# What's In a Name?: Takings, Taxation, & Categorizing the Wealth Tax

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***Abstract***

*Taxation and takings are impositions almost as old as society itself. Both taxation and takings infringe on the individual property rights in favor of the collective good, and in the absence of limiting principles amount to little more than different modes of government funding. However, given the differing constitutional tolerance for taxation and takings, line drawing between these similar impositions becomes important. The rising star of the wealth tax serves to illustrate the hazy distinction between taxation and takings, and demonstrates the importance of this dichotomy for the future of tax policy. In the midst of such ambiguity, the principle of proportionality shows itself to be a helpful dividing line between taxation and takings, though finding a functional test for such a metric is easier said than done. The Continuous Burdens Principle (CBP) poses itself as one potential test for dividing taxation from takings based on proportionality via marginal impact, looking at the substance of a levy over its form. However, regardless of the eventual test we choose for dividing taxation from takings, the name that we give a government imposition has a great impact on its treatment in the courts, and thus it should be given a great deal of thought.*



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## *I. Introduction*

What's in the name by which we call a levy? Does it matter substantively whether the financing goals of a government are achieved via taxation, taking, or other forms of appropriation? In reality, for impositions of the government on private property, a rightful name may be more powerful than we realize, greatly informing the treatment received within the courts. However, as the Supreme Court notably pointed out in *National Federation of Independent Business v. Sebelius*, governmental impositions cannot be self-categorizing; the government may not simply "expand its power under the Taxing Clause" through a clever use of labeling.[2] In short, the notion that the fate of a levy be based on the name that Congress chooses to give it cannot co-exist with a government of limited power. This, then, creates ambiguity among the myriad of different governmental impositions on the populace, with regulations, penalties, fees, taxes, and takings among them.[3] Stemming from this haziness is the need for delineation, as discussed in this note, specifically between the power to tax and the power to take property via eminent domain. The wealth tax serves as a timely example of

[2] 567 U.S. 519, 544 (2012) ("It is true that Congress cannot change whether an exaction is a tax . . . for constitutional purposes simply by describing it as one . . . .").

[3] *Id*. at 537, 539, 565 (referencing throughout the opinion regulations, penalties, fees and taxes that the government has imposed).

this ambiguity, illustrating the importance of the taxes-takings distinction and its potentially far-reaching impacts.[4] As noted by one scholar, "[p]erhaps the most surprising observation about recent commentary on drawing the line between taxation and takings is its paucity," given the fundamental nature of the issue.[5] Taxation and takings are both relatively common privileges of governing bodies over the property of the citizenry, interfering with the absolute protection of property rights in favor of public benefit.[6] Thus, the very concept of taxation and takings allows for significant overlap. Yet, while their similarities abound, taxes and takings receive nearly opposite treatment within the courts.[7] When a use of the taxing power is legitimate and within constitutional bounds, it is nearly unquestionable.[8] Conversely, takings are treated as automatically suspect, having their motives scrutinized and requiring a rigorous

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[4] *See Ultra-Millionaire Tax,* WARREN DEMOCRATS (2021), https://elizabethwarren.com/plans/ultra-millionaire-tax [https://perma.cc/8T2P-MQTW].

[5] Eric Kades, *Drawing the Line Between Taxes and Takings: The Continuous Burdens Principle, and its Broader Application*, 97 NW. UNIV. L. REV. 189, 191 (2002).

[6] *See, e.g.*, Kelo v. City of New London, Conn., 545 U.S. 469, 477-79 (2005) (discussing the "Public Use Requirement" of government takings, even those which are paid just compensation); Frederick N. Judson, *Public Purposes for Which Taxation is Justifiable*, 17 YALE L.J. 162, 162 (1908) ("It inheres in the very nature of a tax . . . that it shall be levied for a public and not a private purpose. It has therefore come to be a fundamental canon of the law of taxation, recognized and enforced by the courts, that the tax be so levied for public purposes.").

[7] *Compare* McCray v. United States, 195 U.S. 27, 59 (1904) ("Since … the taxing power conferred by the Constitution knows no limits except those expressly stated in that instrument, it must follow, if a tax be within the lawful power, the exertion of that power may not be judicially restrained because of the results to arise from its exercise.") *with* Horne v. Dep't of Agric., 576 U.S. 350, 358 ("[I]n the case of real property, such an appropriation is a *per se* taking that requires just compensation . . . . Nothing in the text or history of the Takings Clause, or our precedents, suggests that the rule is any different when it comes to appropriation of personal property.").

[8] *See McCray*, 195 U.S. at 61 ("The right of Congress to tax within its delegated power being unrestrained, except as limited by the Constitution, it was within the authority conferred on Congress to select the objects upon which an excise should be laid.").

analysis of just compensation.[9] Thus, some form of delineation is needed between taxes and takings to ensure proper treatment at both the state and federal level. Despite their disparate treatment, this note argues that there is little fundamental difference between the power to tax and the power of eminent domain. Rather, the two are treated differently because of the way their costs are borne and the way that compensation for those costs is conceptualized, or in a phrase, based on a rough sense of proportionality.[10] Because of this, that which is commonly called a "tax" might be better conceived as a taking if it is borne too acutely. The recently-popularized "wealth tax," a levy on a percentage of a person's accumulated wealth, uniquely showcases the hazy distinction between taxes and takings.[11] Due to the small target demographic which would bear its burden, and given its growing popularity within American political circles, the wealth tax serves as a paradigmatic example of such ambiguity. The treatment of this ambiguity could help shape the landscape of taxation in the United States for years to come.

This Note broadly discusses the current conception of the wealth tax and its potential placement within the dichotomy of taxation and takings. While there are countless other constitutional and administrative questions that could be raised regarding the wealth tax, this Note largely confines its discussion to the domain of taxation and takings. Part II discusses the contemporary rise of the wealth tax within the United States, the varied motivations for the tax, and recent proposals to codify it at the state and federal level. Part III then turns to a discussion of the taxes-takings dichotomy and the difficulty that this distinction might pose to current iterations of the wealth tax. Part IV takes this discussion of taxes and takings

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[9] *See Kelo*, 545 U.S. at 477-79 (inquiring into the satisfaction of the "Public Use Requirement" and just compensation for a government taking).

[10] *See* M. DE VATTEL, THE LAW OF NATIONS; OR PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS 172 ("[Taxes] ought to be regulated in such a manner, that all the citizens might pay their quota in proportion to their abilities; and the advantages they reap from society."); *see also* Saul Levmore, *Just Compensation and Just Politics*, 22 CONN. L. REV. 285, 292 (1990) (describing how the problems potentially posed by the taxes-takings distinction can be avoided completely if taxes are commensurate with implicit benefits).

[11] *See Ultra-Millionaire Tax, supra* note 3 (describing Senator Elizabeth Warren's wealth tax proposal as part of her 2020 presidential campaign); *see also Tax on Extreme Wealth*, *infra* note 11 (describing Senator Bernie Sanders' wealth tax proposal as part of his 2020 presidential campaign).

further and proposes justifications for viewing proportionality as the functional dividing line between the two types of government imposition. Part V discusses potential tests for proportionality in drawing the line between taxation and takings, determining at what point disproportionate burdens implicate the Takings Clause. Part VI then applies these tests to current proposals for the wealth tax. Part VII touches on how categorization of the wealth tax would bear on relatively similar tax concepts, like property tax and estate tax, which are widely accepted. Finally, Part VIII briefly discusses potential treatment of the wealth tax at both the state and federal level, given its categorization under the rule of proportionality.

## *II. The Rise of the Wealth Tax*

The increase in income and wealth inequality in the United States is a phenomenon which many have brought to light in recent years,[12] with potential causes and solutions hotly debated. In terms of income, recent studies show that the income ratio between the 10th percentile and the 90th percentile of Americans has increased by 39% over the past few decades, from 9.1 in 1980 to 12.6 in 2018.[13] A popular indicator for the distribution of wealth, the Gini Coefficient, indicated in 2017 that the United States had a greater degree of wealth inequality any other G7 country.[14] Such drastic differences between the haves and the have-nots in the United States has led to a common lament about the existence of two separate Americas, "one

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[12] *See Ultra-Millionaire Tax*, *supra* note 3 ("[A] small group of families has taken a massive amount of the wealth American workers have produced, while America's middle class has been hollowed out."); *see also Tax on Extreme Wealth*, BERNIE (last visited Mar. 13, 2021), https://berniesanders.com/issues/tax-extreme-wealth/ [https://perma.cc/S6JH-CBBW] ("Today, the United States has more income and wealth inequality than almost any major country on Earth, and it is worse now than at any time since the 1920s.").

[13] JULIANA MENASCE HOROWITZ, RUTH IGIELNIK & RAKESH KOCHHAR, *Trends in income and wealth inequality*, *in Most Americans Say There Is Too Much Economic Inequality in the U.S., but Fewer Than Half Call It a Top Priority*, 1, 21-22 (2020) ("In 1980, the 90/10 ratio in the U.S. stood at 9.1, meaning that households at the top had incomes about nine times the incomes of households at the bottom. The ratio increased in every decade since 1980, reaching 12.6 in 2018, an increase of 39%").

[14] *Id.* (comparing the Gini Coefficient of the United States to those of the United Kingdom, Italy, Japan, Canada, Germany, and France).

of unimaginable wealth, the other of miserable poverty; an America of the promised good life and one of almost guaranteed premature death."[15] This disparity has sparked outrage against the financial elites, often accused of rigging the system in their own favor.[16] This outrage has then given way to many large-scale social movements. As such, Occupy Wall Street and its ilk have taken action against inequality,[17] and more recently populist spirits have returned to upset financial elites in the stock market, tying to beat them at their own game.[18] These symptoms of underlying wealth disparity have recently recently been brought to the forefront of political thought, leading to an array of reactions, from claims that inequality is inherent to capitalism, to attempts to quell these unequal tendencies.[19]

One solution gaining increasing support in the United States is the "wealth tax," a levy on the assets held by those with over a

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[15] Dr. Liz Theoharis, *We Still Live In 2 Americas, Not 1*, THE NATION (Nov. 19, 2020), https://www.thenation.com/article/society/we-still-live-in-two-americas-not-one/ [https://perma.cc/Z6WF-3758]. ("All of us live in a land where there are two Americas, one of unimaginable wealth, the other of miserable poverty; an America of the promised good life and one of almost guaranteed premature death.").

[16] *See, e.g.,* ULTRA-MILLIONAIRE TAX, *supra* note 3 ("For too long, the ultra-rich, corporations, and their lobbyists have used their influence to rig the system in their favor – corroding our democracy and hollowing out the middle class.").

[17] Heather Gautney, *What is Occupy Wall Street? The History of Leaderless Movements*, WASH. POST (Oct. 10, 2011), https://www.washingtonpost.com/national/on-leadership/what-is-occupy-wall-street-the-history-of-leaderless-movements/2011/10/10/gIQAwkFjaL_story.html [https://perma.cc/3MCP-KTTU] (describing the history of Occupy Wall Street movement as a reaction against economic inequality).

[18] Katie Martin, *Occupy Wall Street Spirit Returns as Day Traders Upset the Elites*, FIN. POST (Jan. 29, 2021), https://financialpost.com/financial-times/occupy-wall-street-spirit-returns-as-new-traders-upset-the-financial-elites [https://perma.cc/RMY8-GAZ5] (describing Occupy Wall Street's reaction to the new investors such as hedge funds and derivatives traders).

[19] *See generally* Richard D. Wolf, *Inequality is a Feature of U.S. Society Under Capitalism*, MINN. SPOKESMAN-RECORDER (Aug. 6, 2020), https://spokesman-recorder.com/2020/08/06/inequality-is-a-feature-of-u-s-society-under-capitalism/ [https://perma.cc/ZGU9-K22Q] (stating that inequality is an inherent characteristic of capitalism and addressing the issues of unequal economic distributions).

certain amount of accumulated wealth.[20] While there is some disagreement about the exact rates and exemptions that would apply, proponents agree that such a tax would help the wealthiest Americans "pay their fair share."[21] Perhaps tied to the disproportionate growth in wealth inequality, the rise in the popularity of the wealth tax in recent years appears to be a uniquely American phenomenon. While twelve European countries had instituted a wealth tax by the 1990's, today this number has dwindled to only three.[22] In the same span, and especially since the 2008 financial crisis, the United States has only grown in its fervor for its wealthiest citizens to pay a greater proportion of the tax burden.[23]

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[20] *See Ultra-Millionaire Tax, supra* note 3 (explaining the Ultra-Millionaire Tax, a type of "wealth tax"); *see also Tax on Extreme Wealth*, *supra* note 11 (explaining how taxing extreme wealth would work).

[21] *See Ultra-Millionaire Tax*, *supra* note 3 (proposing a wealth tax of 2% annually on household wealth from $50 Million to $1 Billion, and 6% for wealth in excess of $1 Billion); s*ee also Tax on Extreme Wealth*, *supra* note 11 (proposing a wealth tax of 1% annually on household wealth from $32 Million to $50 Million, 2% for $50 Million to $250 Million, 3% for $250 Million to $500 Million, 4% for $500 Million to $1 Billion, 5% for $1 Billion to $2.5 Billion, 6% for $2.5 Billion to $5 Billion, 7% for $5 Billion to $10 Billion, and 8% on wealth in excess of $10 Billion).

[22] Greg Rosalsky, *If a Wealth Tax is Such a Good Idea, Why Did Europe Kill Theirs?*, NPR (Feb. 26, 2019), https://www.npr.org/sections/money/2019/02/26/698057356/if-a-wealth-tax-is-such-a-good-idea-why-did-europe-kill-theirs [https://perma.cc/LXC5-MMDN] (stating that the only European nations with a continuing wealth tax are Norway, Spain, and Switzerland).

[23] Howard Schneider & Chris Kahn, *Majority of Americans Favor Wealth Tax on Very Rich*, REUTERS (Jan. 10, 2020), https://www.reuters.com/article/us-usa-election-inequality-poll/majority-of-americans-favor-wealth-tax-on-very-rich-reuters-ipsos-poll-idUSKBN1Z9141 [https://perma.cc/Y2WT-HV9F] (showing that among 4,441 respondents polled, 64% strongly or somewhat agreed that the very rich should pay a wealth tax).

While the desire for wealth equality may seem fantastical, state legislatures in California,[24] Washington,[25] and Minnesota[26] have most recently proposed to make the American wealth tax a reality. While every state legislature has enacted some form of property tax,[27] essentially a tax on wealth accumulated in the form of real property, nowhere in the United States has this power been extended to all accumulated wealth over a given threshold. The California proposal, if passed, would impose a wealth tax of 1% on net global wealth in excess of $50 million but less than $1 billion, and 1.5% on net wealth in excess of $1 billion.[28] This tax would apply even to so-called "temporary residents," anyone who spends more than 60 days within the state's borders,[29] though amendment would be required to circumvent appropriations limits in the California Constitution.[30] The Washington proposal, instead, would institute a 1% tax on the

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[24] Assemb. B. 310, 2021 Legis., Reg. Sess. (Ca. 2021) (proposing a comprehensive wealth tax for California).

[25] S.B. 5426, 77th Legis., Reg. Sess. (Wa. 2021); H.B. 1406, 77th Legis., Reg. Sess. (Wa. 2021) (proposing a comprehensive wealth tax for Washington State).

[26] H.B. 1021, 92nd Leg., Reg. Sess. (Minn. 2021) (proposing a comprehensive wealth tax for Minnesota) ("A bill for an act relating to taxation; establishing a Minnesota wealth tax; proposing coding for new law in Minnesota Statutes, chapter 290.").

[27] *See* Samuel Stebbins, *Property Tax Varies by State. Here's a Look at What You'll Pay*, USA TODAY (Feb. 12, 2019), https://www.usatoday.com/story/money/2019/02/11/property-taxes-us-state-state-look-what-youll-pay/38909755/ [https://perma.cc/CV4Q-L39E] (explaining the effective property tax rate for all 50 U.S. states, ranked from lowest to highest).

[28] Assemb. B. 310, *supra* note 23. ("This bill would, for taxable years beginning on or after January 1, 2022, impose an annual tax at a rate of 1% of a resident of this state's worldwide net worth in excess of $50,000,000 . . . The bill would also impose an additional tax at a rate of 0.5% of a resident's worldwide net worth in excess of $1,000,000,000 . . .").

[29] *Id.* (stating that, for such "temporary residents," net global worth as calculated with reference to a discount for the percentage of days per year that they spend within California's borders).

[30] Assemb. Const. Amend. 8, 2021 Leg.., Reg. Sess. (Cal. 2021) (proposing changes for the treatment of the appropriations limit under the California Constitution which currently "limits taxation of certain specified personal property to no more than 0.4% of the value of such property").

worldwide total wealth of its residents with over $1 billion, with revenues to be used as tax credits for lower income households.[31]

Minnesota, in turn, would create a 2% tax on net wealth in excess of $30 million, "excluding property with a situs outside of Minnesota." At the federal level, the Ultra-Millionaire Tax Act, proposed in March 2021, seeks to establish a federal wealth tax of 2% on net taxable assets in excess of $50 million but less than $1 billion, increasing to 3% for assets in excess of $1 billion.[32] Unique to the federal proposal are harsh anti-avoidance provisions, requiring frequent auditing and an expatriation "exit tax" of 40% for the renunciation of U.S. citizenship.[33] Though no such a bill has yet passed in the United States, these mark some of the first legislative proposals of their kind on American soil, paving the way for future iterations within the American political landscape. With ample proposals at the state and federal level, a comprehensive wealth tax could be a reality for U.S. citizens in the near term.

Naturally, the potential codification of the controversial tax led to a litany of responses, with some raising potential issues regarding its implementation. The difficulty of assessing wealth accurately, the need to prevent transfers or expatriation which might evade the tax, and the resultant impacts on the global economy all present important issues central to a wealth tax's successful implementation.[34] On the other end of the spectrum, debate has also

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[31] *See* S.B. 5426, *supra* note 24 ("The Washington state wealth tax is created by narrowing the existing tax preference that exempts all intangible property and assesses a modest one percent tax only on financial intangible assets . . . The first $1,000,000,000 of assessed value is exempt from the Washington state wealth tax.").

[32] Ultra-Millionaire Tax Act of 2021, S. 510, 117th Cong. (2021) ("(A) 2 percent of so much of the net value of all taxable assets of the taxpayer in excess of %50,000,000 but not in excess of $1,000,000,000, plus).

[33] *Id.*; s*ee also Ultra-Millionaire Tax*, *supra* note 3 ("The proposal also includes strong anti-evasion measures, including but not limited to . . . a 40% "exit tax" on the net worth above $50 million of any U.S. citizen who renounces their citizenship . . . .").

[34] Allison Schrager & Beth Akers, *Issues 2020: What's Wrong with a Wealth Tax*, MANHATTAN INST. (Oct. 8, 2020), https://www.manhattan-institute.org/whats-wrong-with-a-wealth-tax#:~:text=A%20Wealth%20Tax%20Would%20Not,especially%20if%20interest%20rates%20increase [https://perma.cc/Z6CR-LDDU] ("A dozen European countries had a wealth tax in 1990, but most abandoned them because they were ineffective and expensive to administer. In part, the taxes failed to

arisen as to whether such a tax is allowed due to constitutional barriers at both state and federal level.[35] Popular questions at the federal level involve whether a wealth tax would be considered a tax on "incomes" within the meaning of the Sixteenth Amendment,[36] as well as whether it should be considered a "direct" tax required to be laid in proportion to state population.[37] Interestingly, the wealth tax even has a non-zero chance of being invalidated as a Bill of Attainder,[38] as a potential extrajudicial punishment on "named individuals or too easily ascertainable members of a group."[39]

Despite the questions which surround it, one inquiry has largely escaped public attention altogether: whether or not the so-called "wealth tax" should rightly be conceptualized or treated as a tax at all. Targeting an exceedingly small demographic, here

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raise much revenue because wealthy individuals easily moved their assets across borders to avoid taxation.").

[35] *Compare* Peter J. Reilly, *Wealth Tax – That Pesky Constitution Might Get in the Way*, FORBES (Jun. 25, 2019), https://www.forbes.com/sites/peterjreilly/2019/06/25/wealth-tax-that-pesky-constitution-might-get-in-the-way/?sh=66d9571b779c [https://perma.cc/2UD2-RURP] ("The constitutionality of a wealth tax is somewhat dubious.") *with* Calvin H. Johnson, *A Wealth Tax is Constitutional*, AM. B. ASS'N (Aug. 8, 2019) https://www.americanbar.org/groups/taxation/publications/abataxtimes_home/19aug/19aug-pp-johnson-a-wealth-tax-is-constitutional/#:~:text=Warren's%20wealth%20tax%20is%20constitutional,as%20this%20article%20will%20demonstrate.&text=The%20Constitution%2C%20Article%20I%2C%20section,among%20the%20states%20by%20population [https://perma.cc/4M24-X4RA] ("Warren's wealth tax is constitutional under the standards laid down by the Founders . . . .").

[36] U.S. CONST. amend. XVI ("The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.").

[37] U.S. CONST. art. I, § 9, cl. 4 ("No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.").

[38] U.S. CONST., art. I, § 9, cl. 3 (prohibiting bills of attainder at the federal level); U.S. CONST. art. I, § 10, cl. 1 (prohibiting bills of attainder at the state level).

[39] United States v. Lovett, 328 U.S. 303, 315 (1946); *see also* Kades, *supra* note 4, at 191 (discussing the potential for acute taxation to be considered a Bill of Attainder).

wealthy "ultra-millionaires,"[40] the wealth tax serves as an enlightening example for the hazy distinction between taxation and constitutional taking.[41] Despite their similarity, takings alone require the payment of "just compensation" under constitutional law.[42] As such, what line can be drawn between these conceptions of taxation and taking? On which side this line could a comprehensive wealth tax fall, and what treatment might it receive at either the state or federal level?

## *III. The Line Between Taxation & Takings*

While conceived and treated very differently within conventional thought, the taxing power and the taking power are both exercises of state power brought to bear upon individual property rights, stemming from the sovereignty of the state itself.[43]

At the origin of both the power to tax and the power to take is the idea that the "particular domain of the citizens" is necessarily subordinated to that of the state, as the "general domain of the nation

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[40] *See Ultra-Millionaire Tax*, *supra* note 3 (explaining the extreme concentration of wealth in America and the need for a tax on the wealthy).

[41] Kades, *supra* note 4 at 190. ("Under his fully articulated theory, the Takings Clause invalidates not just esoteric hypotheticals like the Bill Gates tax, but deems unconstitutional the income tax code's long-standing progressive rate structure.").

[42] U.S. CONST. amend. V (". . . [N]or shall private property be taken for public use, without just compensation."); Maureen E. Brady, *Property's Ceiling: State Courts and the Expansion of Takings Clause Property*, 102 VA. L. REV. 1167, 1168 (2016) ("The Federal Constitution and nearly all state constitutions include takings clauses, which require the payment of just compensation when government takes 'property' for public use.").

[43] *See Tax*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("A charge, usually monetary, imposed by the government on persons, entities, transactions, or property to yield public revenue. Most broadly, the term embraces all governmental impositions on the person, property, privileges, occupations, and enjoyment of the people, and includes duties, imposts, and excises."); *Taking*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("The government's actual or effective acquisition of private property either by ousting the owner or by destroying the property or severely impairing its utility. There is a taking of property when government action directly interferes with or substantially disturbs the owner's use and enjoyment of the property.").

is full and absolute."[44] This subordination to the state is necessary because social order is a prerequisite for the accumulation of property, justifying both takings and taxation as "what we pay for a civilized society."[45] As such, the concepts of tax and taking, stemming from this same rationale, allow significant room for overlap. The term "taxes" applies most broadly to "all governmental impositions on the person, property, privileges, occupations, and enjoyments of people."[46] Similarly, takings exist when "government action directly interferes with or substantially disturbs the owner's use and enjoyment of the property."[47] As some have pointed out, at their extremes, taxation and takings are merely a choice of method for achieving the same result.[48] In the absence of relevant restrictions, "it is of no account whether [the government obtains property] simply by appropriating it directly, or by purchasing it, together with a tax on the original owner for the full purchase price. In this case, taxing and taking are identical."[49]

Why, then, are the two appropriations conceived and treated so differently under the U.S. Constitution? One surface-level distinction may lie in the types of property that each typically involve. Typically, takings involve land or a seizing of specific assets, while taxes involve a more general liability in terms of dollars

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[44] M. DE VATTEL, LAW OF NATIONS: OR, PRINCIPLES OF THE LAW OF NATURE; APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS 164 (6th ed., 1844).

[45] Compania Gen. de Tabacos de Filipinas v. Collector of Internal Revenue, 275 U.S. 87, 100 (1927) (Holmes, J., dissenting).

[46] *Tax*, *supra* note 42.

[47] *Taking*, *supra* note 42.

[48] *See* Kades, *supra* note 4, at 2 ("there are no fundamental tensions between tax policy and takings policy . . .").

[49] Geoffrey Brennan & James Buchanan, *The Logic of Tax Limits: Alternative Constitutional Constraints on the Power to Tax*, 32 NAT'L TAX J. 11, 11-12 (1979); *see also* Calvin R. Massey, *Takings and Progressive Rate Taxation*, 20 HARV. J.L. & PUB. POL'Y 85, 104 (1996) ("After all, taxation is, by definition, a taking. Surely the government takes your property if government officers enter your home and haul off your piano. How then is it not a taking if, instead, the government imposes a tax liability on you that you can only extinguish by surrendering your piano?").

and cents.[50] However, this difference alone cannot be the reason for their disparate treatment.[51]

Indeed, by the very definition of a tax, taxation need not be accounted for in dollars.[52] Additionally, in recent years the Takings Clause has applied to the taking of fungible goods[53] and even monetary exaction by the state.[54] Another suggested difference might be that legislatures generally enact taxes by statute, while takings may be done via eminent domain and without specific statutory basis. Under scrutiny, this too falls by the wayside. Takings may emerge from a statutory action as well as eminent domain, and the codification of a taking which requires just compensation is not sufficient for it to be reconsidered as a tax.[55] With these surface-level differences out of the way, it is possible that a line of difference between taxation and takings emerges in the breadth of their application, that is, in the breadth of the population who bears their burdens.[56] In the words of one scholar, "an income tax of 100% imposed on a single individual —for example, Bill Gates — would violate the Takings Clause."[57] If this is true, and there is taxation,

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[50] *See* Kades, *supra* note 4, at 4 (explaining how takings involve deprivation of specific assets, while taxes involve general obligations).

[51] *Id.* at 5 (suggesting that the Takings Clause generally targets specific assets only because "it is pointless for the government to take money by condemnation, because the Takings Clause requires its immediate return").

[52] *See Tax*, *supra* note 42 ("Although a tax is often thought of as being pecuniary in nature, it is not necessarily payable in money.").

[53] *See* Horne v. Dep't of Agric., 576 U.S. 350 (2015) (holding that the Takings Clause applies to personal property as well as real property, and deeming a civil forfeiture of raisins to be a taking which requires the payment of just compensation).

[54] *See* Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595 (2013) (holding that withholding a land-use permit based on disproportionate requirements of monetary payment is considered a taking requiring just compensation).

[55] *See id.* at 600-01 (discussing a taking under the Florida-enacted Warren S. Henderson Wetlands Protection Act); *see also Horne*, 576 U.S. at 351 (discussing a taking under the federally-enacted Agricultural Marketing Agreement Act of 1937).

[56] *See* Brennan & Buchanan, *supra* note 48, at 13 (suggesting that taxation and takings can be distinguished based on the number of citizens that each involves).

[57] Massey, *supra* note 48, at 104 (asserting that the Takings Clause cannot be "read as limiting only governmental takings of property by means other than taxation" and that instead "[t]he purpose behind the Takings Clause is

however severe or acute, which would be so untenable so as to be considered a taking, "then the problem becomes a matter of degree"[58] which separates taxation from takings, rather than a matter of kind.

Perhaps tied up with this difference in degree is the concept of compensation for the property which is taken for public use. Under the Fifth Amendment, private property may not be taken without just compensation.[59] At first glance, this appears to be facially inconsistent with the taxing power handed down to Congress, which, in a literal sense, allows for the taking of private property for public use.[60] However, courts have been clear that "the Constitution is not self-destructive. In other words, that the powers which it confers on the one hand it does not immediately take away on the other."[61] Thus, these two clauses must be read as internally consistent with one another.

This, however, raises a new question: why would the Constitution protect against the "taking of private property for public use" in the case of the individual, but allow for a similar taking in the taxation of the masses? A simpler answer is that the Framers intended to allow taxes and takings to coexist so that neither clause may be said to preclude the other.[62] However, the importance of property rights to the Framers,[63] and to free societies generally,[64]

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to prevent the forcible redistribution of private property for public benefit" in whatever form).

[58] *Id.*

[59] U.S. CONST. amend. V. ("nor shall private property be taken for public use, without just compensation").

[60] U.S. CONST. art. I, § 8, cl. 1 ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence [sic] and general Welfare of the United States . . . .").

[61] Billings v. United States, 232 U.S. 261, 282 (1914).

[62] *Id*.

[63] *See* THE FEDERALIST NO. 54 (James Madison) ("Government is instituted no less for protection of the property, than of the persons, of individuals. The one as well as the other, therefore, may be considered as represented by those who are charged with the government."); *see also* James Madison, Co-Chairman, Va. Const. Convention of 1829, First Speech at the Virginia Convention (Dec. 2, 1829) (transcript available at the University of Virginia Rotunda Press) ("It is sufficiently obvious, that Persons and Property, are the two great subjects on which Governments are to act: and that the rights of persons, and the rights of property are the objects for the protection of which Government was instituted. These rights cannot well be separated.").

[64] *See* Frank I. Michelman, *Property as a Constitutional Right*, 38 WASH. & LEE L. REV. 1097, 1102 (1981) ("Let us consider that the institution of

points to the idea that taxation might also be thought of as requiring just compensation due to its interference with the right to property. Certainly, it is inconsistent for the Constitution to deem property rights as valuable and deserving of remuneration in the case of the takings, while saying that substantially similar interference from taxes is of no consequence.[65] This conundrum, and the need for internal consistency in the Constitution, perhaps indicates that just compensation for taxes already exists, albeit implicitly.[66] As Oliver Wendell Homes Jr. well said, perhaps taxation bears its own just compensation as "what we pay for a civilized society."[67]

If this is so, the two constitutional provisions are not as at odds as they might seem. After all, a form of "just compensation" is provided for both takings and taxation in different ways.[68] For instance, when burdens of the state are felt generally, implicit compensation is seen as sufficient via a well-run state, ample public services, or other indirect benefits from societal living generally. In

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property is responsive to the values of security and regularity in daily social encounters -themselves conditions, it may well be said, upon which liberty in turn depends.").

[65] *See id*. at 1111 ("It is easy to see why taxes have to be categorically distinguished by the courts from takings of property, but hard to deny that the distinction hides … an immense subordination of property rights to general welfare.").

[66] *See* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 195-97 (1985) (asserting that just compensation for a taking need not be explicit at all, and that implicit forms of compensation for takings through regulation and taxation require no explicit payment due to their implicit compensation through regulatory structures or other state benefits). "It does not follow, however, that major government initiatives go forward only if cash or other property is explicitly transferred to persons whose property has been taken . . . In principle, therefore, the sate may provide compensation in whatever form it chooses . . . Many large number takings are in the form of regulations, taxations, and modification of liability rules."); *Id.*

[67] Compania Gen. de Tabacos de Filipinas, 275 U.S. at 100 (Holmes, J. dissenting). ("Taxes are what we pay for civilized society, including the chance to insure.").

[68] *See* EPSTEIN, *supra* note 65, at 195-97. ("The Constitution speaks only of 'just' compensation, not of the form it must take. In principle, therefore, the state may provide compensation in whatever form it chooses . . . Many large number of takings are in the form of regulations, taxation, and modification of liability rules. In these instances, the problem of assessing the impact of the taking . . . on each person can be divided into two inquiries.").

other words, "the taking of property by taxation requires no other compensation than the tax-payer [sic] receives in being protected by the government to the support of which he contributes."[69]

Instead, when the burden of the state on private property is felt too acutely, this kind of implicit compensation ceases to be sufficient and explicit compensation is then required under the Takings Clause.[70] In this, the difference between taxation and takings can be said to be based on a rough sense of proportionality:[71] that is, whether or not the social costs which are imposed on the individual are justifiable as based on an implicit sense of public benefit. It is in this framework of implicit benefit, burden sharing, and proportionality that the Constitutional grants of the taxing power and the taking power can be reconciled.

## *IV. The Case for Proportionality*

Despite the preceding paragraph, the idea that proportionality should be the dividing line between taxation and taking is not necessarily self-evident. Nevertheless, multiple sources counsel in favor of adopting proportionality as a deterministic metric between taxes and takings. Among these are the Framers' conception of the taxing power, current regulatory takings doctrine, and the treatment of the taxing power abroad.

First, and perhaps most importantly, we turn to the Framers' original conception of the taxing power. The Constitution

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[69] Cole v. City of La Grange, 113 U.S. 1, 8 (1885); *see also* Griffin v. Mayor of Brooklyn, 4 N.Y. 419,422 (1851) ("Taxation takes [money] for public use; and the tax-payer receives, or is supposed to receive his just compensation in the protection which government affords to his life, liberty and property, and in the increase of the value of his possessions by the use to which the government applies the money raised by the tax.").

[70] *See* U.S. CONST. amend. V ("[P]rivate property [shall not] be taken for public use, without just compensation.").

[71] *See* DE VATTEL, M. DE VATTEL, LAW OF NATIONS: OR, PRINCIPLES OF THE LAW OF NATURE; APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS (6th ed., 1844) 164. ("[Taxes] ought to be regulated in such a manner, that all the citizens might pay their quota in proportion to their abilities; and the advantages they reap from society."); *see also* Saul Levmore, *Just Compensation and Just Politics*, 22 CONN. L. REV. 285, 292 (1990) (describing how the problems potentially posed by the taxes-takings distinction can be avoided completely if taxes are commensurate with implicit benefits).

undoubtedly and unequivocally grants the federal government the broad power to tax and raise revenues.[72] At the time of its ratification, this broad power to tax was considered necessary both to the survival of a federal government[73] and to prevent the disproportionate results of relying on duties and imposts alone.[74] As Alexander Hamilton wrote in his Federalist 35, "[t]wo evils would spring from this source: the oppression of particular branches of industry; and an unequal distribution of the taxes, as well among the several States as among the citizens of the same State."[75]

Not content with the ability of the broad taxing power to be abused, the power to tax was granted with "guarded circumspection,"[76] and explicitly limited by the Founders in a few key ways.[77] These limitations on the taxing power appear to be aimed at the similar goal of preventing its burdens from being abused or felt too acutely, as a legitimate use of the taxing power would not impose the burdens of the nation as a whole on only a few states or individuals. The uniformity requirement of duties and excises,[78] the proportionality requirement for direct taxes,[79] and the tax exemption of state exports[80] all counsel toward proportional treatment of citizens as a characteristic of legitimate tax burdens under the Framers' view. Accordingly, that taxing power generally should be construed so that

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[72] U.S. CONST. art. I, § 8, cl. 1 ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence [sic] and general Welfare of the United States . . . .").

[73] THE FEDERALIST NO. 31 (Alexander Hamilton) ("As revenue is the essential engine by which the means of answering the national exigencies must be procured, the power of procuring that article in its full extent must necessarily be comprehended in that of providing for those exigencies.").

[74] THE FEDERALIST NO. 35 (Alexander Hamilton) (discussing the power to tax granted to the federal government under the U.S. Constitution).

[75] *Id.* ("Two evils would spring from this source: the oppression of particular branches of industry; and an unequal distribution of the taxes, as well among the several States as among the citizens of the same State.").

[76] THE FEDERALIST NO. 36 (Alexander Hamilton).

[77] U.S. CONST. art. I, § 8, cl. 1 ("[A]ll Duties, Imposts and Excises shall be uniform throughout the United States."); U.S. CONST. art. I, § 9, cl. 4 ("No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or enumeration herein before directed to be taken."); U.S. CONST. art. I, § 9, cl. 5 ("No Tax or Duty shall be laid on Articles exported from any State.").

[78] U.S. CONST. art. I, § 8, cl. 1.

[79] U.S. CONST. art. I, § 9, cl. 4.

[80] U.S. CONST. art. I, § 9, cl. 5.

no state or citizen should be subjected to the "evil" of an "unequal distribution of taxes."[81]

This is true even though tax burdens at the federal level have been "unequal," in most senses of the word, for nearly the past century.[82]

Another consideration which skews in favor of proportionality for tax burdens and disproportionality for takings is current regulatory takings law, with the treatment of government regulation acting as a stand-in for taxation.[83] As taxation is often regulatory in nature, and as direct regulation imposes similar costs on private property interests, a constitutional comparison between taxation and regulation is perhaps an apt one.[84] Under current Takings Clause doctrine, regulatory conditions on land use run afoul of the Fifth Amendment where there is an absence of a "rough proportionality" between the regulation and the public impact of the land's proposed use.[85] This is because the burdens imposed on the individual must be roughly equivalent to the potential harm of the land use on the public welfare generally.[86] Where this proportionality is evident, the cost of the regulation on the individual is balanced out by the its implicit public benefit, and thus no taking exists. However, where such regulation is disproportionate, just compensation is required, as "[a] strong public desire to improve the public condition

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[81] THE FEDERALIST NO. 35 (Alexander Hamilton).

[82] *See* 1901-1932: The Income Tax Arrives, TAX ANALYSTS (2021), http://www.taxhistory.org/www/website.nsf/Web/THM1901?OpenDocument [https://perma.cc/R2BH-4MDS] (discussing the advent of the income tax and tax progressivity generally).

[83] Massey, *supra* note 48, at 111-24 (applying regulatory takings doctrine to progressive rate taxation).

[84] *See* Reuven S. Avi-Yonah, *Taxation as Regulation: Carbon Tax, Health Care Tax, Bank Tax and Other Regulatory Taxes*, 1 ACCT., ECON., & L., no. 1, 2011, at 1, 2-3 ("In most developed countries governments use the tax system to change the behavior of actors in the private sector, by incentivizing (subsidizing) activities they wish to promote and by disincentivizing (penalizing) activities they wish to discourage.").

[85] Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595, 599 (2013) (quoting Dolan v. City of Tigard, 512 U.S. 374, 391 (1994)).

[86] *Dolan*, 512 U.S. at 391 ("No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.").

[will not] warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."[87]

This requirement has been applied not only to regulatory restrictions on how land may be used, but equally to monetary exaction by the state in exchange for land use, where once more a sense of proportionality is required to legitimize it.[88] Thus, takings law already has a doctrine of proportionality as applied to regulatory takings, pointing to the rule of proportionality as a helpful way in determining that "takings [may exist] where the government . . . achieved a result that could have been obtained through taxation."[89] As extrapolated and applied to taxation, which bears substantial similarity to regulation, this doctrine supports the conclusion that legitimate tax burdens are rightly viewed as proportional.

Finally, the treatment of legitimate tax burdens in the international community supports proportionality as a guiding principle. The German example, in particular, appears to be particularly germane and instructive. While Germany is a civil law jurisdiction, its constitution, the *Grundgesetz*, or "Basic Law," explicitly protects property rights in a manner similar to the Takings Clause.[90] As such, the *Grundgesetz* states that "[p]roperty and the right of inheritance shall be guaranteed,"[91] but that this right is not unfettered, as "[p]roperty entails obligations."[92] As a part of these obligations, municipalities have a right to "tax revenues based upon economic ability."[93]

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[87] *Id.* at 396 (quoting Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416 (1922)).

[88] *Id.* ("[Y]et this court has repeatedly found takings where the government, by confiscating financial obligations . . . ."); *see also* Brown v. Legal Found. of Wash., 538 U.S. 216, 232 (2003). ("If the State had imposed a special tax . . . Provided that she receives just compensation for the taking of her property . . . .").

[89] *Id.* ("[Y]et this court has repeatedly found takings where the government, by confiscating financial obligations . . . ."); *see also* Brown v. Legal Found. of Wash., 538 U.S. 216, 232 (2003). ("If the State had imposed a special tax . . . Provided that she receives just compensation for the taking of her property . . . .").

[90] GRUNDGESETZ [GG] [CONSTITUTION], *translation at* https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0083 [https://perma.cc/5C4A-2PVB].

[91] GG art. 14(1). ("[P]roperty and the right of inheritance . . . .").

[92] GG art. 14(2). ("[P]roperty entails obligations . . . .").

[93] GG art. 28(2). ("[T]ax revenues based upon economic ability . . . .").

"Expropriations," or government takings of private property, are required to be done for the public good and to be compensated under German law.[94] These constitutional requirements caused German courts to struggle over several years with a problem similar to that contemplated in this note, with the sovereign power of the state to tax on one hand and the individual right to property on the other. While many Germans believed that "the strong shoulders should carry more than the weak ones . . . it is nowhere specified how much more the strong shoulders can or should do."[95] In 1996, a German constitutional judge announced what some termed the "*Halbteilungsgrundsatz*" or the "Equal Division Principle"[96] holding – in essence – that tax burdens that exceed 50% of the taxable base interfered unconstitutionally with the general guarantee of the right to property.[97] Though Germany's Federal Constitutional Court eventually disavowed this hardline 50% rule due to its arbitrary line drawing, the court redoubled its assertion that taxation can indeed interfere with the personal right to property, stating that the government's power to tax has an "upper limit resulting from the principle of proportionality."[98] Thus, to prevent arbitrary line drawing by the courts, while still protecting individual property rights, proportionality has been shown to be a useful and intuitive dividing line which limits the power to tax.

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[94] GG art. 14(3).

[95] Bert Rürup & Axel Schrinner, *Der Chefökonom: Der Unterfinanzierte Staat*, HANDELSBLATT RSCH INST. (Dec. 4, 2020) (Ger.), https://www.handelsblatt.com/downloads/26686512/2/2020-12-04-chefoekonom-der-unterfinanzierte-staat.pdf [https://perma.cc/5V8J-BGXK].

[96] *See* Moris Lehner, *The European Experience with A Wealth Tax: A Comparative Discussion*, 53 TAX L. REV. 615, 651 (2000).

[97] *See* BVerfG, 2 BvR 552/91, Jun. 22, 1995, 93, 21 https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/1995/06/rs19950622_2bvr055291.html [https://perma.cc/6U9T-DLQE]; *see also* Dieter Endres & Reinhard Gerhardy, *Germany's 1997 Tax Act Includes Abolition of Net Assets Tax*, 7 J. INT'L TAX'N 375, Aug. 1996, at 1, 1 (discussing that this decision led to an overhaul of the German tax code in 1997, and a repeal of the German wealth tax).

[98] BVerfG, 2 BvR 2194/99, Jan. 18, 2006, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2006/01/rs20060118_2bvr219499.html [https://perma.cc/95M9-YTWU].

## *V. Tests for Proportionality*

Given that a rough proportionality, as previously described, is a helpful demarcation between taxation and takings, the next question which naturally arises regards the point at which just compensation must be made explicit. That is, how acute or disproportional must a burden be to be considered a constitutional taking of property? As is generally appropriate for a question of this breadth, there is no one clear approach or answer. While the Constitution, the Framers, or other authoritative sources may counsel toward a certain end, they often remain silent regarding particular tests to be used or the thresholds to be met.

### A. The Unfair Apportionment Test

One older distinction used to divide taxes and takings has been termed by some as the "Unfair Apportionment Test."[99] Under this test, taxation and takings are defined by the central question of whether burdens of a proposed tax fall proportionately on those who ought to bear them, so that the tax is not *per se* flagrant or arbitrary based on its disproportionality.[100] Though the Unfair Apportionment Test is somewhat vague, it looks for a "flagrant departure from substantial equity in the imposition of taxes," as "[n]othing but extreme excitement, bordering on fury, would reconcile even a domineering majority, to an act which should impose on the minority the entire or a flagrantly disproportionate burthen [sic] in supporting the government or carrying on its public and general objects."[101] Put another way, this test asks whether a tax is "so arbitrary as to compel the conclusion that it does not involve an exertion of the taxing power, but constitutes, in substance and effect, the direct exertion of a different and forbidden power."[102] The weaknesses of the Unfair Apportionment Test, however, lie in its great subjectivity. At what point does a burden become so arbitrary or so flagrant that it no longer is considered a valid use of the taxing power? Notably, this line of inquiry also does exactly what courts so often refuse to do, by looking into and imputing a legislative motivation for a given tax

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[99] Kades, *supra* note 4, at 202 (defining the unfair appointments test).
[100] *Id.*
[101] Cheaney v. Hooser, 48 Ky. 330, 342 (1849).
[102] A. Magnano Co. v. Hamilton, 292 U.S. 40, 44 (1934).

burden. American courts have repeatedly expressed the sentiment that, so long as it is aimed at raising at least some revenue, the "[c]ollateral purposes or motives of a Legislature in levying a tax of a kind within the reach of its lawful power are matters beyond the scope of judicial inquiry."[103] Thus, the Unfair Apportionment Test, while importantly focused on proportionality, is perhaps less useful as a dividing line between taxes and takings due to its ambiguity and focus on legislative intent.

### B. The Continuous Burdens Principle (CBP)

A more recent and more objective basis for testing the proportionality of tax burdens is termed the Continuous Burdens Principle (CBP), a mathematically rigorous version of older distinctions regarding burden sharing.[104]

This test focuses on the marginal impact of a levy, determining that a taking exists where there is a discontinuity in the burdens borne by a segment of the population, relative to the benefits which they enjoy because of it.[105] A discontinuity in this sense is any disproportionate jump between the net burden imposed on any given taxpayer and the taxpayer who is the next-most burdened, displayed graphically.[106] While it is not specified exactly how much of a discontinuity must exist to implicate the Takings Clause, the Takings Clause would be violated under the CBP when any discontinuity exceeds some minimal threshold to be determined either administratively or judicially.[107] Current takings case law would suggest that this minimal threshold is likely small, as takings may

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[103] *Id*.

[104] *See generally* Kades*, supra* note 4*,* at 223-49 (presenting the Continuous Burdens Principle).

[105] *See id.* at 224 ("[T]he idea is that the marginal burden imposed on an owner or group of owners must be examined… if a governmental measure imposes costs in such a way that there are no discontinuous "jumps" in marginal burdens, there is no taking.").

[106] *See id*. at 190-91 ("To satisfy the CBP, a tax must impose burdens such that there are no large jumps-discontinuities, in an imprecise sense-between the burden imposed on any taxpayer and the next-most-burdened taxpayer.").

[107] *See id.* at 224-25 (stating that the CBP requires that the difference in burdens at every point be "relatively small," and that any "large jump . . . is a graphical clue that compensation is required under the CBP.").

exist even where economic impact is minimal, depending on the nature of the governmental action.[108] Thus, if there is complete uniformity in net burdens of a levy, the imposition is always permissible under the CBP.[109] Contrarily, impositions on only a few individuals which create a large disparity in net burdens are more likely to implicate the Takings Clause.[110] For this analysis, net burden curves are useful for determining the character of a discontinuity via graphical depiction, looking at burdens not in terms of total dollars but in terms of the percentage of the interest burdened.[111] An excessively steep slope at any interval on the net burden curve evidences a discontinuity and indicates that a disproportionate imposition exists which could implicate the Takings Clause.[112]

Note that the CBP is a potentially useful test for proportionality for a number of reasons. While providing a better guiding line between taxes and takings, the CBP also represents a middle ground, neither requiring that all burdens be completely uniform,[113] nor that longstanding practices of progressive rate taxation be overturned.[114] Also in the CBP's favor is its consistency with the Supreme Court's regulatory takings doctrine under *Penn Central Transportation Co. v. New York*, numerically capturing the economic impact of the regulation on the taxpayer and its interference with investment-backed expectations.[115] Additionally,

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[108] *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426-30 (1982) (enumerating past examples where activities with little economic impact on the land, including telegraph lines on the property and airplanes flying low overhead, constituted a taking despite its low economic impact.).

[109] *See* Kades, *supra* note 4, at 224-25.

[110] *See id.*

[111] *See id*. at 227 (observing that the use of absolute dollars can create a discontinuous burden even on taxes which everyone agrees are permissible, such as flat rate taxes, while a percentage burden alleviates this issue).

[112] *See id.* at 225 ("Generally, a gross or net benefit curve violates the CBP when its slope becomes excessively steep along any interval.").

[113] *See id.* at 240 (observing that manipulating the tax base allows for an easy end run around calls for flat-rate taxation).

[114] *See id.* at 224 (finding that extreme progressivity like the "Bill Gates Tax" would violate the CBP).

[115] *See* Penn Cent. Transp. Co. v. New York, 438 U.S. 104, 124 (1978) ("The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations."); *see also* Kades*, supra* note 4*,* at 247.

whereas the Unfair Apportionment Test was vague and variable, the CBP is mathematically replicable, allowing for consistency in its application to a number of legal contexts where the Takings Clause might be implicated.[116] Finally, and importantly, the CBP, in looking at net burdens rather than formalism, would prevent a workaround from circumventing the Takings Clause by imposing an impermissible burden by other means.[117]

However, though the CBP is less arbitrary than the Unfair Apportionment Test, it is not without potential issues. Basing the test on "excessively steep" net burden curves[118] still leaves substantial room for arbitrary implementation as to which taxes are permissible and which are not, though the mathematical nature of the test requires this line to be applied consistently. This issue may be mitigated somewhat by administrative or judicial rule-making determining when net burdens become "excessively steep."[119] Additionally, past takings case law could be used in conjunction with the CBP to determine which burdens have been considered excessive in the past. Thus, though the CBP still leaves room for arbitrary application, this arbitrariness is more readily addressable than that of the Unfair Apportionment Test, which is based on imputed tax motivation.[120]

## *VI. Applying Proportionality Tests to the Wealth Tax*

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[116] *See* Kades, *supra* note 4, at 237 ("The results of applying the CBP, however, are robust: they survive under a wide variety of assumptions about the distribution of benefits from governmental expenditures.").

[117] *See, e.g.*, Ari Glogower, *A Constitutional Wealth Tax*, 118 MICH. L. REV. 717 (2020) (proposing that a wealth tax which is struck down on formalistic grounds could be passed through an excessively progressive income tax).

[118] *See* Kades, *supra* note 4, at 224-25 (discussing these "excessively steep" curves).

[119] *See id*. ("Generally, a gross or net benefit curve violates the CBP when its slope becomes excessively steep along any interval… One derives net burden curves from gross benefit curves by raising each point to reflect the benefit that each person received as a result of the governmental program.").

[120] *See id*. at 203-04 ("Taxation exacts money from individuals as their share of a justly imposed and apportioned general public burthen, and the equivalent is presumptively received in the benefits conferred by the government.").

Using tests for proportionality as a guidepost between takings and taxation, we turn to applying these tests to current iterations of the wealth tax. The Unfair Apportionment Test, though vague, does not bode well for the current wealth tax proposals. Given the anger and passion which has excited movements against wealth inequality and harsh rhetoric against the wealthy,[121] it seems at least plausible that the current iteration of the wealth tax is a "flagrant departure from substantial equity in the imposition of taxes," as caused by "[n]othing but extreme excitement, bordering on fury."[122] Applying the taxing power only to those with extreme wealth, in some cases explicitly targeting "the top 0.1 percent"[123] due to collective outrage, arguably imposes an intentionally inequitable burden. However, due to the vague subjectivity of the Unfair Apportionment Test, this assessment cannot be dispositive.

Analysis under the more rigorous CBP presents a better picture of the current wealth tax, looking only at how net burdens fall amongst all taxpayers. This provides a more objective test, apart from tax motivations, which gets to the heart of the dividing line between taxes and takings: the proportionality of the burdens imposed upon the populace.[124] However, for such mathematical rigor,

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[121] *See* Katie Martin, *Occupy Wall Street Spirit Returns as Day Traders Upset the Elites*, FIN. POST (Jan. 29, 2021), available at https://financialpost.com/financial-times/occupy-wall-street-spirit-returns-as-new-traders-upset-the-financial-elites [https://perma.cc/RMY8-GAZ5] (asserting that recent aggressive tactics to fight wallstreet by the public are the result of generational economic issues); *see also* Garth Theunissen, *Financial Insurrection*, FIN. MAIL, (Feb. 4, 2021) https://www.businesslive.co.za/fm/money-and-investing/2021-02-04-reddit-vs-wall-street-financial-insurrection/ ("If you want to take on the people who control the crony capitalist system you despise, you have to hit them where it hurts most: their pockets.").

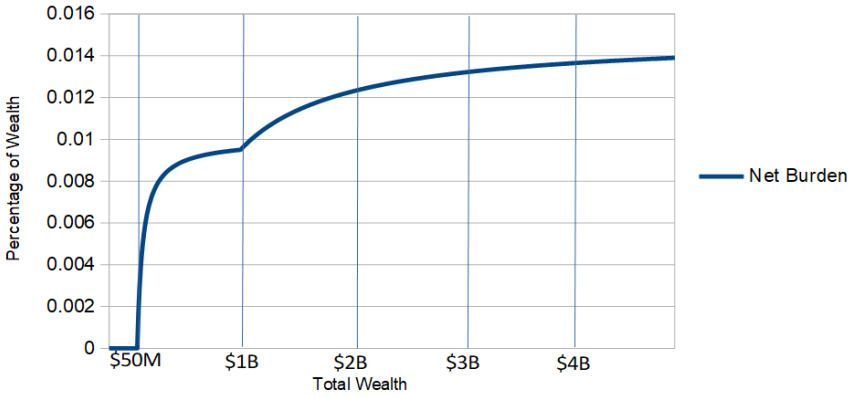
[122] Cheaney v. Hooser, 48 Ky. 330, 342 (1848) (explaining that imposing taxes on a smaller group of individuals at the will of the majority might be "an oppressive and ruinous discrimination under color of the taxing power."); *see also* A. Magnano Co. v. Hamilton, 292 U.S. 40, 44 (1934) (discussing the limitation imposed by the Fifth Amendment on a taxing statute "so arbitrary as to compel the conclusion that it does not involve an exertion of the taxing power, but constitutes, in substance and effect, the direct exertion of a different and forbidden power.").

[123] *See Tax*, *supra* note 42 (describing the "Key Points" of Bernie Sanders' position on the issue of taxing the very highest of wealth).

[124] *See id.* (suggesting that the line that converts a tax to a taking has to do with the interference with a property owner's rights); Kades, *supra* note 4,

some assumptions must be made about the distribution of the burdens and benefits from the tax to yield a net burden curve. As the wealth tax is generally discussed as redistributive in nature,[125] it is not unreasonable to assume that most of the benefits of a wealth tax would accrue to those who are less wealthy, while causing the

**Figure 1: California Wealth Tax**




wealthiest Americans to bear the brunt of the tax. However, for ease of application, and to combat considerations that societal gains from law and order accrue in proportion to wealth,[126] evenly distributed gains will be assumed here. Under these assumptions and using net burden curves to represent the impact of a proposal on all taxpayers, graphs employing the CBP can display the extent to which current wealth tax proposals might impose disproportionate burdens which could implicate the takings clause.

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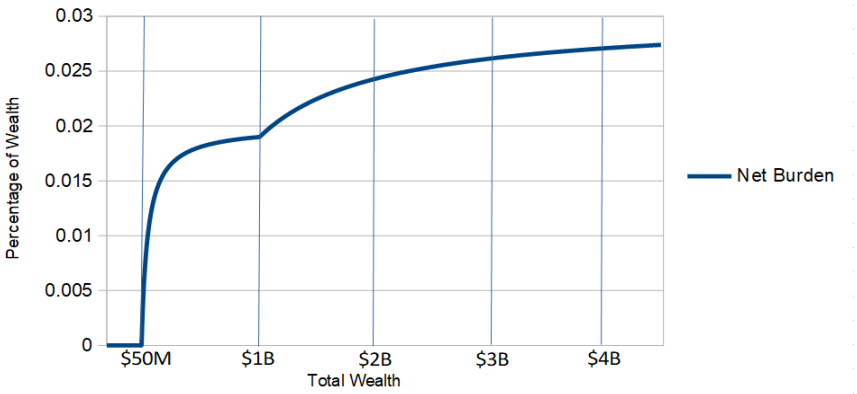
at 203 ("Courts, admitting the fundamental similarity of taxation and takings often used words like'just,' 'equitable,' or 'fairly apportioned' to determine when compensation was or was not required for the application of a particular tax…").

[125] *See* S.B. 5426, 77th Legis., Reg. Sess. (Wa. 2021) (aiming to use the wealth tax revenues as a tax credit for less wealthy Washington residents); *see also Tax on Extreme Wealth*, BERNIE (last visited Mar. 13, 2021), https://berniesanders.com/issues/tax-extreme-wealth/ [https://perma.cc/S6JH-CBBW] (citing the use of the wealth tax to "reduce the outrageous level of inequality that exists in America today and to rebuild the disappearing middle class").

[126] *See* Kades, *supra* note 4, at 220-23 ("For similar reasons, law and order may be a luxury good disproportionately desired by those with the most to lose from radical change or chaos…").

First, looking at the California state wealth tax proposal, it would impose a tax of 1% on households with net global wealth over $50 million and less than $1 billion, and 1.5% on net worth in excess of $1 billion, with no burden imposed on taxpayers with less than $50 million.[127] The resulting net burden curve would be similar in shape to that shown in Figure 1. Similar to the California proposal, is

**Figure 2: Federal Wealth Tax**




the federal proposal, which would create a wealth tax of 2% on net taxable assets in excess of $50 million but less than $1 billion, increasing to 3% for assets in excess of $1 billion.[128] The resulting net burden curve would be similar to that of Figure 2.

Note that both the California and federal proposals' slope is steepest where the tax is initially imposed, after the exemption amount of $50 million. In both cases, this displays the impact that higher exemption amounts have on marginal tax burdens, increasing the likelihood of discontinuous burdens as exemption amounts increase, due to the smaller target demographic of the tax. Notably, both proposals also display an increase in slope once more, after the increase in the tax at asset values of $1 billion. Interestingly, the federal proposal creates a steeper curve after this rate increase than the California proposal. This suggests those greater, more progressive

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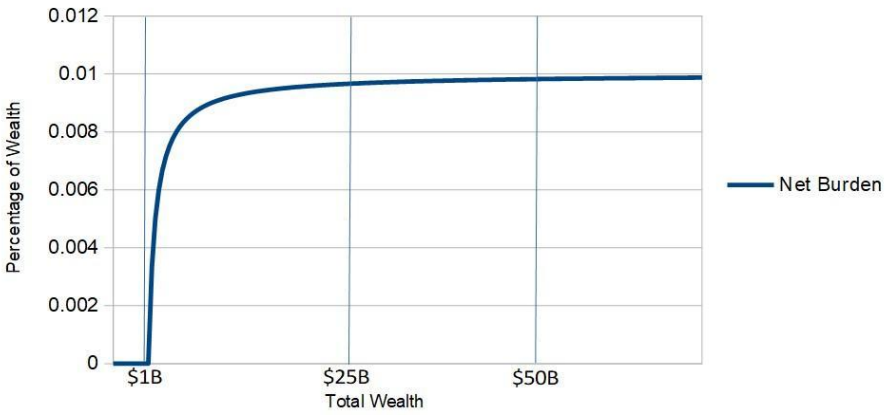
[127] *See* Assemb. B. 310, 2021 Legis., Reg. Sess. (Ca. 2021) (describing the various layers of the potential California wealth tax).

[128] *See* Ultra-Millionaire Tax Act of 2021, S. 510, 117th Cong. (2021) (describing how the tax will be computed against the incredibly wealthy nationally).

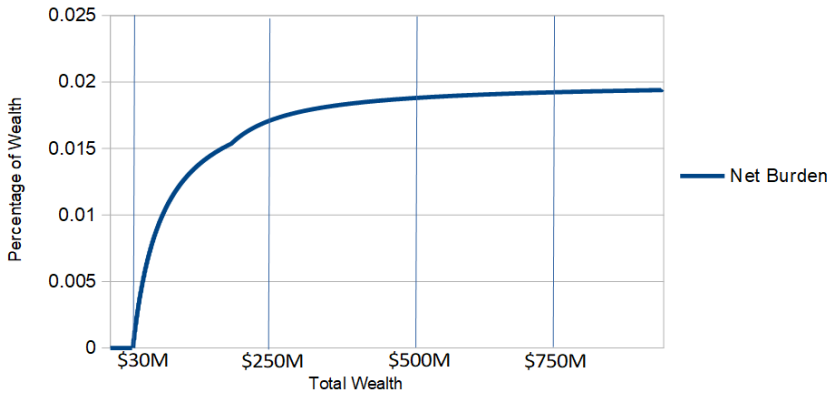
increases in a tax,[129] are more likely to create disproportionate impositions. In this way, high progressivity, which impacts few individuals, appears to make a tax imposition more likely to implicate the takings clause via discontinuous burdens under the CBP.

**Figure 3: Washington Wealth Tax**




In this next instance, the Washington state proposal would institute a 1% tax on the worldwide total wealth of its residents with wealth in excess of $1 billion, with no burden below the $1 billion mark.[130] The resulting curve would be similar to that shown in Figure 3. Similarly, the Minnesota state proposal would create a simple 2%

**Figure 4: Minnesota Wealth Tax**




$1,000,000,000 of a resident's financial intangible assets.").

tax on net wealth in excess of $30 million.[131] The resulting net burden curve would be similar to that shown in Figure 4.

Whereas the federal and California proposals prominently displayed the impact of rate increases on the net burden curve, the juxtaposition of the Minnesota and Washington proposals display the relative impact of exemption amounts. The much higher exemption amount of $1 billion results in an extremely steep slope for the Washington proposal where it is first implemented, even considering its relatively lower imposition of 1% tax.[132] Contrarily, even while imposing a higher tax rate of 2%, the Minnesota proposal's lower exemption of $30 million makes this imposition more widely applicable, and thus displays a less extreme slope where the tax is first implemented.[133] As such, higher exemption amounts contribute to higher slopes, and thus are more likely to violate the CBP. It should also be noted that both the Washington and Minnesota proposals lack the rate hikes of the federal and California proposals, eschewing the potential problems of rate hikes from a CBP standpoint.[134]

Recall that the likelihood of any burden implicating the Takings Clause under the CBP is based on the size of the discontinuity it creates.[135] By this measure, the California proposal and the federal proposal appear relatively more likely to be considered takings under the CBP, due to the way that they employ rate hikes at higher wealth thresholds. Conversely, the Washington and Minnesota state proposals would appear relatively less likely to implicate the Takings Clause on this front. However, the extremely high exemption amount of the Washington proposal causes it to exhibit an extreme slope at its first implementation, also making it potentially problematic. While the CBP requires that taxes do not put a disproportionate net burden on certain parts of the population relative to those marginally different from them, the wealth tax proposals here appear to be practically designed with this end in

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[131] *See* H.B. 1021, 92nd Legis., Reg. Sess. (Mn. 2021) ("Tax imposed. A tax is annually imposed equal to 2 percent of the taxable wealth of an individual or trust in excess of $30,000,000.").

[132] *See* S.B. 5426, *supra* note 129.

[133] *See* H.B. 1021, *supra* note 25.

[134] *See* Assemb. B. 310, 2021 Legis., Reg. Sess. (Ca. 2021) (proposing new taxes on the wealth of ultra-millionaires); Ultra-Millionaire Tax Act of 2021, *supra* note 28; S.B. 5426, *supra* note 129; H.B. 1021, *supra* note 21.

[135] *See* Kades, *supra* note 4, at 224 (discussing the burden caused by discontinuities in wealth distributions").

mind for the purpose of redistributing wealth.[136] However, it should be noted that the CBP does not strike down every wealth tax, nor every tax with a redistributive impact,[137] but only those which create an intolerable discontinuity. As shown by the above figures, the discontinuities of the wealth tax are lessened when exemption amounts are lower, and where progressive rate hikes are foregone. As always, it should be kept in mind, that what exactly constitutes an "intolerable discontinuity" is up for debate. Just as German courts could not stand by the arbitrary, judge-made "Equal Division Principle," the CBP itself cannot give us a constitutionally legitimate line to draw between taxes and takings, but it could be a useful methodology for enforcement once such a line is determined either administratively or judicially.

## *VII. Distinguishing the Wealth Tax from Property & Estate Taxes*

An analysis of the comprehensive wealth tax under standards of proportionality would be remiss if it did not distinguish the wealth tax from established taxes which bear substantial similarity to it. These established taxes include property taxes and estate taxes. Just as a dividing line between taxes or takings which censures the longstanding use of progressive tax rates would likely be administratively unattractive and perhaps untenable, so would a distinction which denounces the established use of estate and property taxes. Potential concerns about these other "wealth-like" taxes,[138] as they apply to the dividing line of proportionality and the CBP, will be addressed here.

Property taxes have been introduced and long-used in every state in the country.[139] These taxes generally apply to real property

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[136] *See Ultra-Millionaire Tax, supra* note 3 (citing the correction of wealth inequality as a factor in favor of enacting the wealth tax).

[137] *See id.* at 252 (discussing the effect of a wealth tax on the inequalities of wealth distribution).

[138] *See, e.g.*, Kyle Pomerleau, *A Property Tax is a Wealth Tax, but…*, TAX FOUND., https://taxfoundation.org/property-tax-wealth-tax/ [https://perma.cc/9E2F-AXQ6] (discussing the similarities and differences between property taxes and wealth taxes).

[139] *See* Stebbins, *supra* note 26.

on an *ad valorem* basis,[140] at rates varying from a quarter of a percent to two and a quarter percent, depending on state and local law.[141] However, two characteristics of property taxes, as currently applied, keep them from likely violating the Continuous Burdens Principle: the breadth at which this tax is applied and the low percentage rate of the tax itself. By imposing some of the overall burden on every owner of real property, the property tax is more akin to a generally applicable flat rate wealth tax,[142] which is permissible under the CBP.[143] Such a general application causes any given discontinuity between burdened taxpayers to be lessened, compared to the large discontinuity which occurs when exemption amounts are high. General applicability causes property taxes to be less likely than the wealth tax to implicate the Takings Clause under the Continuous Burdens Principle, and thus to be more generally acceptable under the rules of proportionality that the CBP represents.

Estate taxes are generally taxes at the federal level on the value of an estate to be inherited upon a taxpayer's death.[144] As of 2021, the estate tax currently sits at about 40%, to the extent that the value of an estate exceeds an exemption amount of about $11.7 Million.[145] While the Supreme Court allows estate taxes on the tenuous distinction between property rights and inheritance rights, CBP analysis makes room for estate taxes on different grounds.[146] Under CBP analysis, estate taxes generally violate the CBP only

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[140] *See Tax*, *supra* note 42 (deeming a property tax any "tax levied on the owner of property (especially real property) usually based on the property's value.").

[141] *See id.*

[142] *See Quarterly Residential Vacancies and Home Ownership, Second Quarter 2021*, UNITED STATES CENSUS BUREAU (July 27, 2021) https://www.census.gov/housing/hvs/files/currenthvspress.pdf [https://perma.cc/SW7Y-ZLAF].

[143] *See* Kades, *supra* note 4, at 222-23.

[144] *See Tax*, *supra* note 42 (terming an estate tax any "tax imposed on the transfer of property by will or by intestate succession.").

[145] Amelia Josephson, *A Guide to the Federal Estate Tax for 2021*, SMARTASSET.COM (Mar. 21, 2021), https://smartasset.com/taxes/all-about-the-estate-tax#:~:text=For%20most%20of%20the%20federal,amounts%20greater%20than%20%241%20million [https://perma.cc/U9UT-5YDC] ("Current federal estate taxes max out at 40% for taxable amounts greater than $1 million.").

[146] *See* Kades, *supra* note 4, at 238-39 ("The CBP, however, provides a much firmer defense of progressive estate taxation.").

when exemption amounts are extremely high. Like the wealth tax, these exemptions are to the benefit of all taxpayers.[147] That is, even those who are subjected to the tax are not taxed based on the exemption amount.[148]

As the exemption amounts for the wealth tax tends to be much greater than those of the current estate tax, as high as $30 Million and $50 Million in some cases,[149] this difference is likely sufficient to differentiate the two under the CBP. As exemption amounts get higher, discontinuous jumps get greater and taxes look more like takings under the CBP due to disproportionate burdens placed on few taxpayers. The extremely high exemption amounts of the wealth tax in most contexts is much higher than that of the estate tax, suggesting that the estate tax could be in violation of the CBP if its exemption amounts were to increase, but that it is not *per se* disallowed under its analysis. Of note, however, is the increase in the exemption amount of the estate tax over the years, growing from $1.5 Million in 2004 to $11.7 Million in 2021.[150] This historical increase suggests that if the exemption amount of the estate tax continues to grow, it too could potentially to run afoul of the rules of proportionality which are represented by the CBP.[151]

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[147] *See id.* at 239 ("For all but extreme cases, where the exemption levels are so high that they impact one or only a few taxpayers, the burdens of the tax are still continuous under the CBP because even those paying the tax get the benefit of the fairly high, but not extraordinarily high, exemption.").

[148] *See id.* ("For all but extreme cases, where the exemption levels are so high that they impact one or only a few taxpayers, the burdens of the tax are still continuous under the CBP because even those paying the tax get the benefit of the fairly high, but not extraordinarily high, exemption.").

[149] *See* H.R. 1021, 92nd Leg., Reg. Sess. (Mn. 2021) (proposing a Minnesota wealth tax with an exemption of $30 Million); *see also* Ultra-Millionaire Tax Act of 2021, S. 510, 117th Cong. (2021) (proposing a federal wealth tax with an exemption of $50 Million); Assemb. B. 310, 2021st Leg.., Reg. Sess. (Ca. 2021) (proposing a California wealth tax with an exemption of $50 Million).

[150] *Estate Tax*, IRS.GOV (Mar. 12, 2021) https://www.irs.gov/businesses/small-businesses-self-employed/estate-tax [https://perma.cc/72YL-2WS6] ("A filing is required for estates with combined gross assets and prior taxable gifts exceeding $1,500,000 in 2004;… $11,700,000 in 2021").

[151] *See* Kades, *supra* note 4, at 239 (suggesting in 2002 that an estate tax would run afoul of the CBP "where the exemption levels are so high that they impact one or only a few taxpayers").

Thus, as differentiated based on exemption amounts, property taxes and estate taxes are not censured by the CBP in many places where wealth taxes would be. So long as these taxes continue to be generally applicable, and do not increase exemption amounts to the large levels seen in most wealth taxes, they are sufficiently differentiated under the CBP so as to be less likely to run afoul of the guiding principle of proportionality.

## *VIII. Treatment of the Wealth Tax at the State & Federal Level*

Given the above analysis of current wealth tax proposals under principles of proportionality and the CBP, certain results would manifest from their potential categorization as tax or taking at both the state and federal level.

In the first instance, the California, Washington, and federal proposals appear relatively more likely to be censured under the CBP, as evidenced by the more extreme slopes on their net burdens curves which indicate potentially disproportionate burdens.[152]

As a taking, under both state and federal law,[153] appropriations for wealth taxes would be treated identically and just compensation would be required in both cases.[154] Just compensation, in the case of these wealth taxes, would likely render each of these respective taxes moot, demanding the repayment of the very assets which were taken by the wealth tax in the first place. Such a likelihood gives credence to the assertion that "it is pointless for the government to take money by condemnation, because the Takings Clause requires its immediate return."[155] As such, the finding that a

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[152] *See* Assemb. B. 310, 2021st Leg., Reg. Sess. (Ca. 2021) (proposing a California wealth tax with an exemption of $50 Million); *see also* Ultra-Millionaire Tax Act of 2021, S. 510, 117th Cong. (2021) (proposing a federal wealth tax with an exemption of $50 Million).

[153] U.S. CONST. amend. V (". . . [N]or shall private property be taken for public use, without just compensation."); CAL. CONST. art. 1, § 19 ("Private property may be taken or damaged for a public use and only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner.").

[154] *See* Better Hous. for Long Beach v. Newsom, 452 F. Supp. 3d 921, 935 (C.D. Cal. 2020) (stating that in most circumstances "the California Takings Clause is interpreted identically to its federal counterpart").

[155] *See* Kades, *supra* note 4, at 197.

wealth tax proposal is a taking, under the CBP or any other rationale, would essentially preclude the use of such a tax altogether.[156]

In the second case, current wealth tax proposals could receive normal tax treatment, as appears relatively more likely for the Minnesota proposal. Allowance of the wealth tax under this context would be subject only to each state's power to tax under the relevant state and federal constitutions.[157] For instance, Minnesota taxes are required to be "uniform upon the same class of subjects" within the state.[158] This requirement is potentially not met, depending on how a "class of subjects" is defined, as the Minnesota proposal only applies its wealth tax to those "subjects" with more than $30 million in wealth.[159] Another potential problem arises with a limitation on tax exemption in the Minnesota Constitution, stating that "[t]here may be exempted from taxation personal property not exceeding in value $200 for each household, individual or head of a family . . . as the legislature determines."[160] As there is an exemption amount of $30 million under the Minnesota proposal,[161] this is clearly greater than the $200 by which the legislature may exempt personal property from taxation under the Minnesota Constitution.

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[156] *But see* Kades, *supra* note 4, at 197-98 (suggesting that one way around this conclusion is for the government to provide just compensation for money taken in the form of government bonds, turning a taking into what is essentially the forced sale of bonds).

[157] *See generally* James E. Sabine, *Constitutional and Statutory Limits on the Power to Tax*, 12 HASTINGS L.J. 23 (1960) (discussing the limitations of the Due Process Clause and the Commerce Clause on state taxation).

[158] MINN. CONST. art. 10, § 1 ("Taxes shall be uniform upon the same class of subjects and shall be levied and collected for public purposes. . . .").

[159] *See* H.B. 1021, *supra* note 25 ("A tax is annually imposed equal to 2 percent of the taxable wealth
of an individual or trust in excess of $30,000,000.").

[160] MINN. CONST. art. 10, § 1 ("There may be exempted from taxation personal property not exceeding in value $200 for each household, individual or head of a family, and household goods and farm machinery as the legislature determines.").

[161] *See* H.B. 1021, *supra* note 25 ("A tax is annually imposed equal to 2 percent of the taxable wealth
of an individual or trust in excess of $30,000,000.").

While these discrepancies could be explained by other[162] Minnesota law or jurisprudence, this ambiguity may spell trouble for the Minnesota proposal, even if it is given tax treatment under the CBP. Notably, other state and federal proposals would face similar constitutional hurdles. Even if it should ultimately be granted tax treatment, the novelty of the wealth tax in many cases makes it potentially difficult to implement.[163]

## *IX. Conclusion*

Summarily stated by the Supreme Court in *Armstrong v. United States*, "[t]he Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed 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."[164]

In contrast, "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."[165][166][148] It is through this lens of proportionality and burden sharing that the taxes-takings dichotomy truly finds its meaning, and that the taxing power and the Takings Clause can truly be read as internally consistent.

With discussions about economic inequality only growing, the proper treatment and conceptualization of the wealth tax within this paradigm is an important topic. How such a proposal is conceptualized, whether as a tax or a taking, will greatly influence not only the fate of the wealth tax, but the very scope of taxation itself for years to come. Under the theory that taxation and takings can be differentiated based on their proportionality, the Continuous

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[162] WASH. CONST. art. 7, § 1 (finding that the Washington Constitution grants the legislature power to exempt personal property to up to $15,000 per person in a household, as well as an exemption amount that is greater than $1 million).

[163] *See, e.g.*, Assemb. Const. Amend. 8, 2021 Legis., Reg. Sess. (Ca. 2021) (identifying and outlining a constitutional amendment required for the codification of the California wealth tax proposal).

[164] 364 U.S. 40, 49 (1960).

[165] THOMAS M. COOLEY, THE LAW OF TAXATION 103 (Clark A. Nichols ed., Chicago: Callaghan & Co. 4th ed. 1924).

[166] 148 THOMAS M. COOLEY, THE LAW OF TAXATION 103 (Clark A. Nichols ed., Chicago: Callaghan & Co. 4th ed. 1924).

Burdens Principle presents itself as a potentially useful test for differentiating taxation from takings, despite their substantial similarity. While the CBP is not free from ambiguity, it provides a replicable framework for administrative or judicial line-drawing between taxes and takings based on proportionality. This framework, as applied to the current iterations of the wealth tax, shows us that certain proposals are potentially more likely to implicate disproportionality than others, especially as exemption amounts increase.

However, some might push back on this conclusion, claiming that the CBP provides no real protection for targeted taxpayers and only perversely increases the administrative burden for creating the tax. Despite this, the administrative burden itself makes it more difficult for one section of the populace to be targeted by a disproportionate imposition without others bearing some of the burden as well. In the case of the wealth tax, this would mean that in order to get at the wealth of "ultra-millionaires," those who are less wealthy must also bear some of the weight, a solution that is administratively more difficult and politically less popular. Thus, the CBP is one method of ensuring that the wealth tax is reasonably general in its scope and impact on the populace, without inquiring as to tax motivation. While the strong shoulders may legitimately be required to carry more than the weak, and in the end the net impact on the wealthy may still be substantial, "[a] strong public desire to improve the public condition [will not] warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."[167][168][149]

Undoubtedly, future questions about the state of the wealth tax will continue to persist until such a tax is codified and ultimately litigated. This eventuality demands the proper conceptualization of taxation and takings, as the language of tax which surrounds a levy is not, and cannot be, dispositive.[169] As a tax, the wealth tax would be

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[167] Dolan v. City of Tigard, 512 U.S. 374, 396 (1994) (quoting Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416 (1922)).

[168] 149 Dolan v. City of Tigard, 512 U.S. 374, 396 (1994) (quoting Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416 (1922)).

[169] *See* United States v. Constantine, 296 U.S. 287, 294 (1935) ("If in reality a penalty it cannot be converted into a tax by so naming it . . . we must ascribe to it the character disclosed by its purpose and operation, regardless of name."); Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 564 (2012) (declaring that a label alone "does not determine whether the payment may be viewed as an exercise of Congress's taxing power.").

generally beyond judicial inquiry, unless it somehow overstepped the broad taxing power.[170] As a taking, the wealth tax would be allowed only so long as just compensation is given, essentially precluding its effective use altogether.[171] Ultimately, the conception of the wealth tax today will greatly influence the tax policy of tomorrow; the name it is given bears significant weight for its future treatment, and, as such, should be given a great deal of thought.

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[170] A. Magnano Co. v. Hamilton, 292 U.S. 40, 44 (1934) ("Collateral purposes or motives of a Legislature in levying a tax of a kind within the reach of its lawful power are matters beyond the scope of judicial inquiry.").

[171] *See* U.S. CONST. amend. V ("[n]or shall private property be taken for public use, without just compensation."); *see also* Kades, *supra* note 4, at 197 ("Perhaps the appeal stems from a mistaken analogy to a seemingly less controversial principle: that it is pointless for the government to take money by condemnation, because the Takings Clause requires its immediate return.").