,\\_Initiative\\_1098\\_\(2010\)](https://ballotpedia.org/Washington_Income_Tax,_Initiative_1098_(2010)).

have made these contributions based on neutral policy principles, but one does not have to be excessively cynical to suspect that they were opposing the proposal because it would raise their total personal state tax bills substantially. To give but one more example, the timber industry intensively and successfully campaigned against reform of Alabama's regressive tax system that contains extraordinarily favorable tax treatment for owners of forests.<sup>68</sup>

Thus, the motivation behind regressive taxes may well not be benign but rather regressively redistributory. Given assertions that disproportionate impact is more important anyway, and the application of substance over form necessary to effectuate the natural property rights vision of the Takings Clause, the conclusion seems inescapable: the very same argument deployed to show that a progressive federal income tax is a taking also demonstrates that regressive state sales taxes are takings.

#### *D. An Unbearable Taxation Straitjacket*

Taken together, the last two sections demonstrate that the natural property rights model of the Takings Clause puts society in a real straitjacket. The only permissible taxes are a flat income tax or a flat sales tax. Massey declares that Congress lacks the constitutional authority to impose anything but a flat income tax.

What Congress ought not be permitted to decide, if the Constitution is to be taken seriously, is whether it wishes to impose differential tax rates simply to dispossess some people of a disproportionately greater share of their income. A flat tax would simultaneously preserve legislative discretion and the *raison d'être* of the Takings Clause, and would also be simple to administer judicially.<sup>69</sup>

Epstein likewise declares flatly<sup>70</sup> that “[i]f the ideal tax is a general revenue tax, then the state should be required to use it.”<sup>71</sup> Although it is not entirely clear, by “general revenue tax” Epstein seems to mean a flat tax on either (i) income, or (ii) sales (i.e., on consumption).

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<sup>68</sup> Jeremy Lewis, *Collection of Articles on Alabama's Tax Reform Proposals, Sep. '03*, HUNTINGDON C., <http://fs.huntingdon.edu/jlewis/al/ALtaxReform03arts.htm> (last visited Dec. 30, 2017).

<sup>69</sup> Massey, *supra* note 39, at 117.

<sup>70</sup> Pun intended.

<sup>71</sup> EPSTEIN, *supra* note 2, at 291.

The effects of holding that the *progressive* federal income tax is unconstitutional are considerable: Congress would have to impose either a flat income tax or some sort of flat consumption tax (e.g., a national sales tax or a VAT).<sup>72</sup> The effect of a holding that *regressive* state sales taxes violate the Takings Clause would be orders of magnitude larger, a constitutional earthquake completely off the Richter scale. Almost every state would have to abandon its sales tax and replace it with either a flat income tax or a flat sales tax coupled with a flat tax on savings. It is hard to identify a more sweeping incursion of federal constitutional law on the workings of state government. Even a transformative case like *Brown v. Board of Education*,<sup>73</sup> ending *de jure* segregation, pales in comparison. Epstein's interpretation of the Takings Clause would not only impose severe limits on the federal power of taxation. It would literally force almost all states to radically alter the way that they raise revenue.

One might hope that natural rights scholars like Massey and Epstein would have specified some play in the joints of this rigid, restrictive reading of the Takings Clause's application to taxation. That, however, is simply not the case. One way to make a sales tax less regressive is to introduce exemptions for goods and services on which the poor spend larger shares of their income than the wealthy. For instance, many states exempt food and residential rents from their sales taxes, and thereby make their taxes much less regressive. Both Massey and Epstein, however, are crystal clear that such ameliorative measures have no place in their interpretation of the Takings Clause. "Although exempting food from taxation may be advertised as an implicit subsidy to low-income individuals, it only invites the type of legislative mischief that uniform levels of taxation avoid, as for example the redistributive struggles between chain food stores and restaurants."<sup>74</sup> What these natural rights scholars deem a subsidy is in substance *under their assumptions* a way of making sales taxes *less regressive* — in reality it is a reduction in a subsidy to the wealthy, not a positive subsidy for the poor.

Indeed, it sometimes seems that a single-minded focus on universal and uniform taxation blinds natural rights theorists to critical

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<sup>72</sup> VAT is an acronym for a value added tax, a common levy in the rest of the world. See RICHARD A. MUSGRAVE & PEGGY B. MUSGRAVE, PUBLIC FINANCE IN THEORY AND PRACTICE 399-403 (5th ed. 1989).

<sup>73</sup> 347 U.S. 483 (1954).

<sup>74</sup> EPSTEIN, *supra* note 2, at 294. On similar grounds he argues that state "severance" taxes on natural resources exported from the state also violate the Takings Clause. *Id.* For similar arguments, see Massey, *supra* note 39, at 116-17.



substantive distinctions that provide strong grounds for non-uniform taxation. Consider, for example, Epstein's argument that the Windfall Profits Tax Act of 1980<sup>75</sup> violated the Takings Clause. Congress enacted this tax in the wake of embargoes and foreign production cuts that raised the price of oil to unnaturally high (oligopolistic) levels.<sup>76</sup> American oil producers thus enjoyed supra-normal profits not based on efficiency, wise investments in production, or innovation, but rather because Saudi Arabia and other members of OPEC reduced supply and thus drove prices to artificially high levels. Taxation might not be the optimal reaction to uncompetitive pricing, but it certainly does constitute a special circumstance justifying a narrowly-targeted profits tax on one industry. In his extended (four page) discussion of the Windfall Profits Tax on Oil, however, Epstein omits any mention of the reason Congress enacted the tax and why taxing oligopolistic profits might serve as an important justification for it.<sup>77</sup>

The rare occasions in which natural rights theorists express approval for deviations from uniformity are very hard to square with their otherwise absolute demands for universal and uniform taxation. Epstein, for example, argues that it is constitutional to tax capital income at different rates than labor income, and, in an even greater deviation from his norms, declares that it is permissible to "adopt different treatments for different types of assets."<sup>78</sup> He justifies these deviations from his prime directive on the rather flimsy basis of avoiding forced asset sales and neutralizing the effects of inflation.<sup>79</sup>

Taxing capital income at a lower rate than labor income has a disproportionate regressive impact. Wealth is distributed highly unevenly, even more unequally than the current high levels of income inequality.<sup>80</sup> Taxing interest, dividends, and other forms of capital

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<sup>75</sup> Crude Oil Windfall Profit Tax Act of 1980, Pub. L. No. 96-223, 94 Stat. 229 (1980). The Supreme Court upheld the constitutionality of this tax in a challenge brought under the Uniformity Clause of the Constitution. See *United States v. Ptasynski*, 462 U.S. 74, 80 (1983).

<sup>76</sup> For an overview of the Windfall Profits Tax and the background to its enactment, see *id.* at 75-79 (upholding tax to Uniformity Clause challenge).

<sup>77</sup> See EPSTEIN, *supra* note 2, at 289-93.

<sup>78</sup> *Id.* at 301.

<sup>79</sup> See *id.*

<sup>80</sup> Javier Diaz-Giménez, Andy Glover & José-Victor Ríos-Rull, *Facts on the Distribution of Earnings, Income, and Wealth in the United States: 2007 Update*, 34 FED. RES. BANK MINNEAPOLIS Q. REV. 2, 4-5 tbl.2 (2011), <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.589.344&rep=rep1&type=pdf>; Arthur B. Kennickell, *Ponds and Streams: Wealth and Income in the U.S., 1989 to 2007*, at 34 (Fed. Reserve Bd., Fin. and Econs. Discussion Series, Paper No. 2009-13, 2009),

(wealth) income at a lower rate than labor income guarantees a regressive outcome — and so natural property rights theory must deem it unconstitutional under its own postulates that impute natural property rights onto the Takings Clause. To reduce the natural law perspective on taxation to a sound bite, “flat means flat,” and all income must be taxed at the same rate to avoid imposing a disproportionate impact on either the poor or the wealthy. This requires taxing labor income and capital income at one equal, “flat” rate.

Epstein’s puzzling assertion that the state may vary tax rules by asset type is an even greater deviation from the severe constraints imposed by a natural property rights reading of the Takings Clause — and creates no end of possible manipulations that would result in disproportionate impact. Epstein’s claim that “the gains and losses of these tax rules are so heavily diversified throughout society that it seems pointless to challenge them under any disproportionate impact test”<sup>81</sup> is simply untrue. Essentially the only form of wealth held by most lower- and middle-class families is their home.<sup>82</sup> Stocks, bonds, and other financial assets are owned extremely disproportionately by the wealthy. Thus, providing more generous tax treatment for financial assets than for homes inevitably introduces a regressive disproportionate impact into the tax code.

The fact that Epstein felt compelled to carve out these exceptions to the universality and uniformity requirements of natural property rights seems to be an implicit recognition that applying his interpretation of the Takings Clause to taxation is simply too constraining. His attempt to insert even these modest bows to practicality, however, is inconsistent with the natural rights theory of the Takings Clause. There is no escaping the taxation straitjacket imposed by this theory.

Finally, barring all income taxes save the flat tax prevents policymakers from using innovative and appealing ideas from the modern optimal tax literature. In work that earned him a share of the Nobel Prize in Economics,<sup>83</sup> James Mirrlees demonstrated that for a

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[https://eml.berkeley.edu/~saez/course/Kennickell\(2009\).pdf](https://eml.berkeley.edu/~saez/course/Kennickell(2009).pdf) (showing Gini index, used to measure inequality, was 0.5745 for income and 0.8120 for wealth in the United States).

<sup>81</sup> EPSTEIN, *supra* note 2, at 301.

<sup>82</sup> See Edward N. Wolff, *Recent Trends in Household Wealth in the United States: Rising Debt and the Middle-Class Squeeze — An Update to 2007*, at 17-18 (Levy Econs. Inst., Working Papers Series, Paper No. 589, 2010).

<sup>83</sup> See *The Sveriges Riksbank Prize in Economic Sciences in Memory of Alfred Nobel 1996*, NOBELPRIZE.ORG, [http://www.nobelprize.org/nobel\\_prizes/economic-sciences/laureates/1996](http://www.nobelprize.org/nobel_prizes/economic-sciences/laureates/1996) (last visited Feb. 15, 2018).

society interested in balancing efficiency (in the form of incentives to work) and equity (as measured by the extent of income inequality), a particular type of progressive income taxation best achieves these twin goals.<sup>84</sup> This is a very strong result in favor of progressive taxation. If, as seems likely, a large number of Americans give weight to both efficiency and fairness in setting tax policy, they should find Mirrlees' optimal income tax very attractive. Natural property rights theories of the Takings Clause, however, take this attractive option off the table.

*E. Debtor Relief and a Surprising Straitjacket for Monetary Policy*

The straitjacket problem of natural property rights theories is by no means confined to taxation. This subpart traces the straightforward but nonetheless surprising argument that the natural rights *per se* rule against any form of debtor relief puts the monetary authorities into a straitjacket even more binding than that imposed on tax policy.

Natural rights scholarship does not expressly discuss monetary policy, but a relationship arises implicitly based on the school's discussion of debtor relief laws.<sup>85</sup> Epstein again makes the natural rights argument in greatest detail. Starting from the (natural property rights) proposition that the right to alienate is absolute,<sup>86</sup> he expands on the theme and asserts that all contract rights are property rights protected by the Takings Clause. Debtor relief legislation modifies debt contracts in favor of borrowers and therefore amounts to a taking of creditors' property. Specifically, Epstein contends that shortening the statute of limitations for collecting a debt, statutory reductions in interest rates, statutory delay in collection of a debt, and even imposing a new burden of proof are all takings of property because they reduce the consideration that creditors receive under their contracts with debtors.<sup>87</sup> Although the case is dated and the current Court might not follow it, Epstein echoes the sentiments of the

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<sup>84</sup> See J.A. Mirrlees, *An Exploration in the Theory of Optimal Income Taxation*, 38 REV. ECON. STUD. 175, 207-08 (1971). Mirrlees' result actually had a basic rate structure that is flat or even declining, but included a large fixed "demogrant" guaranteeing a minimum income. In calculating how effective tax rates vary with income, the demogrant dominates the relatively flat rate structure and produces progressivity.

<sup>85</sup> For an early discussion of property rights in contractual terms, see WILLIAM B. STOEBUCK, *NONTRESPASSORY TAKINGS IN EMINENT DOMAIN* 132-33 (1977).

<sup>86</sup> See EPSTEIN, *supra* note 2, at 74 ("The right of disposition is a property, in the same degree and manner as the right of exclusive possession.").

<sup>87</sup> See *id.* at 89.

conservative Supreme Court that struck down debtor relief measures during the early stages of the Great Depression.<sup>88</sup>

As any college student who takes Macroeconomics 101 knows, one of the most powerful tools for debtor relief is monetary policy. If the monetary authority (the Federal Reserve in the United States) pursues an expansionary policy that causes prices to rise, then debtors who borrow “old” dollars at the execution of a loan are able to repay creditors with “new” dollars that are worth less — potentially considerably less.<sup>89</sup>

To give but one example, consider someone who borrowed \$1 million for thirty years in 1960, when inflation was running at about 1.4%.<sup>90</sup> Like most bonds, assume that the debtor pays periodic interest for the term of the loan and repays all principal at the end of the term. If the parties made the quite natural and common assumption that current inflation was the best predictor of future inflation, their borrowing agreement would factor in the expectation that principal repaid in thirty years would be made with dollars worth about 25% less. In actuality, given the higher inflation rates experienced for much of the 1970s, 1980s, and even 1990s, the lender would be repaid with dollars worth about 78% less. That is a difference of a little over 50%.<sup>91</sup>

This real-world example shows just how potent inflation can be in transferring wealth from creditors to debtors. As the numbers in the previous paragraph illustrate, debtors who borrowed in 1960 for a 30-year term had the real burden of repaying principal in 1990 cut in half. That is some serious debt relief. Unless natural rights theorists are going to elevate form over substance, inflation must be every bit as much of a taking as the other debtor relief legislation they cite.

There is an important caveat: it is only *unexpected* inflation that is a taking. In the example above, we made the natural assumption that parties would factor current inflation levels into their loan agreement. If inflation had continued at about 1% for the entire 30-year period, then we have assumed that the terms of the loan would have been

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<sup>88</sup> See *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 602 (1935) (holding debt repayment extensions, reducing principal owed to appraised value of property, and other measures constituted a taking of creditor property without due process). *Radford* has never been overruled or even questioned by the Court.

<sup>89</sup> See, e.g., RUDIGER DORNBUSCH ET AL., *MACROECONOMICS* 169-70 (11th ed. 2011) (describing how inflation erodes the value of assets yielding fixed returns).

<sup>90</sup> *Top Picks*, BUREAU LAB. STAT., <https://data.bls.gov/cgi-bin/surveymost?bls> (last visited Feb. 15, 2018).

<sup>91</sup> Of course, this is just the loan principal; the value of the lender's periodic interest payments are also eroded, and the size of this erosion increases during periods of continual inflation, as the United States experienced from 1960 to 1990.

such that the lender received exactly what she expected, in real terms, when principal was repaid in 1990. Thus, if the Federal Reserve both announced inflation targets in advance and met those targets precisely, inflation would surprise no one, targets would be factored into the terms of loan agreements, and creditors would have no takings claims.

That, however, is unrealistic. The Federal Reserve does announce inflation targets, though only for a few years out and not for anything like thirty years.<sup>92</sup> Hitting even short-term targets, however, is quite another matter. Macroeconomics is far more social than science — it enjoys little of the precision found in physics or chemistry. In particular, the Federal Reserve has frequently failed to hit its inflation targets.<sup>93</sup> The world is simply too complicated. Unforeseeable shocks, from financial meltdowns to oil embargoes to the changing fortunes of large economies (e.g., China on the upside, Greece on the downside), to name just three, constantly confront monetary policymakers. They must either adjust their policies to meet old targets under new conditions or may need to take the more serious step of changing those targets to deal with all of those surprises.

Thus, unexpected bouts of inflation are inevitable. Or, to be more accurate, inflation will be above targeted levels with some frequency. Of course, it will also be below target with some frequency.<sup>94</sup> In that case, it is creditors instead of debtors who will reap a benefit, as they will receive repayment in dollars that are worth more than the dollars they originally loaned out. The opposing pair of inflation and deflation both impose disproportionate burdens in precisely the same fashion as progressive and regressive taxation: progressive taxation and inflation burden the wealthy; regressive taxation and deflation burden the poor.

Epstein argues that progressive taxation and debtor relief (like inflation) are unconstitutional takings from the wealthy, with hardly

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<sup>92</sup> See *Open Market Operations*, BOARD GOVERNORS FED. RES. SYS., <https://www.federalreserve.gov/monetarypolicy/openmarket.htm> (last updated Dec. 13, 2017) (showing that the Federal Reserve generally changes interest rate targets more than once a year, and since 2005 has never left a single target in place for longer than seven years — an unprecedented target of essentially 0% adopted as part of the response to the onset of the Great Recession).

<sup>93</sup> See generally Daniel L. Thornton, *Monetary Policy: Why Money Matters and Interest Rates Don't* (Fed. Reserve Bank of St. Louis, Working Paper 2012-020A, Oct. 2012), <https://research.stlouisfed.org/wp/2012/2012-020.pdf> (arguing that “by aggressively pursuing countercyclical stabilization policymakers run a significant risk of missing on their inflation objective”).

<sup>94</sup> It is natural to assume that the Federal Reserve makes *unbiased* errors in hitting its inflation targets. If it made biased errors (e.g., on average it came in 2% above its targets), economic actors would simply add 2% to any target announced by the Fed and draft contracts accordingly.

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any discussion of the symmetric cases that harm the less affluent majority of society. A primary purpose of this Article is to highlight the fact that natural property rights theory, taken to its logical conclusion, finds symmetric takings from the less affluent in the cases of regressive taxation and deflationary monetary policy.

If unexpectedly high and unexpectedly low inflation/deflation are both takings (the former from creditors, the latter from debtors), the Federal Reserve is in a by-now familiar policy straitjacket, though likely even worse than that constricting tax policy. At least there is one tax that conforms to Epstein's read of the Takings Clause that can be set and maintained without any risk of error: the flat tax. Given the practical impossibilities of hitting inflation targets, the Fed will face a continual stream of takings claims — from creditors when it comes in above target and from debtors when it comes in below target. This is really far worse than a straitjacket. A natural rights interpretation of the Takings Clause makes it impossible to conduct monetary policy in a large modern economy without provoking hundreds of thousands if not millions of just compensation claims every year from either creditors or debtors. It is difficult to justify such a result under any acceptable theory of constitutional interpretation.

Natural rights advocates might issue this seemingly powerful reply to this argument. They could note that monetary policy involves substantial risk given the Fed's chronic inability to hit its inflation targets. Loan contracts then should be read, the argument continues, to allocate the risk inherent in the conduct of monetary policy. Creditors who do not bargain for protection from unexpectedly high inflation have only themselves to blame, and symmetrically so for debtors who do not bargain for protection against unexpectedly low inflation. Thus, the argument would run, the risks of monetary policy surprises are for private parties to allocate as they see fit in their contracts. There simply is no taking.

This argument, however, would prove far too much for natural property rights theories. Indeed, it would unravel the entire project. Start with the more targeted debtor relief measures expressly deemed takings (e.g., lengthening debtors' time to repay, or reducing interest rates).<sup>95</sup> Creditors who wanted to guard against such legislation could include clauses in loan agreements either opting out of the new rule if permitted or requiring additional consideration if not. This method of rejecting any unfavorable legal innovation during the performance of a contract works in any domain in which natural property rights

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<sup>95</sup> See *supra* text accompanying notes 86–87.

theorists argue that governmental action has taken the contract/property rights of one side. For example, Epstein's extended argument that Workers' Compensation statutes might amount to a taking, depending on their details, crumbles entirely in the face of this stratagem.<sup>96</sup>

Indeed, taken to its logical conclusion, this argument implies that compensation need not be paid even in the paradigmatic case of the government taking title to property for construction of a road. If monetary policy — one type of governmental policy — is a risk for private parties to manage, why would we treat land acquisition policy any differently? Property owners worried about the taking of their real estate could simply buy insurance that would fully compensate them if and when the government expropriated their land. This of course is a reduction ad absurdum, at least for natural property rights advocates, as they clearly wish to expand, not contract, the government's duties to pay just compensation to property owners whose property falls in value due to any governmental action.

Before leaving this topic, it is important to stress the magnitude of the stakes. Monetary policy is one of the most important levers that the government has to control employment, incomes, growth, and inflation (or deflation).<sup>97</sup> The success or failure of such macroeconomic policies has enormous impact on all citizens. Prudent monetary policy fosters sustained economic growth, robust labor markets, and manageable levels of price change.<sup>98</sup> Imprudent monetary policy can induce recessions costing millions their jobs, and inflations or deflation with their attendant harms to creditors or debtors.<sup>99</sup> Natural property rights theory robs The Federal Reserve Board of degrees of freedom necessary to do its part in keeping the economy on track.

#### F. *Barring (Pareto) Efficient Redistribution*

There is yet a third policy dimension in which natural property rights theory straitjackets state action and renders unconstitutional programs that are of value to virtually everyone. In *The Spirit Level*, Richard Wilkinson and Kate Pickett present evidence suggesting that inequality imposes society-wide costs — including significant costs on

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<sup>96</sup> EPSTEIN, *supra* note 2, at 252-53.

<sup>97</sup> See DORNBUSCH ET AL., *supra* note 89, at 249-52.

<sup>98</sup> See *id.* at 271-77.

<sup>99</sup> *Id.*

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the wealthy.<sup>100</sup> It seems, for example, that after controlling for other factors, everyone, rich and poor alike, fair better in terms of many health outcomes in countries with lower inequality.<sup>101</sup> Perhaps less surprisingly, violence is less prevalent in societies with less inequality.<sup>102</sup> They suggest that one of the key causal mechanisms is stress: in highly unequal societies, the poor feel entirely marginalized while the wealthy live in constant fear of crime and experience frequent resentment from the less fortunate. In more equal societies, the authors posit, few citizens feel left out of the economy's bounty, and the wealthy do in fact face less crime and likely less resentment as well.<sup>103</sup>

What, one might ask, does this have to do with taxation and takings? In a word, everything. If the suggestive findings in *The Spirit Level* are confirmed with stronger empirical evidence,<sup>104</sup> there is a new and very powerful reason to redistribute income and wealth: inequality really does make everyone worse off. There is no need to rely on human empathy or the desire to maintain social peace. If *The Spirit Level* analysis is correct, redistribution of wealth would benefit both rich and poor in general, meaning that it comes very close to meeting the extremely demanding standard of Pareto efficiency.<sup>105</sup> Yet, under a natural rights regime, redistribution violates the Takings Clause on *a priori* grounds impervious to any such empirically validated novel phenomenon. Yet again, a natural property rights reading of the Takings Clause summarily bans policies of potentially enormous social utility. That has to be a major reason to question the validity of the natural rights approach.

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<sup>100</sup> See WILKINSON & PICKETT, *supra* note 12.

<sup>101</sup> See *id.* at 63-72 (chapter 5, "Mental health and drug use"); *id.* at 73-87 (chapter 6, "Physical health and life expectancy"); *id.* at 89-102 (chapter 7, "Obesity: wider income gaps, wider waists").

<sup>102</sup> See *id.* at 129-44 (chapter 10, "Violence: gaining respect").

<sup>103</sup> See *id.* at 33-45.

<sup>104</sup> There is some scholarship suggesting that the data on health outcomes, properly analyzed, does not support the thesis of *The Spirit Level*. See, e.g., Angus Deaton, *Health, Inequality, and Economic Development*, 41 J. ECON. LIT. 113, 115 (2003).

<sup>105</sup> Recall that a Pareto-Efficient policy harms no one's welfare and increases the welfare of at least one person. See *supra* text accompanying note 25.



II. FAILINGS OF THE NATURAL PROPERTY RIGHTS CASE AGAINST  
REDISTRIBUTION

A. *Public Goods in General and Charity in Particular*

None of the arguments made in Part II identify any flaws in the internal logic of natural property rights theory. Its conclusions follow from its premises. Thus, the only escape from the straitjackets that it imposes on taxation, redistribution, and monetary policy is to undermine those foundational assumptions. That is the purpose of the remainder of this Article. Later subparts will (i) call into question choice of the proper tax base, (ii) offer alternative reasonable ways to regulate taxation constitutionally, and (iii) point out that the natural property rights social welfare criterion (which I dub “super-Pareto efficiency”) could not be less feasible.

This subpart begins the critique of natural property rights assumptions by raising two fundamental questions about its treatment of public goods. First, it rejects the presumption that public goods provide benefits in roughly direct proportion to income. It then focuses on the particularly important case of one public good in particular: charity. Because Richard Epstein has constructed the most comprehensive and cohesive natural property rights case for barring progressive taxation, and because his work remains by far the most influential articulation of natural property rights, the critique in this subpart focuses largely on his assumptions.

1. How Are the Benefits of Public Goods Distributed Across  
Income Levels?

At the core of Epstein’s case against the progressive income tax as a taking is his assertion that public goods benefit taxpayers in direct proportion to their income.<sup>106</sup> To put this in concrete terms, if a road delivers \$100 of value to someone earning \$10,000 (a 1% “yield”), Epstein assumes that it benefits someone earning \$100,000 to the tune of \$1,000 (same said 1% “yield”). He of course does not argue that this holds precisely. He does, however, contend that it is the most natural and realistic assumption to make about the manner in which the benefits of public goods vary with income. Combined with his rule against disproportionate impacts, this directly implies that a flat tax and only a flat tax satisfies the Takings Clause by keeping amounts

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<sup>106</sup> See *supra* text accompanying notes 46–48.

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taken via taxation in rough equivalence with benefits received from the expenditure of those tax dollars on public goods.

As discussed earlier,<sup>107</sup> however, Epstein presents no data to support this foundational assumption, and his theoretical justifications are exceedingly flimsy (e.g., benefits in proportion to income seems the “most natural” assumption to make). No other natural rights theorist has stepped in to fill this gap.

Although no hard data appears to exist, there are contrary theoretical grounds to believe that the benefits emanating from public goods increase disproportionately as income (and wealth) increase. First and foremost, a large share of federal and state dollars (for example, police, courts, the patent office, recording systems, etc.) is spent to protect property. The expenditures are of immense value to those with lots of property needing protection, but they are of essentially no value to those in the bottom quintile of the population who have essentially no wealth at all. In addition, small property owners (e.g., someone who owns only a home) can in many ways protect their property with little state assistance, but someone with a large fortune in multiple forms (real estate in many states; patents; stocks; bonds; etc.) has not a prayer of protecting their property on their own. There are economies of scale in the provision of the law and order that keeps property safe, and the wealthy capture the lion’s share of this value created by tax dollars because of the extreme inequality of wealth holdings.<sup>108</sup>

Second, those same dollars also go to protecting citizens from physical harm. At one extreme, one might believe that this is of roughly equal value to all citizens. Under Epstein’s theory, this would call for a “head tax,” (i.e., a levy that collected the exact same dollar amount from each citizen) independent of income. Epstein suggests that a head tax would be a taking from the poor,<sup>109</sup> but this again depends critically on his assumption that the benefits of public services vary directly with income. At the other extreme, however, protecting people may yield benefits that rise sharply with income, as the previous section suggested was the case for property. Due to their greater public influence, the wealthy appear able to divert disproportionate police protection to the neighborhoods that they inhabit.<sup>110</sup> This is one of the reasons that wealthy neighborhoods are

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<sup>107</sup> *Id.*

<sup>108</sup> See Kennickell, *supra* note 80, at 13-14.

<sup>109</sup> See EPSTEIN, *supra* note 2, at 297.

<sup>110</sup> See Robert P. Inman & Daniel L. Rubinfeld, *The Judicial Pursuit of Local Fiscal Equity*, 92 HARV. L. REV. 1662, 1675 (1979).

much safer than nearby poorer neighborhoods. These hidden politics of police protection may insure that wealthy neighborhoods always enjoy disproportionate police protection.<sup>111</sup> The wealthy should pay taxes on a progressive schedule if they are indeed able to capture more than their share of public safety services.

To take a very different example, consider the distribution of benefits from national policies to promote international trade like NAFTA<sup>112</sup> or the proposed Trans-Pacific Partnership (“TPP”).<sup>113</sup> Although these trade agreements certainly benefit all citizens by facilitating cheaper goods, they also give rise to real costs — and those costs are not distributed evenly across the income distribution. One of the primary effects of trade is to reduce domestic employment in labor-intensive industries.<sup>114</sup> Foreign competition has decimated a number of large U.S. industries since World War II, including, among others, textiles, steelmaking, and appliance manufacturing.<sup>115</sup> Although some domestic capital owners have suffered, many have simply moved production overseas and enjoyed higher profits. When capital benefits at the expense of labor, the wealthy benefit disproportionately and the poor suffer disproportionately. Thus, government resources spent to increase international trade yield disproportionate benefits to the wealthy.

As mentioned previously, in order to assess the distribution of benefits from governmental expenditures, we must sum the benefits

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<sup>111</sup> See Naomi Martin, *Questions of Fairness Arise as Wealthy Pay for Extra Patrols*, WASH. TIMES (Oct. 26, 2015), <http://www.washingtontimes.com/news/2015/oct/26/questions-of-fairness-arise-as-wealthy-pay-for-ext>.

<sup>112</sup> North American Free Trade Agreement, Can.-Mex.-U.S., Dec. 17, 1992, 32 I.L.M. 289 (1993), <http://www.worldtradelaw.net/fta/agreements/nafta.pdf>.

<sup>113</sup> The Trans-Pacific Partnership, Feb. 4, 2016, <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text>. One of President Trump’s first acts was to formally abandon efforts to ratify this proposed treaty. See Peter Baker, *Trump Abandons Trans-Pacific Partnership, Obama’s Signature Trade Deal*, N.Y. TIMES (Jan. 23, 2017), [https://www.nytimes.com/2017/01/23/us/politics/tpp-trump-trade-nafta.html?\\_r=0](https://www.nytimes.com/2017/01/23/us/politics/tpp-trump-trade-nafta.html?_r=0). For an overview of this proposed multilateral trade treaty, see *TPP: What Is It and Why Does It Matter?*, BBC (Jan. 23, 2017), <http://www.bbc.com/news/business-32498715>.

<sup>114</sup> See John McLaren & Shushanik Hakobyan, *Looking for Local Labor Market Effects of NAFTA 4* (Nat’l Bureau of Econ. Research, Working Paper No. 16535, 2010) (finding that NAFTA dramatically lowered wage increases for workers in industries most subject to competition from unskilled labor in Mexico).

<sup>115</sup> See JOHN P. HOERR, *AND THE WOLF FINALLY CAME: THE DECLINE OF THE AMERICAN STEEL INDUSTRY* (1988); TIMOTHY J. MINCHIN, *EMPTY MILLS: THE FIGHT AGAINST IMPORTS AND THE DECLINE OF THE U.S. TEXTILE INDUSTRY* (2013); VACLAV SMIL, *MADE IN THE USA: THE RISE AND RETREAT OF AMERICAN MANUFACTURING* (2015) (documenting, *inter alia*, decline in appliance manufacturing in the United States).

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from each of these examples (law and order; trade policy) along with a long list of other services funded with tax dollars. Nobody knows the true distribution of benefits across income levels, but the examples given above suggest that, contra Epstein, there are good reasons to believe that public goods disproportionately benefit the wealthy. If so, Epstein's conclusions about progressive taxation must do a full 180 degree turn: progressive taxation becomes not just permissible, but mandated under natural rights postulates as the only way to restore proportionality between taxes paid and benefits received from the use of those tax dollars.

## 2. Charity Is a Public Good — No Different from Others

Charity, in the form of welfare payments, merits special attention. Such expenditures share a core *redistributory* purpose with progressive taxation. Natural rights theories of course condemn redistribution as it by definition does not match tax bills with the benefits from public projects as closely as possible. Instead, it takes from *A* and gives to *B*. From a natural rights perspective, this is an *Ur-taking*.

The problem is that charity is a classic economic public good.<sup>116</sup> Whether motivated by innate empathy, desires to provide insurance against hard times, or majoritarian decisions to “buy social peace” by mollifying the poor, government-conducted redistribution solves a collective action problem with what amounts to mandated charity. Those who voluntarily give to charity (for whatever reason) cannot exclude non-contributing fellow citizens from the benefits of charity — be it a satisfied sense of empathy for relieving those in the most abject poverty or, alternatively, less social unrest. In addition, gifts to charity are non-rivalrous: benefits (be it empathy or social peace) accruing to one wealthier taxpayer in no way diminish benefits to another. These are the two attributes characteristic of public goods and, like police services or national defense, private markets will provide suboptimal levels of charity and possibly none at all.<sup>117</sup>

Epstein initially suggests that welfare (i.e., publicly-organized charity) paid for with tax dollars, is not a public good, declaring that “there is no classic public good like defense that necessarily requires a

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<sup>116</sup> James Andreoni, *Philanthropy*, in 2 HANDBOOK OF THE ECONOMICS OF GIVING, ALTRUISM AND RECIPROCITY 1202, 1204 (Serge-Christophe Kolm & Jean Mercier Ythier eds., 2006) (noting that all widely-cited explanations for charity support classifying private gifts as *pure* public goods).

<sup>117</sup> See William H. Oakland, *Theory of Public Goods*, in 2 HANDBOOK OF PUBLIC ECONOMICS 485, 485-87 (Alan J. Auerbach & Martin Feldstein eds., 1987); POSNER, *supra* note 13, at 402.

collective choice” to assist the needy.<sup>118</sup> As he must, given the copious literature to the contrary,<sup>119</sup> Epstein eventually does concede that charity is a public good. This concession, however, is stinting. Instead of acknowledging alternative possibilities, he suggests that public welfare programs are “little more than a strategic bribe that spares the payers the greater cost of police enforcement and control.”<sup>120</sup>

Epstein further claims that there is no real need for welfare in the United States as it is the land of opportunity — such that anyone willing to work hard and save to invest can move out of the ranks of poverty.<sup>121</sup> This was a more defensible claim when he wrote *Takings* in 1985, but no more. A large and sophisticated empirical literature has shown that America has gone from being one of the most socioeconomically mobile developed nations to one of the least mobile.<sup>122</sup>

Ignoring this (very important) issue, it is far from clear that using redistribution to insure domestic peace would be unconstitutional. The government certainly has the power to use money instead of force to resolve international disputes. Why would the Takings Clause prohibit domestic analogs of such tactics? When candidates in favor of foreign aid win elections, opponents of such policies will be (involuntarily) taxed to implement the very policy that they abhor. Shifting the context from foreign to domestic makes no material difference. Natural property rights supporters might note a material difference: when the state uses money to buy domestic peace, the poor receiving welfare vote to benefit themselves. This, however, is only a question of degree. It is conceivable that a majority of the middle and upper classes who bear the cost of redistributive policies might find welfare the best tool for tamping down social unrest.

All of this presumes that welfare actually is a bribe to maintain domestic tranquility. This casts such public programs in the worst possible light, implying that the less fortunate are a rabble constantly

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<sup>118</sup> EPSTEIN, *supra* note 2, at 315.

<sup>119</sup> Andreoni, *supra* note 116, at 1204.

<sup>120</sup> EPSTEIN, *supra* note 2, at 316.

<sup>121</sup> *See id.* at 316.

<sup>122</sup> *See* Raj Chetty et al., *The Fading American Dream: Trends in Absolute Income Mobility Since 1940*, SCIENCE, Apr. 24, 2017, at 8-9 [hereinafter *The Fading American Dream*]; Miles Corak, *Inequality from Generation to Generation: The United States in Comparison 2* (Univ. of Ottawa, Discussion Paper No. 9929, 2016). *See also* Raj Chetty et al., *Is the United States Still a Land of Opportunity? Recent Trends in Intergenerational Mobility*, 104 AM. ECON. REV. (PAPERS & PROC.) 141, 146 (2014) [hereinafter *Recent Trends*] (noting that several regions in the United States persistently offer less mobility than other developed nations).

threatening to pillage if they do not receive adequate ransom from the propertied class. There is a compelling alternative: innate human empathy for the misfortunes of others. There is a large and growing literature demonstrating the important role that empathy plays in social relations.<sup>123</sup> Such empathy may motivate a majority of the population to favor progressive taxation and transfer programs that assist less fortunate citizens.

It is no answer to say, as Epstein does,<sup>124</sup> that empathetic individuals are more than welcome to contribute privately, on their own. This misses the obvious and critical combination of the facts that (i) people's empathy is not boundless and, moreover, (ii) charity is a public good. Empathy is but one component of people's preferences, and it competes with more selfish desires. Those who donate to private charity when their peers with equal or, even worse, greater means decline to do so cannot help but feel that these others have taken advantage of them. If most people do have an innate sense of empathy, then what we have is a classic free-rider problem. Potential contributors to private charity may balk at the prospect of giving their fair share only to see those of equal or greater means free-ride on such contributions without making their own donations. Free-riding, of course, is one of the central problems with private provision of public goods<sup>125</sup> and explains why we do not observe significant privately-financed police departments or privately-funded armies. These are public goods for which coerced payments (i.e., taxes) must be levied. Charity is no different.<sup>126</sup>

Given his recognition that charity/welfare is a public good, it is puzzling that Epstein does not make this connection. It is even more puzzling that he deploys private law doctrines to claim that government welfare programs are takings. Reminding readers that the government's powers are simply the sum of ceded private rights and

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<sup>123</sup> See, e.g., C. Daniel Batson et al., *Empathy and Altruism*, in HANDBOOK OF POSITIVE PSYCHOLOGY 485, 485-98 (C. R. Snyder & Shane J. Lopez eds., 2002).

<sup>124</sup> See EPSTEIN, *supra* note 2, at 317 ("The refusal of any single individual to provide welfare payments does not prevent others from going ahead with their plans.").

<sup>125</sup> *Free-rider Problem*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Free-rider\\_problem](https://en.wikipedia.org/wiki/Free-rider_problem) (last visited Mar. 13, 2018) ("In economics, the free-rider problem occurs when those who benefit from resources, goods, or services do not pay for them, which results in an underprovision of those goods or services.").

<sup>126</sup> Cf. EPSTEIN, *supra* note 2, at 323 (arguing that the charitable deduction on federal income tax returns is a violation of the Takings Clause, as it permits those making charitable deductions to implicitly shift some of the cost of their contributions onto fellow taxpayers).

causes of action, he declares that “[t]here is quite simply no private cause of action for want of benevolence that remotely resembles those causes allowable under the dominant actions of tort, contract, and restitution.”<sup>127</sup>

All true, but entirely irrelevant. There is no private cause of action analogous to the state’s power to extract taxes to support the police or the military. As Epstein himself emphasizes, government’s coercive powers are necessary to provide such public goods. He offers no reason, however, for why we should take a different perspective on the particular public good called charity. If a majority can force everyone to pay for police services, Epstein has no principled grounds on which to argue that a majority cannot force everyone to pay for welfare programs.

Epstein similarly appeals to the foundational American tort law rule that a person has no duty to rescue another, regardless of how easy rescue might be, if the person has no legal duty to the imperiled other party.<sup>128</sup> “The legal theory that recognizes no obligation to rescue a stranger in imminent peril cannot generate, let alone nourish, a system of transfer payments and welfare obligations.”<sup>129</sup> Yet again, Epstein fails to acknowledge the difference made by the fact that welfare is a public good. A majority can force all American taxpayers to pay for a war to liberate oppressed people abroad. Does it make any sense to say that the Takings Clause prevents the same majority from forcing everyone to help impoverished domestic citizens?

To round out the discussion of welfare, we turn to a couple of empirical issues. First, Epstein asserts that private actors are better at delivering charity because they can better police the moral hazard problem — the fact the existence of charity may encourage sloth and thus the demand for charity.<sup>130</sup> He provides no support for this empirical assertion, and I was unable to unearth any in my own research. Moreover, there are at least a few data points to the contrary. In particular, there is actually evidence that medical care benefits are

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<sup>127</sup> *Id.* at 318.

<sup>128</sup> For representative cases, see for example *Hurley v. Eddingfield*, 59 N.E. 1058 (Ind. 1901); *Osterlind v. Hill*, 160 N.E. 301 (Mass. 1928); *Harper v. Herman*, 499 N.W.2d 472 (Minn. 1993); *Yania v. Bigan*, 155 A.2d 343 (Pa. 1959). For the black letter statement of the no-duty-to-rescue rule, see RESTATEMENT (SECOND) OF TORTS § 314 (AM. LAW INST. 1965) (“The fact that the actor realizes or should realize that action on his part is necessary for another’s aid or protection does not of itself impose upon him a duty to take such action.”).

<sup>129</sup> EPSTEIN, *supra* note 2, at 319.

<sup>130</sup> See Mancur Olson, *A Less Ideological Way of Deciding How Much Should Be Given to the Poor*, 112 DAEDALUS 217, 234 (1983).

delivered more efficiently by the government than by private actors.<sup>131</sup> Indeed, fundamental economic theory predicts that the government will be superior to the market in delivering public goods.<sup>132</sup>

### B. Is There One “Right” Tax Base?

The previous subpart focused largely on *expenditure* issues — the extent to which government outlays benefited rich and poor citizens asymmetrically. This subpart explores the other side of the ledger, the source of government revenues. When Epstein discusses tax revenue, he focuses overwhelmingly on *rates*. This subpart argues that his stunted discussion of tax *base* issues is unjustified and that there is no one “right” tax base. Indeed, there are strong arguments that a *wealth* tax has a better fit with the logic of natural property rights theories than an income tax. The prospect of a wealth tax presents natural rights theories with a serious problem: a *flat* wealth tax likely approximates a *progressive* income tax given the fact that wealth is distributed much more unevenly than income. Can natural property right’s aversion to progressive taxation be defeated by the simple expedient of adopting a tax base that actually offers a better fit with the paradigm’s basic logic? If so, the case against progressive income taxation is a matter of superficial form, not substantive bite.

#### 1. The Dubious Presumption in Favor of an Income Tax

Epstein devotes remarkably little attention to the choice of a tax base. He seems to believe that the modern state can fund itself only with “general revenue” taxes and seems to use this phrase to mean only income and consumption taxes.<sup>133</sup> Although he explicitly states that the Takings Clause permits a consumption tax instead of an income tax,<sup>134</sup> he generally focuses on the latter.

His seeming indifference between income and consumption taxation is puzzling, as they have substantially different effects across the

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<sup>131</sup> For a good review of the literature, see Lisa Clemans-Cope et al., *Medicaid Spending Growth Compared to Other Payers: A Look at the Evidence*, HENRY J. KAISER FAM. FOUND. at 10-13 (Apr. 13, 2016), <http://kff.org/report-section/medicaid-spending-growth-compared-to-other-payers-issue-brief>.

<sup>132</sup> See RICHARD CORNES & TODD SANDLER, *THE THEORY OF EXTERNALITIES, PUBLIC GOODS, AND CLUB GOODS* 143 (2d ed. 1996) (discussing the “tendency for [market] equilibrium to result in the provision of an amount of the public good that falls short of its Pareto-efficient level”).

<sup>133</sup> See EPSTEIN, *supra* note 2, at 297-301.

<sup>134</sup> See *id.* at 294.



wealth distribution. The difference between the two is simple. An income tax is a levy on both consumption and savings — all income is used in one of these two ways. A consumption tax, of course, taxes only consumption and leaves savings undiminished. If the savings rate was constant across incomes, then both taxes would have the same substantive impact on tax rates. Of course, that is not the case; the savings rate rises sharply at higher income levels.<sup>135</sup>

The positive relationship between income and savings rates means that a consumption tax — usually implemented in the form of a sales tax — is much more regressive than an income tax. The consumption tax leaves savings untaxed, and only the wealthy save significant shares of their income.<sup>136</sup> Epstein's argument implies that there is only one "right" way to tax in compliance with the Takings Clause, but then blesses two taxes that impose markedly different burdens across the income distribution. Further, he offers no explanation for why it is acceptable to tax either income (consumption + savings) or consumption alone, but not acceptable to tax just savings. A tax on only savings would be extraordinarily progressive, yet Epstein provides no explanation of why such a tax would violate the Takings Clause — which presumably it must, because a savings tax would be even more progressive than an income tax which natural rights theory deems excessively progressive.

## 2. The Long List of Potential Tax Bases

The problem is actually much larger, as the universe of possible tax bases extends far beyond income and consumption. Here is a list, by no means complete, of the tax bases that governments might use:

- (i) Incomes
- (ii) Consumption (sales tax)
- (iii) Savings
- (iv) Individuals (head tax)
- (v) Tariffs
- (vi) Wealth (general property)
- (vii) Inheritances/Estate

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<sup>135</sup> See Dynan et al., *supra* note 55, at 399-400.

<sup>136</sup> See PEW CHARITABLE TRUSTS, *THE PRECARIOUS STATE OF FAMILY BALANCE SHEETS* 11-13 (2015).

We have already seen that Epstein (i) would permit both income and consumption taxes despite the very different burdens that they would impose on different incomes, and (ii) gives no reason for embracing either of these taxes but implicitly seems to reject a tax on savings.

Epstein does consider the possibility of using the individual person as the tax base, meaning that each person would pay the same amount in taxes regardless of income, savings, or wealth. Such a “head tax” or “capitation” of course would be extraordinarily regressive. A poor person paying the same dollar tax as a wealthy person would face a much higher effective percent tax rate. Epstein properly realizes this and deems a head tax an “illicit redistribution to the rich.”<sup>137</sup> It is far from clear, however, that a head tax is inconsistent with natural property rights axioms. The key issue, as discussed earlier, is the extent to which the benefits from government services such as the police, the courts, and the military vary with income.<sup>138</sup> It is not logically impossible that the benefits of government services are the same to everyone, regardless of income or wealth, in which case Epstein’s assumptions would force him to embrace the head tax — despite the fact that the poor almost certainly could not afford to pay their equal share of total public revenue needs. This is yet another illustration of the sort of straitjacket that natural rights interpretations of the Takings Clause impose on tax policy.

To the extent that original intent matters, funding the government largely with tariffs on imported goods must pass constitutional muster as that is indeed the manner in which the federal government met most of its revenue needs until the twentieth century.<sup>139</sup> Though formally paid by consumers, the true burden (“incidence”) of such taxes is complicated.<sup>140</sup> Figuring out the incidence of a tax — who actually pays the tax — can be complex. To take only the most prominent issue, tariffs are usually enacted to protect domestic manufacturers from foreign competition. If, however, even a relatively high tariff is insufficient to make domestic goods competitive, the tariff harms consumers but does not help producers. At the other

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<sup>137</sup> EPSTEIN, *supra* note 2, at 297.

<sup>138</sup> See *supra* pp. 33-34.

<sup>139</sup> Tariffs made up over 90% of revenues throughout the first decades of the American Founding Era and, with the exception of the Civil War, tariffs comprised over half of federal revenue until the twentieth century. BUREAU OF THE CENSUS, HISTORICAL STATISTICS OF THE UNITED STATES 1789-1945, at 243-45 (1949), <https://www2.census.gov/prod2/statcomp/documents/HistoricalStatisticsoftheUnitedStates1789-1945.pdf>.

<sup>140</sup> See ROBERT M. DUNN, JR. & JOHN H. MUTTI, INTERNATIONAL ECONOMICS 138-48 (6th ed. 2004).

extreme, if domestically produced goods are only slightly more costly than imports, a tariff imposes minimal costs on consumers.<sup>141</sup> Questions about incidence (true burden) make analyzing all of the taxes on the list above more complex; for the purposes of this Article we abstract from these concerns.

### 3. The Strong Case for a Wealth (General Property) Tax — Under Natural Property Rights Assumptions

Perhaps Epstein's most glaring omission from the taxes listed in the previous section is the wealth, or general property tax.<sup>142</sup> If we think about what the state protects with police, courts, and other essential public services, it looks a lot more like it is protecting property than income. Of course, law and order enables a modern economy to function and is essential to enabling the division of labor and the higher incomes generated from such economic activity. Still, the police devote a considerable share of their resources to protecting business premises, houses, and the contents of both. These of course are property interests. The government provides significant services to protect intellectual property rights like patents, copyrights, and trademarks.<sup>143</sup> It also provides significant protection for owners of stocks, bonds, and other financial assets.<sup>144</sup> Larger expenditure categories, like the military, protect both property and the ability to earn income. So too for state and local police forces and court systems. It is difficult if not impossible to calculate the magnitude of the benefits provided to each. Given all of these examples, it is plausible that the government is as much or more in the business of protecting property than it is in protecting the ability to earn income. If so, it does not seem particularly controversial to claim that property is an appropriate tax base.

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<sup>141</sup> See *id.* at 147.

<sup>142</sup> I use the phrase “general property tax” to distinguish a wealth tax on *all* forms of property from the more limited common meaning of a “property tax” as a tax on only real estate. A general property (wealth) tax would reach not just realty but all forms of personal property as well: bank accounts, bonds, stocks, patents, copyrights, etc.

<sup>143</sup> In fiscal year 2016, running the U.S. Patent and Trademark office cost about \$3.5 billion. See U.S. PATENT & TRADEMARK OFFICE, FISCAL YEAR 2016 PRESIDENT'S BUDGET: THE USPTO CONGRESSIONAL BUDGET JUSTIFICATION 11 (2015), <https://www.uspto.gov/sites/default/files/documents/fy16pbr.pdf>.

<sup>144</sup> The Commodity Futures Trading Commission (“CFTC”) cost about \$250 million. COMMODITY FUTURES TRADING COMM'N, PRESIDENT'S BUDGET: FISCAL YEAR 2017, at 11 (2016). In fiscal year 2016, running the Securities and Exchange Commission (“SEC”) cost about \$1.6 billion. U.S. SEC. & EXCH. COMM'N, FY 2017 CONGRESSIONAL BUDGET JUSTIFICATION 15 (2016).

To put the matter in sharp relief, consider a citizen who lives exclusively off of income produced by property — for example, assume that *X* owns a building worth \$1 million that generates \$50,000 a year in net income. Though *X* of course needs the government to protect his right to collect this year's rents, she has a much larger interest in governmental protection of her "permanent" property interest in the building. Losing this year's income or a fraction of it would of course be painful, but losing part or all of her property (wealth) interest will affect income not just this year but for all subsequent years (out to infinity given her right to make a bequest).

More generally, when we think of an individual's share in a venture, we tend to think in terms of stock, not dividends. Indeed, the term stock comes from something fixed like wealth, not from a flow like income. Stocks in companies that pay no dividends still represent wealth. Any business net income not distributed raises the value of the stock — an accretion to wealth.<sup>145</sup> If we imagine society as one huge joint venture, then the most natural measure of a taxpayer's share in this societal business is her relative wealth. Wealth and not income should be taxed under the natural property right theories' prime directive to match the individual burdens of taxes and the individual benefits of public outlays as closely as possible.

Property taxation has a long pedigree in the United States, especially at the state and local level.<sup>146</sup> Although most frequently it has been applied to real property, there are no barriers to imposing a broader property tax that reaches all forms of property/wealth. The Takings Clause no doubt protects property, but by its very language it protects property from *takings*. It does not protect property from taxation as a matter of either history or doctrine.

Wealth (property) is distributed much more unequally than income.<sup>147</sup> Thus, wealth ("general property") taxation is much more progressive than income taxation. It is possible, then, that a *flat* property tax would be roughly equivalent to a *progressive* income tax. As natural property rights theorists have no grounds to reject using property as a tax base, this possibility puts them in a rather uncomfortable position. If a progressive income tax is a taking, then

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<sup>145</sup> This is an application of the well-known Modigliani-Miller result. See Merton H. Miller & Franco Modigliani, *Dividend Policy, Growth, and the Valuation of Shares*, 34 J. BUS. 411, 425-26 (1961).

<sup>146</sup> See GLENN W. FISHER, *THE WORST TAX? A HISTORY OF PROPERTY TAX IN AMERICA* 1-3 (1996).

<sup>147</sup> See *supra* note 80.

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— unless form dominates substance — so too must a flat tax on wealth. Given that elevating substance over form is essential to natural rights reading of the Takings Clause,<sup>148</sup> arguing that a progressive income tax is a taking becomes simply untenable. Taxing property is unobjectionable, and a flat tax on property (the flat rate mandated by natural property rights arguments) will in substance look a lot like a progressive tax on income. This demonstrates the rather obvious point that the choice of the tax basis is critical, and different tax bases will have different distributional consequences. This strains the natural property rights case against progressive income taxation to the breaking point.

Admittedly, *general* wealth taxation (beyond taxes on real property) is uncommon in America and other developed nations. In a world of sharply rising inequality, however, scholars are advancing wealth taxation as perhaps the best tool to prevent the accumulation of excessive dynastic wealth. Most prominently, in his widely acclaimed book *Capital in the Twenty-First Century*, Thomas Piketty argues that a worldwide tax on wealth is the best tool available to counterweigh the growing inequality of income and wealth produced by private markets and legal regimes subject to disproportionate influence by the wealthy.<sup>149</sup> From a natural rights perspective fighting inequality is not a proper governmental task. As argued earlier, however,<sup>150</sup> inequality may impose costs on the wealthy as well as the poor, and the government alone has the potential to overcome collective action problems in acting effectively to reduce it.

#### 4. The Strong Case for an Inheritance Tax

As detrimental as growing income and wealth inequality may be to the social fabric of America, the decline in socioeconomic mobility is of even greater concern. “Equal opportunity” has been a foundational principle of American society from the founding of the Republic. For generations, America has conceived of itself as the antithesis of the feudalism that still permeated British society in the eighteenth century, where lineage determined life chances.<sup>151</sup> In the United States, it has

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<sup>148</sup> See *supra* text accompanying notes 63–70.

<sup>149</sup> THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* 515-39 (2014) (chapter 15, “A Global Tax on Capital”).

<sup>150</sup> See *supra* text accompanying notes 100–03.

<sup>151</sup> JACQUE LE GOFF, *MEDIEVAL CIVILIZATION 400-1500*, at 26 (Julia Barrow trans., 1988) (1964) (“Medieval Christian Europe was to turn the desire to escape from one’s lot into a major sin. ‘Like father, like son’ was to be the rule in the western middle ages, inherited from the late [Roman] Empire.”).

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long been maintained that even children from poorer families could make good with hard work and entrepreneurship.<sup>152</sup>

Through most of the twentieth century, America remained a land of relatively high socioeconomic mobility.<sup>153</sup> Since about 1980, however, that has changed. Some very recent findings from extraordinarily good data sources have confirmed what earlier studies suggested: American society has calcified and enjoys lower intergenerational economic mobility than most other developed nations.<sup>154</sup>

As with (*intra*-generational) inequality, natural rights advocates almost surely would argue that any government measures to tilt the playing field in favor of greater intergenerational economic mobility would constitute a taking. Addressing intergenerational immobility requires essentially the same tools as addressing *intra*-generational inequality: taking from the privileged to benefit the underprivileged. From a natural property rights perspective, that is a taking simpliciter. Yet, as with inequality there are both efficiency and equitable reasons to find immobility objectionable. On the efficiency side, having parentage determine life chances undermines incentives for hard work and creativity for “nobles” and “peasants” alike. In addition, immobility tends to lock assets into inefficient usage. On the equity side, it is hard to articulate a less fair regime than one dooming the children of disadvantage to their parents’ fate (and guaranteeing the children of advantage their parents’ privileges). Finally, immobility may impose the same sort of “*Spirit Level*” social tension costs on the entrenched nobility as well as the permanent underclass.<sup>155</sup> As with inequality, the basic theory of public goods tells us that private charity to rectify this social ill will be insufficient; solving this problem is a public good and thus requires governmental action.

Diminishing social mobility has multiple causes. Most obviously, it is a predictable result of growing income inequality. There are many causal channels between growing income inequality among generations of parents and the life chances of their children. Recent literature has focused on two. First, in an age where education and

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<sup>152</sup> There is perhaps no better evidence of the longstanding rags-to-riches ethos in America than the extremely popular Horatio Alger fictional stories of impoverished but industrious young boys working their way up from homelessness to membership in the middle or upper class. See, e.g., HORATIO ALGER, JR., *FAME AND FORTUNE, OR THE PROGRESS OF RICHARD HUNTER* (1868); HORATIO ALGER, JR., *RAGGED DICK* (1868); HORATIO ALGER, JR., *STRUGGLING UPWARD, OR LUKE LARKIN'S LUCK* (1890).

<sup>153</sup> See *The Fading American Dream*, *supra* note 122, at 8.

<sup>154</sup> See *Recent Trends*, *supra* note 122, at 146.

<sup>155</sup> See *supra* text accompanying notes 100–103.

intellectual skills are becoming more and more important, the gap between rich and poor families in the amounts invested in their children's intellectual enrichment has mushroomed over the last few decades.<sup>156</sup> Second, growing economic segregation — rich families tending to live around only other rich and poor around poor — has created environments in which children of privilege tend to enjoy more positive role models than their disadvantaged counterparts.<sup>157</sup>

In the worst-case scenario, we could experience a “New Feudalism,” an America in which the educational and peer advantages enjoyed by the wealthy are so powerful that they become permanent.<sup>158</sup> We could become, at a fundamental level, a version of the British feudalism so categorically rejected by our founding generation and the Constitution that they bequeathed us.

One of the most direct and effective tools for stemming the trend towards dynastic wealth and socioeconomic mobility is an inheritance tax. It weakens one of the most powerful forces blocking socioeconomic mobility, the transmission of family wealth. To be sure, it is not a complete solution. Wealthy parents can pass on tremendous advantages to their children via investments in education and *inter vivos* gifts. Still, inherited wealth provides a powerful channel for wealthy decedents to project the advantages that they enjoyed on to their progeny.

Until relatively recently, the other powerful legal rule standing in the way of creating dynastic wealth was the Rule Against Perpetuities (“RAP”).<sup>159</sup> To oversimplify a bit, the RAP prevented those making property bequests from indefinitely limiting the use and alienability of that property by their direct and subsequent beneficiaries. As a general rule, testators making gifts to family members could impose limits on property rights only until their youngest grandchild reached the age of twenty-one.<sup>160</sup>

The RAP signified the victory of forward-looking English judges over noble families bent on insuring that land remained in their

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<sup>156</sup> Sabino Kornrich & Frank Furstenberg, *Investing in Children: Changes in Parental Spending on Children, 1972–2007*, 50 *DEMOGRAPHY* 1, 12-13 (2013).

<sup>157</sup> See Sean F. Reardon & Kendra Bischoff, *Income Inequality and Income Segregation*, 116 *AM. J. SOC.* 1092, 1100-02 (2011).

<sup>158</sup> I discuss the forces pushing the United States in this direction in a forthcoming book. ERIC KADES, *THE NEW FEUDALISM* (forthcoming 2019).

<sup>159</sup> For an exhaustive treatment of the RAP, see generally JOHN CHIPMAN GRAY, *THE RULE AGAINST PERPETUITIES* (4th ed. 1942).

<sup>160</sup> See *id.* at 191 (“No interest is good unless it must vest if at all, not later than twenty-one years after some life in being at the creation of the interest.”).

bloodline, perpetuating their privileged position in English society.<sup>161</sup> It remained in place for centuries, largely unaltered, serving the important social policies of curbing dynastic wealth, limiting the power of the dead over the assets used by the living, and enhancing the alienability of land. In the 1980s, however, states began eliminating the RAP entirely or lengthening the time of restricting so liberally that the restriction had little bite. The cause of this effective abolition of the RAP in virtually all states was not due to any repudiation of its worthy purposes. It was driven by nothing more than interstate competition among banks and other financial entities for trust business.<sup>162</sup>

The death of the RAP has enabled wealthy decedents to set up truly dynastic trusts that last either forever or for a very long time — many, many generations.<sup>163</sup> Thus the current progressive federal estate tax, which imposes a tax of up to 55%, but only on estates with a value of \$10 million or more,<sup>164</sup> stands as the sole governmental counterweight to a growing tide of wealth inequality. An influential group of wealthy families almost succeeded at having the tax abolished in 2000,<sup>165</sup> and there is every reason to expect continued attempts to eliminate this levy under a Trump administration with Republican control of both houses of Congress.

Natural property rights theories of course deem the federal estate tax a taking given its disproportionate impact due mostly to exempting estates worth less than \$10 million. Epstein, for example, rejects a long

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<sup>161</sup> See generally George L. Haskins, *Extending the Grasp of the Dead Hand: Reflections on the Origins of the Rule Against Perpetuities*, 126 U. PA. L. REV. 19 (1977) (arguing that RAP was a compromise that simultaneously weakened and strengthened dead hand control).

<sup>162</sup> See generally Jesse Dukeminier & James E. Krier, *The Rise of the Perpetual Trust*, 50 UCLA L. REV. 1303 (2003) (arguing that perpetual trusts were encouraged, leading to the end of RAP, which benefitted banks and financial institutions); Max M. Schanzenbach & Robert H. Sitkoff, *Perpetuities or Taxes? Explaining the Rise of the Perpetual Trust*, 27 CARDOZO L. REV. 2465 (2006) (arguing that the GST tax led to a rise in perpetual trust which benefitted trust companies); Stewart E. Sterk, *Jurisdictional Competition to Abolish the Rule Against Perpetuities: R.I.P. for the R.A.P.*, 24 CARDOZO L. REV. 2097, 2117 (2003) (arguing that rise of perpetual trust benefits banks and trust companies).

<sup>163</sup> See, e.g., Rachel Emma Silverman, *Looser Trust Laws Lure \$100 Billion — Amid Congressional Scrutiny, Huge Sums Pour into States That Allow “Dynasty Trusts,”* WALL ST. J., Feb. 16, 2005, at D1.

<sup>164</sup> 26 U.S.C. § 2001 (2018).

<sup>165</sup> See MICHAEL J. GRAETZ & IAN SHAPIRO, *DEATH BY A THOUSAND CUTS, THE FIGHT OVER TAXING INHERITED WEALTH* 131-217 (2005) (chapters 13-19, “The Battle for Passage”).



line of Supreme Court cases upholding progressive inheritance taxation<sup>166</sup> with the assertion that “there is no principled distinction between the right of property and the right of succession.”<sup>167</sup> Anglo-American legal tradition, however, is squarely to the contrary. No less a source than William Blackstone flatly declared in an age of quite limited governments and expansive private rights that

[t]he right of making wills and disposing of property after death is merely a creature of the civil state, which has permitted it in some countries and denied it in others; and even where it is permitted by law, it is subjected to different formalities and restrictions in almost every nation under heaven.<sup>168</sup>

Thomas Jefferson similarly stated quite clearly that there was no natural property right for owners to leave their property by their wills.

The portion occupied by an individual ceases to be his when himself ceases to be, and reverts to the society. If the society has formed no rules for the appropriation of its lands in severalty, it will be taken by the first occupants. These will generally be the wife and children of the decedent. If they have formed rules of appropriation, those rules may give it to the wife and children, or to some one of them, or to the legatee of the deceased. So they may give it to his creditor. *But the child, the legatee or creditor takes it, not by any natural right, but by a law of the society of which they are members, and to which they are subject.*<sup>169</sup>

American courts have not deviated from this principle. The right to inherit is neither a natural nor a constitutional right but rather a statutory creation of the legislature subject to regulation, taxation, and even elimination. Here is one example of the courts’ uniform perspective:

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<sup>166</sup> See, e.g., *N.Y. Tr. Co. v. Eisner*, 256 U.S. 345 (1921) (ruling that a progressive federal levy of the estate tax was constitutional); *Knowlton v. Moore*, 178 U.S. 41 (1900) (ruling that a progressive state inheritance tax was constitutional); *Magoun v. Ill. Tr. & Sav. Bank*, 170 U.S. 283 (1898) (upholding the estate tax as it is a tax of succession and thus, the state can impose conditions on it).

<sup>167</sup> EPSTEIN, *supra* note 2, at 304.

<sup>168</sup> 2 WILLIAM BLACKSTONE, COMMENTARIES \*488, \*491.

<sup>169</sup> Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), <http://www.let.rug.nl/usa/presidents/thomas-jefferson/letters-of-thomas-jefferson/jefl81.php> (emphasis added). Thanks to my colleague Tom McSweeney for bringing this letter to my attention.

The law of descent, and the right to devise and take under a will, within the state of Illinois, owe their existence to the statute law of the state. The right to inherit and the right to devise being dependent on the legislative acts, there is nothing in the constitution of this state which prohibits a change of those subjects at the discretion of the lawmaking power. The law of descent and devise being the creation of the statute law, the power which creates may regulate and may impose conditions or burdens on a right of succession to the ownership of property to which there has ceased to be an owner because of death, and the ownership of which the state then provides for by the law of descent or devise.<sup>170</sup>

Thus, there simply is no historical or doctrinal basis on which to assert that the rights to give and receive an inheritance are natural or constitutional rights. States and the federal government have plenary power to abolish inheritance of property and *a fortiori* may regulate and tax bequests in the furtherance of public policies like narrowing inequality and fostering socioeconomic mobility.

At a policy level, large inheritances are a very attractive tax base. Although the contribution of the estate tax to the federal fisc is modest,<sup>171</sup> the tax has attractive efficiency and fairness properties. The best evidence suggests that the estate tax causes little if any reduction in labor supply or investment.<sup>172</sup> The fairness reasons for taxing large inheritances are obvious. It is difficult to imagine a set of taxpayers more able to bear the burden of a tax without any noticeable effect on welfare, and taxing large estates further serves the salutary purpose of pushing against the creation of feudal-like dynastic wealth.

Obviously, the United States cannot rely on estate taxation alone to fund the government. There is no reason, however, for the government to rely on only one tax base to counter rising inequality and sinking mobility. Each tax involves distinct efficiency costs (so-

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<sup>170</sup> *Kochersperger v. Drake*, 47 N.E. 321, 321-22 (Ill. 1897). For similar holdings, see, for example, *In re Fox's Estate*, 117 N.W. 558, 563 (Mich. 1908); *State v. Clark*, 71 P. 20, 23 (Wash. 1902).

<sup>171</sup> In 2014, the federal estate tax raised a bit more than \$19 billion, which comprised 0.6% of total federal revenue of over \$3 trillion. Andrew Lundeen, *The Estate Tax Provides Less than One Percent of Federal Revenue*, TAX FOUND. (Apr. 7, 2015), <https://taxfoundation.org/estate-tax-provides-less-one-percent-federal-revenue>.

<sup>172</sup> For a summary of theoretical and empirical research on the estate tax, including a tentative finding that estate "accumulation is not very responsive to tax incentives," see Wojciech Kopczuk, *Economics of Estate Taxation: Review of Theory and Evidence*, 63 TAX L. REV. 139, 157 (2009).

called “deadweight burden”), efficiency benefits (e.g., delivery of the public good charity; addressing “*Spirit Level*” issues of social tension), and fairness benefits. Thus, there is nothing untoward about the current co-existence of a progressive income tax and a progressive estate tax, and there would be nothing untoward about adding Piketty’s proposed tax on wealth to the mix.

C. *Utterly Unattainable Super-Pareto Efficiency*

The last two subparts looked at either side of the government’s ledger in isolation from the other. Section II.A considered the benefits that flow from delivery of public goods in general and charity in particular. Section II.B turned the spotlight exclusively to the revenue side and examined the variety of tax bases that governments can use to pay for the delivery of public goods. This subpart in effect considers both sides of the ledger, benefits and costs, and considers efficiency standards used to judge the net combined effect of taxation and public services. We consider the range of patterns of winners and losers that can result from any public program financed with tax dollars.

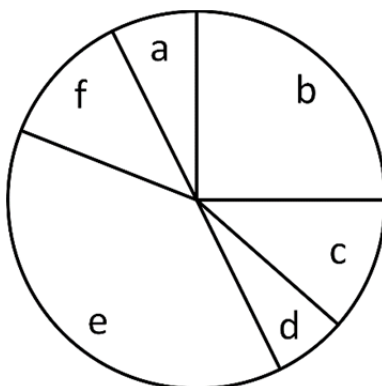
Natural property rights theories are not primarily focused on efficiency. Instead, they emphasize categorical rights that trump any sort of utility maximization. It is surprising, then, that Epstein’s canonical statement of natural property rights actually introduces an entirely new and unprecedentedly demanding social welfare criteria. His innovation, which I dub “super-Pareto efficiency,” has heretofore gone unnoticed.

We will use simple pie charts to illustrate alternative conceptions of efficiency and introduce super-Pareto efficiency. Each concept is illustrated based on the following common starting point used by Epstein:<sup>173</sup>

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<sup>173</sup> EPSTEIN, *supra* note 2, at 4.

Figure 3



This diagram represents the initial distribution of income (or wealth) in a simple society of six individuals, labeled *a* to *f*. By “initial” Epstein means in the “state of nature,” before any government is formed to solve collective action problems and deliver public goods. In this example, individual *e* enjoys the biggest slice of the social pie, well over 25%. Individual *b* has the second highest welfare, at about 25%. At the other extreme, *a* and *d* have about 10% of income/wealth.

When individuals band together to form a government, almost any action that the new state takes will affect individual wealth asymmetrically. On the burden side this is obvious: different tax regimes will of course have different income and wealth effects. The benefit side is a bit more complex. Building a new road might benefit everyone but is unlikely to benefit everyone in exactly the same dollar amount or in proportion to their initial wealth. It is possible, moreover, that the new road may help some individuals but harm others (e.g., by reducing traffic in front of their store on an existing road). So too with a decision to fight a war: makers of munitions will benefit but makers of luxury sedans likely will suffer.

The primary issue addressed by the welfare standards we are about to examine is the distribution of net gains from public measures after accounting for individuals’ tax payments. The most basic requirement is simple efficiency: government programs should increase the total size of the social pie.<sup>174</sup>

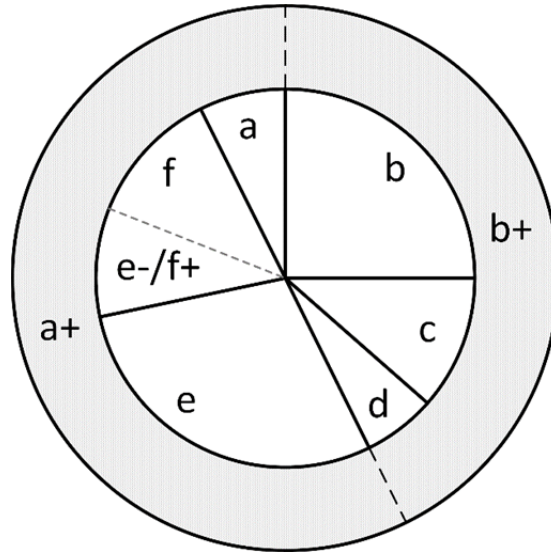
The most workable efficiency standard is Kaldor-Hicks efficiency, which requires nothing more than that the governmental activity under consideration increase the size of the social pie.<sup>175</sup> Formally, it

<sup>174</sup> See, e.g., POSNER, *supra* note 13, at 11-15.

<sup>175</sup> *Id.* at 13-14.

is often phrased as the requirement that the winners from the activity have the ability to compensate the losers — without actually requiring compensation. It is easy to see that this amounts to the same thing as requiring an increase in the size of the pie. The following diagram provides a rather extreme example of the workings of Kaldor-Hicks efficiency.

Figure 4



In this figure, the shaded outer ring represents the expansion in net wealth due to some governmental program (e.g., construction of a new road) after accounting for both the tax costs and the program benefits to each citizen. Note that *a* and *b* have captured all of the net increase in social wealth. That may seem unfair, but does not violate the requirements of Kaldor-Hicks efficiency. More subtly, by comparison with the initial position in Figure 3, note that *e* has suffered an actual reduction in wealth while *f* has enjoyed a corresponding rise. The transfer is marked by the dashed line and the area labeled *e-/f+*. This could be the product of many things, perhaps most simply asymmetric taxation. Again, there is no violation of Kaldor-Hicks efficiency. The size of the pie has increased, and *a*, *b*, and *f* could afford to compensate *e* for her losses without foregoing all of their gains.

Although Kaldor-Hicks efficiency does not guarantee universal gains, many if not most economists think that, accounting for practicalities, it is the best that large, complex modern societies can

expect to achieve.<sup>176</sup> In a nation like the United States, with a population of over 325 million,<sup>177</sup> any significant public program is going to have winners as well as losers. Obamacare surely benefited many lower-income Americans, but arguably imposed costs on healthy younger workers.<sup>178</sup> Building a new gas pipeline may save consumers billions in energy costs but will expose those along the route to risks of environmental harm and could pose a threat to culturally sacred Indian lands.<sup>179</sup> Financial regulation might prevent extraordinarily costly financial meltdowns like the one that occurred in 2007, but almost surely reduces bank profits.

A theoretically preferable alternative to Kaldor-Hicks efficiency is Pareto efficiency, which requires that governmental programs increase the welfare of at least one citizen without diminishing the welfare of any other citizen.<sup>180</sup> In plain English, nobody gets hurt and at least one person gets helped. One obvious way to implement Pareto efficiency in the real world is to require those enjoying gains to pay a portion of those gains to make up the losses of any losers. The following figure, building off of Figure 4, gives an example of how this works.

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<sup>176</sup> *Id.* at 13-15.

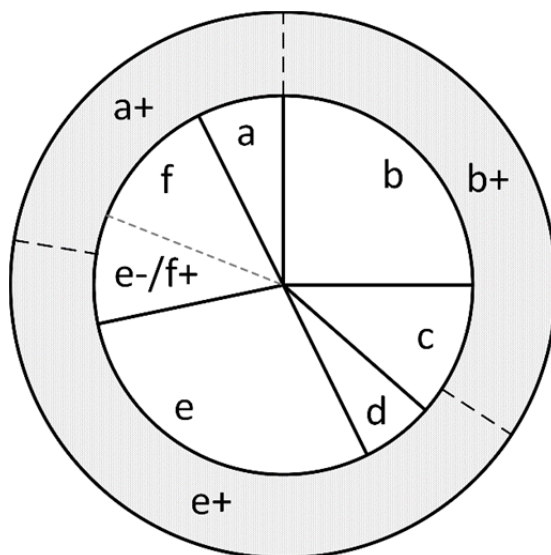
<sup>177</sup> *U.S. and World Population Clock*, U.S. CENSUS BUREAU, <http://www.census.gov/popclock> (last visited Dec. 28, 2017).

<sup>178</sup> Michele Lerner, *8 Health Insurance Reform Winners and Losers*, BANKRATE (Jan. 24, 2014), <https://www.bankrate.com/finance/insurance/health-insurance-reform-winners-losers-1.aspx#slide=3>.

<sup>179</sup> See Justin Worland, *What to Know About the Dakota Access Pipeline Protests*, TIME (Oct. 28, 2016), <http://time.com/4548566/dakota-access-pipeline-standing-rock-sioux>.

<sup>180</sup> See POSNER, *supra* note 13, at 12-13.

Figure 5



Contrasting this with Figure 4,  $e$  still suffers a loss to  $f$ , but  $a$  and  $b$  have given up a portion of their gains ( $a+$  and  $b+$  in the outer, shaded ring have shrunk) such that these “side-payments” to  $e$  (the outer shaded area  $e+$ ) exceed the size of  $e$ ’s loss to  $f$  (again the area labeled  $e-/f+$  in the inner circle).

The problem with Pareto efficiency in the real world is that making all of the side payments necessary to meet the standard is effectively impossible.<sup>181</sup> Major governmental programs to deal with medical insurance, large public works projects like gas pipelines, and regulation of large industries like the financial sector create literally hundreds of thousands or even millions of losers in a large economy like America’s. Simply identifying all of the affected parties, let alone calculating the size of their losses, is prohibitively expensive.

That said, the just compensation requirement of the Takings Clause is a constitutional nod in the direction of Pareto efficiency. When the government needs a citizen’s property for a public project, one alternative is to simply take it without paying a cent — perhaps labeling the taking a “special tax.” This, of course, would leave most other citizens with a small incremental gain: marginally lower taxes, since no compensation is paid to the targeted property owner. This would, of course impose a relatively large loss on that targeted

<sup>181</sup> *Id.*

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property owner. The compensation requirement thus serves as a modest tool to move from Kaldor-Hicks to Pareto efficiency in a relatively small class of easy cases: the complete expropriation of well-defined property interests from one person or a relatively small group of people.

Epstein notes this relationship between Pareto efficiency and the Takings Clause, saying that

[t]he [Takings] clause seems even more stringent [than Kaldor-Hicks efficiency], given that it requires actual compensation, not hypothetical compensation as the Kaldor-Hicks formula envisions. The clause seems to embody a constitutional Pareto criterion, in which shifts in legal entitlements are possible only if at least one person is made better off, and no person is made worse off.<sup>182</sup>

Epstein, however, tries to extend this limited tool governing small-number takings to cover all taxation and other legislation. This is a futile exercise. Economists have long understood that Pareto efficiency is more a theoretical baseline than a workable tool for shaping public policy.

In what is perhaps the most surprising unnoticed feature of *Takings*, it turns out that even Pareto efficiency is insufficiently protective of property rights for Epstein's articulation of natural rights theory. Though omitting to label or herald it, Epstein in fact proposes a new efficiency standard, one that I label (for reasons that will be made clear) "super-Pareto efficiency." Epstein nutshells this standard as follows: "The sovereign is allowed to take from the citizens only those funds that are necessary to operate the state. *The rest of the surplus subject to that tax lien should be divided among all citizens, pro rata in accordance with their private holdings.*"<sup>183</sup> He actually includes the idea in the introduction, illustrating it with the following (slightly modified) diagram.<sup>184</sup>

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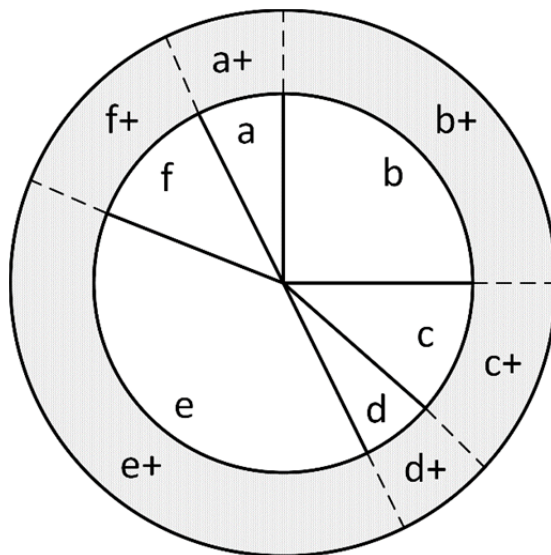
<sup>182</sup> EPSTEIN, *supra* note 2, at 201.

<sup>183</sup> *Id.* at 163 (emphasis added).

<sup>184</sup> *Id.* at 4.



Figure 6



Starting from the initial position shown above in Figure 3 (reproduced here as the inner white circle), the increase in social wealth due to a governmental activity (the outer gray ring) is divided among citizens *in strict proportion to their initial wealth*. The absolute size of everyone's slice of the pie grows, but the size of each slice relative to the total pie is unchanged. The dashed lines portioning out the expansion in wealth simply continue along the same track as the lines dividing up the initial pie.

Pareto efficiency guarantees only that no citizen's *absolute* wealth decreases as a result of governmental actions. Although much less permissive than Kaldor-Hicks efficiency, this still leaves the government with a fair amount of leeway to distribute the gains from a given policy measure. Epstein's new standard is exceedingly limiting. It dictates that the gains from all state actions must be apportioned strictly in proportion to current wealth. This is an extraordinarily conservative doctrine, freezing into place the current distribution of wealth — at least as concerns governmental acts.

Moreover, it is even more of a pipe dream than already-unattainable Pareto efficiency — hence the moniker “super-Pareto efficiency.” Compensation for the losses of large numbers of citizens no longer suffices. Instead, the government would have to calibrate compensation to each loser's initial wealth. To illustrate the seriousness of the problem, we will highlight the complexity of

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implementing super-Pareto efficiency with a couple of examples.<sup>185</sup> In each case, we assume that the proposed governmental project is Kaldor-Hicks efficient — that the sum of all benefits from the project exceeds all of the costs (taxes) required to effectuate the project.

First, consider the prosaic case of the construction of a new road, one that will significantly reduce traffic on an existing road nearby. With fewer people making trips past their doors, owners of businesses along the old road will suffer a decline in business — quite possibly a serious decline.<sup>186</sup> Epstein might argue that there is no requirement to pay compensation on such facts because there is no taking in the first place: owners have no property rights in vehicles passing in front of a business. He explicitly rejects this line of reasoning, however, in his long and impassioned argument that the government must pay for lost business goodwill (like reduced traffic and dispersion of customers) when it engages in urban renewal that changes neighborhoods.<sup>187</sup> Epstein contends that the government must pay compensation for goodwill lost not only by owners whose property is taken, but also must compensate owners of parcels not taken whose businesses suffer due to large changes in the neighborhood. There is no principled distinction between owners of such untaken properties and the owners of businesses along the old road in our example.<sup>188</sup>

Imagine the task of trying to calculate super-Pareto efficiency compensation amounts for owners along the old road in the aftermath of the new road's construction. Public officials would first need to calculate the net increase in total social wealth due to the new road. They would next need to calculate the reduction in property value for each parcel along the old road. Finally, they would need information

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<sup>185</sup> In these examples, Pareto efficiency is problematic as well but less problematic than super-Pareto efficiency.

<sup>186</sup> Old U.S. Route 66 is one of the most famous examples of a popular highway losing traffic to new roads — the federal interstate highway system. E.g., Christina Crapanzano, *Route 66*, TIME (June 28, 2010), <http://content.time.com/time/nation/article/0,8599,2000095,00.html> (discussing how “the no-tell motels and mom-and-pop shops along the road disappeared” when nearby interstate highways were built); *U.S. Route 66*, WIKIPEDIA, [https://en.wikipedia.org/wiki/U.S.\\_Route\\_66](https://en.wikipedia.org/wiki/U.S._Route_66) (last visited Dec. 29, 2017).

<sup>187</sup> EPSTEIN, *supra* note 2, at 80-86.

<sup>188</sup> Epstein tries to distinguish urban renewal from new roads by arguing that urban renewal, unlike new roads, involves the “use of force or misrepresentation to limit the [property owner’s] prospective relationships with third parties.” *Id.* at 83. Why using condemnation is force in one case (urban renewal) but not in the other (building roads) is said to be “too obvious and too persuasive to be denied,” but no substantive case is made and at least one of Epstein’s readers does not find the distinction obvious or persuasive. *Id.*

on the wealth of each of these landowners. Calculating compensation under Epstein's super-Pareto efficiency requires all of this information — a daunting task indeed.

To take an even more daunting example, consider the decision to fight a war. There will be big winners and big losers. Manufacturers of tanks and boots can anticipate record profits, while those making passenger sedans and loafers likely will face some lean years. Those owning property in Washington, D.C. and near military bases will enjoy robust demand, while those with interests at risk of destruction due to the conflict (abroad or domestically) will see the market value of their assets tumble.<sup>189</sup> Attempting to calculate the compensation due to the losers under the requirements of super-Pareto efficiency again encounters the insuperable informational and administrative demands enumerated in the case of a new road.

So far, we have examined only those suffering *losses* under new road construction or decisions to fight a war. Super-Pareto efficiency, however, also requires symmetrically difficult administrative costs in dealing with those enjoying *gains*. Epstein's new efficiency standard dictates that all gains from governmental projects must be distributed in strict proportion to pre-project wealth. The only way to fund the payment of losers is to impose special taxes on the winners — that is where the increment to pre-existing wealth goes, and so winners' gains must serve as the source of compensation. To impose such taxes, the government again must calculate the magnitude of the gains for each property owner who comes out ahead and must estimate each owner's current wealth. When we account for winners as well as losers, the already intractable demands of super-Pareto efficiency double.

It is easy to see the fundamental source of difficulty with implementing Epstein's super-Pareto efficiency: prohibitive administrative costs. In the abstract there might be defenses of super-Pareto efficiency, but in practice it is simply too expensive to implement. This observation is nothing new. In one of the most influential and widely-cited article on takings ever published, predating Epstein's book by almost twenty years, Frank Michelman included such costs as an integral component of his test for whether or not to pay compensation.<sup>190</sup>

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<sup>189</sup> See, e.g., *United States v. Caltex*, 344 U.S. 149 (1952) (holding, *inter alia*, U.S. government not responsible for private assets destroyed to prevent enemy from capturing them); *Block v. Hirsh*, 256 U. S. 135 (1921) (holding rent control statute enacted in Washington D.C. during World War I to manage spike in demand for housing in capital city did not constitute a taking).

<sup>190</sup> Michelman, *supra* note 6, at 1215. Michelman labels these administrative costs

Making implementation of super-Pareto efficiency even more unrealistic, Epstein maintains that each specific government project, on its own, must meet the super-Pareto efficiency standard. He expresses deep mistrust of permitting public officials to argue that although programs A, B, and C each on their own violate the standard, when considered together do deliver roughly proportional gains to each citizen.<sup>191</sup> He labels such arguments “step transactions”; perhaps a better label is “packaging.” He would permit lawmakers to package multiple programs for purposes of determining super-Pareto efficiency only if they are part of a common plan and argues that judges should begin with a presumption against the existence of such a plan.<sup>192</sup>

Epstein’s anti-packaging view is fundamentally at odds with the realistic operation of a democratic state, especially a large one. Desirable (efficient) important public policies have widely divergent welfare effects. For the United States in the current age, free trade helps owners of mobile capital and those with skilled labor in demand worldwide, but it hurts both domestic producers of products with significant foreign competition and unskilled laborers.<sup>193</sup> Subsidizing public colleges and universities benefits most middle class and some poorer citizens but works to the disadvantage of poorer citizens unqualified for higher education at one extreme and wealthy families with no need for financial aid and no desire for a larger pool of competing skilled laborers. Environmental legislation yields material benefits to most citizens but raises the costs of some manufacturers.

There is a strong case that all three of these measures (free trade, subsidized education, and environmental protection laws) are socially efficient. Assembling a coalition to support any one of them, however, may be difficult — especially if opponents are well-organized and stand to suffer large losses while a much larger group of winners, although enjoying large total gains, each benefit only modestly and do not form a cohesive group.<sup>194</sup> Democracy, however, gives different interests the ability to engage in “horse-trading” or “logrolling” — you vote for my proposal and I’ll vote for yours.<sup>195</sup> This can enable the

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as “settlement costs,” and argues that compensation need not be paid if these settlement costs are greater than the demoralization costs created by failure to compensate. *Id.*

<sup>191</sup> See EPSTEIN, *supra* note 2, at 210.

<sup>192</sup> See *id.* at 209-10.

<sup>193</sup> See *supra* notes 112–115 and accompanying text.

<sup>194</sup> See generally MANCUR OLSEN, JR., *THE LOGIC OF COLLECTIVE ACTION* 53-65 (1971) (writing on “[t]he coherence and effectiveness of small groups”).

<sup>195</sup> See RANDALL HOLCOMBE, *PUBLIC SECTOR ECONOMICS: THE ROLE OF GOVERNMENT*

legislature to pass our three proposals *as a package* even if each one, on its own, would not have garnered a majority. The hope then is that over the long run, with many different coalitions backing different public policy measures, most citizens will enjoy roughly equal net gains. If all or most proposals yield net gains (i.e., are Kaldor-Hicks efficient) and if no groups are consistently on the losing side, then the Law of Large Numbers guarantees that this indeed will be the case.<sup>196</sup>

#### D. *Natural Rights in Historical Context*

So far, throughout this Article, we have taken the existing distribution of wealth (or income) as given and focused on just how far the government can go in altering property rights before courts will find a taking and order payment of just compensation. It is time to examine a foundational question: how do we determine if the existing distribution of property is justified? To the extent that a society's property distribution is inefficient or unjust, state action, such as wealth taxation, to rectify the injustice seems entirely warranted. What looks like a taking in a world of justly apportioned property rights will not look like a taking in a world of unjustly distributed wealth.

Natural rights are universal, inalienable rights that exist independently of rights created by governments. Such natural rights exist even without a state — in the so-called “state of nature.” This refers to an environment without any organized government. Thomas Hobbes, one of the first political theorists to discuss the state of nature, described it as an environment of “continual fear, and danger of violent death: and the life of man, solitary, poor, nasty, brutish and short.”<sup>197</sup> Much if not most of the voluminous writings on natural rights discuss the state of nature ahistorically — without reference to identified periods of disorder and chaos.<sup>198</sup> Philip Hamburger summed up early American understandings of natural rights as follows:

On the assumption that the state of nature was a condition in which all humans were equally free from subjugation to one

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IN THE AMERICAN ECONOMY 179-81 (Jeff Shelstad et al. eds., 2006). For a more technical analysis of logrolling, see generally Robert Wilson, *An Axiomatic Model of Logrolling*, 59 AM. ECON. REV. 331 (1969) (analyzing logrolling in relation to the General Possibility Theorem).

<sup>196</sup> See Yew-Kwang Ng, *Quasi-Pareto Social Improvements*, 74 AM. ECON. REV. 1033, 1035 (1984).

<sup>197</sup> THOMAS HOBBS, *LEVIATHAN* 97 (Oxford Press 1929) (1651).

<sup>198</sup> See EPSTEIN, *supra* note 2, at 7-12, 333-34; NOZICK, *supra* note 2, at 10-12, 118-19, 198-204; Claeys, *Jefferson Meets Coase*, *supra* note 2, at 1402-03.

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another — in which individuals had no common superior — Americans understood natural liberty to be the freedom of individuals in the state of nature. That is, they understood natural liberty to be the freedom an individual could enjoy as a human in the absence of government. A natural right was simply a portion of this undifferentiated natural liberty.<sup>199</sup>

This is a more abstract and benevolent vision of the state of nature, with the emphasis not on Hobbes' all-too-imaginable war of all against all but rather on the abstract notion of equality and liberty in a world without any government.

Although the abstract notion of a state of nature has some utility for political theorizing, I believe that rooting the notion in history provides necessary context. The key piece of context is feudalism, the socioeconomic system of government that emerged after the fall of Rome and the resulting chaos in a Europe suffering from ubiquitous internal disorder and external depredations from the north (Vikings), south (Moors), and east (Asiatic tribes).<sup>200</sup> Feudalism arose in reaction to this real-world state of nature. It created a small ruling class of warriors (kings and their legions of knights) to (i) maintain internal law and order and (ii) repel external threats.<sup>201</sup> Providing armor, arms, horses, training, and wages for knights was expensive. To fund these forces necessary to maintain even a semblance of order, knights were granted ownership of land — the only form of wealth that really mattered during this age.<sup>202</sup> Essentially everyone else became a peasant farmer, a class of lowly tenants who owned no property and hence relied for their livelihood on leasing arable land from their landlord (the local knight). They handed over a large portion of their harvest to their landlord, and in addition often were required to contribute significant amounts of labor to farming portions of their landlord's estate not leased out (his "demesne" or domain).<sup>203</sup>

Feudalism was the essential background for both early natural law theorists and America's founding generation. Theorists like Hobbes and John Locke were either justifying or challenging the divine rights

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<sup>199</sup> Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 YALE L.J. 907, 918-19 (1993) (footnote omitted).

<sup>200</sup> MARC BLOCH, FEUDAL SOCIETY 3-38 (L.A. Manyon trans., 1961).

<sup>201</sup> See WIM BLOCKMANS & PETER HOPPENBROUWERS, INTRODUCTION TO MEDIEVAL EUROPE, 300-1550, at 3-5 (Isola van den Hoven trans., 2002).

<sup>202</sup> *Id.* at 70.

<sup>203</sup> See *id.* at 72-75, 112-13; JEAN-PIERRE POLY & ERIC BOURNAZEL, THE FEUDAL TRANSFORMATION, 900-1200, at 136 (Caroline Higgitt trans., 1991).

of royalty ensconced at the top of the feudal hierarchy.<sup>204</sup> More profoundly, America's founding generation was rebelling against an English society still to a large extent defined by feudalism and sharp class lines. In eighteenth century England, even though many of the elements of feudalism were fading away, still all men were not equal in the eyes of the law.<sup>205</sup>

That feudalism embodied an extremely unequal division of wealth and, moreover, a lack of intergenerational socioeconomic mobility, is beyond a doubt.<sup>206</sup> Still, not all inequality is unjust. Indeed, a major implication of Epstein's argument is that the wealthy deserve protection from the masses using government to expropriate their property. The question is: was the wealth inequality created by feudalism just or unjust?

Two different models of the birth of feudalism help frame answers to this question.<sup>207</sup> In *Feudalism Origins I* ("Feudalism I"), local toughs in each region of Europe took advantage of their strength and organizational skills to impose the feudal hierarchy on an unwilling population. This is imposition of tyranny and extreme inequality without consent. For those believing in natural rights and for those believing in less abstract notions of justice, *Feudalism I* is unjust. State action to undo inequality created by *Feudalism I* seems uncontroversial.

*Feudalism Origins II* ("Feudalism II") is slightly more complicated. In addition to local toughs, we have brigands — thieves and pillagers who constantly target defenseless peasants. Unlike the brigands, the toughs do not prey on the peasants. They are able to defend themselves but do not defend the peasants — and natural rights theorists would emphasize that they have no natural duty to rescue others in distress.<sup>208</sup> Toughs in *Feudalism II* see an opportunity for

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<sup>204</sup> HOBBS, *supra* note 197, at 81-94; JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 142 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690). Ryan states that Locke wrote his treatises "primarily to sabotage the idea that patriarchal authority had been absolute and that rulers still possessed it." ALAN RYAN, *PROPERTY AND POLITICAL THEORY* 27 (1984).

<sup>205</sup> See Norma Landau, *Eighteenth-Century England: Tales Historians Tell*, 22 *EIGHTEENTH CENTURY STUD.* 208, 214 (1989) ("[E]ighteenth-century England possessed an ideology which simultaneously repudiated feudalism and recognized hierarchy.").

<sup>206</sup> See POLY & BOURNAZEL, *supra* note 203, at 107.

<sup>207</sup> These two models of feudalism were invented for the purposes of this discussion. They are not drawn from any historical scholarship on the Middle Ages.

<sup>208</sup> See *supra* text accompanying note 128 (elaborating on common law doctrine rejecting naked duty to rescue others).

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mutual gain and make a proposal to the peasants. If the peasants will cede to the toughs title to all lands (which was essentially all wealth in the Middle Ages) and agree to perform some labors on part of the land for the toughs, the toughs will agree to (i) lease the remainder of the land to the peasants at pretty steep rents, and (ii) protect the peasants from the brigands and from any foreign invaders. To sharpen contrasts, assume that the toughs can afford to impose internal order and repel external invaders only by striking such a hard bargain with the peasants.

It is difficult to maintain that the toughs in Feudalism II have violated any natural rights of the peasants, or to paint the system that they proposed and the peasants accepted as unjust. True, the toughs for whatever reason were tougher (hence their moniker!) and better organized than the peasants, but it is not their fault that there were brigands and foreign invaders running roughshod all over the country. The toughs had no duty to rescue the peasants. They simply made a proposal that promised mutual benefits, albeit with the lion's share of the benefits accruing to the toughs themselves. Note that the toughs do not satisfy Epstein's super-Pareto efficiency, as they enjoy a disproportionate share of the gains from establishing a government able to maintain law and order. Their proposal does, however, satisfy Pareto efficiency: the toughs clearly think their new plan will make them better off, and the peasants would not agree to the plan unless it improved their sorry lot, no matter how marginally. This is a signal weakness of super-Pareto efficiency: it rejects many deals favored by all parties.

So far, so good: Feudalism II meets the relatively demanding standards of Pareto efficiency. But Feudalism II becomes troubling when we note that it creates property rights that last *forever*. There is no need to assume some form of serfdom legally tying the peasants to the lands of their lords and the labors of their parents. With the right to leave large landed estates by will to successive generations, the toughs, soon called lords, entrench the socioeconomic status of themselves and their progeny indefinitely. Long after order has been restored and thus their essential role in maintaining peace and order has disappeared, the lordly descendants of the toughs will continue to own the lion's share of wealth.

Feudalism II poses a real problem for natural rights theorists. Given the peasants' consent to inherited hierarchy, it simply is not possible to argue that their natural rights have been violated. Natural rights include the right to strike bargains, even when they turn out badly. Yet, we are left with a system that propagates inequality generation



after generation. Although the vestiges of feudalism in Britain today are relatively modest, they still do exist: a monarch deriving millions of dollars a year from Britain's Crown Estate,<sup>209</sup> and a host of noble families with large estates traceable to the Domesday Book. Moreover, the society borne of feudalism in 1066 remained largely in place well into the nineteenth century — a stretch of about 800 years.<sup>210</sup> Though not forever, eight centuries is a very long time to endure a largely frozen socioeconomic hierarchy.

Natural rights theorists are surprisingly insensitive to this concern and, moreover, quite cavalier about the establishment of property rights in the first place. Epstein, for example, requires that every public policy measure increase everyone's wealth proportionally (super-Pareto efficiency), but imposes no such super-fairness requirement at the critical initial stage of property distribution from the commons. He asserts that:

[T]here is a general consensus that exclusive, or at least well-defined, property rights over particular things will expand the size of the social pie. Any system which takes things of value out of a common pool and subjects them to well-defined rights should in principle be able to generate sufficient wealth to satisfy the compensation requirement of the eminent domain clause.<sup>211</sup>

We can agree with the general consensus that private property rights are efficient (i.e., they expand the size of the social pie). The second sentence, however, is deeply troubling and inconsistent with the super-Pareto efficiency standard. Creating property rights is a state project, so where is his requirement to distribute the gains from the project in strict proportion with everyone's pre-existing wealth?

Natural rights theorists also seem to grossly underestimate the powerful role played by property in the creation of wealth. Citing Locke, for example, Epstein simply declares that "when labor is mixed with property, 99% of their combined value is attributable to labor."<sup>212</sup>

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<sup>209</sup> *Finances of the British Royal Family*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Finances\\_of\\_the\\_British\\_royal\\_family](https://en.wikipedia.org/wiki/Finances_of_the_British_royal_family) (last visited Dec. 29, 2017).

<sup>210</sup> See Laundau, *supra* note 205, at 210.

<sup>211</sup> EPSTEIN, *supra* note 2, at 202.

<sup>212</sup> *Id.* at 11 (paraphrasing 2 JOHN LOCKE, TWO TREATISES OF GOVERNMENT § 40 (1764), <http://www.johnlocke.net/two-treatises-of-government-book-ii> ("[I]f we will rightly estimate things as they come to our use, and cast up the several expences about them, what in them is purely owing to nature, and what to labour, we shall find, that in most of them ninety-nine hundredths are wholly to be put on the account of labour.")).

Simple, well-established empirical facts on the ancient practice of share-cropping, however, demonstrate that land has long played a much larger role in wealth creation than the 1% conjectured by Locke. In ancient Rome, peasants typically paid a third of their crop to their landlords; in ancient Egypt the fraction was a full half.<sup>213</sup> Medieval peasants paid rents approaching half of their annual crop.<sup>214</sup> This was not the sole form of rent, as peasants frequently paid money rents and in addition had a duty to work their lord's land for significant chunks of time.<sup>215</sup> Little changed from ancient to modern times. Chinese share-cropping peasants in the 1930s paid from 29 to 69% of their crop over to their landlords.<sup>216</sup> Sharecropping African-Americans in the post-slavery American South paid over to their landlords anywhere from a third to half of their annual crop.<sup>217</sup>

Far from accounting for only 1% of the value of land, these simple sharecropping contracts spanning millennia suggest that real property (arable land) generally accounts for at least a third of the value of agricultural production and frequently much more. Thus, *contra* empirically unanchored Lockean natural rights assertions, labor does not create virtually all value; rather, those who own property enjoy considerable economic advantages over those who own nothing of value — unless Lockean natural rights theorists mean to contend that land owners have been grossly overcompensated since time immemorial. That would indeed be a surprising reaction from defenders of property and its privileges, and of course would challenge fundamental economic theories about the way in which markets give rise to efficient prices.

Lest anyone contend that Feudalism II is at odds with the historical record, there is significant evidence that it better captures the contours of the transition from the Age of Rome into the Middle Ages than Feudalism I. Here is how one basic reference summarizes the evolution of feudal land relations:

Free farmers, weak and defenseless before barbarian invaders, brigands, and greedy officials, sought protection from powerful local landowners. In return for support and

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<sup>213</sup> Dennis P. Kehoe, *Sharecropping*, in *THE ENCYCLOPEDIA OF ANCIENT HISTORY* 6201, 6201 (R.S. Bagnall et al. eds., 2012).

<sup>214</sup> Harry Kitsikopoulos, *Social and Economic Theory in Medieval Studies*, in *2 HANDBOOK OF MEDIEVAL STUDIES 1270, 1278* (Albrecht Classen ed., 2010).

<sup>215</sup> *Id.* at 1278-79.

<sup>216</sup> STEVEN N.S. CHEUNG, *THE THEORY OF SHARE TENANCY* app. B, at 172 tbl.9 (1969).

<sup>217</sup> Joseph D. Reid, *Sharecropping as an Understandable Market Response: The Post-Bellum South*, 33 *J. ECON. HIST.* 106, 108-09 (1973).

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protection, small landholders surrendered their lands to, and became the dependents of, the strong. The weak became bound to the soil, working their patron's lands; they lost their freedom, could not move, and became serfs. This trend toward serfdom continued to the 11th century.<sup>218</sup>

Wim Blockmans and Peter Hoppenbrouwers similarly offer a more detailed description of the birth of feudalism that squares much better with Feudalism II than with Feudalism I:

Lack of safety and an increasing tax burden persuaded many originally free smallholders to place themselves under the protection of a neighboring landowner. Sometimes this happened by way of a formal transaction known as a *precaria* (literally meaning "request") in which the peasant relinquished his land and paid a fee in recognition of his landlord. In return he retained the right to use the land. Many others acquired the status of *colonus*, which tied the peasant to the land the landowner allowed them to work in exchange for part of the produce and often also specific services. In this way the large landowners usurped the dwindling powers of the state by taking the law into their own hands and by strengthening their position of power through patronage over weaker individuals.<sup>219</sup>

David Herlihy offers yet more evidence in this vein.<sup>220</sup> He found records showing that one path to higher social status for strong men with modest capital in the early Middle Ages was to build a castle in an unsettled area, attract colonizing peasants from disorderly districts nearby, and let them settle under the protection of the castle. The enterprising developer/castellan in effect grabbed land out of the commons and offered terms of settlement. Those who agreed to become his (and his progeny's) peasants, paying onerous rents and taxes, were not forced into serfdom. Rather, their decision to migrate to the new feudal estate must have been based on a belief that, whatever its shortcomings, this new life offered better prospects than their current lord's terms.

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<sup>218</sup> *Conditions of Life, Western Europe in the Early Middle Ages, 461–1000*, in THE ENCYCLOPEDIA OF WORLD HISTORY 165 (Peter N. Stearns et al. eds., 6th ed. 2001).

<sup>219</sup> BLOCKMANS & HOPPENBROUWERS, *supra* note 201, at 15. For an economic take on this phenomenon, see DOUGLASS C. NORTH & ROBERT P. THOMAS, THE RISE OF THE WESTERN WORLD 21-32 (1973).

<sup>220</sup> David Herlihy, *Three Patterns of Social Mobility in Medieval History*, 3 J. INTERDISC. HIST. 623, 625-26 (1973).

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The historical record, then, contains significant evidence that Western Europe's transition from the chaotic "state of nature" created in the wake of the fall of the Roman Empire involved *voluntary* assumption of property-less serfdom by the weak in return for protection from the strong. Given that freedom of contract is one of its fundamental axioms,<sup>221</sup> it is difficult to see how natural property rights theory can avoid a whole-hearted endorsement of medieval feudalism and the centuries of legally-mandated subservient status imposed on the vast majority of Western Europe's population.

E. *An Overarching Status Quo Bias*

This unseemly embrace of the odious feudal hierarchy provides insight into a more general shortcoming. Like any excessively broad conception of property rights, natural property rights theory imposes socially undesirable levels of bias in favor of the status quo and especially in favor of elements of the status quo that have existed for an extended stretch of time.

We have covered one example above: business goodwill. Recall the argument that if the government builds a new road that reduces traffic on an old road, it must pay compensation to businesses on the old road that suffer a reduction in business due to re-routing of some traffic onto the new road.<sup>222</sup> This gives the status quo pattern of retail trade a privileged status. It is doubtful that such a rule is efficient or fair. Societies periodically need new roads and part of the reason may be to provide more convenient trade for a citizenry that may be both growing and shifting its patterns of residence and trade. The government makes not even an implicit promise to existing businesses that it will refrain from building roads that might harm their businesses, and thus it is difficult to make either a fairness or an efficiency case for this natural property rights contention.

*Miller v. Schoene*,<sup>223</sup> a famous Supreme Court takings case, illustrates another aspect of this status quo bias. In *Miller*, the Court upheld a Virginia statute ordering the destruction, without compensation, of cedar trees close enough to apple orchards to pass along a fungus (cedar rust) that is benignly harbored by cedar trees but malignant for infected apple trees. Epstein objects based on his observation that the

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<sup>221</sup> See NOZICK, *supra* note 2, at 160-64 (discussing why freedom of contract between a famous basketball player and his fans causes inequality and that such freedoms should trump desires for equal incomes).

<sup>222</sup> See *supra* text accompanying notes 187-188.

<sup>223</sup> 276 U.S. 272 (1928).

apple orchard owners would not have a private nuisance claim against the cedar tree owners because they did not *act* in any way that *caused* the fungus to invade the plaintiffs' apple trees. Surely, Epstein would not object to a new statute that, presumably based on newfound scientific knowledge, *prospectively* barred new plantings of cedar trees within the proximity of apple orchards. This is the simplest sort of *efficient* property protection law one can imagine. This lays bare the extraordinarily privileged status that natural property rights theories confer on current usage — the status quo.

The same logic applies to wetlands regulation. Scientific research of relatively recent vintage has demonstrated the adverse environmental impacts of land development that destroyed large swaths of wetlands.<sup>224</sup> This has led many local, state, and federal agencies to regulate development of such land.<sup>225</sup> Epstein objects, arguing that restrictions on developing wetland parcels permit neighbors to capture aesthetic and environmental benefits at the cost of wetlands owners who have not violated any common law rights. As with cedar rust, however, shouldn't changing science change property rights? If a company spends a billion dollars to construct a factory to develop a new drug that is later found to be a carcinogen (think DES from *Sindell v. Abbott Laboratories*<sup>226</sup>), does the Takings Clause really require the government to compensate the manufacturer for the value of the factory if it wants to ban the use of the drug? The answer must be, and is, of course not. Then why are wetlands any different? New scientific findings as a matter of simple supply and demand can cause the value of all sorts of property to increase or decrease, sometimes dramatically.

To examine a slightly different dimension of the same phenomenon, consider the married women's property acts.<sup>227</sup> Before their passage in

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<sup>224</sup> See, e.g., W. Aaron Jenkins et al., *Valuing Ecosystem Services from Wetlands Restoration in the Mississippi Alluvial Valley*, 69 *ECOLOGICAL ECON.* 1051 (2010); Wanhong Yang et al., *Examining Water Quality Effects of Riparian Wetland Loss and Restoration Scenarios in a Southern Ontario Watershed*, 174 *J. ENV'T'L MGMT.* 26 (2016); CENTER FOR WATERSHED PROT., *DIRECT AND INDIRECT IMPACTS OF URBANIZATION ON WETLAND QUALITY* (2006), <http://www.northinlet.sc.edu/training/media/resources/Article1Impact%20Urbanization%20Wetland%20Quality.pdf>.

<sup>225</sup> See, e.g., Clean Water Act § 404, 33 U.S.C. § 1344 (2018); CAL. FISH & GAME CODE §§ 1601-1616 (2018); Virginia Water Protection Permit, VA. CODE ANN. § 62.1-44.15:20 (2018).

<sup>226</sup> 607 P.2d 924 (Cal. 1980).

<sup>227</sup> See generally Joseph A. Ranney, *Anglicans, Merchants, and Feminists: A Comparative Study of the Evolution of Married Women's Rights in Virginia, New York, and Wisconsin*, 6 *WM. & MARY J. WOMEN & L.* 493 (2000) (observing married women's

the nineteenth century, married women generally could not own property; for husbands, what was his was his, and what was hers was his. The married women's property acts gave women the legal right to hold property on the same terms as men.<sup>228</sup> When passed, however, the acts were generally not applied retroactively: women married after an act passed would enjoy the benefits of the legislation, but women married prior to passage did not enjoy any increased ability to own property.<sup>229</sup> Thus, the status quo was preserved for those already married. Presumably, natural rights theorists would approve.

Yet, was this the proper approach to a law remedying a fundamental violation of a basic human right like the right to hold property? If so, should the Thirteenth Amendment to the U.S. Constitution, abolishing slavery, have applied only retroactively, freeing future-born children of slaves, but preserving the enslaved status of slaves living at the amendment's ratification in 1865? That would have been inconsistent with the notion that slavery always and everywhere is an evil and that it was a generation-spanning violation of the most basic of human rights of every American slave. When a population's moral sensibilities change, it may be time for dramatic, immediate changes to social and economic relations. Applying the Thirteenth Amendment only prospectively would have suggested that it was not quite time yet to restore freedom to every American. Applying it retroactively instead emphasized that it was long past the time at which every slave should have been freed.

If natural property rights stands at one pole in its attachment to the status quo, Louis Kaplow's theory of legal evolution is at the other. In *Legal Transitions*,<sup>230</sup> Kaplow argues that legal change is no different from other sorts of changes that alter market conditions (e.g., changes in weather, technology, consumer preferences).<sup>231</sup> If one accepts this premise, he then demonstrates that in general there should be no compensation or transition relief for any legal innovations.<sup>232</sup> Just as individuals must prepare for and guard against unpredictable weather, new technology, or evolving consumer desires, so too should they deal

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property rights across states and time periods).

<sup>228</sup> See Bernie D. Jones, *Revisiting the Married Women's Property Acts: Recapturing Protection in the Face of Equality*, 22 AM. U.J. GENDER, SOC. POL'Y & L. 91, 99 (2013).

<sup>229</sup> See, e.g., *Holmes v. Holmes*, 4 Barb. 295, 300-01 (N.Y. 1848); *Elliott v. Bentley*, 17 Wis. 591, 595 (Wis. 1863).

<sup>230</sup> Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509, 511 (1986).

<sup>231</sup> *Id.* at 526-36.

<sup>232</sup> *Id.* at 550-52.

with legal risk. Any form of compensation or transition relief (e.g., prospective application only, slow phase-in of a new law) do positive harm to the economy: they obviate the need for people to think carefully about how the law might evolve and so create a serious moral hazard problem — much like the incentives to adopt less healthy lifestyles when total medical bills do not rise substantially with use of medical resources.

Turning our lens back to taxation, Kaplow's view is that when the government decides to change tax laws, it should not provide any transition relief to taxpayers.<sup>233</sup> From his perspective, taxpayers should note that tax laws change with some frequency and should plan and order their affairs accordingly. In contrast, natural property rights theories, with their bias in favor of the status quo, would suggest that the government should provide compensation to those who relied on tax law X only to see it replaced with tax law Y that diminished the value of their property (e.g., an increase in the capital gains tax rate). Needless to say, given the relatively frequent changes to the federal income tax code, actually paying just compensation in all such cases would be administratively daunting.

### III. A MORE WORKABLE APPROACH TO POLICING TAXATION

In this final substantive part critiquing natural property rights theory, we leave behind these concerns over transition rules and return to consider the more fundamental issue of the constitutionality, under the Takings Clause, of the wide range of general revenue tax rate structures (differing degrees of regressive, flat, or progressive taxation). The preceding sections have laid out three important problems with applying a natural rights version of the Takings Clause to tax policy.

- (i) The theory of public goods in general and charity in particular provides ample justification for progressive taxation and other forms of redistribution.
- (ii) The government has wide discretion in the choice of tax bases.
- (iii) The super-Pareto efficiency standard is completely infeasible.

The combined import of all problems might suggest that the Takings Clause cannot impose any restraints on the power of taxation. This,

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<sup>233</sup> *Id.* at 607-14.

however, is not so. Calvin Massey makes the point with a stark hypothetical. “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.”<sup>234</sup> Epstein makes the case in more general terms, noting that “the differences between [taxation and takings] all go to matters of detail and technique, rather than to basic principle . . . both may be used as instruments of confiscation.”<sup>235</sup>

The difficulty is trying to draw this line between taxes that amount to takings and taxes that do not. As we have seen, natural property rights theory draws the line such that the overlap between taxes and takings is quite large — indeed only a single tax, the flat tax, falls outside of the just compensation requirement. Is there any way to avoid such an excessive overlap, so that the legislature has significantly more discretion in setting tax policy, but that still deems measures like Massey’s “Bill Gates” tax as takings?

I have articulated just such a standard, centered on the Continuous Burdens Principle (“CBP”).<sup>236</sup> This approach begins with the Supreme Court’s most commonly cited policy rationale for the Takings Clause and its Just Compensation requirement: “The Fifth Amendment’s guarantee that private property shall not be taken for a public use without just compensation 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.”<sup>237</sup> In most important takings cases decided over the last thirty years, either the majority or a dissent have cited this language in the course of arguing how to apply the Takings Clause to difficult scenarios.<sup>238</sup> I dub this the “anti-singling-out” principle.

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<sup>234</sup> Massey, *supra* note 39, at 104.

<sup>235</sup> Richard A. Epstein, *Taxation, Regulation, and Confiscation*, 20 OSGOOD HALL L.J. 433, 434 (1982).

<sup>236</sup> Eric Kades, *Drawing the Line Between Taxes and Takings: The Continuous Burdens Principle, and its Broader Application*, 97 NW. L. REV. 189, 224-26 (2002).

<sup>237</sup> *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

<sup>238</sup> See *Ark. Game & Fish Comm’n v. United States*, 133 S. Ct. 511, 518 (2012); *Lingle v. Chevron*, 544 U.S. 528, 537 (2005); *Tahoe-Sierra Pres. Council v. Tahoe Reg’l Planning Auth.*, 535 U.S. 302, 336 (2002); *Palazzolo v. Rhode Island*, 533 U.S. 606, 607 (2001); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 702 (1999); *E. Enters. v. Apfel*, 524 U.S. 498, 522-23 (1998) (Breyer, J., dissenting); *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1071 (1992) (Stevens, J., dissenting); *Pennell v. City of San Jose*, 485 U.S. 1, 19 (1988) (Scalia, J., alternative holding); *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 835 n.4 (1987); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 318-19 (1987);



The anti-singling-out principle dovetails well with legal doctrine on the relationship between taxation and takings from the late nineteenth and early twentieth centuries. Justice Cooley, a leading theorist and treatise author, and one sympathetic to an older, “classical” style of natural rights, distinguished the two as follows.

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 government may fall ratably upon all who in justice should bear them.

This classical conception of distinguishing taxes from takings stresses two points. First, taxes fall on “the people,” (i.e., a large swath of the population) instead of one or a few property owners as is invariably the case for takings. Second, takings involve prices for specific assets (“forced sale”), but taxes are subject to a less exacting definition: taxes must (i) “be equal and proportional,” two words which are far from synonymous; and (ii) “fall ratably upon all who in justice should bear them.” Justice Cooley’s articulation of this “classical” approach to distinguishing taxes from takings thus sounds little like modern natural property rights theories’ straitjacket reading of the Takings Clause. In another important departure from the straitjacket we have documented, Justice Cooley and his contemporaries also asserted that taxation was one of the foundational powers ceded to the legislature and that judges should strike down tax laws only in the most extreme cases of overreach. As Justice Cooley put it, “[t]he power of taxation is a great governmental attribute, with which the courts have very wisely shown extreme unwillingness to interfere . . . .”<sup>239</sup>

The Continuous Burden Principle offers a way to operationalize this traditional understanding of the extent to which takings law applies to

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*Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 227 (1986).

<sup>239</sup> THOMAS M. COOLEY, *A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION* 705 (Alexis C. Angell ed., 6th ed. 1890).

taxation. The essential idea is that to determine whether or not there has been a taking, we look for *discontinuous jumps* in the *marginal burdens* that a given tax imposes. Both italicized words in the previous sentence require elaboration. A discontinuous jump is a relatively large increase in the burden imposed by the tax. Marginal refers to the difference between the burden imposed on one or a few people subject to the highest exactions under the tax, and those facing the next highest burden.

Some examples will illustrate the basic workings of the CBP. First, consider the taking of a single house to build a road. If the government does not pay compensation, then the owner of the targeted property suffers a relatively large loss while everyone else suffers no loss and indeed likely a small gain from obtaining the use of a new road with fewer tax dollars spent. This clearly violates the CBP: the marginal difference between the burden on the owner and the next most burdened citizen is quite large — a *discontinuous* jump in the burden that violates the *Continuous Burden Principle*. Thus, in this canonical case of a taking, the CBP unsurprisingly dovetails with current, longstanding Takings Clause doctrine.

Let us now turn to two contrasting tax regimes. First, Massey's "Bill Gates" tax that imposed a much higher tax rate on the taxpayer with the highest income than on the second highest earner would amount to a discontinuous burden on the top marginal taxpayer.<sup>240</sup> This violates the CBP and so would amount to a taking under the standard. The government would have to refund the incremental burden imposed on Gates as just compensation. Any government anticipating this result would know better than to even bother trying to impose that particular tax rate.

In sharp contrast, consider the progressive rate structure of the current federal income tax. Marginal rates for married taxpayers filing jointly range from 10% on incomes up to \$18,550, then rates of 15%, 25%, 28%, 33%, 35%, and finally 39.6% for couples with joint incomes above \$466,950.<sup>241</sup> This means that the top rate, 39.6%, applies to a fairly large number of American households. Thus, the group facing the highest burden does not consist of one person or a handful of households. Further, given the workings of an income tax based on

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<sup>240</sup> Arguably such a tax would violate the constitutional stricture against bills of attainder (legislative punishment of individuals without benefit of trial). U.S. CONST. art I, § 9, cl. 3 (barring national Congress from passing bills of attainder); *id.* § 10, cl. 1 (parallel ban on state legislatures).

<sup>241</sup> Kyle Pomerleau, *2016 Tax Brackets*, TAX FOUND. (Oct. 14, 2015), <http://taxfoundation.org/article/2016-tax-brackets>.

marginal rates, the burden cannot take a discontinuous jump from the party most highly burdened and the next most burdened taxpayer. America has many multi-millionaires whose effective (average) income tax rate is very close to the top marginal rate, 39.6%, because their incomes are so high that the vast majority of their income is taxed at this top marginal rate. Thus, in keeping with history, precedent, and the anti-singling-out purpose of the Takings Clause, the current progressive federal income tax easily passes constitutional muster under the CBP.

Indeed, it would take a tax almost as extreme as the Bill Gates tax to violate the CBP. To give one more example, imagine that the bottom 90% of the income distribution elected legislators charged with imposing even a modest income tax, say a flat 25%, on the top 10% of taxpayers in the income distribution but no taxes on themselves. This would violate the CBP. There would be a discontinuous jump in the tax rate between the person with the highest income who did not pay the tax and the lowest-income taxpayer among those subject to the tax: the former would pay a rate of 0%, the latter 25%. That is a clear discontinuous jump in the burden imposed by the tax.

Based on the CBP, I conclude that natural property rights theory errs in arguing that any progressive income tax is a taking. It follows, as a necessary corollary drawn in Part I of this Article, that the contention that any regressive tax is a taking is also in error. That said, the Takings Clause does impose some limits on the power of taxation. Given that its animating purpose is to avoid singling out one or a few citizens to bear an unfairly large portion of the burdens of producing public goods, the CBP provides a cogent framework for drawing the line between taxes that do and do not effectuate such singling out.

#### CONCLUSION

The flexibility of the CBP, permitting a wide range of tax structures (including both progressive and regressive options), stands in stark contrast to the straitjacket imposed on tax policy by the natural rights visions of the Takings Clause. A reading of the Takings Clause that forecloses all possible income tax rate structure save one, the flat tax, removes virtually all flexibility in using the income tax to address changing circumstances. Moreover, natural property rights readings of the Takings Clause have deleterious impacts in other crucial policy domains. In particular, they would paralyze the monetary authorities' ability to manage a protean world and keep the economy on track. Previous scholarship has not highlighted these enormous hazards pregnant in natural property rights theory. Shedding light on the

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harmful straitjacket that the theory would impose in key policymaking areas is thus the most novel, important contribution made in this Article.

The Article also sheds new light on the more commonly discussed question of the constitutionality of redistributive policies. It highlights important and unappreciated flaws in the natural rights case against redistribution: in particular, the failure to take seriously the fact that charity is a public good and the failure to understand the implications of choosing different tax bases when calling for a flat tax.

Given these fundamental shortcomings, it is hard not to ask: what explains the seemingly seductive allure of natural property rights theory to conservative scholars and judicial appointees? One obvious, cynical answer is that natural property rights support policies that are quite favorable to those of wealth and influence. Progressive taxation of income and estates, for example, tend to undermine existing socioeconomic hierarchies.

In the interest of avoiding cynicism and instead imputing the best motives possible to fellow scholars, let us assume instead that the appeal of natural property rights theory arises from its austere intellectual beauty. The natural property rights theory of the Takings Clause proceeds from a compact set of simple axioms and builds an impressive intellectual edifice on this foundation clearly and cogently.

It is beautiful, however, only in the abstract. Natural property rights axioms, the foundation for the theory's assertions, are its tragic flaws. In order to address the messy real world that for better or worse we inhabit, we must leave behind geometric precision and return to the disorderly real world of social science, in which there are no precise and eternal solutions (like the flat tax) to difficult policy questions (like the proper way to fund the state). The natural rights straitjacket is simply unsuited to regulating taxation, monetary policy, and other critical governmental operations. The most important issue is not progressivity or regressivity. It is flexibility.