Regulatory Taxings

Eduardo Peñalver

Follow this and additional works at: https://chicagounbound.uchicago.edu/journal_articles

Part of the Law Commons

Recommended Citation

This Article is brought to you for free and open access by the Faculty Scholarship at Chicago Unbound. It has been accepted for inclusion in Journal Articles by an authorized administrator of Chicago Unbound. For more information, please contact unbound@law.uchicago.edu.
REGULATORY TAXINGS

Eduardo Moisés Peñalver*

The tension between the Supreme Court's expansive reading of the Takings Clause and the state's virtually limitless power to tax has been repeatedly noted, but has received little systematic exploration. Although some scholars, most notably Richard Epstein, have used the tension between takings law and taxes to argue against the legitimacy of taxation as it is presently practiced, such an approach has failed to gain a significant following. Instead, the broad legal consensus is that legislatures effectively have unlimited authority to impose tax burdens. Nevertheless, this Article demonstrates that every attempt to formulate a "Reconciling Theory," a theory that would square the prohibition of takings with such a broad tax power, yields a substantial category of Regulatory Taxings: government actions that—though they would likely be deemed takings under current doctrine—cannot be distinguished from taxes under the particular Reconciling Theory being examined.

This Article argues that the persistence of the category of Regulatory Taxings demonstrates that present takings doctrine is far too broad to fully reconcile with longstanding constitutional norms governing taxation. Given the overwhelming consensus that existing taxation practices are largely constitutional, Professor Peñalver identifies a need for the Supreme Court to adopt a narrower understanding of the Takings Clause. At a minimum, Professor Peñalver concludes that any regulation that can easily be translated into a permissible tax should not be deemed a taking in need of compensation. Professor Peñalver further asserts that broadly applicable regulations and regulations of fungible property should rarely be treated as takings.

INTRODUCTION .......................................................... 2183
I. THE CONSTITUTIONAL LAW OF TAXATION .................. 2193
   A. Modern Takings Doctrine ............................... 2193
   B. The Exemption of Taxation from Takings Clause Scrutiny ........................................... 2198
   C. The Variety of Tax Measures Approved by the Court . 2200
      1. Progressive Taxes ................................... 2200
      2. Unequal Taxes on Land ............................ 2201
      3. Narrowly Targeted Taxes .......................... 2202
II. REGULATORY TAXINGS ........................................... 2204

* Associate Professor, Fordham University School of Law. Thanks to Ben Barros, Avi Bell, Rick Bierschbach, Holly Doremus, Richard Epstein, Jill Fisch, William Fischel, Phil Frickey, Abner Greene, Eric Kades, Marty Lederman, Thomas Lee, Leo Martinez, Mark Patterson, Andrea Peterson, Aaron Saiger, Joseph Sax, David Schizer, Peter Siegelman, Linda Sugin, William Treanor, John Yoo, and Ben Zipursky for comments and suggestions at various stages of this project. Thanks also to Juan Fernandez and Paul Miller, of the Fordham Law School library, for invaluable research assistance. This Article also benefited from numerous suggestions and comments at faculty workshops at the Fordham and U.C. Berkeley law schools.

2182
A. Defining “Property” to Exclude Taxation from the Takings Clause ........................................................................... 2205
   1. The Reconciling Theory .................................................. 2205
   2. Regulatory Taxings ....................................................... 2215
B. Defining “Taken” to Exclude Taxation from the Takings Clause ................................................................. 2219
   1. The Reconciling Theory .................................................. 2219
   2. Regulatory Taxings ....................................................... 2223
C. Defining “Just Compensation” to Exclude Taxation from the Takings Clause .................................................. 2228
   1. The Reconciling Theory .................................................. 2228
   2. Regulatory Taxings ....................................................... 2234

III. IMPLICATIONS OF REGULATORY TAXINGS FOR TAKINGS LAW ................................................................. 2240
A. Translatable Regulations .................................................. 2241
B. Assessing the Existing Reconciling Theories ............... 2242
C. Composite Reconciling Theories .................................. 2246
D. Narrowing the Takings Doctrine .................................... 2248
   1. Fungible Property ........................................................ 2248
   2. Singling Out ............................................................... 2248
   3. Just Compensation ..................................................... 2249
E. Theoretical Implications .................................................. 2251

CONCLUSION ........................................................................ 2254

INTRODUCTION

One of the abiding puzzles of the Supreme Court’s Takings Clause jurisprudence is the obvious tension between the rigor with which the Court scrutinizes regulations of property under the Takings Clause and the enormous deference it displays toward the state’s exercise of its power to tax. On the few occasions when scholars have paid attention to the issue, most have sought to resolve the tension by drawing upon their own normative theories of takings to define the proper scope of taxation. But a different approach, in which the well-settled constitutional law of taxation is used to define the more contentious and confused law of takings, may prove more fruitful. This Article employs the broad consensus surrounding the Court’s taxation jurisprudence as a pragmatic tool for reconfiguring the current law of takings. The result is a narrower takings doctrine than the one the Court has developed over the past two decades, one in which broadly applicable regulations affecting fungible property receive far less scrutiny than under present law.

It is not immediately obvious why, as a matter of takings law, taxation should be treated as somehow fundamentally different from other government regulation of property.1 Taxes often serve transparently regula-

1. See Richard A. Epstein, Takings: Private Property and the Power of Eminent Domain 283-84 (1985) [hereinafter Epstein, Takings] (calling the refusal to analyze taxes as takings the result of a judicial “sleight of hand”); Stephen R. Munzer, A Theory of
tory goals. Moreover, when the state taxes its citizens, it (literally) forces them to hand over nontrivial amounts of valuable resources that we would normally think of as property. And when citizens refuse to pay their taxes, the state is permitted to seize their assets. It is therefore unsurprising that John Locke viewed taxation as a potentially problematic wrinkle in his theory of government as formed principally to protect individual property.

On the other side of the coin, regulation is frequently used to pursue goals typically associated with taxation. As Richard Posner observed in his classic article on the subject, regulation can be (and often is) used to redistribute wealth and to subsidize the provision of services that the market would not otherwise provide at a price policymakers desire. Indeed,

---

Property 420-22 (1990) ("[T]here is not always a clear line between taxes and takings."); Note, The Principle of Equality in Takings Clause Jurisprudence, 109 Harv. L. Rev. 1030, 1036-38 (1996) (observing that "[t]axes of all kinds are analogous to takings" but are not normally scrutinized under the Takings Clause).

2. See Mark Kelman, Strategy or Principle? The Choice Between Regulation and Taxation 1-2 (1999) (arguing that the "interchangeability or substitutability of taxation and regulation is quite transparent"). The most obvious examples of taxes aimed at altering conduct are so-called "sin taxes," which are often intended as much, if not more, to curb unwanted behavior as they are to raise revenue. See infra note 94. Similarly, favorable tax treatment, such as the exemption from income taxation of donations to charities, is often used to encourage favored behavior. See 26 U.S.C. § 170(a)(1) (2000).

3. See Epstein, Takings, supra note 1, at 99-100 (pointing out that "[w]ith a tax, the government takes property in the narrowest sense of the term, ending up with ownership and possession of that which was once in private hands"); see also Morris R. Cohen, Property and Sovereignty, 13 Cornell L.Q. 8, 24 (1927) ("[T]he whole business of the state depends upon its rightful power to take away the property of some (in the form of taxation) and use it to support others . . . ").

4. See, e.g., 26 U.S.C. § 6321 ("If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount . . . shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person."). Even without a shift in tide, taxes may often have dramatic effects on the value of property. See William A. Fischel, The Homevoter Hypothesis: How Home Values Influence Local Government Taxation, School Finance, and Land-Use Policies 40-42 (2001) (arguing that local taxes on real property are capitalized within the resale value of the real property); Eric A. Posner & Adrian Vermeule, Transitional Justice as Ordinary Justice, 117 Harv. L. Rev. 761, 785-86 (2004) ("[N]othing prevents [government] from raising . . . taxes . . . to an extent that would undermine the value of holding particular kinds of property. Title would be preserved, but as an empty form; the value of property ownership is qualified by the risk of changes in tax law . . . ").

5. See John Locke, Two Treatises of Government 362 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690) (acknowledging need for governments to levy taxes, but suggesting that these taxes' legitimacy can derive only from consent of the governed).

6. Richard A. Posner, Taxation by Regulation, 2 Bell J. Econ. & Mgmt. Sci. 22, 28-29 (1971); see Pennell v. City of San Jose, 485 U.S. 1, 9-15 (1988) (upholding ordinance requiring "tenant hardship" to be considered as a factor in rent calculations and stating that "a legitimate and rational goal of price or rate regulation is the protection of consumer welfare").
Posner argued, in some cases such regulatory taxation may be a more efficient means of achieving public finance goals than traditional taxes.\(^7\)

Because of the substantial conceptual overlap between takings and taxes, legal scholars in the fields of both taxation and takings have long puzzled over the apparently inconsistent treatment the two topics receive under the applicable constitutional law. Tax theorists Walter Blum and Harry Kalven concede that "the difference [between takings and taxation] is more troublesome to isolate than one would expect."\(^8\) And takings scholar William Stoebuck has posited that the taxing power "is not merely similar to eminent domain; it is the same, as far as the power itself goes."\(^9\) Saul Levmore has therefore argued that "every theory of takings law should explain or at least struggle with the question of why the power to tax—without compensation, of course—is not fundamentally inconsistent with the constitutional obligation to compensate condemnees."\(^10\)

Apart from merely recognizing this deep doctrinal tension, takings scholars have paid only passing attention to the relationship between takings and taxation.\(^11\) As Richard Epstein—one of the few scholars to focus substantial effort on the issue—has noted, "[t]he taxing power is placed in one compartment; the takings power in another," and scholarly discussion of the conflict between the two never really gets off the ground.\(^12\) In his book *Takings*, Epstein invited readers to view the conceptual similarity between takings and taxes as a reason to dramatically curtail the state's power to tax.\(^13\) Specifically, Epstein argued that the Takings Clause required the government to adopt a system of proportional taxation, also known as a "flat tax."\(^14\) This argument flew in the face of settled constitutional orthodoxy, which since the founding era has understood the state's power to tax as being virtually plenary. Whatever influence Epstein's the-

---

7. See Posner, supra note 6, at 42.
11. See Eric Kades, Drawing the Line Between Taxes and Takings: The Continuous Burdens Principle, and Its Broader Application, 97 Nw. U. L. Rev. 189, 191 (2002) ("Perhaps the most surprising observation about recent commentary on drawing the line between taxation and takings is its paucity.").
12. Epstein, Takings, supra note 1, at 283.
13. See id. at 295–303.
14. See id.
ory has had on discussions of takings law generally, few have accepted his invitation to turn their backs on the unqualified power to tax.

This cool response to Epstein’s proposal is unsurprising. The constitutional doctrine defining the state’s power to tax is so entrenched that it is nearly axiomatic. In contrast, Takings Clause jurisprudence is characterized by nothing if not the confusion and intense disagreement it generates. Between the alternatives of using a novel and contentious takings theory to shatter the broad consensus surrounding the, constitutional jurisprudence of taxation, on the one hand, and finding a way to accommodate a disjointed and weakly theorized takings law into the deeply rooted status quo surrounding taxation, on the other, the latter, at least as a practical matter, is clearly the preferable route.

Indeed, the stark contrast between the settled nature of the constitutional law of taxation and the disarray within takings law suggests the possibility of a novel approach to clarifying the takings muddle. The vast majority of takings articles start with broad, normative theories and then


17. See infra Part I.B.

attempt to delineate the precise content of takings doctrine on the basis of those theories. Thus, we have been treated to Rawlsian theories of takings,\textsuperscript{19} utilitarian theories of takings,\textsuperscript{20} law and economics theories of takings,\textsuperscript{21} Hegelian personhood theories of takings,\textsuperscript{22} libertarian theories of takings,\textsuperscript{23} textualist theories of takings,\textsuperscript{24} originalist theories of takings,\textsuperscript{25} and public-choice theories of takings.\textsuperscript{26} Absent consensus regarding the validity of the underlying theories, however, the persuasive powers of these efforts are necessarily limited.

But there is an alternative to such a theory-driven approach to clarifying the law of takings. Instead of proceeding from broad normative theory to concrete takings rules, it is possible to back into a clearer definition of takings by extrapolating from a closely related doctrine about which there is greater consensus. Reasoning from such a constitutional "fixed point" cabins broader debate over the merits of particular theories and seeks instead pragmatically to ask whether certain applications of the Takings Clause cohere with our settled commitments in related areas of law.

Reasoning by such legal fixed points has two prerequisites. First, the doctrine chosen as a fixed point must be sufficiently closely related to the doctrine to be defined that different definitions of the latter are capable of being assessed as either more or less consistent with the fixed point. Second, there must be a strong consensus concerning the validity of the doctrine to be used as a fixed point. Fixed-point reasoning is, obviously, only convincing to those who are willing to accept the assumed fixed point as truly fixed and as actually relevant. In other words, the principal challenge of fixed-point reasoning is picking the right fixed points.

In line with his theory of property, Epstein in effect treated as a fixed point an extremely demanding and controversial notion of takings—one not evident in the case law—and then sought to limit the law of taxation accordingly. That is, he attempted to redefine a settled area of law by reference to a novel theory of a doctrine badly in need of concrete definition. Under a fixed-point analysis, Epstein's approach failed because his fixed point did not satisfy the second criterion. But Epstein was surely correct in observing the many conceptual connections between takings and taxation, and he properly understood that the constitutional doctrine affecting them should be internally consistent.

\textsuperscript{20} See, e.g., id. at 1214–19.
\textsuperscript{23} See, e.g., Epstein, Takings, supra note 1, at 3–6.
\textsuperscript{24} See, e.g., Rubinfeld, supra note 18, at 1119–20.
\textsuperscript{25} See, e.g., Treanor, Original Understanding, supra note 15, at 782–83.
\textsuperscript{26} See, e.g., Levmore, supra note 10, at 291–93.
It would be easier to reconcile the state's broad discretion to impose taxes with the scrutiny applied to non-tax-related takings claims were the Takings Clause limited to its original understanding as a prohibition on the exercise of eminent domain without compensation. The government actions covered by such a narrow conception of takings would look quite different from paradigmatic examples of taxation. An argument explaining the differential treatment would go something like this: Takings are the state's direct appropriation of parcels of property from individuals through the power of eminent domain, and taxes are generally applicable measures, enacted under the state's power to tax, requiring individuals to make payments to the state. Each corresponds to different and nonoverlapping governmental powers. As a result, there is no conflict between the state's ability to impose a "tax" and its obligation to pay compensation when it "takes." 

Although somewhat formalistic, such an argument could be normatively justified by the idea that generally applicable taxes are likely to be less onerous (from the individual's point of view) and less susceptible to political abuse than the state's exercise of its power of eminent domain. Indeed, as William Treanor has argued, the Framers believed, perhaps on the basis of such a normative judgment, that the Takings Clause—understood narrowly as requiring compensation for the exercise of the government's power of eminent domain—was fully consistent with even redistributive taxation.

The problem of reconciling takings with taxation has come into sharper relief, however, as a result of the Court's expanding the reach of the Takings Clause beyond the government's direct appropriation of property to cover a number of government activities, including run-of-the-mill state regulations affecting a person's property, that resemble taxation at least as much as they do the state's physical seizure of property through the power of eminent domain. The more the Court's takings

29. For an example of such a formalistic argument, see Bennis v. Michigan, 516 U.S. 442, 452 (1996) (arguing that forfeiture is not a “taking” because it does not occur under government's eminent domain power).
31. See Bell & Parchomovsky, Takings Reassessed, supra note 28, at 284-85 (noting difficulty of maintaining a formalistic distinction between takings and taxes in light of vagueness of the categories); see also Kelman, supra note 2, at 44 (“[I]t is vital to be aware that regulation and taxation are substitutes one for the other . . . .”); Frank Michelman, Tutelary Jurisprudence and Constitutional Property, in Liberty, Property, and the Future
doctrine has ballooned beyond its origins in eminent domain, the more
difficult it has become to explain the differential treatment of takings and
taxation on any but the most formalistic, and unsatisfying, grounds.

Some might question whether this inconsistency is truly a problem in
need of resolution. After all, many constitutional doctrines appear to
conflict with one another. Why is it not enough simply to say that, as an
historical matter, the constitutional treatments of taxation and regulation
have developed down divergent doctrinal paths? There are two answers
to this question. First, the conflict between the treatment of regulation
and taxation is internal to takings doctrine. Thus, an effort to resolve
that tension does not necessarily reflect a commitment to the notion that
constitutional law must be completely coherent and internally consistent.
Instead, it can be justified on the basis of the far more modest notion that
the requirements of takings law, as they relate to taxation and regulation,
should not contradict one another. Second, the commitment to coher-
ence within takings law necessary to justify the project to which this Arti-
cle is dedicated need not even go that far. Virtually every commentator
who has written about takings law over the past few decades has com-
mented on its muddled state. In light of this general dissatisfaction
with the current state of takings law, particularly as that law relates to the
mere regulation of property (the precise area where the tension with the
law of taxation is strongest), it is worthwhile to explore whether pursuing
increased coherence between more and less settled areas of takings doc-
trine might help to cast the law of takings in a more acceptable form.

Thus, despite Epstein’s failure to convince courts to reconfigure the
treatment of taxation within takings law, his fundamental insight—that
there is a deep tension within current takings doctrine as it relates to
taxation—is compelling. Instead of using that apparent conflict to con-
strain the state’s power to tax, however, one could run his argument in
the other direction and use the settled law of taxation as a constitutional
fixed point around which to more clearly define the law of takings. Such
an effort would be consistent with the approach implicit in the thinking
of most takings scholars, who have often noted in passing how their vari-
ous proposed theories of takings are able to explain the longstanding
judicial deference towards tax measures.

---

32. See sources cited supra note 18.

33. See, e.g., John E. Fee, The Takings Clause as a Comparative Right, 76 S. Cal. L.
Rev. 1003, 1037–39 (2003) (arguing that takings differ from taxes because they single out
individual property owners to bear communal losses); Thomas W. Merrill, The Landscape
of Constitutional Property, 86 Va. L. Rev. 885, 980–81 (2000) (arguing that taxes are not

of Constitutional Development 127, 137 (Ellen Frankel Paul & Howard Dickman eds.,
1990) (noting that regulatory takings and taxation are similar in that they both “threaten
to disturb the extant proportional distribution of wealth”); Posner, supra note 6, at 28–29
(discussing similarities between state power exercised in taxation and internally subsidized
regulatory regimes); Posner & Vermeule, supra note 4, at 785–86 (noting similar effects of
regulation and taxation on property values).
Takings scholars, however, have not explored in depth the implications of the status quo of taxation (taken as a theoretical fixed point) for the current doctrine of takings. This Article engages in such an exploration, the result of which is the conclusion that no theory can bridge the gap between takings doctrine as it now stands and the constitutional treatment of taxation. Any such theory will either fail to embrace the state's broad power to tax or will require a substantial narrowing of present takings doctrine.

Every attempt to formulate what I will call a "Reconciling Theory," that is, a theory that reconciles the prohibition of takings (as currently understood to include both eminent domain and certain regulatory actions) with the traditional understanding of the state's tax powers, yields a category of "Regulatory Taxings." Regulatory Taxings are state actions that, although they would be viewed as takings under current doctrine, cannot be distinguished from taxes under the particular Reconciling Theory being examined. A Reconciling Theory functions as a constitutional definition of the boundary between takings and taxation, which has the effect of shielding the actions covered by the definition from takings scrutiny because they are the functional equivalent of taxes. Accord-

34. An exception is Mark Kelman, who has staked out the position that taxation and regulation are, as a functional matter, largely interchangeable and that, as a consequence, regulation should be granted the same constitutional deference as taxation under the Takings Clause. See Kelman, supra note 2, at 1-6, 44-46. I reject Kelman's initial assumption of the broad equivalence of taxation and regulation. To begin with, Kelman ignores the substantially different effects that regulation and taxation may have on property owners. When owners value their property at market value (that is, when the property is subjectively fungible to its owner), they will, as Kelman's analysis suggests, be largely indifferent to the distinction between regulation and taxation. But when owners value their property well in excess of its market value (that is, when the property has nonfungible value), they will often prefer a tax to a regulation. Moreover, in cases of nonfungible property, it is not clear that regulation and taxation will, as Kelman suggests, be capable of achieving the same results. See infra notes 278-280 and accompanying text. Because I reject Kelman's initial assumption of the interchangeability of regulation and taxation, I do not, as he does, simply apply the law of taxation to the takings problem. Instead, I attempt to identify those regulations whose goals could not be achieved through taxation and the circumstances under which such regulations might require the state to compensate property owners. See infra Part III.

Moreover, by starting with the assumption, founded in the current constitutional law of taxation, that the state has virtually plenary power to tax, this Article engages in a project that is fundamentally different from that undertaken by Eric Kades in his thoughtful article on the relationship between takings and taxes. See Kades, supra note 11. Kades adopts Epstein's approach of formulating a theory of takings and then using it to discuss the limits of the state's tax powers. See id. at 190-91 ("This Article proposes a novel rule to draw the line between permissible taxes and those that violate the Takings Clause . . . ."). Although Kades's theory of takings is more moderate than Epstein's, and therefore yields a tax power that coheres more closely than Epstein's with current tax doctrine, it adopts Epstein's methodology, in which the theory of takings "judges" the constitutionality of current tax practices.
ingly, Regulatory Taxings are the government actions that the Reconciling Theory would place within the shielded category of taxation but that are (according to the Reconciling Theory) wrongly treated as takings under the current doctrine.

The observation that every Reconciling Theory will generate its own unique set of Regulatory Taxings reveals that the tension between takings and taxes is not merely an idle academic curiosity. Rather, it is a serious conceptual inconsistency in current constitutional property law that presents the Supreme Court with a choice. If the Court wants an internally consistent doctrine of takings, it can either remake the state's power to tax along the lines suggested by Epstein and his followers, or it can narrow its takings jurisprudence to conform to the existing doctrine of taxation. But these options are not symmetric. The former would entail a dramatic departure from long-settled law affirming the state's virtually limitless power to tax. The latter would require the paring back of an expansive takings jurisprudence that the Court itself acknowledges to be a muddled creation of relatively "recent vintage."35

In Part I, I briefly describe the contours, such as they are, of the fairly contested law of regulatory takings. I also spell out in greater detail the nature of the longstanding constitutional doctrine concerning the state's power to tax. According to this settled body of constitutional case law, the state enjoys, within certain limits, virtually plenary authority to tax, a principle that is in substantial tension with the Supreme Court's recent takings jurisprudence. Although scholars have sometimes hinted in passing at various strategies for reducing the tension, such strategies have remained seriously underdeveloped, and no one has explored in any detail the implications of those strategies for the law of takings. As a consequence, the existence of Regulatory Taxings has gone largely unnoticed.36

Accordingly, in Part II, I examine several strategies for reconciling takings law with taxation. I have categorized those strategies according to their relationship to the three constitutive elements of the Takings

---


36. What I term "Regulatory Taxings," for the purposes of this Article, are different from the regulatory taxes discussed by Posner and Kelman. For Posner and Kelman, the term "regulatory tax" refers to regulations that are methods of taxation. See, e.g., Kelman, supra note 2, at 1-6. The term Regulatory Taxings, in contrast, refers to the category of regulations that are currently deemed takings under the relevant Supreme Court precedent, but that are the functional equivalent of a tax according to the particular theory used to justify the differential treatment of takings and taxation within takings law. As Kelman might put it, Regulatory Taxings refers to the narrower category of (currently) impermissible regulatory substitutes for taxation. Id. at 45-46.
Clause: first, attempts to define "property" for Takings Clause purposes in a way that excludes taxation; second, efforts to establish criteria for when property has been "taken" that distinguish taxation from takings; and finally, arguments that even if taxation constitutes a taking of property for public use, it does not violate the Fifth Amendment's Takings Clause as long as it is implicitly offset by (in-kind) "just compensation." Each of these approaches, however, generates its own nontrivial category of Regulatory Taxings.

In Part III, I discuss the implications of the persistent existence of Regulatory Taxings for the Supreme Court's expansion of takings doctrine over the past two decades. In identifying the category of Regulatory Taxings, I hope to provide a basis for understanding the deep irreconcilability of current takings doctrine with the constitutional law of taxation. That conceptual inconsistency by itself constitutes a powerful reason for the Supreme Court to reconsider its broad view of the Takings Clause. The question, then, is how to go about narrowing the Court's takings jurisprudence.

I argue that, to begin with, any regulation of property that can be translated into a paradigmatically permissible tax without changing the impact on the property owner should not count as a taking. In addition, I introduce several subsidiary fixed points widely accepted within the law of takings (such as the need to compensate people whose homes are confiscated by the state). Because the Reconciling Theories that focus exclusively on one element of the takings equation (for example, the definition of "property" or of when property has been "taken") fail to adequately account for these subsidiary fixed points, I propose alternative Reconciling Theories that combine various elements of the several strategies discussed in Part II. I conclude that taxes should be differentiated from takings on the ground that the former involve obligations imposed on nonarbitrarily defined subgroups to give fungible property to the state, with fungibility understood as property the claimant would view as interchangeable with other property or with money of equivalent market value.

Employing this theory, a government action affecting property could not qualify as a tax (and would therefore be properly subject to heightened takings scrutiny) if it either (1) affected a nonfungible property interest or (2) singled out a property owner for disparate treatment. Thus,

39. See, e.g., Fee, supra note 33, at 1037–39; Levmore, supra note 10, at 308.
as with the theories I discuss in Part II, this Article calls for a significant narrowing of current takings doctrine, particularly as it relates to the property of large scale commercial enterprises. But my approach does a better job of accounting for those situations in which virtually everyone would conclude a taking had occurred.

Finally, although this Article self-consciously avoids attempting to generate yet another substantive theory of takings, the fixed-point methodology that I employ does have distinct theoretical implications. Indeed, my analysis coheres particularly well with personhood theories of property and, perhaps even more so, with certain public-choice approaches to the takings problem. Consequently, as I discuss in Part III, this Article can be understood as adding an argument to the quivers of such frameworks.

I. THE CONSTITUTIONAL LAW OF TAXATION

Before discussing the possible means of reconciling takings with taxation, I briefly summarize the Court's Takings Clause jurisprudence. I then provide a brief overview of constitutional law as it relates to the power of the state to impose taxes.

A. Modern Takings Doctrine

The Takings Clause has always been understood to require compensation for the state's physical seizure of property under the power of eminent domain. More contentious, however, has been the Court's recent expansion of the clause to cover a broad range of property regulations that fall short of such physical appropriation or its functional equivalent. The Court has, famously, traced the origins of its expansive reading of the Takings Clause to Pennsylvania Coal Co. v. Mahon, a case in which the Court, in an opinion by Justice Holmes, held Pennsylvania's Kohler Act unconstitutional. That statute prohibited coal companies from mining in such a way as to cause subsidence, unless the company owned the surface land. Justice Holmes said that "while property may be regul-

41. See Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 322 (2002) ("Our jurisprudence involving condemnations and physical takings is as old as the Republic and, for the most part, involves the straightforward application of per se rules. Our regulatory takings jurisprudence, in contrast, is of more recent vintage and is characterized by 'essentially ad hoc, factual inquiries . . .'.").
42. 260 U.S. 393 (1922).
lated to a certain extent, if regulation goes too far it will be recognized as a taking.” 45

In the years following Mahon, the Court declined to craft a clear test to determine when regulation of property had gone “too far.” 46 In Penn Central Transportation Co. v. New York City, 47 the Court attempted to give some content to the vague “too far” standard. It crafted an “ad hoc” test for regulatory takings to determine whether the provision at issue in that case, a landmark designation that prevented the owners of Grand Central Station in New York City from constructing an office building above the station, had crossed the line between regulating and taking. 48

The scrutiny the Court has applied to regulations challenged as takings, even under its ad hoc Penn Central approach, has exceeded the extremely deferential rational basis review it applies to tax measures. 49 While tax legislation need only avoid arbitrariness and irrationality in order to satisfy the requirements of the Fifth Amendment, 50 the Court has often stated that regulations of property must “substantially advance legitimate public interests.” 51 As a result of this heightened standard, several commentators have compared the Court’s regulatory takings jurisprudence to the pre-Lochner doctrine of economic substantive due process. 52

45. Id. at 415.
46. See Bruce A. Ackerman, Private Property and the Constitution 255 n.2 (1977) [hereinafter Ackerman, Private Property].
48. The Court indicated that it would explore three “essentially ad hoc” factors in reaching its decision: (1) the diminution in property value attributable to the challenged regulation; (2) the extent to which the regulation interfered with the owner’s “investment-backed expectations”; and (3) the character of the governmental action. Id. at 124.
50. See infra Part I.B.
51. City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 704 (1999); see Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1016 (1992); Agins v. City of Tiburon, 447 U.S. 255, 260 (1980); see also Chevron USA, Inc. v. Cayetano, 224 F.3d 1030, 1033–34 (9th Cir. 2000) (discussing standard for determining whether state interest has been substantially advanced). Although commentators have rightly questioned the basis for the Court’s “substantially advance” language, see Robert G. Dreher, The Strange Origins, and Dubious Future, of “Substantially Advance” Takings Claims, 5 (Oct. 30, 2003) (unpublished manuscript, on file with the Columbia Law Review), few would dispute that the Court actually applies a higher degree of scrutiny to regulations challenged under the Takings Clause than it has to those attacked under the traditional rational basis, due process standard of review.
The *Penn Central* test has been criticized for its indeterminacy.\(^{53}\) Perhaps in an effort to create more certainty in takings law, in the years since *Penn Central* the Court has crafted several "per se" rules for deciding at least certain subsets of takings cases. Most significantly, the Court has repeatedly held that a regulation effecting a permanent physical invasion of property will per se constitute a taking of such property.\(^{54}\) Similarly, in *Hodel v. Irving*, the Court arguably established a per se rule that the complete abrogation of the right to pass land to one's heirs or devisees constitutes a taking of property.\(^{55}\) Finally, the Court created its most recent regulatory takings doctrine is reminiscent of use of substantive due process to strike down labor regulations); Fee, supra note 33, at 1004 ("Our regulatory takings doctrine today functions more like a substantive due process right."); Haar & Wolf, supra note 18, at 2167–68 (arguing that recent opinions striking down regulatory programs as unconstitutional takings may come to be viewed "with the same general opprobrium" as *Lochner*); Roderick E. Walston, The Constitution and Property: Due Process, Regulatory Takings, and Judicial Takings, 2001 Utah L. Rev. 379, 393 ("[T]he Supreme Court has also expanded the scope of the Takings Clause by developing a doctrine—the regulatory takings doctrine—that incorporates many substantive due process principles . . .").; Robert Ashbrook, Comment, Land Development, the *Graham* Doctrine, and the Extinction of Economic Substantive Due Process, 150 U. Pa. L. Rev. 1255, 1257 (2002) ("[F]ederal courts have allowed economic substantive due process . . . to escape extinction (and in some instances even to flourish) within the ecosystem that is land development law . . . despite its protections having been incorporated into regulatory takings doctrine . . . ."); J. Freitag, Note, Takings 1992: Scalia’s Jurisprudence and a Fifth Amendment Doctrine to Avoid *Lochner Redivivus*, 28 Val. U. L. Rev. 743, 774–76 (1994) (stating that regulatory takings analysis is a return to the heightened level of scrutiny the Court applied under *Lochner*); Dan Herber, Comment, Surviving the View Through the *Lochner* Looking Glass: Tahoe-Sierra and the Case for Upholding Development Moratoria, 86 Minn. L. Rev. 913, 941 (2002) ("[S]ome argue that the broad conception of the Takings Clause that Justice Scalia and a majority of the current Court have adopted embodies a strict form of substantive due process reminiscent of the *Lochner* era." (internal citation omitted)); see also Dolan v. City of Tigard, 512 U.S. 374, 406–07 (1994) (Stevens, J., dissenting) ("The so-called ‘regulatory takings’ doctrine . . . has an obvious kinship with the line of substantive due process cases that *Lochner* exemplified."). But see Molly S. McUsic, The Ghost of *Lochner*: Modern Takings Doctrine and Its Impact on Economic Legislation, 76 B.U. L. Rev. 605, 606–08 (1996) (acknowledging similarities between *Lochner* and modern regulatory takings law, but arguing that those who see in regulatory takings law a full-blown return to *Lochner* are overstating their case).


54. See Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 441 (1982). In *Loretto*, the plaintiff challenged a New York law requiring the owners of rental properties to allow the cable company to install its equipment on their premises so that tenants could have access to cable television. The Court held that any government-sanctioned permanent physical occupation of property, no matter how small, constituted a taking within the meaning of the Fifth Amendment. See id. at 421; see also Kaiser Aetna v. United States, 444 U.S. 164, 179–80 (1979) (asserting that depriving someone of the right to exclude others from their property constitutes a taking).

55. See 481 U.S. 704, 717–18 (1987). *Hodel* involved a challenge to a federal statute completely prohibiting the Native American owners of highly fractionated parcels of Native American trust land from passing those small shares by descent or devise upon their deaths. See id. at 706–07. In *Babbitt v. Youpee*, the Court slightly extended *Hodel* to include
bright-line takings rule in *Lucas v. South Carolina Coastal Council,* in which it held that, when a landowner is deprived of all economically beneficial uses of a piece of land, the land has been "taken" within the meaning of the Fifth Amendment.

In addition to the per se rules it has carved out from its default ad hoc *Penn Central* analysis, the Court has created a different, and more stringent, takings analysis for claims that government permission to develop property has been conditioned on the unconstitutional "exaction" of property rights from the landowner. In *Nollan v. California Coastal Commission,* the Supreme Court held that exactions of property demanded as a condition for granting permission to develop land must share some nexus with the goals the state would seek to achieve by denying the requested permission. In *Dolan v. City of Tigard,* the Court again signaled its intention to apply a heightened level of scrutiny to exactions. To the *Nollan* nexus requirement, the Court in *Dolan* added the requirement that any harm eliminated by the exaction upon which permission to

---

56. David Lucas, the plaintiff in the case, was a South Carolina developer who became involved in the development of the Isle of Palms, "a barrier island situated eastward of the city of Charleston." 505 U.S. at 1008. In the mid-1980s, Lucas purchased two lots in one of the Isle of Palms subdivisions for his own use, planning to build homes on each plot. Id. In 1988, however, the South Carolina legislature frustrated his plans when it enacted a statute prohibiting construction on the seaward side of a line connecting the landward-most points of beach erosion in an area that included Lucas's lots. Id. at 1008-09.

57. Id. at 1015-16. The Court qualified its holding, however, by observing that compensation would not be due when the regulation depriving the owner of all value in his land does no more than "duplicate the result that could have been achieved in the courts" under the state's common law of nuisance. Id. at 1029. The potential reach of the per se rule set forth in *Lucas* appears to have been substantially narrowed by the Court's decision in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency,* in which the Court made clear that temporary construction moratoria do not fall within the scope of the *Lucas* rule. 535 U.S. 302, 321 (2002).

58. 483 U.S. 825, 837-39 (1987). In *Nollan,* the plaintiffs owned a small beachfront home in California. They wanted to demolish the existing home and build a new, larger home on their lot. California law required them to obtain permission from the Coastal Commission before they could undertake their project. The Commission refused to grant the Nollans permission to build unless they would give the state an easement allowing the public to cross over a portion of their property. Id. at 828-29. The Supreme Court held that the exaction demanded by the Commission was an unconstitutional condition. See id. at 841-42.


60. See Dana & Merrill, supra note 38, at 222.
develop is conditioned be roughly proportional to the harm that would be caused by permitting the development to go forward.\textsuperscript{61}

The takings doctrine of exactions set forth in \textit{Nollan} and \textit{Dolan} has sparked two subsidiary controversies among the lower courts. First, courts have split over whether the \textit{Nollan}/\textit{Dolan} heightened scrutiny applies to exactions in which the government demands a cash payment rather than a dedication of land as a condition for granting permission to develop.\textsuperscript{62} Second, they have divided over whether the Supreme Court's exactions doctrine applies only to ad hoc, or "adjudicated," exactions or whether it instead applies to all exactions.\textsuperscript{63} The Supreme Court has not yet intervened to resolve either debate.

Although many things about the Court's takings jurisprudence are unclear, it is apparent that the Court applies a form of heightened scrutiny to regulations challenged under the Takings Clause. At a minimum, regulations challenged under takings theories receive far more scrutiny than they would if contested under the auspices of the Due Process Clause.\textsuperscript{64} This is true whether the regulation is deemed to fall within one

\textsuperscript{61} The plaintiff in \textit{Dolan} owned a small store. When she applied for a permit to expand the store and pave her parking lot, the city conditioned approval of her application on her cession of a piece of her property to the city for use as a flood plain and bicycle path. 512 U.S. at 379–81. The Court conceded the existence of a nexus between the plaintiff's desired use of her property and the city's exaction, but it nonetheless held that the city had violated the Takings Clause because it had failed to establish that its exaction was proportional to the harm the plaintiff's proposed property use would cause. See id. at 387–88, 395.


\textsuperscript{63} Compare, e.g., Krupp v. Breckenridge Sanitation Dist., 19 P.3d 687, 695–96 (Colo. 2001) (refusing to apply \textit{Dolan} to legislatively enacted exactions), Greater Atlanta Homebuilders Ass'n v. DeKalb County, 588 S.E.2d 694, 697 (Ga. 2003) (refusing to apply \textit{Dolan} to facial challenge to "generally applicable land-use regulation"), Parking Ass'n of Ga., Inc. v. City of Atlanta, 450 S.E.2d 200, 203 n.3 (Ga. 1994) (refusing to apply \textit{Dolan} to a legislative determination), and Curtis v. Town of S. Tomaston, 1998 ME 63, ¶ 6–7, 708 A.2d 657, 659–60 (same), with Town of Flower Mound, 135 S.W.3d at 640–42 (applying \textit{Dolan} to a legislative exaction), Been, Exactions, supra note 62, at 8–12 (collecting cases), and Dana & Merrill, supra note 38, at 226 & n.355 (same).

\textsuperscript{64} Since the end of the \textit{Lochner} era in 1937, the Court has applied an exceptionally deferential "rational basis" standard to review economic legislation for violations of the
of the categorical takings rules or instead is analyzed under the Court's ad hoc *Penn Central* analysis.

**B. The Exemption of Taxation from Takings Clause Scrutiny**

In contrast with its tendency to scrutinize regulations challenged under the Takings Clause, the Court has shied away from all but the most deferential constitutional review of tax provisions. Since the earliest days of the republic, the Court has consistently affirmed the virtually plenary power of the state to tax its citizens. In *M'Culloch v. Maryland*, Chief Justice Marshall noted that "the power of taxing the people and their property is essential to the very existence of government, and may be legitimately exercised on the objects to which it is applicable, to the utmost extent to which the government may chuse to carry it." Although Marshall acknowledged that the state could go too far in taxing its subjects, he considered the judiciary poorly equipped to consider when a particular tax crossed the line between a "legitimate use" and an "abuse of power." "The only security against the abuse of this power [to tax]," Marshall said, "is found in the structure of the government itself. In imposing a tax the legislature acts upon its constituents. This is in general a sufficient security against erroneous and oppressive taxation."
Consistent with Marshall's vision, the Court has been particularly ad-
\[\ldots\] amant in refusing to use the Fifth Amendment aggressively to determine when taxes go "too far." In a long line of cases, the Supreme Court has rejected Takings Clause and Due Process Clause challenges to taxes when those challenges are premised on the assertion that the tax rate imposed by the state is excessive. This is true even when the challenged tax rates threaten to put the taxpayer out of business. In City of Pittsburgh v. Alco Parking Corp., for example, the Court reversed the Pennsylvania Supreme Court's decision⁶⁹ that a 20% tax imposed by the City of Pittsburgh on private parking receipts was an unconstitutional taking of property:

The claim that a particular tax is so unreasonably high and un-
\[\ldots\] duly burdensome . . . is both familiar and recurring, but the Court has consistently refused either to undertake the task of passing on the "reasonableness" of a tax that otherwise is within the power of Congress or of state legislative authorities, or to hold that a tax is unconstitutional because it renders a business unprofitable.⁷⁰

According to the Court, a tax, "however great," is simply not a "tak-
\[\ldots\] ing." Only where the tax "complained of [is] so arbitrary as to con-
strain to the conclusion that it [is] not the exertion of taxation but a confiscation of property," would it run afloat of the Fifth Amendment.⁷² This prohibition of arbitrariness in taxation, however, amounts to little more than a statement that taxes are subject to the same rational basis review typically applied to economic regulation in the post-Lochner era.⁷³

---

⁷⁰. 417 U.S. 369, 373 (1974); see also A. Magnano Co. v. Hamilton, 292 U.S. 40, 45 (1934) (upholding against due process attack a state excise tax of 15¢ per pound on butter substitutes even though, as the Court conceded, the "tax is so excessive that it may or will result in destroying the intrastate business of appellant"); Alaska Fish Salting & By-Products Co. v. Smith, 255 U.S. 44, 48 (1921) ("Even if the tax should destroy a business it would not be made invalid or require compensation upon that ground alone."); McCray v. United States, 195 U.S. 27, 59–63 (1904) (finding that tax on oleomargarine is not unconstitutional even if it renders production of oleomargarine unprofitable); Vezzie Bank v. Fenno, 75 U.S. (8 Wall.) 533, 548–49 (1869) (holding that tax on bank notes is constitutional even if it renders state-franchised bank operation unprofitable).
⁷². Brushaber v. Union Pac. R.R. Co., 240 U.S. 1, 24–25 (1916); see also Quarry v. United States, 170 F.3d 961, 968–69 (9th Cir. 1999) (noting that taxes only violate the Takings Clause when arbitrarily imposed); 287 Corporate Ctr. Assoc. v. Township of Bridgewater, 101 F.3d 320, 324 n.5 (3d Cir. 1996) (same); Acker v. Comm'r, 258 F.2d 568, 574–75 (6th Cir. 1958) (same).
⁷³. See Boris I. Bittker et al., Federal Income Taxation of Individuals ¶ 1.01[2] (3d ed. 2002) (noting that courts apply to federal income taxation the "familiar" rational basis rule used in reviewing regulatory and other economic regulation); Chemerinsky, supra note 64, at 601–04 (describing the Court's deferential post-Lochner due process review of economic regulation). For an example of the Court's post-Lochner due process review at work, see Williamson v. Lee Optical, 348 U.S. 483, 487–88 (1955) (upholding against due process challenge an Oklahoma statute prohibiting opticians from making duplicate lenses without a prescription from an optometrist or an ophthalmologist). The Court's refusal to rigorously scrutinize the exercise of the taxing power under the Takings Clause has
In short, as long as a tax satisfies basic demands of rationality, it will withstand a Takings Clause attack. Molly McUsic is therefore correct when she observes that "the Court apparently no longer considers the Takings Clause a limitation on the taxing power of the government."74

C. The Variety of Tax Measures Approved by the Court

In light of the Court's general exemption of taxes from substantial Takings Clause scrutiny, it is important to determine the content of the category of "taxation." One way to approach such an endeavor is to explore the variety of provisions the Court has treated as unproblematic examples of taxation. The Court has upheld an array of provisions against constitutional challenge. While not all of these cases were decided under the Takings Clause, they nonetheless illustrate the range of measures the Court has deemed to constitute valid taxes. Specifically, the Court has refused to strike down progressive taxes, taxes that apply unevenly to people who are similarly situated in terms of ability to pay, and taxes that narrowly target certain property owners or categories of property.

1. Progressive Taxes. — The Court has repeatedly indicated its acceptance of the state's use of steeply progressive tax rates with high exemptions.75 In Magoun v. Illinois Trust & Savings Bank, the Court turned back an equal protection attack on a progressive state inheritance tax.76 Two years later, in Knowlton v. Moore, the Court upheld a similarly progressive federal inheritance tax against constitutional attack.77 In both Magoun and Knowlton, the Court observed that the state's power to tax inheritance progressively was limited only by the requirement that distinctions made among the different classes of the recipients of inherited property not be "arbitrary."78

In Brushaber v. Union Pacific Railroad Co., the Court applied a similarly deferential standard in upholding against a Fifth Amendment (including

74. McUsic, supra note 52, at 654.


76. See 170 U.S. 283, 300-01 (1898).

77. See 178 U.S. 41, 109 (1900).

78. Id. at 109-10; Magoun, 170 U.S. at 300. Indeed, the inheritance tax cases provide a particularly vivid illustration of the more lenient approach the Court takes in cases involving constitutional challenges to taxes. In upholding the constitutionality of progressive inheritance taxes, the Court in Magoun noted that the "right to take property by devise or descent is the creature of the law, and not a natural right," and concluded that, as a consequence, the state "may impose conditions" upon that right. Id. at 288. This emphasis on the state's virtually limitless power to "impose conditions" on the legally constructed right to pass property to one's heirs and devisees is in some tension with the Court's insistence on the unabridgeable nature of the right to inherit in Hodel and Youpee. See supra note 55 and accompanying text.
a Takings Clause) challenge the progressive-rate income tax enacted by Congress in the wake of the Sixteenth Amendment. It is worth noting that the progressive tax in Brushaber did not resemble today's federal income tax, which nearly everyone pays. The Brushaber tax's exemption of all income below $3,000 meant that it was paid by only 4% of the population. Critics of the 1913 income tax, such as Henry Cabot Lodge, described it at the time as "confiscation of property under the guise of taxation." Despite its incredibly narrow application, however, the Court rejected the Brushaber plaintiff's attacks on the statute. The constitutionality of even steeply progressive taxation is no longer seriously contested.

2. Unequal Taxes on Land. — The state's power to tax property directly is just as extensive as its power to tax income and inheritance. And, as with taxation of income and inheritance, the state enjoys wide discretion even when it chooses to impose vastly differing tax burdens on property owners who are, in many respects, similarly situated. Consistent with the extremely deferential standard of review of the state's exercise of its tax power, highly unequal property taxes will be upheld as long as the basis for the unequal treatment is not wholly arbitrary.

79. 240 U.S. 1, 24-25 (1916). The Sixteenth Amendment states that "Congress shall have power to lay and collect taxes on incomes, from whatever source derived . . . ." U.S. Const. amend. XVI.

80. See Robert Stanley, Dimensions of Law in the Service of Order: Origins of the Federal Income Tax, 1861-1913, at 226-27 (1993). Earlier federal income taxes, to which the Court referred favorably in Brushaber, were even narrower in their application. The 1894 federal income tax, for example, had such a high exemption ($4,000) that it applied to just one-tenth of 1% of American households. See id. at 133 tbl.3-7. And the first federal income tax, imposed in the 1860s, was touted by its proponents as affecting fewer than one in seventy households. See id. at 21. In 1918, the top 1% of income earners paid nearly 80% of the revenue collected by the federal income tax. See Dennis J. Ventry Jr., Equity Versus Efficiency and the U.S. Tax System in Historical Perspective, in Tax Justice: The Ongoing Debate 25, 32 (Joseph J. Thorndike & Dennis J. Ventry Jr. eds., 2002). In contrast, in 2000, the top 1% of income earners was responsible for 25.6% of federal income tax revenue. See Cong. Budget Office, Effective Federal Tax Rates, 1997 to 2000, at 16 tbl.1 (Aug. 2003), available at http://www.cbo.gov/ftpdocs/45xx/doc4514/08-29-Report.pdf (on file with the Columbia Law Review).


82. See Walter J. Blum & Harry Kalven, Jr., The Uneasy Case for Progressive Taxation 10 (2d ed. 1963) [hereinafter Blum & Kalven, Uneasy Case] ("There can be no doubt that progression today is immune from constitutional attack."). The "uneasy case" for progressive taxation to which Blum and Kalven referred in the title of their classic work on the subject was the "uneasy" normative (as opposed to constitutional) case for progressive taxation; the legal case for the constitutionality of such taxation under the Fifth Amendment, as Blum and Kalven acknowledged, is not uneasy in the least. See id. at 10-11. The broad consensus concerning the constitutionality of progressive rate taxation has not prevented the occasional scholar from attempting to breathe life into Epstein's arguments on this issue. See Massey, supra note 16, at 88 (challenging legal academia's "uncritical acceptance of the premise that taxation is immune from control by the Takings Clause").
In *Nordlinger v. Hahn*, the Supreme Court upheld against equal protection challenge the vastly uneven property taxes that resulted from California’s adoption of Proposition 13 in 1978. That provision caps property taxes at 1% of a property’s “full cash value,” with the “full cash value” itself based on the assessed valuation as of the 1975–1976 tax year or on the price when the property was subsequently built or purchased. Proposition 13 allows the state to increase this base assessment, but limits the permissible adjustment to a maximum of 2% annually. Because property values in California have increased at a rate far in excess of 2% per year since 1975, Proposition 13 has yielded enormously different property taxes for similarly valued parcels of property. People who purchased property after the statute went into effect, and whose taxes are therefore based on the new purchase price, pay substantially higher property taxes than neighbors in comparable homes who have been living in their homes for a longer period of time and whose taxes are based on the price they paid many years before (or, in some cases, on their homes’ assessed values when Proposition 13 went into effect). In rejecting the plaintiffs' equal protection claim, the Court noted that “[s]tates have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation.”

3. Narrowly Targeted Taxes. — Not only has the Court approved widely disparate property taxes, but it has also affirmed the constitutionality of property taxes that are narrowly targeted at a small subset of landowners within a taxing jurisdiction. Often called “special assessments,” such taxes typically reflect an effort by the state to recover the cost of a particular government project from a group of taxpayers the state has identified as having specially benefited from the project. In *Houck v. Little River Drainage District*, Missouri imposed a tax of 25¢ per acre on landowners living within a district identified as having benefited from a state-
funded drainage project. The Court rejected the plaintiff's Takings Clause challenge, saying that "[w]hen local improvements may be deemed to result in special benefits, a further classification may be made and special assessments imposed accordingly, but even in such case there is no requirement of the Federal Constitution that for every payment there must be an equal benefit." As with the other taxes the Court has considered, "unless the [special assessment] is a flagrant abuse, and by reason of its arbitrary character is mere confiscation of particular property, it cannot be maintained that the State has exceeded its taxing power." Thus, special assessments will generally be upheld against takings challenges unless the project funded through the assessment is not likely to confer any benefits at all on the affected property holder.

In addition to taxes that target narrow categories of landowners, the Supreme Court has approved of taxes that target narrow categories of personal property. Luxury taxes, for example, are taxes on categories of personal property typically associated with the rich. And so-called "sin taxes" on alcohol and tobacco have become a permanent feature of this country's tax system. Similarly, the current federal tax code aims "tax

89. See 239 U.S. 254, 259-60 (1915).
90. Id. at 265.
91. Id.
92. See Kades, supra note 11, at 258 ("The general rule, then, is that even a slight, tenuous correlation between the amount paid in taxes or assessments on the one hand, and the benefits received on the other hand, is sufficient to shield a measure from a takings challenge.").
93. In Hylton v. United States, 3 U.S. (3 Dall.) 171 (1796), for example, the Court upheld a 1794 tax Congress had imposed on carriages, see id. at 179-81, which were considered luxury items at the time, see 4 Annals of Cong. 644-45 (1794) (characterizing "pleasure carriages" as "objects of luxury"). And in Knowlton v. Moore, 178 U.S. 41 (1900), in the course of defending progressive inheritance taxes, the Court observed with approval that Congress had previously created "progressive" taxes specifically targeted at high-priced fabrics. See id. at 93. Such taxes are not artifacts of the past. More recently, in 1991, the federal government imposed luxury taxes on the sale of jewelry, furs, passenger vehicles, watercraft, and aircraft. See Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 1221(a), 104 Stat. 1388, 1388-438 to 1388-444 (1990). The tax was phased out in 2003 as a result of amendments enacted in 1993.
94. See, e.g., 26 U.S.C. § 5001 (2000) (tax on distilled spirits); id. § 5701 (tax on tobacco products). Like luxury taxes, "sin taxes" are narrowly aimed at specific categories of activities or products. In the case of sin taxes, however, the affected products and activities are targeted, not because of their association with the wealthy, but because they are disfavored for some reason by the state. The same statute that imposed the tax on the "pleasure carriages" at issue in Hylton also taxed morally suspect categories of personal property, such as snuff and liquor. See Act of June 5, 1794, chs. 45, 48-49, 51, 1 Stat. 373, 373-81, 384-90. Because the activities covered by sin taxes are typically frowned upon (often, though not always, because of their perceived harmful effects), sin taxes are often aimed as much at discouraging the targeted behavior by making it more expensive as they are at raising revenue. See, e.g., 4 Ex-Surgeons General Push Higher Cigarette Tax, N.Y. Times, Feb. 4, 2004, at A14 ("Four former surgeons general offered a plan on Tuesday to cut cigarette smoking in part with a $2-a-pack tax increase. That move alone, they said, would prompt at least five million smokers to quit.").
penalties,” or narrow exceptions from favorable tax treatment, at disfavored activities, such as the payment of bribes to foreign officials. These narrow taxes have never been held to exceed the government’s taxing power.

II. REGULATORY TAXINGS

The tension between the doctrines of takings and taxation has not been fully explored by legal scholars. Rather than using the Court’s expansive takings jurisprudence to pare back the power to tax, one can attempt to generate Reconciling Theories, that is, means of distinguishing takings from taxes that treat the state’s traditionally broad power to tax as a fixed point. When examined in light of existing takings doctrine, however, each Reconciling Theory will yield a category of regulations—Regulatory Taxings—that are indistinguishable from taxation under the theory but that are wrongly treated as takings by current doctrine.

State actions that fall within the Regulatory Taxings category will vary depending upon the particular Reconciling Theory one examines. For example, if one were to adopt as a Reconciling Theory the view that the Takings Clause applies only to property in land, taxes would never be takings because they are not collected in land. As a consequence, however, any regulation (or, indeed, any physical taking) of personal property that would—under current doctrine—be treated as a taking would constitute a Regulatory Taxing.

The breadth of the category of Regulatory Taxings provides a useful measure of how closely a particular Reconciling Theory fits with current takings doctrine. Thus, considered in isolation, the category of Regulatory Taxings can serve as a metric for determining the extent to which a proposed Reconciling Theory is able to bridge the gap between takings and taxes as both are presently understood. Perhaps more significantly, however, when viewed across a range of Reconciling Theories, the shifts in the Regulatory Taxings category provide a powerful means of diagnosing the overall coherence of takings doctrine with the assumed fixed point of taxation.

In this Part, I discuss a series of strategies for reconciling takings and taxes. For ease of presentation, I have categorized them based upon their relationship to the three elements of the Takings Clause itself: defining “private property” to exclude taxation, defining “taken” to exclude taxation, and defining “taxation” to exclude public takings.
tion; and defining "just compensation" to exclude taxation. The approaches I discuss in this Part reflect the range of theories proposed in the academic literature for reconciling the law of takings with the traditional treatment of taxation. On the basis of my discussion of these various approaches, I conclude that the Regulatory Taxings category is impossible to eliminate. I argue that no colorable Reconciling Theory will completely square current takings doctrine with the constitutional fixed point of taxation. Indeed, under most theories, the Regulatory Taxings category will be surprisingly large.

A. Defining "Property" to Exclude Taxation from the Takings Clause

1. The Reconciling Theory

a. Discrete Assets vs. General Obligations. — The Court might try to eliminate the tension between takings and taxation by somehow defining "property" for the Takings Clause such that it excludes taxes while still allowing robust scrutiny of regulations affecting "property." For exam-

99. See, e.g., Fee, supra note 33, at 1037-39 ("If there is a meaningful distinction... between general taxes and eminent domain takings, it must be in how taxes are imposed in society compared to how government takes land."); Levmore, supra note 10, at 305-08 (arguing that just compensation is necessary to protect rights of individuals who cannot mobilize political opposition to a taking, and is therefore inapplicable to broad-based taxes).

100. The term "implicit in-kind compensation" is drawn from Epstein's work. See Epstein, Takings, supra note 1, at 195. But the notion that taxpayers are implicitly compensated for the taxes they pay, and that this compensation justifies the requirement of taxation, is present (implicitly) in the thinking of Frank Michelman and others. See, e.g., Michelman, Ethical Foundations, supra note 19, at 1218-26 ("[W]e are pleased to believe that we can arrive at an acceptable level of assurance that over time the burdens associated with collectively determined improvements will have been distributed 'evenly' enough so that everyone will be a net gainer.").

101. See Joseph L. Sax, Takings and the Police Power, 74 Yale L.J. 36, 51-53 (1964) (discussing tendency of courts to reject takings claims on the ground that the value destroyed by the regulation in question was not a "property" right). Defining "property" for the Takings Clause is a fundamentally legal, as opposed to philosophical, project. Thus, it is a different endeavor from the one undertaken by Liam Murphy and Thomas Nagel in their book on tax justice. See generally Liam Murphy & Thomas Nagel, The Myth of Ownership: Taxes and Justice (2002). Murphy and Nagel suggest that taxes as such do not violate the rights of property owners because the concept of property is for the most part conventional. The conventional understanding of property, they argue, includes within itself the obligation to pay taxes imposed by the state. See id. at 32 (arguing that the notion of pretax income as unqualified property of the wage earner is incoherent). Whether this suggestion that property is conventional is true as a philosophical matter, and I suspect that it is, it is a question separate from the legal one addressed by the need to define "property" for the Takings Clause. Applied within the context of takings law, the
ple, one might adopt the aforementioned understanding of "property" for the Takings Clause as including only property in land. Obviously, however, such a Reconciling Theory would not be a very plausible one. To begin with, the category of Regulatory Taxings generated by such a theory would require a radical reworking of the Court's eminent domain jurisprudence, which has always been understood to require compensation for the condemnation of both personal property and land. Moreover, as I have argued elsewhere, although it does appear to be the case that the Supreme Court has granted more robust regulatory takings protection to property in land than it has extended to other forms of property, such favoritism cannot be justified on textual, historical, or normative grounds.

A more plausible attempt at such a definitional Reconciling Theory is Thomas Merrill's proposal to define "property" for the Takings Clause so as to include only discrete assets. Because taxes are simply the imposition of a general obligation to pay money to the state and do not involve state action directed at discrete assets, the argument goes, they are not implicated by the Court's current takings doctrine. As Merrill has stated, "This interpretation of the Takings Clause would bar only the

---

103. For an extensive discussion of this issue, see generally Eduardo Moisés Peñalver, Is Land Special? The Unjustified Preference for Landownership in Regulatory Takings Law, 31 Ecology L.Q. 227, 232–33 (2004). The text of the Takings Clause makes no such distinction between land and other forms of property. See U.S. Const. amend. V. And the Framers most likely intended the clause to apply equally to both personal and real property. See Peñalver, supra, at 249–50. Moreover, none of the dominant normative theories of property or takings proposed in the academic literature justify a categorical distinction between the regulation of land and other forms of property. See id. at 253–82.
104. See Merrill, supra note 33, at 974–78, 980–81. Merrill's suggested definitional solution was anticipated, at least in part, by Blum and Kalven in a 1973 pamphlet. See Blum & Kalven, Anatomy, supra note 8, at 4 (arguing that the difference between takings and taxes "appears to reside essentially in the difference between taking money and taking specific property"). A similar distinction between government impositions of general obligations and government demands for specific assets appears to be at work in the takings theory proposed by Ronald Krotoszynski. See Ronald J. Krotoszynski, Jr., Expropriatory Intent: Defining the Proper Boundaries of Substantive Due Process and the Takings Clause, 80 N.C. L. Rev. 713, 747–49 (2002).
105. This proposed distinction between obligations affecting a specific parcel of property and obligations affecting a person's overall holdings has an interesting parallel in the case law surrounding the rule against perpetuities. Some courts have indicated that purchase options that apply to a person's holdings in general are not covered by the rule against perpetuities, while purchase options that apply to a particular parcel of land may indeed be subject to the rule. See, e.g., Southeastern Pa. Transp. Auth. v. Phila. Transp. Co., 233 A.2d 15, 19–20 (Pa. 1967); Restatement (First) of Property § 401 (1944).
singling out of specific parcels of land or other isolated property rights for special burdens; it would not affect general taxes or changes in liability rules."\(^\text{106}\) To the extent that courts have confronted the tension between takings and taxation, many have resorted to such a definitional solution. Most significantly, in *Eastern Enterprises v. Apfel*, five Justices endorsed the notion that the Takings Clause protects only discrete assets and is not implicated by the government's imposition of general obligations to pay money.\(^\text{107}\)

In *Eastern Enterprises*, the Court considered the constitutionality of Congress's retroactive imposition of liability for retirees' benefits on existing and former coal companies through the Coal Industry Retiree Health Benefit Act of 1992 (Coal Act).\(^\text{108}\) Coal companies challenged the liability provisions as violative of the Takings Clause. A plurality of the Court, in an opinion by Justice O'Connor, agreed that the provision violated the Takings Clause, but Justice O'Connor was unable to win a fifth vote for that position.\(^\text{109}\)

Instead, Justice Kennedy, concurring in the judgment, argued that, while the Coal Act violated the Due Process Clause, the retroactive imposition of liability did not constitute a taking, because the statute did not "operate upon or alter an identified property interest."\(^\text{110}\) The statute, he said,

\[
\text{does not appropriate, transfer, or encumber an estate in land (e.g., a lien on a particular piece of property), a valuable interest in an intangible (e.g., intellectual property), or even a bank account or accrued interest. The law simply imposes an obligation to perform an act, the payment of benefits.}\(^\text{111}\)
\]

The four dissenters, who believed that the statute violated neither the Due Process Clause nor the Takings Clause, were even more explicit. In an opinion by Justice Breyer, the dissenters agreed with Justice Kennedy that "[t]he 'private property' upon which the [Takings] Clause traditionally has focused is a specific interest in physical or intellectual property."\(^\text{112}\) Because the Coal Act only involved "an ordinary liability to pay money," they argued, it could not constitute a violation of the Takings Clause.\(^\text{113}\) Were it otherwise, the dissenters noted, it would be very difficult to justify any distinction between takings and taxation: "If the [Takings] Clause applies when the government simply orders A to pay B, why does it not apply when the government simply orders A to pay the govern-

\(^{106}\) Merrill, supra note 33, at 980.


\(^{109}\) *Eastern Enterprises*, 524 U.S. at 503, 538.

\(^{110}\) Id. at 540 (Kennedy, J., concurring in judgment and dissenting in part).

\(^{111}\) Id.

\(^{112}\) Id. at 554 (Breyer, J., dissenting).

\(^{113}\) Id.
ment, *i.e.*, when it assesses a tax?"114 Lower courts have split over whether to follow the plurality’s interpretation of the Takings Clause or that of the five Justices (Justice Kennedy plus the four dissenters) who found the Takings Clause inapplicable.115

There is something unpersuasive about distinguishing takings from taxes on the basis of a distinction between regulations affecting discrete assets and those imposing obligations to pay money.116 This is because general obligations to pay money may or may not affect a person’s “discrete assets,” depending on the person’s particular financial situation. As Blum and Kalven have correctly pointed out, “[t]axes can be set so high that the taxpayer is forced to dispose of specific property or simply turn it over to government in order to satisfy his tax obligation.”117

b. *In-Kind Taxation.* — Another problem with this attempt to distinguish takings from taxes is its inability to make sense of the category of in-kind taxation, that is, taxes the state requires taxpayers to pay in property other than money. The Supreme Court has repeatedly upheld in-kind taxation as legitimate.118 Nevertheless, it has been completely overlooked by takings scholars. This is unsurprising, since such taxes have not been widely employed in the United States in recent years. But in-kind taxation is as old as taxation itself.119

114. Id. at 556 (Breyer, J., dissenting).
115. See Gordon v. Norton, 322 F.3d 1213, 1217 (10th Cir. 2003) (“A majority of the [Eastern Enterprises] Court held that the Coal Act was unconstitutional. A different majority, however, concluded that the Takings Clause was not implicated by the Coal Act and that . . . the controlling question was whether the Coal Act violated the substantive component of the Due Process Clause.” (citations omitted)); Commonwealth Edison Co. v. United States, 271 F.3d 1327, 1339 (Fed. Cir. 2001) (following the dissenters plus Kennedy as majority position); Holland v. Big River Minerals Corp., 181 F.3d 597, 606 (4th Cir. 1999) (same); Parella v. Ret. Bd. of the R.I. Employees’ Ret. Sys., 173 F.3d 46, 58 (1st Cir. 1999) (same); Unity Real Estate Co. v. Hudson, 178 F.3d 649, 659 (3d Cir. 1999) (same). But see United States Fid. & Guar. Co. v. McKeithen, 226 F.3d 412, 419–20 (5th Cir. 2000) (applying Takings Clause to imposition of general liability); Cent. States, Southeast & Southwest Areas Pension Fund v. Midwest Motor Express, Inc., 181 F.3d 799, 807–08 (7th Cir. 1999) (applying Eastern Enterprises plurality’s analysis to claim asserting taking resulting from retroactive imposition of monetary liability); see also United States v. Alcan Aluminum Corp., 315 F.3d 179, 189 (2d Cir. 2003) (finding no controlling principle in Eastern Enterprises); United States v. Dico, Inc., 266 F.3d 864, 880 (8th Cir. 2001) (same); Franklin County Convention Facilities Auth. v. Am. Premier Underwriters, Inc., 240 F.3d 534, 552 (6th Cir. 2001) (same); Ass’n of Bituminous Contractors v. Apfel, 156 F.3d 1246, 1254 n.5 (D.C. Cir. 1998) (noting that dissenting votes in Eastern Enterprises have no precedential authority).
116. See Merrill, supra note 33, at 979–81 (arguing that a “discrete-asset test” in takings law would “confine the Takings Clause to its traditional orbit” and insulate it from use in challenges to “general taxes”).
117. Blum & Kalven, Anatomy, supra note 8, at 5.
118. See infra notes 125–135 and accompanying text.
119. See Genesis 41:34–35 (New Revised Standard) (“Let Pharaoh proceed to appoint overseers over the land, and take one-fifth of the produce of the land of Egypt . . . . Let them gather all the food of these good years . . . . under the authority of Pharaoh for food in the cities, and let them keep it.”). The Greeks and Romans collected many taxes in kind.
Indeed, payment of taxes (and other debts) in kind was commonplace in the colonial period. Virginia and Maryland, for example, relied almost exclusively on tobacco—their principal staple crop—as currency. New England had no equivalent staple crop but, at various times, designated farm products such as beef, wheat, pork, corn, flax, and hemp—typically called "country pay"—as commodity money. Other commodities used in place of money at various times in the English colonies included peas, wool, corn, barley, rice, pitch, tar, cattle, dairy products, lumber, and fish. And in-kind taxation was employed without apparent controversy in the early republic. In 1786, for example, Virginia enacted a statute allowing the payment of taxes in tobacco. Indeed, the payment of certain taxes in kind, whether in labor or in raw materials, continued well into the twentieth century.

See James Coffield, A Popular History of Taxation: From Ancient to Modern Times 5–8, 56 (1970) (noting that payment of taxes in third- and fourth-century Roman Empire was "almost entirely in kind"); Ronald S. Stroud, The Athenian Grain-Tax Law of 374/3 B.C. 1, 27–28 (1998) (describing in-kind tax on grain and observing that "taxes in kind might not have been as unusual at Athens as is sometimes assumed"). The practice of in-kind taxation survived through medieval times and was employed in colonial North America. See B.E.V. Sabine, A History of Income Tax 11 (1966) (discussing medieval "scutage," or "shield money" which was either payable in money or in form of military service by knights); A.W.B. Simpson, A History of the Land Law 11–13 (2d ed. 1986) (noting that "socage" obligations could be paid in money, in labor, or in kind); see also Francis Parkman, The Old Régime in Canada (25th ed. 1885), reprinted in 1 France and England in North America 1055, 1314 (David Levin ed., 1983) (discussing a tax on furs in eighteenth-century Canada whereby "[o]ne-fourth of the beaver-skins, and one-tenth of the moose-hides, belonged to the [French] king").


121. Id. at 1324 (internal citations omitted).

122. See Curtis Putnam Nettels, The Money Supply of the American Colonies Before 1720, at 208–12 (1934); see also Bernard Bailyn, The New England Merchants in the Seventeenth Century 100 (2d prtg. 1979). This pervasive use of commodities as money in colonial times suggests the permeability of the distinction between obligations to pay the state and obligations to turn over specific assets. The fuzziness of this line is particularly apparent where the colonial government supplied definitive standards concerning the quality of the commodities that could be used as a means of discharging obligations to the state. See Nettels, supra, at 213.

123. An Act to Enable the Citizens of this Commonwealth to Discharge Certain Taxes by the Payment of Tobacco, in Acts Passed at a General Assembly of the Commonwealth of Virginia, ch. ix, at 11–12 (1786), microformed on The Eighteenth Century, reel 4311, no. 5 (Research Publ'ns); 2 William C. Rives, History of the Life and Times of James Madison 146–47 (Boston, Little, Brown, & Co. 1870).

124. See, e.g., Cumberland Pipe Line Co. v. Commonwealth ex rel. Ky. State Tax Comm'n, 15 S.W.2d 280, 281–82, 286 (Ky. 1929) (describing and upholding severance tax on petroleum in which state was given title to 1% of crude petroleum); Sartor v. United Gas Pub. Serv. Co., 173 So. 103, 108–10 (La. 1937) (upholding against constitutional challenge a tax on extraction of oil, gas, and natural resources that could be paid "in money" or "in kind"); State v. Kennerly, 104 A.2d 632, 635–36 (Md. 1954) (upholding against constitutional challenge a tax on oyster packing operations to be paid in oyster shells).
For its part, the Supreme Court has repeatedly made clear that, as a constitutional matter, the state has the authority to demand payment of taxes in any form it chooses, whether in money or in kind. In *Lane County v. Oregon*, the Court was confronted with an Oregon county's challenge of an Oregon Supreme Court ruling that it was required to pay its taxes in silver or gold coin. In rejecting the county's claim, the Court set forth the broad principle that states (and their political subdivisions) are free to demand "collection of taxes in kind, that is to say, by the delivery of a certain proportion of products, or in gold or silver bullion, or in gold and silver coin." Sixty years later, the Court reaffirmed the state's broad discretion to "tax" property in kind in *Leonard & Leonard v. Earle*. That case involved a somewhat exotic measure devised by Maryland in which the state required oyster packers to hand over 10% of the empty oyster shells produced in the course of their operations. The state intended to dump the shells into the ocean in order to furnish the structural support and lime thought necessary for oyster beds to reproduce themselves. The oyster shells, however, had substantial commercial value to the packers, who typically sold them for use in roadmaking, fertilizer manufacture, and chicken feed. Stung by the loss of this supplemental income, oyster packers attacked the statute as a taking of their property.

The Court rejected the challenge. It began by noting that the state could easily have imposed a "privilege tax," demanding (as a condition on the right to do business) cash equal to 10% of the market value of the

The military draft, which survived into the 1970s, bears a striking resemblance to in-kind taxation, particularly when one considers its Civil War incarnation, which allowed draftees to avoid their service obligation by paying $300 to the federal government. See Union Conscription Act of 1863, 12 Stat. 751, 783, reprinted in The Draft and its Enemies: A Documentary History 63, 65 (John O'Sullivan & Alan M. Meckler eds., 1974). In allowing draftees to pay to commute their obligation, the Civil War draft was virtually indistinguishable from more unambiguous cases of in-kind taxation, such as the Nevada road tax, payable in labor or money, discussed by the Nevada Supreme Court in *Hassett v. Walls*, 9 Nev. 387, 392–93 (1874). Violent opposition to the Civil War draft, and to its $300 commutation fee in particular, led to the infamous 1863 "draft riots" in New York City. See Eugene Converse Murdock, *Patriotism Limited 1862-1865: The Civil War Draft and the Bounty System* 9–10 (1967). For an interesting analysis of the draft as a taking of property, see William A. Fischel, *The Political Economy of Just Compensation: Lessons from the Military Draft for the Takings Issue*, 20 Harv. J.L. & Pub. Pol'y 23, 24–28 (1996).
shells produced in the packers' operations.\textsuperscript{132} Citing \textit{Lane}'s discussion of in-kind taxes and noting that the imposition of such taxes was not unprecedented in the United States, the Court found no reason to apply a more demanding standard to review the in-kind collection of 10\% of the oyster shells than would have applied to an equivalent tax collected in cash.\textsuperscript{133} The Court essentially reiterated its position in \textit{Lane}:

\begin{quote}
[I]f the condition of any state, in the judgment of its Legislature, shall require the collection of taxes in kind—that is to say, by the delivery to the proper officers of a certain proportion of products—or in gold or silver bullion, or in anything different from the legal tender currency of the country, the right to make the requirement is unquestionable . . . .\textsuperscript{134}
\end{quote}

Because the State's demand for 10\% of the packers' oyster shells was "neither oppressive nor arbitrary," the Court held, it did not violate the Constitution.\textsuperscript{135}

It would be tempting to try to cast aside a tax collected in oyster shells as a constitutional anomaly, but the case of in-kind taxation points towards a larger normative problem in the attempt to distinguish takings and taxes on the basis of the "discrete asset" definition of "property" for the Takings Clause. The distinction between the government's demand that a citizen hand over a certain amount of money (which this Reconciling Theory categorizes as a tax) and the government's seizure of specific assets worth the same amount of money (which this Reconciling Theory categorizes as a taking) seems formalistic and arbitrary.\textsuperscript{136} As the Court properly observed in \textit{Leonard}, there is no obvious difference between requiring a taxpayer to pay a tax equal to 10\% of the value of his oyster shells and requiring him to simply hand over 10\% of his oyster shells (or oil or coal or any other property desirable to its owner only "because convertible into money").\textsuperscript{137}

\begin{itemize}
  \item \textsuperscript{132} Id. at 396.
  \item \textsuperscript{133} See id. at 396–97.
  \item \textsuperscript{134} Id. at 397 (quoting 1 Thomas M. Cooley, \textit{The Law of Taxation} \S 23, at 92 (Clark A. Nichols ed., 4th ed. 1924)).
  \item \textsuperscript{135} Id. at 398.
  \item \textsuperscript{136} See Fee, supra note 33, at 1037–38 (arguing that a meaningful distinction between money and property for Takings Clause analysis cannot be drawn); Kades, supra note 11, at 193–98 (discussing shortcomings of recent attempts to draw formalistic distinctions between money and property); Stoebuck, supra note 9, at 571 (stating that taxation "is not merely similar to eminent domain; it is the same, as far as the power itself goes").
  \item \textsuperscript{137} The Court reviewed its taxation jurisprudence, and concluded that there was no reason to doubt the power of the State to exact of each oyster packer a privilege tax equal to 10\% of the market value of the empty shells resulting from his operations. . . . And as the packer lawfully could be required to pay that sum in money, we think nothing in the Federal Constitution prevents the State from demanding that he give up the same per cent. [sic] of such shells. The result to him is not materially different . . . [for the] shells are but ordinary articles of commerce, desirable because convertible into money.
\end{itemize}

\textit{Leonard}, 279 U.S. at 396.
c. Fungibility. — The distinction between imposition of monetary liability and regulation of discrete parcels of property becomes even more arbitrary when Merrill and the Eastern Enterprises five attach legal significance to a difference between general monetary liabilities (which are not included within their definition of "property" for the Takings Clause) and obligations to hand over money that has been segregated into a particular bank account (which does fall within their definition of "property").

What could be the reason for defining the category of property protected by the Takings Clause in a way that excludes general obligations to pay money but includes money held in specific accounts? Blum and Kalven suggest that the option of choosing which particular assets will satisfy a general monetary obligation to the state makes a general obligation (such as a tax) less onerous than the state's taking a specific asset of its own choosing. A similar judgment may lie behind the definitional argument made by Merrill and by the five Justices in Eastern Enterprises. But this assumption is only plausible when the selection among different specific assets might conceivably make a difference to the property holder.

It is difficult to see, for example, why an individual should care whether, on the one hand, the government imposes on him a general obligation that allows him to choose to pay this dollar or that dollar or, on the other hand, the government forces him to pay that particular dollar from a specific bank account. The same would seem to be true of oyster shells, or bushels of corn, or any other type of fungible property whose principal value to a person is its convertibility into money or other property through market transactions. From the point of view of the owner of such property, there is no difference between the state's imposi-

138. See E. Enters. v. Apfel, 524 U.S. 498, 540 (1998) (Kennedy, J., concurring in judgment and dissenting in part) (indicating that "a bank account or accrued interest" is covered by the Takings Clause); id. at 555 (Breyer, J., dissenting) ("[T]he Clause can apply to monetary interest generated from a fund into which a private individual has paid money."); Merrill, supra note 33, at 975 (stating that bank account is a discrete asset that satisfies definition of property for Takings Clause purposes).

139. One response to this criticism would be to argue that a regulation targeting a particular asset is more likely to reflect a desire to single out the affected property owner for adverse treatment. See Krotoszynski, supra note 104, at 747 ("[T]he specificity requirement might well provide support for a finding of expropriatory intent."). If suspicion of regulations that single certain property owners out for adverse treatment is the normative basis for the distinction between discrete assets and general obligations, however, a more direct way to get at the suspect category of regulations would be to simply define takings as regulations that single out. For a discussion of such an attempt, see infra Part II.B.1.b.

140. See Blum & Kalven, Anatomy, supra note 8, at 4-5.

141. See Krotoszynski, supra note 104, at 747.

142. See United States v. Sperry Corp., 493 U.S. 52, 62 n.9 (1989) ("Unlike real or personal property, money is fungible. No special constitutional importance attaches to the fact that the Government deducted its charge directly from the award rather than requiring Sperry to pay it separately.").
tion of a general obligation to pay the money and the state's decision to seize a specific amount of money's worth of merchandise.\textsuperscript{143}

If the state plans to seize $1,000 worth of furniture from someone's living room, however, allowing the owner to choose which pieces to hand over does actually seem less onerous than allowing the state to make the choice on its own. Most people would like to be able to force the state to take the mass-produced coffee table they recently bought from Sears instead of the armchair left to them by their grandfather, even if the two have the same market value. In other words, assigning weight to a distinction between a general obligation to turn over property to the state and the state's taking of specific assets makes sense only in the case of nonfungible property.

Thus, the distinction between general obligations and specific assets is something of a red herring. What does most of the work for Merrill's (and Justice Kennedy's) attempted definition of "property" for the Takings Clause is not a distinction between general obligations and specific assets, as such, but rather a distinction between state confiscation of fungible and nonfungible property. Taxes are demands by the state that the taxpayer turn over fungible property, whether in cash or in kind. Of course, taxes might have other essential features, but, applying this Reconciling Theory, the confiscation of nonfungible property can never count as a tax.

Some items of property, such as money, will be fungible to everyone. Others, such as land or cars or clothing, will be fungible in the hands of those for whom the value of such property equals its market value but nonfungible in the hands of someone for whom such property is valuable for reasons going beyond its utility in market transactions.\textsuperscript{144} Understood in this subjective sense, the seizure by the state of nonfungible assets does in fact seem to work a different kind of harm on an individual than the seizure of fungible property, such that a definitional Reconciling Theory built around a distinction between fungible and nonfungible property is not an arbitrary one.\textsuperscript{145}

\textsuperscript{143} This would not be true, however, if the government were to seize fixed quantities of goods. Under such circumstances, differences in quality between one batch of goods and another would cause the owner to prefer that the government seize the less valuable batch. Indeed, the uneven quality of goods generated considerable transaction costs for colonial governments that opted to collect their taxes in kind. See Priest, supra note 120, at 1325 (discussing various attempts at quality control of commodity money).

\textsuperscript{144} See Radin, Personhood, supra note 22, at 987 ("The wedding ring is fungible to the artisan who made it and now holds it for exchange even though it is property resting on the artisan's own labor."). Economists acknowledge that certain categories of property are likely to possess a subjective value to their owners well beyond their market value. See Jack L. Knetsch & Thomas E. Borcherding, Expropriation of Private Property and the Basis for Compensation, 29 U. Toronto L.J. 237, 240–41 (1979) ("There is in the view of each owner no complete similarity among parcels of real property. This is particularly the case for residential property, but much the same may be true of other such specialized assets.").

\textsuperscript{145} See Radin, Personhood, supra note 22, at 1002–08 (discussing possible application of "personhood perspective" to government takings).
The Supreme Court has itself suggested that fungibility in the sense relevant for distinguishing takings from taxes is necessarily in the eye of the beholder. In affirming the idea that the state could collect 10% of the packers' oyster shells, the Court in Leonard observed that “[f]rom the packer’s standpoint empty shells are but ordinary articles of commerce, desirable because convertible into money.”146 It was the subjective fungibility of the oyster shells to the packers that allowed the Court to treat their appropriation by the state as the equivalent of a tax, analyzed as such simply for an absence of arbitrariness or oppressiveness.

Although the necessary understanding of fungibility is at base a subjective one, the question whether a particular piece of property will be fungible to a particular person is not so unpredictable that it resists the formulation of useful legal categories.147 In general, it is safe to assume that certain forms of property, particularly property that satisfies the traditional definition of fungibility (items of personal property that are interchangeable with property of the same kind)148 will be fungible (in the subjective sense) to any right-thinking person.149 Conversely, someone's primary residence will virtually always be nonfungible.150 But even items that are more personalized and unique will almost always be fungible to people who seek to make a living through their purchase and sale.151 Indeed, land, which has traditionally been understood as the paradigmatic example of nonfungible property,152 would likely qualify as fungible in the hands of both a large real estate developer and a mining consortium.153

The definitional attempt to distinguish takings from taxes can thus be made less formalistic and more plausible by rejecting the definition of “property” for the Takings Clause as “discrete assets.” Instead, one could understand the Takings Clause as providing only limited protection for

---

147. See Margaret Jane Radin, Residential Rent Control, 15 Phil. & Pub. Aff. 350, 364–65, 378 (1986) [hereinafter Radin, Residential] (suggesting that “a residential tenancy carries the same moral weight” as home ownership, while a landlord’s interest is often “fungible”).
148. See Black’s Law Dictionary 698 (8th ed. 2004) (defining fungible as “[r]egarded as commercially interchangeable with other property of the same kind”).
149. See Radin, Residential, supra note 147, at 362 (“[O]ne dollar bill is as good as another, or the equivalent in stocks or bonds, or any other item with market value.”).
150. See id. at 364 (“The ‘home’—usually conceived of as an owner-occupied single-family residence—seems to be a paradigm case of personal property in our social context.”); see also Gideon Parchomovsky & Peter Siegelman, Selling Mayberry: Communities and Individuals in Law and Economics, 92 Cal. L. Rev. 75, 139 (2004) (“[C]ourts should recognize that property owners stand to suffer a loss well in excess of fair market value as a result of government takings . . . .”).
151. See Radin, Personhood, supra note 22, at 959–60 (pointing out that, while a jeweler can easily be recompensed for theft of a wedding ring, “if a wedding ring is stolen from a loving wearer, the price of a replacement will not restore the status quo”).
152. See supra note 148.
153. See Radin, Personhood, supra note 22, at 960 (identifying “land in the hands of [a] developer” as an archetypical example of a “perfectly replaceable” good).
fungible assets. Taxes would present less of a problem under such a reading of the Clause because, the argument would go, they are typically collected in fungible property, whether that be money, gold coins, tobacco, or oyster shells.

2. Regulatory Taxings

a. Generally. — Understood as based upon a distinction between fungible and nonfungible property, this Reconciling Theory creates a large category of Regulatory Taxings. Specifically, it calls into question any robust application of the Takings Clause to government action (whether a regulation or even a direct seizure) touching on fungible property. Such a move would constitute a substantial shrinking of the application of the Takings Clause, which has been assumed to apply equally to fungible and nonfungible property.154

Because the distinction between fungible and nonfungible property rests (as a normative matter) upon the subjective impact of the government action on the property owner, the content of the category of “fungible” property will necessarily vary to a certain extent depending on the identity or category of the property owner.155 The definitional Reconciling Theory thus seems to generate a category of Regulatory Taxings in which commercial and corporate-owned property would be subject to substantially diminished constitutional protection. For example, the land on which a homeowner’s home rests would never be treated as fungible to the homeowner, but the same land could be deemed fungible if bought by a real estate developer as part of a large development project.156 In other words, this Reconciling Theory suggests the desirability of a takings doctrine that bears a striking resemblance to the one proposed by Margaret Jane Radin in her discussion of property rights for personhood.157

154. See id. at 1005–06 & n.173 (contending that distinction between fungible and nonfungible property is absent from the Court’s takings jurisprudence); see also Rose Acre Farms, Inc. v. United States, 55 Fed. Cl. 643 (2003) (finding that a regulatory taking resulted from federal salmonella regulation requiring sale of plaintiff’s eggs in less profitable “breakers” market).

155. This normative basis for the distinction does not rule out the possibility that, as a practical matter, courts might choose to avoid inquiring into the subjective state of mind of individual property owners, preferring instead to categorize property as fungible or not based on an objective assessment of the likely subjective impact of a regulation on a reasonable property owner in the claimant’s position.

156. A parcel of land might be “nonfungible,” in a certain sense, to a real estate developer because it is uniquely situated to allow the developer to complete a certain project in a profitable manner. But the real estate developer’s inability to complete the first project without the parcel of land can be fully captured in terms of market value of either the essential parcel or the neighboring parcels of land. We can distinguish between the unqualified nonfungibility necessary to distinguish takings from taxes and the instrumental nonfungibility of the real estate developer’s desire for a particular parcel of land.

157. Radin’s theory of takings is built around the notion that property that is intrinsically related to the development of someone’s conception of themselves as a person
Such a subjective approach to property interests is not without foundation in the case law. Nevertheless, this Reconciling Theory would require a different outcome in a variety of cases. To begin with, this theory would have compelled a rejection of the coal company's takings claim in *Mahon*. The property in that case was certainly fungible to the mining company, which, as with the plaintiffs in *Leonard*, likely viewed its mineral rights as only "desirable because convertible into money." Comparing the Kohler Act's prohibition to the oyster-shell tax in *Leonard* demonstrates why, under this Reconciling Theory, *Mahon* was wrongly decided. As in *Leonard*, nothing in the constitutional law of taxation would have prevented the Pennsylvania legislature from enacting a tax on coal mining beneath land not owned by coal companies that would have "taken" from each coal company precisely the same value (in money) as the Kohler Act "took" in mineral rights. And, as the mineral rights "taken" by the statute were valuable to the coal company simply because they could be converted into money through market transactions, it is not clear why the state could not simply "take" some portion of them without having to go through the trouble of taxing the coal companies in cash just to "buy" back the same value in mineral rights. A should be entitled to greater legal protection against taking by the government than property that has only instrumental (or, as Radin says, "fungible") value to the person. See *Radin, Personhood*, supra note 22, at 986–88. And Radin understands her distinction between fungible and nonfungible property to be significant to the legitimacy of taxation. See id. at 990–91. 

158. See, e.g., United States v. Sperry Corp., 493 U.S. 52, 62 & n.9 (1989) (observing that it is "artificial" to view deductions from monetary awards as physical appropriations of property because money is fungible as compared with real or personal property); *Leonard & Leonard v. Earle*, 279 U.S. 392, 396 (1929) (assessing value of property from "standpoint" of owner).


160. Scholars have argued that requiring the government to condemn property and provide compensation for it encourages the government to use its power of eminent domain efficiently. See, e.g., Blume & Rubinfeld, supra note 21, at 598–99 (suggesting that the compensation requirement in takings law functions as a form of government insurance and encourages efficiency in the market for investors at all risk levels); Michael H. Schill, *Intergovernmental Takings and Just Compensation: A Question of Federalism*, 137 U. Pa. L. Rev. 829, 859–60 (1989) (arguing that "forcing the government to bear the real costs of its actions" via a compensation requirement promotes efficiency by incentivizing the use of property in ways most valuable to society). There are two responses to this so-called "fiscal illusion" argument in this particular context. First, it is far from obvious how government's incentives differ when, instead of simply confiscating property, it can impose a tax of equivalent value to the property that would be taken on precisely the same group of property owners. Second, and more generally, as Daryl Levinson and others have argued, governments do not appear to behave as rational economic actors such that requiring them to go through the process of condemning and paying for property would result in more efficient conduct. See Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. Chi. L. Rev. 345, 387 (2000) ("[T]he incentive effects of constitutional cost remedies are, as a general matter, simply indeterminate . . . ."); see also Kelman, supra note 2, at 113, 119–20; Daniel Shaviro, *When Rules Change: An Economic and Political Analysis of Transition Relief and Retroactivity*
similar analysis would likely apply to many of the Court's regulatory takings cases concerning land held for commercial development.\textsuperscript{161}

Likewise indistinguishable from taxation under this Reconciling Theory would be the taking of interest income discussed in \textit{Webb's Fabulous Pharmacies, Inc. v. Beckwith}\textsuperscript{162} and \textit{Phillips v. Washington Legal Foundation}.

In \textit{Webb's Fabulous Pharmacies}, the Court held that a county's retention of the interest on an interpleader fund deposited in the county court was a violation of the Takings Clause.\textsuperscript{164} In \textit{Phillips}, the Court held that interest earned on money deposited in a lawyer's trust account for clients was "property" of the client within the meaning of the Takings Clause.\textsuperscript{165} On this Reconciling Theory, however, because of its intrinsic fungibility, money would not be protected by the Takings Clause.\textsuperscript{166} Accordingly, as long as the state did not act arbitrarily or irrationally, its confiscation of money would be indistinguishable from taxation.

b. \textit{Land-Use Exactions}. — Within the framework of this Reconciling Theory, it would be fairly easy to resolve the open question surrounding the applicability of the Court's exactions jurisprudence to state demands for monetary payments as a condition of permission to develop. Because monetary exactions demand payment of fungible property in order to obtain permission to develop property, they constitute a Regulatory Taxing of development that should be analyzed as a tax and not subjected to the Court's \textit{Nollan/Dolan} brand of heightened scrutiny.

Moreover, even in the many cases in which exactions are demanded in kind, the property to be handed over to the state may well qualify as

\begin{itemize}
\item \textsuperscript{161} See, e.g., Palazzolo v. Rhode Island, 533 U.S. 606, 611 (2001) (addressing takings claim brought by an individual developer seeking to convert wetlands into commercial beach); City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 693-94 (1999) (addressing takings claim brought by a commercial developer); Radin, Residential, supra note 147, at 372-74, 377 (characterizing residential rental property held by large-scale landlords as subjectively "fungible").
\item \textsuperscript{162} 449 U.S. 155, 162-65 (1980).
\item \textsuperscript{163} 524 U.S. 156, 170-72 (1998).
\item \textsuperscript{164} 449 U.S. at 164-65.
\item \textsuperscript{165} 524 U.S. at 172. In a follow-up case to its decision in \textit{Phillips}, the Court held that although the interest generated by IOLTA accounts constituted property of the lawyer's client, the appropriation of that interest by the state did not violate the Takings Clause because the client's money would not have generated any interest income but for the IOLTA program that effected the appropriation. See Brown v. Legal Found., 538 U.S. 216, 237-40 (2005).
\item \textsuperscript{166} See supra notes 148-153 and accompanying text.
\end{itemize}
fungible in the subjective sense relevant to this Reconciling Theory. While the residential property at issue in Nollan was probably (subjectively) nonfungible, the commercial property in Dolan is less easy to categorize. Radin at times suggests that all commercial property is fungible in the subjective sense because its primary value is its ability to generate money for the owner through market transactions. But such property may well serve multiple purposes. The wedding ring in the hand of the artisan jeweler may simultaneously be both a source of personal pride as well as a means of making a living. And, as Radin acknowledges, the jeweler's business as a whole is likely to possess value to the jeweler well in excess of the price it would fetch on the market if sold. Indeed, it generally seems safe to assume that individually owned small businesses, such as the hardware store at issue in Dolan, will be subjectively nonfungible to their owners.

Whether that nonfungibility extends to interests in land that do not directly affect the viability of that business is a more difficult question. Land that is directly bound up with the operation of the business, as would be the case were the business a small farm, would share in the nonfungible value attributed to the business itself. Such land is, in a sense, the same as the (nonfungible) business. But when, as in Dolan, the land interests at stake do not appear to immediately relate to the functioning of the business, the conclusion that the land partakes of the nonfungible nature of the business is harder to sustain. Moreover, where, as is often the case, land-use exactions target large-scale developers for whom the land is typically a mere commodity, a focus on fungibility suggests that the exactions should be treated as permissible taxes.

In sum, under this Reconciling Theory, property that is fungible to its owner (that is, property that is valuable only because convertible into money via market transactions) would enjoy a lower level of protection under the Takings Clause than nonfungible property. Thus, state action (including exactions) affecting such property would not constitute a taking. This Reconciling Theory would therefore allow the state to seize fungible property from its owners, as long as it did so in a nonarbitrary way and for rational reasons.

167. See Radin, Personhood, supra note 22, at 960.
168. See id. at 987 (noting that for a business owner, ownership of physical facilities that make her business possible may be "bound up with her being to some degree").
169. See Knetsch & Borcherding, supra note 144, at 240–41 (discussing nonfungible nature of residential land and land used for family-owned businesses and farms); Radin, Residential, supra note 147, at 372–74 (suggesting that small landlords who live in their units attach more than fungible value to their business).
170. See Knetsch & Borcherding, supra note 144, at 240–41.
B. Defining "Taken" to Exclude Taxation from the Takings Clause

1. The Reconciling Theory

a. "Taking" Property. — Another possible strategy for reconciling takings with the fixed point of taxation is to define when property is "taken" within the meaning of the Takings Clause in such a way as to exclude taxes while still requiring compensation for the most troubling state intrusions on individual property rights. One easy solution along these lines would be to return to the status quo at the time of the framing, when the Takings Clause was understood to bar only uncompensated seizure of property through the power of eminent domain and not to reach the mere regulation of property. Such a move would undo the past two decades of regulatory takings jurisprudence and largely set aside Holmes's requirement that the state pay compensation for regulations that go "too far." Although both elegant and textually sound, this bold solution has been endorsed by few.

b. Singling Out. — A more promising means of distinguishing takings from taxes on this ground is to focus on the general applicability of tax measures as contrasted with the tendency of activities commonly viewed as "takings" to single out individual property owners for uniquely unfavorable treatment. The normative force behind this distinction can be variously described as rooted in concerns with transparency in government, a well-functioning political process, or general fairness.

i. Transparency. — In his dissent in Pennell v. City of San Jose, Justice Scalia suggested that the different treatment afforded to takings and taxation under the Fifth Amendment is rooted in a concern with transparency in the political process. Scalia identified the essence of a taking as its singling out of an individual to bear "public burdens" that

---

172. See supra notes 27–30 and accompanying text.
173. See Doremus, supra note 18, at 3 ("The [regulatory takings] doctrine responds to some widely held intuitions, and the Court shows no sign of renouncing it."). But see Byrne, supra note 52, at 91 (arguing that the Court should eliminate the doctrine of regulatory takings).
178. 485 U.S. at 21–22 (Scalia, J., concurring in part and dissenting in part).
"should be borne by the public as a whole." Scalia suggested that the costs of such public burdens should be compensated, not primarily to protect individuals with little power to influence government, but to force the political process to consider more carefully the aggregate costs created by its regulatory actions. His argument in *Pennell* thus incorporated reasoning similar to that of scholars who argue that the purpose of the Takings Clause is to avoid overregulation due to the "fiscal illusion" created when costs are transferred "off the books" to the individuals affected by regulation. Under such a view, taxes would not fall within the purview of the Takings Clause because they are more visible than regulation and therefore subject to more considered democratic decisionmaking.

**ii. Public Choice.** Similarly, public-choice theorists identify takings by their tendency to single out certain property owners to bear public burdens. But, on their view, the problem with singling out a property owner is a regulation's propensity to affect isolated individuals, preventing them from obtaining compensation (over the long run) through

---

179. Id. (internal quotations omitted).

180. See id. at 22 ("The politically attractive feature of regulation is not that it permits wealth transfers to be achieved, but rather that it permits them to be achieved 'off budget,' with relative invisibility and thus relative immunity from normal democratic processes.").

181. See supra note 160. Scalia's position in *Pennell* is actually a modified version of these fiscal illusion arguments, since his argument would allow the "off budget" transfer of costs to the individual when the costs in question are in some sense caused by the individual's own activities. See 485 U.S. at 22 (Scalia, J., concurring in part and dissenting in part).

182. See 485 U.S. at 22 (Scalia, J., concurring in part and dissenting in part). Of course, Scalia's argument, and the argument of fiscal-illusion theorists in general, assumes that the processes by which revenue-raising measures are enacted are particularly transparent or democratic. This is a highly questionable assumption, especially when one considers the complexity of the tax code, which prevents the average citizen from exercising much democratic control over the mechanisms of taxation. See Susan B. Hansen, The Politics of Taxation: Revenue Without Representation 265 (1983) ("In many cases, tax policy changes have taken place behind closed doors, as a result of fiscal illusions or elite manipulations, after elections in which they played no part or elections in which parties or candidates failed to take articulate opposing positions."); Kelman, supra note 2, at 118 ("Polling evidence ... suggests ... that popular awareness of both the incidence and relative distributive burdens of explicit taxes is low."); Thomas J. Reese, The Politics of Taxation, at xi (1980) ("[T]ax expenditures make it possible for Congress to give financial aid to specific groups or industries that could never obtain direct appropriations from the government because of the public outcry that would arise."); id. at 3 (calling the Internal Revenue Code a "legal maze" and a "house of horrors"); Surrey & McDaniel, supra note 95, at 104 (identifying complexity of the internal revenue code as a reason for popularity of "tax expenditures," which, as a result of that complexity, are able to avoid democratic scrutiny); Steven M. Sheffrin, Perceptions of Fairness in the Crucible of Tax Policy, in Tax Progressivity and Income Inequality 309, 311-14 (Joel Slemrod ed., 1994) (arguing that members of the public are only dimly aware of the tax structure or even how much they actually pay in taxes).
democratic political processes. Saul Levmore has put forward such a public-choice approach to resolving the tension between takings and taxation. After setting up that tension as one with which every theory of the Takings Clause should have to grapple, Levmore argues that a public-choice theory of takings is capable of solving the puzzle.

The difference between takings and taxes, Levmore argues, is the ability of people affected by taxes to organize and protect their interests. Taxes typically affect "organized interest groups" that are "meant to take care of themselves in the political arena." Takings, on the other hand, which are exemplified by the state's power of eminent domain, tend to be singular episodes aimed at relatively small numbers of citizens who are likely to find it difficult to band together to challenge a "once in a lifetime" burden imposed by the state. "It is unlikely," Levmore contends, "that such individuals can compete effectively in the political arena and it would be undesirable for them to try; the transaction costs of individual involvement in politics is [sic], after all, quite great." As a consequence, such "occasional individuals" find their interests protected by the Takings Clause.

Thus, on Levmore's view, it is not puzzling that taxes are not takings, because taxes are generally levied on such bases as corporate revenues, all real property owners, cigarettes, fuels, and retail sales, which either draw in to the tax base an enormous number of citizens (so that there is every reason to think that the magnitude and design of each tax will be of great interest to politicians) or affect interest groups that can be well organized.

Given that most "taxes are likely to be the subject of careful political bargaining," Levmore continues, "there is no need to import an explicit market mechanism as protection against exploitative majoritarian rule."

iii. Fairness. — Perhaps the dominant understanding of the normative significance of singling out within the takings context is that it simply is unfair in some fundamental sense. Thus, takings, understood as...
state actions that single out certain property holders for especially unfavorable treatment, require compensation to restore a fair apportionment of burdens among the members of society. Taxes, however, do not require compensation because they are fairly distributed across a broad cross section of society. The Court has expressed this fairness explanation for the singling out definition of takings in its repeated citation of *Armstrong v. United States,* which stated that the Takings Clause is 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." Some scholars have placed this fairness explanation at the heart of their theories of what constitutes a taking. John Fee, for example, argues that the Takings Clause creates "a right to be treated legally the same as other property owners in a community, or to receive compensation when differential treatment is justified." In his view, taxes are not takings because they are spread over the entire population through a series of general provisions. Indeed, takings are taxes gone bad. "The problem of eminent domain," Fee argues, "is essentially one of discriminatory taxation, which the government corrects through the provision of just compensation." the public from loading upon one individual more than his just share of the burdens of government." (quoting *Monongahela Navigation Co. v. United States,* 148 U.S. 312, 325 (1893))).


196. See, e.g., Fee, supra note 33, at 1004 (suggesting that "the law of regulatory takings is commonly understood as a defense for individuals against government actions that are extreme and unreasonable as applied to the individual, rather than as a guarantee of equal treatment among members of a community"); Michelman, Ethical Foundations, supra note 19, at 1223 (stating that risks of unfairness are low when "burdens similar to that for which compensation is denied are concomitantly imposed on many other people," which indicates "that settlement costs are high and that those sustaining the burden are probably incurring relatively small net losses—else, being many, they probably could have been mobilized to deflect the measure which burdens them").

197. Fee, supra note 33, at 1005.

198. Id. at 1039. In setting forth his comparative theory of the Takings Clause, Fee argues that focusing on the extent to which a regulation singles out a property owner helps resolve the notorious "denominator" problem (determining the scope of the relevant preregulation property interest). See id. at 1041. But, as with the denominator problem, the question of discriminatory treatment requires a baseline for comparison. Fee assumes that the proper baseline is established by the regulation under consideration and that the question whether the regulation discriminates against a property owner reduces to the question whether it distinguishes among property owners. Perhaps by considering the regulatory treatment of a particular claimant from a perspective that includes several regulations over an extended period of time, however, the claimant is, on balance, treated equally to other property owners even though the property owner in question might appear to be treated less (or more) favorably than others when viewed in light of one particular regulation at one moment in time. See Daryl J. Levinson, Framing Transactions
2. Regulatory Taxings

a. Incidental vs. Intentional Singling Out. — As with the attempt to reconcile takings and taxes by defining "property" in the Takings Clause to exclude fungible property, the attempt to distinguish taxes from takings solely on the basis of the generality of tax measures creates a large category of Regulatory Taxings. In this case, the category comprises all government actions that would be deemed takings under current doctrine but that do not sufficiently single out property owners in a way that (under this theory) distinguishes them from taxes. The content of this category, however, will depend on what precisely one means by singling out.

To begin with, singling out must refer, at a minimum, to the number of people affected by a government measure. Of course, in addition to simply tallying up the sheer number of people on whom any costs whatsoever are imposed, there must also be a focus on the relative extent of those costs. In other words, determining whether a regulation singles out particular property owners to the extent necessary requires courts to estimate the number of owners in the jurisdiction asked to bear comparably heavy burdens. For example, in the case of a regulation that imposed costs of one dollar on every resident of a jurisdiction respectively, but one million dollars on one unlucky individual, an analysis of the degree to which the regulation singled out would treat the measure as one that focused its costs on one individual, not as one that spread its costs over the entire community. Determining which particular burdens are sufficiently similar for the purpose of measuring the breadth of a regulation's impact will be as much art as science.

in Constitutional Law, 111 Yale L.J. 1311, 1339-45 (2002) [hereinafter Levinson, Framing]. Such locally uneven regulatory treatment is typical of interest groups operating in an environment where decisionmaking is characterized by logrolling. As Daryl Levinson has observed, "A given statute or regulation might look like pure rent-seeking, divorced from any legitimate policy goal, when considered in isolation, but become perfectly comprehensible and justifiable when recognized as the political compensation paid to some constituency or interest group in exchange for support on a different statute or regulation." Id. at 1352. Ultimately, however, a focus on the individual regulation probably holds up against Levinson's observations about the realities of the legislative process. If a "taking" is defined as a government measure that singles out a property owner for adverse effects, it is not arbitrary, when determining whether a taking has occurred, to limit one's view to the effects of the regulation being challenged. But this victory over the denominator problem at the stage of determining whether a regulation singles out a property owner merely delays the moment of reckoning with the "framing" issues explored by Levinson to the "just compensation" stage of takings analysis. See infra Part II.C.1.b.

199. This does not mean that such a regulation would constitute a taking, or even that it singles out the burdened property owner in the necessary sense. See infra notes 202-204 and accompanying text.

200. In addition to the "framing" issues identified by Levinson, see supra note 198, the difficulty of determining precisely how to measure the impact of a regulation on a property owner introduces further complexity into the equation. Do we, for example, consider the absolute cost of the regulation imposed on property owners or its subjective impact? If a regulation imposes $1,000 of costs on every person in a jurisdiction made up
On one view, there is nothing more to the singling out analysis than simply measuring the sheer number of property owners on whom roughly comparable burdens happen to fall. From this standpoint, a regulation singles out a property owner when it imposes comparable costs on only a small number of property owners relative to the total number in the regulating jurisdiction. This focused burden appears to be the sort of singling out that concerned Justice Scalia in Pennell. The more people whose bottom lines happen to be affected by a regulation, the less likely it is that the regulation will slip under the democratic radar.201

There is something odd, however, about the argument that the singling out of concern to the Takings Clause is nothing more than the varying disparate effects of a generalized policy on particular individuals. On such a view, a tax measure or regulation might be valid one day and invalid the next, depending on its constantly changing effects due to shifts in the underlying distributions of property on which it operates.202 There is no indication in the tax jurisprudence that the constitutionality of a tax depends on such transient facts about the world.

Alternatively, the problems inherent in the effect-focused understanding of this Reconciling Theory suggest that the singling out required here may call for an intent to treat one person (or, perhaps, a small group of people) differently from others who are similarly situated.203 Such an “intent” requirement would be satisfied whenever government action is designed with the knowledge and desire that its impact be limited to a particular set of people. It would not be enough, on this view, for a regulatory formula merely to have the (incidental) effect of adversely impacting a small number of people (or even just one person). In addition, the government’s action would have to be designed to target its adverse effects on a small subset of the population. The existence of alternative means of achieving a regulation’s policy goals—means that spread the adverse effects of the regulation more evenly over the population—would seem to be extremely relevant to the question whether a leg-

201. See Pennell v. City of San Jose, 485 U.S. 1, 21–23 (1988) (Scalia, J., concurring in part and dissenting in part) (pointing out that the attractiveness of burdensome economic regulation is its “invisibility” to the unaffected electorate, and questioning whether broadly applicable wealth transfers would pass democratic muster as easily).

202. This fluidity is a problem with Kades’s attempt to distinguish constitutional from unconstitutional taxes primarily on the basis of a tax measure’s effects on taxpayers. See Kades, supra note 11, at 223–44. Depending on how property is distributed, the same tax might be constitutional one year and unconstitutional the next.

203. See Fee, supra note 33, at 1050–53 (suggesting that regulations burdening only a small portion of an identical class of owners are more likely to be induced by questionable motives rather than “legitimate public values”); Krotoszynski, supra note 104, at 734–37 (“A reviewing court should not find a regulatory taking when a law or regulation affects a small number of entities exceptionally, but government lacks the requisite expropriatory intent.”).
Such an interpretation of singling out coheres with the concerns of the public-choice theorists, who predict that when given the option, the government will pursue policies whose adverse effects fall narrowly on groups that are unable to defend themselves in the political process. It is also consistent with the views of theorists concerned with the fairness of government decisions that narrowly allocate losses resulting from policies designed to benefit society as a whole.

It is important to acknowledge that regulations that are intended to single out an individual for adverse treatment may be hidden behind language of general applicability. That was the situation in American Pelagic Fishing Co. v. United States. In that case, the Court of Claims found a taking of property when certain fishermen—those who feared the impact of the plaintiff's larger boat on their own profitability—used their influence to have Congress withdraw the plaintiff's fishing license by enacting a provision that, although general in its terms, was (intentionally) written so narrowly that it applied only to the plaintiff. It was Congress's questionable motives in intentionally singling out the plaintiff for adverse treatment (the general language of the congressional enactment notwithstanding), and not the fact that the statute happened to have a uniquely harmful effect on the plaintiff, that played a decisive role in the court's

---

204. Consider Eric Kades's hypothetical "Bill Gates tax." See Kades, supra note 11, at 190. Such a tax would single out Bill Gates and run afoul of the Takings Clause under this Reconciling Theory only if the intent behind it were to single out Bill Gates for especially adverse treatment. But if the goal of such a tax were to place an effective limit on the income a person could earn and Bill Gates were the wealthiest individual in the country, it is possible that there would be no alternative means of achieving the stated policy goal (capping income) that did not concentrate its costs on Bill Gates. Such inequality-capping taxes are not without precedent. The highest marginal tax rates under the federal income tax reached 79% in the 1950s, see Veronique de Rugy, High Taxes and High Budget Deficits, Tax & Budget Bull. (Cato Institute, Washington, D.C.), Mar. 2003, at 1, available at http://www.cato.org/pubs/tbb/tbb-0303-14.pdf (on file with the Columbia Law Review), a level likely intended to discourage incomes beyond a certain amount. And, during colonial times, several jurisdictions instituted taxes aimed at preventing the accumulation of landed estates beyond a certain size. See Eric T. Freyfogle, The Land We Share: Private Property and the Common Good 52–55 (2003). Thus, an explicitly redistributive, progressive tax would not necessarily single out a property owner in the relevant respect. In contrast, some rent-control statutes might well single out landlords in the relevant respect. See, e.g., Fischel, Paradox, supra note 177, at 893 (suggesting that certain mobile-home rent-control laws unfairly single out mobile-home park owners to bear a substantial economic loss that could easily be spread over society as a whole without undermining the policy goals of protecting mobile-home tenants).

205. See, e.g., Levmore, supra note 10, at 308; Treanor, Original Understanding, supra note 15, at 856.

206. See Fee, supra note 33, at 1003–07.

determination that a taking had occurred. Thus, even generally worded provisions might satisfy the singling out requirement under this Reconciling Theory if the intent behind such provisions was indeed to single out. But mere disparate impact (as with Proposition 13) not conjoined with such intent would not suffice.

b. Generally Applicable Regulations. — In order to understand the scope of the Regulatory Taxings generated under this interpretation of the Reconciling Theory, it is also important to keep in mind the nature of the constitutional fixed point provided by taxation. In particular, it is crucial to remember that, as Mark Kelman has observed, the degree of singling out permitted even for so-called "general" tax provisions can be quite extreme. The Court has approved steeply progressive taxes that were intentionally aimed at very small segments of the population. The 1894 income tax, for example, applied to just one-tenth of 1% of households. And the federal income tax upheld by the Court in Brushaber applied to just 4%. Similarly, the current estate tax affects only 2% of households. Moreover, as demonstrated by California’s Proposition 13, broadly applicable tax measures are permitted to treat taxpayers—even those who are similarly situated in terms of ability to pay—in dramatically different ways, as long as there are plausible policy explanations for the differential treatment that satisfy the low threshold of rationality. It is therefore apparent that, for this Reconciling Theory to work in light of the fixed point of taxation, the degree of singling out or unequal treatment that must be present for a measure to count as a taking must be very high.

It is clear that this Reconciling Theory identifies as a taking the paradigmatic case of an individual act of eminent domain, such as the seizure of a person’s land to build a post office. An individual who suffers such a taking of her property is singled out. Despite its ability to justify the law’s requirement to compensate for eminent domain, however, this theory has difficulty accounting for the treatment of other, equally paradigmatic,  

---

208. See id. at 49 (“Plaintiff could not assume that the regulatory regime would remain static, but it had no reason to anticipate that Congress would render the regulatory regime uniquely unavailable to it. Plaintiff could not have anticipated that Congress would single it out to revoke its permits by legislation.”).

209. See Kelman, supra note 2, at 59, 72–73 (arguing that only taxes that single out a taxpayer as an individual run afoul of the Constitution). If taxes varied among individuals solely on the basis of ability to pay, the singling-out theory might explain differential taxation on the ground that taxes, though apparently uneven in absolute terms, impose relatively even burdens when ability to pay is considered. But, as the tax cases demonstrate, the Court has allowed wide variation in tax burdens even when those variations have nothing to do with taxpayers’ financial resources. See Nordlinger v. Hahn, 505 U.S. 1, 6, 18 (1992) (upholding against constitutional challenge a California property tax favoring long-term property owners over newer owners).

210. See supra note 80 and accompanying text.

211. See supra note 80 and accompanying text.

212. See supra note 75.

213. See supra notes 83–88 and accompanying text.
examples of takings. For example, the theory would arguably treat as Regulatory Taxings even state seizures of land from individual landowners as long as those seizures affected a sufficiently large number of people.\textsuperscript{214}

In addition, a variety of regulatory actions that would be deemed takings under current law would be indistinguishable from taxation under this Reconciling Theory. The New York law found to be a taking in \textit{Loretto v. Teleprompter Manhattan CATV Corp.}\textsuperscript{215} is impossible to distinguish from taxation on the basis of its tendency to single out. That law required all landlords to allow cable companies to install equipment on their property so tenants would be able to receive cable television.\textsuperscript{216} Focused as it is on the generality of a provision, this theory provides no means to distinguish such a regulation from permissible taxation.

The provision at issue in \textit{Mahon} would also almost certainly constitute a Regulatory Taxing under this theory. Since the Kohler Act applied equally to all coal companies whose mining activities created a risk of subsidence of property they did not own,\textsuperscript{217} it did not single out a particular property owner for adverse treatment any more than a permissible tax might focus on certain high-risk mining activities without running afoul of the Takings Clause. Similarly, \textit{Hodel} would probably also come out differently under this theory. The escheat provision in that case did not single out property owners to bear public burdens. Instead, like a tax (as defined by this Reconciling Theory), it applied to all qualifying property owners of small fractional shares of land, preventing them from passing those shares on to their heirs upon their deaths.\textsuperscript{218} Focusing on the extent to which a regulation singles out affected property owners, the escheat provision looks just like a tax.\textsuperscript{219}

c. Land-Use Exactions. — This Reconciling Theory would likely reject attaching any significance to the distinction between in-kind and monetary exactions, as such.\textsuperscript{220} In contrast, however, it would likely attach substantial significance to the distinction between exactions resulting from legislative enactment and those that are the product of ad hoc adjudication.

\textsuperscript{214} See, e.g., Peterson, supra note 177, at 135–36.
\textsuperscript{215} 458 U.S. 419 (1982).
\textsuperscript{216} See supra note 54 and accompanying text.
\textsuperscript{217} See supra notes 42–45 and accompanying text.
\textsuperscript{218} See supra note 55 and accompanying text.
\textsuperscript{219} Likewise, the imposition of a navigational servitude in \textit{Kaiser Aetna} would constitute a Regulatory Taxing under this Reconciling Theory if it were applied to any property owner who, like the plaintiff in that case, connected previously isolated waters to navigable waters. See \textit{Kaiser Aetna v. United States}, 444 U.S. 164, 184–87 (1979) (Blackmun, J., dissenting). As long as it were applied uniformly to a discernable category of property owners, the imposition of such a servitude would, under this Reconciling Theory, be the equivalent of a tax.
\textsuperscript{220} See supra note 62 and accompanying text. On the other hand, it might arguably support retaining the distinction between the two sorts of exactions on the ground that in-kind exactions are more likely to reflect impermissible government singling out of a property owner for adverse treatment than exactions of money.
Because of their greater potential for singling out individual property owners for unusually harsh treatment, ad hoc exactions would come in for heightened scrutiny.

Ultimately, this Reconciling Theory would dramatically reshape the geography of current takings doctrine. In order to cohere with the fixed point of the law of taxation, the theory would require the singling out of property owners before a provision could be deemed an unconstitutional taking. And by focusing on the generality of the challenged provisions and requiring a high degree of singling out, it might well permit interferences with property rights—such as mass confiscations of property—that under current doctrine would be characterized as virtually paradigmatic examples of takings.

C. Defining “Just Compensation” to Exclude Taxation from the Takings Clause

1. The Reconciling Theory

a. In-Kind Compensation. — The final type of Reconciling Theory rests on the notion that taxpayers are not entitled to compensation for the state’s taking of their money because they are implicitly compensated for their tax payments through the benefits the government provides using the tax revenues it has collected. Locke suggested such a quid pro quo justification for taxation when he argued that “every one who enjoys his share of the Protection [of the state], should pay out of his Estate his proportion for the maintenance of it.” Such a theory reconciles taxation with takings, however, only by dramatically reworking our understanding of the Takings Clause.

The notion that implicit, in-kind compensation could obviate the need for explicit compensation for government conduct that might otherwise constitute an unconstitutional taking was “hinted at” by Holmes in his Mahon opinion, when he suggested that government action that results in an “average reciprocity of advantage” would not constitute a compensable taking. In his classic 1967 article, Frank Michelman expanded on the notion that in-kind compensation might free the govern-

---

221. See supra note 63 and accompanying text.
222. Most tax scholars have rejected the notion that the current tax system can be justified on the ground that the money taxpayers are compelled to pay to the government in taxes is counterbalanced (at the individual level) by offsetting benefits. See, e.g., Blum & Kalven, Uneasy Case, supra note 82, at 35–39 (rejecting the benefits theory of progressive taxation).
224. It is important to note that this Reconciling Theory is neutral as to particular theories of whether property has been “taken.”
225. Epstein, Takings, supra note 1, at 197.
ment from the need to compensate in situations that might otherwise be deemed takings. Michelman argued that compensation requirements ought to be relaxed in situations where "there are visible reciprocities of burden and benefit." Although neither Holmes nor Michelman connected this notion of implicit compensation with taxation, its potential applicability to the problem of reconciling taxation with takings is obvious.

Indeed, Epstein places the idea of implicit, in-kind compensation at the conceptual center of his analysis of the relationship between taxes and takings. He argues that the government's power to tax is limited by its need to match as closely as possible the individualized burdens of taxation with the benefits individual taxpayers receive from the government activities funded by the taxes they pay. Gross mismatches between those burdens and benefits at the individual level violate the Takings Clause. The same analysis can be made for regulation. And several scholars have employed the notion of implicit, in-kind compensation (sometimes in combination with other factors) as a crucial means to distinguish between those regulations that constitute takings in need of compensation and those that do not.

Like Epstein, Fee employs the idea of in-kind compensation (in combination with an underlying theory of takings based on a singling out criterion) to identify compensable takings. He argues that government actions that single out an individual (or group) for treatment different from that afforded to others constitute takings that must be compensated unless the burdened individual (or group) can be shown to receive in-kind compensation in the form of benefits resulting from the very discriminatory treatment being challenged.

227. Michelman, Ethical Foundations, supra note 19, at 1223.
228. Epstein, Takings, supra note 1, at 283–305.
229. At least at the time he wrote his book, Epstein appeared to believe that his argument established the unconstitutionality of progressive income taxation. The basis for his belief was his argument that there was no evidence that the benefits the very well-off received from taxation increased rapidly enough to justify progressively increasing marginal tax rates. Id. at 297–98. In light of the absence of evidence concerning the actual increase in benefits with increasing income, Epstein argued that a flat-rate tax was best suited to minimize the risk of mismatch between tax burdens and benefits. See id. But it is far from clear why this would be the case. Uncertainty about the rate of increase (if any) of benefits received by the rich from government's use of tax revenue offers no direct support for any particular tax structure (whether a head tax, a flat tax, or a progressive tax). If anything, uncertainty calls for a determination as to which branch of government is best suited to guess at the correlation between wealth and the benefits of taxation. There is no reason to believe that unelected federal courts are best situated to make that call.
230. See id. at 104.
231. See, e.g., id. at 195 (concluding that takings analysis of regulations and taxation is the same); Fee, supra note 33, at 1057 (arguing that compensation is required when a "restriction on one group of owners only makes sense because of its benefits to other nonregulated members of the public").
232. See Fee, supra note 33, at 1057–59.
b. *In-Kind Compensation and the Denominator Problem.* — The notion of in-kind compensation contains its own version of the denominator problem: the difficulty of determining the proper scope of government action to be considered in deciding whether the benefits a person receives from government implicitly compensate that person for the property regulated, confiscated, or taxed by the government measure being challenged as a taking. As he does in the context of determining unequal treatment, Fee tries to get around the problem by arguing that the in-kind compensation (or average reciprocity of advantage) must derive from the very regulation being challenged. So, for example, strict fishing limits might be allowed, even though they impose a burden on a small population of people, because their imposition will be compensated in kind in the form of healthy fishing stocks that will directly benefit the affected fishermen. A provision preventing landowners from filling scarce wetlands on their property, however, would not provide in-kind compensation because the benefit generated by the burden imposed on wetlands owners would be shared by society as a whole. But Fee’s focus on the benefits generated by the particular regulation under consideration is just as arbitrary as the question-begging “conceptual severance” sometimes used to resolve the denominator problem in traditional takings law.

233. The denominator problem refers to the difficulty of deciding which preregulation property interest to use as a basis for comparison in order to determine the effect of the regulation on a property owner’s holdings. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1016 n.7 (1992).

234. See supra note 198.

235. See Fee, supra note 33, at 1059–60.

236. This example sidesteps the enormous complexities inherent in such an in-kind compensation analysis. For example, it is possible that, while fishermen in general might derive some benefit from such regulations, those benefits might not actually outweigh the costs imposed on each particular fisherman. A fisherman in the twilight of his career, for example, might derive far less benefit from the restrictions than a young fisherman just starting out, because the effects of declining fish stocks might not be projected to occur until well after the old fisherman’s anticipated retirement. At least in the short term, however, he would bear costs equivalent to those of his younger colleagues. Alternatively, it might be the case that the regulation of fishing is only cost-effective when spillover benefits enjoyed by society as a whole (for example, the benefits to sports fishermen and those concerned about the well being of the species) are taken into account. This could occur, for example, when the regulations are aimed at protecting animals of limited commercial value (say, sea turtles or dolphins) whose destruction is the byproduct of fishing operations targeting commercial species (say, tuna). Under such circumstances, the costs borne by the fishermen might well outweigh any reciprocal benefits they are likely to receive from the conservation measure.

237. See Fee, supra note 33, at 1063.

238. The term “conceptual severance,” which was first coined by Margaret Radin, refers to the practice of defining the relevant parcel affected by a regulation narrowly in order to maximize the perceived effect of the regulation on the plaintiff’s property interest. See Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 Colum. L. Rev. 1667, 1667, 1674–78 (1988). For example, the purchaser of a lot containing an apartment building surrounded by a large
To limit the implicit, in-kind compensation analysis to the specific regulation under attack is to ignore the likelihood that an individual or group burdened by one piece of legislation or one regulation may be able, as a consequence of that very burden, to extract certain benefits from the legislature or regulator in subsequent battles.\textsuperscript{239} Regulatory limits on fishing imposed by the executive branch, for example, might be balanced by a generous fishing boat buyback program enacted by Congress a year later precisely to soften the impact of the new fishing rules.\textsuperscript{240} Allowing fishermen to recover additional damages for a regulatory taking under such circumstances would give them a substantial windfall.

Once the door is cracked open to consider the benefits generated for burdened property owners by other regulatory provisions, however, it is difficult to find a logical stopping point for the in-kind compensation analysis.\textsuperscript{241} Is the proper inquiry the balance of burdens and benefits imposed on the property owner this year, this decade, or in his entire life? Or perhaps, as some have suggested, the inquiry is really the benefit to the property owner of life in society versus life in a hypothetical state of

\footnotesize{law that is denied (under an historic preservation statute) permission to build a series of townhouses on the lawn might try to assert that the relevant parcel to consider in determining whether a taking has occurred is the lawn by itself, as opposed to the entire lot, including the original apartment building. See Dist. Intown Props. Ltd. P'ship v. District of Columbia, 198 F.3d 874, 880-82 (D.C. Cir. 1999) (rejecting argument that landowner's lawn should be considered separately from contested property as a whole). \textsuperscript{239} See Levinson, Framing, supra note 198, at 1351-52 (noting that "the relevant transaction for analyzing redistributive exploitation through the political process is much larger than any particular statute or regulation"); Michelman, Ethical Foundations, supra note 19, at 1225 ("In the face of this difficulty, it seems we are pleased to believe that we can arrive at an acceptable level of assurance that over time the burdens associated with collectively determined improvements will have been distributed 'evenly' enough so that everyone will be a net gainer."); cf. Levmore, supra note 10, at 307-08 (noting that market mechanisms are unnecessary to protect organized interests because such groups are able to protect themselves against uncompensated burdens via the political process).


\textsuperscript{241} See Levinson, Framing, supra note 198, at 1343-45.
The judge considering the question of implicit, in-kind compensation is therefore faced with the same dilemma that confronts those attempting to delineate the boundaries of the relevant parcel for the traditional takings analysis. Focusing narrowly on the benefits conferred by the challenged regulatory provision is as arbitrary as concentrating solely on the portion of land affected by regulation. In addition to its arbitrariness, a rigid notion of just compensation that limited the in-kind compensation considered in the takings analysis to compensation contained within the very measure being challenged would make it impossible to sustain the constitutional fixed point of taxation as it is currently understood. The difficulty stems from the fact that it is frequently impossible to determine the benefits an individual taxpayer will derive from the taxes she pays.

The problem of calculating the "benefit" taxpayers receive from their taxes is often discussed in terms of the practical difficulty of measuring the individualized benefits a particular taxpayer derives from government services funded with her taxes. As many tax scholars have noted, it is virtually impossible to determine with any certainty whether an individual receives as much "value" from the government as he contributes in taxes. Tax scholars have therefore generally rejected the idea that progressive taxes can be justified on the ground that wealthy taxpayers receive greater benefits from government than others.

Before one gets to this practical problem of measurement, however, one must first deal with the even more fundamental difficulty that there is no way to know the benefits a taxpayer (or class of taxpayers) receives from a tax without first learning how the government will spend the money. And because most tax measures do not themselves specify how the money they generate will be spent, it is impossible to determine whether, on balance, the taxpayer is compensated in kind for his taxes.


244. The problem of determining the value of government services enjoyed by the individual taxpayer is related to the general problem of valuing a public good (i.e., a nonrivalrous good from which the individual cannot be excluded). See Blum & Kalven, Uneasy Case, supra note 82, at 35–39.

245. See id.; Hansen, supra note 182, at 198; Richard A. Musgrave, Equity and the Case for Progressive Taxation, in Tax Justice: The Ongoing Debate, supra note 80, at 9, 12; Richard A. Musgrave, Progressive Taxation, Equity, and Tax Design, in Tax Progressivity and Income Inequality, supra note 182, at 341, 342–43; see also Dane v. Jackson, 256 U.S. 589, 598 (1921) ("[T]he system of taxation has not yet been devised which will return precisely the same measure of benefit to each taxpayer or class of taxpayers, in proportion to payment made, as will be returned to every other individual or class paying a given tax . . . .").
without considering the vast diversity of ways in which the government spends its tax revenues, none of which can usually be determined solely by reference to the tax measure itself.\textsuperscript{246} Thus, depending on one’s theory of when property has been “taken,” an overly narrow search for in-kind compensation could result in most taxes being categorized as unconstitutional takings.\textsuperscript{247}

In order to use the concept of in-kind compensation to reconcile taxes with the doctrine of takings, however, it is necessary to define “just compensation” by reference to an extremely expansive notion of implicit, in-kind compensation. That expansion must proceed along two axes. First, it must be extended out temporally so as to include the broad range of government spending measures through which the taxpayer’s money is subsequently used in ways that directly or indirectly benefit the taxpayer.\textsuperscript{248} Second, it must be extended to take into account other tax

\textsuperscript{246} One wrinkle in this discussion of measuring the benefits of taxation arises in the case of government-imposed user fees and special assessments, which are, in essence, taxes that are earmarked to provide a particular service in connection with which they are charged. Such taxes make it possible to determine how the government will spend the money generated by the tax without having to look to other provisions. But both user fees and special assessments would still suffer to varying degrees from the problem of determining precisely what value a particular “user” places on the government services provided with the revenue generated by the tax.

This problem will run in two directions. First, certain users are likely to be overcharged for government services. This could occur whenever the government uses its monopoly power over legal goods (such as licenses) as the means for creating an artificial price of admission to a privately supplied good. Second, some users will be undercharged for government services. FAA operations, for example, are funded primarily through a fee imposed on each airline ticket sold. See generally John W. Fischer, Transportation Trust Funds: Budgetary Treatment, CRS Rep. 98-63 (Apr. 6, 1998), at 3–4 (describing role of airline ticket tax in FAA funding); Gen. Accounting Office, Issues and Deciding to Reinstate or Replace the Airline Ticket Tax: Testimony Before the Senate Committee on Finance, GAO/T-RCED-97-56, at 1–3 (Feb. 4, 1997) (same). But the FAA provides enormous benefits to private pilots who are able largely to free ride on the civil aviation system built up primarily for the benefit of commercial aviation. Accordingly, the FAA “tax” on airline tickets almost certainly represents a wealth transfer from the traveling public to private pilots.

User fees would be arguably less problematic under this particular Reconciling Theory than would special assessments because they are in some sense voluntary. The user often does not need to engage in the activity covered by the fee, and his decision to pay the fee suggests that he values the government services covered by the fee at least as much as the fee itself. See Kelman, supra note 2, at 84.

\textsuperscript{247} Fee appears to believe that most taxes apply with such generality that they need not be defended on the basis of the in-kind compensation they generate. See Fee, supra note 33, at 1099 (characterizing eminent domain as “discriminatory taxation”). But that assumption is hard to square with the diversity of taxation schemes the Court has consistently approved. See supra Part I.C. Many of those schemes are at least as selective and discriminatory as many of the regulations Fee would subject to the scrutiny of his takings theory.

\textsuperscript{248} In considering the ways in which the expenditures might benefit the taxpayer, the court would have to take an extremely broad view of what constitutes a benefit. If, for example, a purely redistributive tax measure—such as the Earned Income Tax Credit—is
measures so as to enable the reviewing court to consider ways in which relatively unfavorable treatment under one tax (for example, the estate tax) is counterbalanced by relatively favorable treatment under another tax (for example, the capital gains tax).

2. Regulatory Taxings

a. Generally. — Applying this broadened notion of in-kind compensation to claims of regulatory—and other—takings would radically reshape existing takings jurisprudence. An analysis of the two axes of in-kind compensation demonstrates why this is the case.

i. Scope of Regulations to Be Considered. — Along the scope axis, selecting the appropriate regulations with which to compare the burdens and benefits imposed upon the plaintiff is an exercise fraught with difficulty, though it is not necessarily unworkable. Under certain circumstances, it might be possible, at least in principle, to nonarbitrarily select clusters of related regulations for consideration within a burdens/benefits calculus. For example, in the case of heavily regulated industries such as telecommunications or banking, courts might be able to aggregate the effects not only of the regulation being challenged as a taking, but of the entire body of regulations applicable to the plaintiff under the regime in question. Unless the regulated entity clearly came out of the scheme as a net sub-

249. Cf. Levinson, Framing, supra note 198, at 1326–28. In his discussion of framing constitutional claims, Levinson identifies three dimensions along which takings transactions might be aggregated. The first two, aggregation over time and regulatory scope, correspond to the two I have discussed in the context of reconciling takings and taxes. The third dimension Levinson discusses, aggregation over groups of individuals, involves combining the benefits and burdens of particular regulations (or regulatory regimes) borne by separate individuals into one aggregate cost-benefit analysis. To argue with any credibility that taxpayers are “compensated” for the money they pay in taxes, the first two types of aggregation are required. Aggregating multiple regulations is required, as I have already argued, because a taxpayer’s tax burden is established by a multitude of different tax measures and, moreover, it is impossible to know what benefits a taxpayer will receive without knowing how tax revenue will be spent. Most tax money is spent through the passage of provisions that are separate from the revenue-generating provisions that create the tax. Further, temporal aggregation will be required to account for any time lag between the collection of tax revenues and the corresponding expenditures. It may turn out that, as an empirical matter, the third sort of aggregation is also required to reconcile takings and taxes. The Supreme Court has, on more than one occasion, suggested as much. See, e.g., *Dane*, 256 U.S. at 598; cf. *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 491 n.21 (1987) (arguing that “[t]he Takings Clause has never been read to require [a calculation of] whether a specific individual has suffered burdens . . . in excess of the benefits received” just as “no one suggests that an individual has a right to compensation for the difference between taxes paid and the dollar value of benefits received”); *Houck v. Little River Drainage Dist.*, 239 U.S. 254, 265 (1915) (“When local improvements may be deemed to result in special benefits, a further classification may be made and special assessments imposed accordingly, but even in such case there is no requirement of the Federal Constitution that for every payment there must be an equal benefit.”). But such aggregation is not required as a conceptual matter in order to determine whether a taxpayer is compensated in kind for the taxes she has paid.
stantial loser (compared perhaps to some counterfactual unregulated state of affairs), no taking would be found.

The precise nature of the relevant baseline necessarily depends on the substantive understanding of takings appended to the "just compensation" theory. For example, a strictly comparative theory, such as Fee's, might look to the treatment of other property owners under the regulated regime. In contrast, a theory of takings that focused on the effect of regulation on the regulated property owner without regard to differential treatment might look to a counterfactual unregulated baseline.\textsuperscript{250}

The Supreme Court has already hinted at a willingness to consider in-kind compensation generated from regulations other than the one being challenged. In \textit{Keystone Bituminous Coal Ass'n v. DeBenedictis}, for example, the Court rejected a coal company's claim that its property had been "taken" by a Pennsylvania statute requiring coal mining operations to leave columns of coal in place to prevent the collapse of land overlying mining operations.\textsuperscript{251} In discussing the notion of "reciprocity of advantage," the Court looked not only to the benefits derived by the plaintiff from the regulation being challenged, but also to the benefits derived from "the restrictions that are placed on others."\textsuperscript{252}

Similarly, such a big picture approach is, in rough form, the test that the Court already uses to analyze claims by public utilities that a particular rate set by a regulatory body is confiscatory.\textsuperscript{253} Courts considering such claims do not focus narrowly on one particular rate decision to determine whether the rate permits the public utility to make a profit on the particular service for which the rate is set. Instead, they look to the entire rate structure to ensure that the public utility is able to generate a reasonable return on its investment, giving substantial deference to the

\textsuperscript{250} See Lunney, supra note 242, at 733–38 (discussing Court decisions with regard to whether "consequential injury" compensation for federal land appropriation includes value created by state grants of authority to landowners).

\textsuperscript{251} 480 U.S. at 476–77, 506.

\textsuperscript{252} Id. at 491.

\textsuperscript{253} See Duquesne Light Co. v. Barasch, 488 U.S. 299, 307–10 (1989) (discussing evolution of Court's standard for judging whether public utility rate is confiscatory); see also Verizon Communications, Inc. v. FCC, 535 U.S. 467, 481–85 (2002) (exploring Court's attempts to set a rule for evaluating telephone rates). I do not intend (or need) to wade into the controversy over so-called "deregulatory takings." See generally J. Gregory Sidak & Daniel F. Spulber, Deregulatory Takings and the Regulatory Contract (1997); William J. Baumol & Thomas W. Merrill, Deregulatory Takings, Breach of the Regulatory Contract, and the Telecommunications Act of 1996, 72 N.Y.U. L. Rev. 1037 (1997); Susan Rose-Ackerman & Jim Rossi, Disentangling Deregulatory Takings, 86 Va. L. Rev. 1435 (2000). My point in citing the Duquesne Light line of cases is not to assess whether the Court has done a particularly good job of policing the boundary between takings and regulation in the specific context of utilities deregulation or in the utilities context more generally. Rather, it is just to note that the idea of considering whether a particular government action constitutes a taking against the backdrop of a larger regulatory regime, a move that is necessary in order to maintain the distinction between takings and taxes under this Reconciling Theory, has deep roots in at least one area of the Supreme Court's takings jurisprudence.
judgment of the regulating body. As a consequence, public utilities are routinely required to provide certain services at a loss (for example, residential telephone service in rural areas) as long as they are able to recoup the loss by charging more profitable rates for another service (for example, telephone service for urban businesses). This Reconciling Theory would, in effect, call for the application of such a holistic analysis to all takings claims.

ii. **Timeframe to Be Considered.** — The results of any calculation based on such a broad conception of just compensation would necessarily be extremely tenuous. That calculation would only become more difficult when variations in benefits and burdens over time are taken into account. Not only do regulated parties horse-trade benefits for burdens across simultaneously enacted regulatory measures; they may willingly suffer losses in one round of rulemaking in order to gain the capital to win a potentially more valuable victory in a later round. Therefore, in addition to looking beyond the costs or benefits of a particular regulation, courts would also have to look beyond the costs and benefits of the entire regulatory regime in place at any given time to determine whether present imbalances are offset (or likely to be offset) by past (or future) costs or benefits.

Again, the appropriate temporal scope to be considered in calculating in-kind compensation will turn to a certain extent on one’s substantive theory of the Takings Clause. On Epstein’s balance-sheet approach, there is no logical reason for failing to consider every possible past or future interaction between the property owner and the government. But a theory that viewed the Takings Clause as combating sudden and unpredictable government-induced changes in wealth would require a fairly tight temporal nexus between the “taking” and the “giving.”

iii. **Applying the Broad In-Kind Compensation Analysis.** — Applied across the board to takings claims, this broad notion of in-kind compensation would blow a hole in the side of the current, arithmetically rigid law of just compensation, turning what has been a fairly mechanical and uncontroversial part of the takings inquiry into a highly indeterminate, ad hoc analysis. In other words, this Reconciling Theory would expand much

254. See *Duquesne Light Co.*, 488 U.S. at 313–16 (noting that regulatory bodies should not be confined to any single formula for determining rates and that public utilities are only entitled to rates that generally yield the prevalent return on investment).

255. See Posner, supra note 6, at 28–42 (discussing “internal subsidization” as compared to other methods of public finance).

256. See Levinson, *Framing*, supra note 198, at 1341–45 (arguing that courts cannot analyze costs and benefits too broadly without “fram[ing] away liability for takings” altogether).

257. See id. at 1340.

258. See id. at 1343–45 (criticizing Epstein’s lack of justification for imposing strict limitations on aggregation over time and scope).

of the malleability surrounding the *Penn Central* regulatory takings test to include the assessment of the proper measure of just compensation once a taking has been found.

It would be impossible to cabin such an ad hoc compensation inquiry within the realm of regulatory (as opposed to physical) takings. Even the state’s obligation to provide explicit compensation for property seized under the eminent domain power would be subject to such a broad based, flexible analysis. After all, the state’s seizure of a person’s piece of land might well be counterbalanced by some other in-kind regulatory benefit.260

The best one could hope for under such a theory of just compensation would be a general evaluation of the fairness of imposing the burdens in question on the particular claimant in light of that claimant’s overall profile of governmental benefits, an impossible calculation to undertake with any great precision or confidence. Accordingly, courts would need to extend to the legislature wide latitude in determining the proper balance of benefits and burdens, and they would only overturn the legislature’s judgment in cases in which it was clear that a property owner who had been singled out for special burdens would be unlikely to obtain (and has not already obtained) any countervailing special benefit in exchange.

A court attempting to determine the extent to which a plaintiff had received (or would likely receive) implicit in-kind compensation for the regulatory burden imposed on his property would probably look to the ability of the particular plaintiff to have its interests considered in the legislative process. In other words, the “just compensation” Reconciling Theory would reduce to a public-choice analysis of the likelihood that the plaintiff would be able to balance regulatory wins and losses over an extended period of time.261

It almost goes without saying that the category of Regulatory Taxings generated by the “just compensation” Reconciling Theory would be large. At a minimum, the category would include all government takings (however defined) that are clearly counterbalanced by contemporaneous implicit, in-kind compensation, or “givings,” as some scholars have

260. See Levinson, Framing, supra note 198, at 1342–43.

261. Identifying which parties are more or less able to make themselves heard in the halls of power presents the principal obstacle to a fully developed public-choice takings theory. Some scholars have argued that “discrete and insular minorities” are disfavored in the rulemaking process and therefore need extra protection under the Takings Clause. See Treanor, Original Understanding, supra note 15, at 856. Others have argued that such minority groups are likely to be favored in the rulemaking process because of their organizational advantages. See Bruce A. Ackerman, Beyond *Carolene Products*, 98 Harv. L. Rev. 713, 723–34 (1985).
dubbed them. In order to work as a Reconciling Theory, however, the Regulatory Taxings category would need to go further and include even government takings that, while not clearly counterbalanced by contemporaneous givings, are loosely compensated by other government benefits granted by the state at other times and in other regulatory schemes.

For instance, in *Lucas*, even if one focused on the substantial burden imposed upon the plaintiff by the South Carolina regulations challenged therein, it would still be very difficult to conclude that the requirement that Lucas leave his two lots undeveloped deprived him of property for which he had not already received substantial implicit in-kind compensation. After all, Lucas had long been involved in the Isle of Palms development project. He and other developers had successfully constructed and sold thousands of homes, making millions of dollars in profits in the process. And that profit was made possible in part by highly targeted governmental programs, such as subsidized homeowners’ insurance for coastal landowners under the National Flood Insurance Program and government-funded beach replenishment, which artificially inflated housing values on the delicate coastal land South Carolina was attempting to preserve.

Similarly, in *Penn Central*, the owner of Grand Central Station had arguably been singled out for a special burden as a result of the city’s declaration of the station as an historic landmark. But, as the New York Court of Appeals observed in ruling against Penn Central’s takings claim, the value of Grand Central Station (and Penn Central’s other properties) had also been significantly enhanced as a result of targeted government largesse. As the state court argued, Grand Central’s value had been substantially inflated by the rights of way the city had granted so that

---


265. See, e.g., Daniel D. Barnhizer, Givings Recapture: Funding Public Acquisition of Private Property Interests on the Coasts, 27 Harv. Env'tl. L. Rev. 295, 318–41 (2003) (describing various government programs that have directly and specially benefited coastal landowners’ property values); Been, Lucas, supra note 264, at 251–56 (same).

266. See Penn Cent. Transp. Co. v. City of New York, 366 N.E.2d 1271, 1276 (N.Y. 1977) (“Absent this heavy public governmental investment in the terminal, the railroads,
trains could run in and out of the station, by the provision of public transportation from throughout the city to the terminal, and by favorable tax treatment for the terminal property. Moreover, after imposing its landmark restrictions on Grand Central Station, the city allowed Penn Central to sell the development rights of which it had been deprived to certain other landowners. In light of this constellation of burdens and benefits, and granting some deference to the regulating body, it would be difficult to say with any certainty that Penn Central had come out of its relationship with the government a net loser.

iv. Land-Use Exactions. — Finally, under this Reconciling Theory, the exactions cases, such as Nollan and Dolan, are very difficult to defend. Assuming the validity of the underlying development restrictions, the plaintiffs in those cases were compensated for the exactions with in-kind regulatory benefits in the form of permission to develop. As a consequence, any taking of property that may have occurred through the state’s imposition of the exactions would arguably have been counterbalanced by in-kind compensation of roughly equal value.

The extremely permissive notion of “just compensation” required to sustain the fixed point of taxation makes this particular category of Regulatory Taxings difficult to define. Nevertheless, it is clear that this Reconciling Theory would require courts to engage in an incredibly complex inquiry into the various ways in which a takings claimant has benefited from and been burdened by government action if their takings analysis is to cohere with the fixed point of taxation. In light of the deference that courts would have to show towards regulating bodies in order to be able to perform this task, the in-kind compensation Reconciling Theory would appear to require a comprehensive overhaul of takings doctrine. Indeed, it seems likely that the difficulty of engaging in this far-reaching calculation of government benefits and burdens would be so overwhelming that the need to undertake it would call into question the viability of any judicial oversight of takings in all but the most extreme cases. In other words, courts would be so ill suited to handle the inquiry this Reconciling The-

and connecting transportation, it is indisputable that the terminal property would be worth but a fraction of its current economic value.”).

267. See id. at 1275–76.

268. Although New York denied Penn Central permission to develop the air space above Grand Central Terminal, it allowed Penn Central to transfer those development rights it would have had (absent the landmark designation) to neighboring properties. See id. at 1277. As of 2003, a third of those rights had been sold for over $22 million. See Dan Monk, When It Comes to Making Cash, Sky’s the Limit, Bus. Courier, May 23, 2003, at 1.

269. Likewise, under this theory, the Court in Mahon should not have focused solely on the costs imposed by the state in the Kohler Act. It should also have looked to the ways in which the government in effect had subsidized coal mining through, for example, targeted tax benefits and research and development subsidies.

270. See Bell & Parchomovsky, Givings, supra note 262, at 610–12; Levinson, Framing, supra note 198, at 1345–49. Of course, this depends on the assumption that the state had the power to deny permission to develop in the first place.
ory would demand that they would have to defer in most cases to structural safeguards to ensure that property owners' regulatory benefits and burdens were fairly balanced, reserving searching takings scrutiny for situations in which the political process appears likely to break down.  

III. IMPLICATIONS OF REGULATORY TAXINGS FOR TAKINGS LAW

The exploration of various possible Reconciling Theories in Part II has not been undertaken primarily with an eye toward choosing one or another as the most plausible. Instead, its principal purpose has been to demonstrate how the takings doctrine as presently understood needs to be substantially scaled back in order to become consistent with the law of taxation. To that end, the persistent existence of the category of Regulatory Taxings across a range of Reconciling Theories suggests that the Court must choose between its recent expansion of Takings Clause review and the broad deference it typically demonstrates towards tax measures.

The choice between reformulating the Court's takings doctrine and abandoning its longstanding deferential review of taxation is like choosing between cutting off a withered limb and a healthy one. The Court's takings jurisprudence has been nearly universally condemned for its doctrinal and theoretical confusion. In contrast, the Court's constitutional tax jurisprudence has come in for criticism by only a small minority of scholars. Since the founding era, the Court has repeatedly and uncontroversially affirmed the virtually plenary power of the state to tax its citizens. To subject tax measures to scrutiny under the current takings law would constitute a radical departure from that settled understanding.

Thus, Part II's argument concerning the irreconcilability of the Court's takings jurisprudence with the longstanding constitutional law of taxation provides a strong argument for paring back current takings doctrine. Of course, this argument is only persuasive to those who would accept the constitutional law of taxation as a compelling fixed point. Absent such agreement, the deep inconsistency between takings law and taxation would be as much a reason to scale back the power of the state to tax as it is to restrict the application of the Takings Clause. But, given the broad rejection among courts and scholars of attempts to rework tax law in the image of this expansive vision of takings, there is reason to think that the fixed point of taxation is one that many, and perhaps most, would accept without objection. The obvious inquiry, then, is how the Court should revise its takings jurisprudence to render it more consistent with taxation.

271. See Levinson, Framing, supra note 198, at 1343.
272. See supra note 18.
273. See supra note 65.
274. See supra Parts I.B, I.C.
A. Translatable Regulations

At a minimum, regulations that can be translated easily into paradigmatically permissible taxes without any difference in the effect felt by the regulated property owner should never be treated as takings. The regulations in *Leonard, Mahon, Loretto,* and *Webb's Fabulous Pharmacies* arguably satisfy this standard. As the Maryland Supreme Court observed when it was considering the in-kind oyster shell "tax" in *Leonard,* the oyster packers would have been no better off had the state opted to impose a tax equal to 10% of the value of the oyster shells produced in the course of their operations and then simply used that money to buy back (or condemn) 10% of the packers' shells for the state's conservation efforts. In light of the obvious functional equivalence to the packers between the state's chosen means of obtaining the shells and a hypothetical tax on oyster packing, both the Maryland high court and the United States Supreme Court correctly declined to find that the state's confiscation of the shells constituted a taking.

Applying the same standard to *Mahon, Loretto,* and *Webb's Fabulous Pharmacies* suggests that the Court erred in finding takings in those cases. The provisions in each could have been easily translated into taxes that, under the Court's longstanding tax jurisprudence, would have merited little more than the most passing rational basis review. In *Mahon,* a surcharge or tax on mining activities that created the risk of subsidence would have had precisely the same effect on Pennsylvania Coal as the regulation invalidated by the Court. Similarly, even assuming that the property interests at stake in *Loretto* had substantial value, nothing would have prevented New York from imposing a tax on rental properties to fund the installation of cable equipment. That tax money could then have been rolled over to pay for condemnation of the property used to install the equipment. Similar translations could be formulated to convert the provision held to be a taking in *Webb's Fabulous Pharmacies* into a general tax that would have had the same (or worse) substantive effects on the property owners in that case. And many exactions, particularly legislative exactions payable in cash, are virtually indistinguishable from taxes. Thus, the translation rule calls into question the results in a num-

---

275. See *Leonard v. Earle,* 141 A. 714, 718 (Md. 1928) (observing that the argument that the state could indirectly seize oyster shells by taxing packers in cash only to turn around and condemn the same oyster shells, but could not simply take more direct route of seizing the oyster shells themselves, would interpret "the Constitution[] to insist upon the form without any objection to the substance"), aff'd, 279 U.S. 392 (1929).

276. See id.

277. Andrea Peterson has argued that the particular provision at issue in *Webb's Fabulous Pharmacies* might not have survived even rational basis review. See Peterson, supra note 177, at 73. If that were the case, the provision would have run afoul of the admittedly deferential review typically associated with judicial evaluation of tax measures. My argument is neutral as to whether Peterson is correct about the rational basis for the measure in *Webb's Fabulous Pharmacies.* My point is simply that the Court was wrong to analyze the provision using the more stringent standards associated with takings review.
ber of the Court's regulatory takings decisions and helps to clarify the limits on others.

Kelman takes the position that virtually all regulation is functionally interchangeable with taxation. But asserting such interchangeability is not the same as arguing that all regulation can be translated (in the sense that I am using the term) into permissible taxes. In arguing for the broad interchangeability of regulation and taxation, Kelman narrowly focuses on the ability of each type of government action to accomplish a particular regulatory goal. For example, he suggests that a complete ban on land development, such as the law at issue in Lucas, would be functionally interchangeable with the state's use of tax revenue to purchase a nondevelopment easement from the landowner. But the use of tax revenue to purchase a nondevelopment easement from a landowner would not constitute an effective translation (in the sense that I use the term) of a regulation prohibiting development because every property owner would clearly prefer the state's purchase of an easement to its unilateral imposition of the regulation. This is true even if, ultimately, both approaches would have the same effect of preventing the land from being developed. In order to qualify under the translation rule, however, a regulation must be fully interchangeable with a paradigmatic tax measure from the point of view of the burdened property owner.

B. Assessing the Existing Reconciling Theories

While the translation rule works well enough for assessing regulations that closely resemble paradigmatic taxes, its utility is limited without

278. Indeed, he argues quite expansively on this point: The ends that might be met through spending programs could generally be met as well through appropriately tailored regulations. At the same time, governments could almost invariably choose to spend the money raised through taxation to achieve the same goals regulatory schemes are designed to accomplish. Furthermore, citizens subject to regulation will generally have no private motive to differentiate a regulation from a tax. Their net income in a world without the regulation or the tax would be higher, so that they will experience the cost of regulatory compliance as indistinguishable from the cost of paying an explicit tax. At times, this interchangeability or substitutability of taxation and regulation is quite transparent . . . . At other times, this functional interchangeability may be less transparent but no less real.

Kelman, supra note 2, at 1–3.

279. See id. at 3.

280. Moreover, it is not clear that all regulation and taxation are interchangeable even in the way that Kelman understands that term. Returning to the example of the nondevelopment easement, the state's purchase of such an easement from the landowner is an imperfect substitute, even on Kelman's purely functional understanding of that term, for regulation prohibiting development. That is because it may well be the case that a property owner will not be willing to sell the state a nondevelopment easement. This is particularly likely to occur if the property is subjectively nonfungible to its owner. If the owner is not willing to sell at a price the state is willing to offer, then coercive regulation is the only means (short of eminent domain) for the state to accomplish its goal of preserving the property.
some elaboration of a workable means for distinguishing taxes from other forms of government action. Was the oyster shell provision at issue in *Leonard* a regulation that resembled a tax or merely an unusual sort of tax? Because it is impossible to know whether a regulation can be translated into a permissible tax without some understanding of what it means for something to constitute a tax, the translation rule suggests the need to formulate a workable Reconciling Theory (that is, a workable way of ascertaining the border between the realm of takings and taxation). Formulating such a theory, however, requires some consideration of the relative strengths of the various theories already discussed in this Article.

Each of the three Reconciling Theories explored in Part II correctly identifies indicia that help to distinguish taxes from takings. First, as the definitional Reconciling Theory correctly indicates, taxes are collected in fungible property. The in-kind taxes discussed in Part II, for example, were collected in commodities that could be translated into money without changing the substantive impact on the affected property owner. While it is relatively easy to imagine a tax collected in commercial animals like cattle or chickens or fish,281 most would rebel at the notion of taxes collected in animals with more sentimental value in our culture, such as dogs or cats.

It is equally true, moreover, that taxes are virtually always framed in general terms. Of course, as the case of steeply progressive taxation demonstrates, a permissible tax may well have the effect of imposing disproportionate burdens on relatively small groups of taxpayers.282 But even the narrowest taxes typically apply more broadly than the paradigmatic cases of eminent domain.283

Finally, it is at least arguable that people expect to derive some benefit from the government operations funded with resources the state has appropriated from them in taxes. Admittedly, this argument is substantially less compelling than the first two.284 Specifically, the force of the proposition is severely undermined by the incurable vagueness of the concept of "benefits."285 But it does find some purchase at the extreme,

281. Cf. Priest, supra note 120, at 1324 (describing types of goods used as "commodity money" for in-kind payment of taxes and debts in colonial America).

282. See supra Part I.B.

283. And, although courts have not had the occasion to address the issue, there is an intuition that a tax that imposes a sufficiently large burden on a sufficiently small group of people (or on an individual) might, under certain circumstances, violate the Takings Clause. See Kades, supra note 11, at 190 (stating that a tax targeting a handful of people offends the constitutional principle, invoked repeatedly by the Supreme Court, that the Takings Clause is designed to prevent public burdens to be forced upon a few when justly they should be borne by all).

284. See Laurie Reynolds, Taxes, Fees, Assessments, Dues, and the "Get What You Pay For" Model of Local Government, 56 Fla. L. Rev. 373, 384 (2004) (calling taxpayer's assertion that he will receive no benefits at all from services funded through his taxes "irrelevant[ ]").

285. See supra notes 241–245 and accompanying text.
where it is clear that a taxpayer will derive no benefits (or, more accurately, no benefits not shared with nontaxpayers) from the services to be funded using his tax money. Under such circumstances, courts sometimes find the tax to be invalid.286

While each of the theories discussed in this Article captures—albeit to varying degrees—some facet of the distinction between takings and taxation, each one also has its own weaknesses. Even within takings law, some propositions are so widely accepted as fixed points that any colorable understanding of the Takings Clause must incorporate them. Two in particular bear mentioning here. First, the state’s ad hoc seizure of property, even fungible property, from individuals should always constitute a taking.287 Second, the state’s seizure of a person’s home for a public works project must always be a taking as well.288

The definitional theory, which seeks to limit the Takings Clause to the seizures of nonfungible property (as contrasted with taxes, which involve obligations to “pay” fungible property to the state), is hard to square with the first fixed point. The state’s ad hoc seizure of goods from farmers or merchants in times of war without compensation lies at the heart of the type of government action the Takings Clause was intended to prevent.289 But as long as such goods are fungible, the definitional Recon-

286. See, e.g., Harrison v. Bd. of Supervisors, 118 Cal. Rptr. 828, 832-34 (Ct. App. 1975) (finding special assessment invalid where no special benefit would accrue to assessed property owners from a flood drainage project because there was no evidence of a flooding problem in the vicinity); Safeway Stores, Inc. v. City of Burlingame, 339 P.2d 933, 937-38 (Cal. Dist. Ct. App. 1959) (finding no special benefit of public parking facilities, funded by special assessment, to supermarket whose own parking lot already exceeded the size needed for peak operations); Fluckey v. City of Plymouth, 100 N.W.2d 486, 489 (Mich. 1960) (finding special assessment inappropriate where road widening would not confer a special benefit on residential property owners abutting the road but would instead impose a loss on them).

287. See, e.g., Matthew P. Harrington, Regulatory Takings and the Original Understanding of the Takings Clause, 45 Wm. & Mary L. Rev. 2053, 2067-75 (2004) (discussing concerns that motivated and shaped the Takings Clause, and emphasizing role that Continental Army’s impressions of goods played in process); Rubenfeld, supra note 18, at 1122-23 (stating that the Takings Clause “was probably intended to restrain the arbitrary and oppressive mode of obtaining supplies for the army, and other public uses, by impressment, as was too frequently practiced during the revolutionary war, without any compensation whatever” (internal quotation omitted)).


289. For further discussion of the history surrounding the Takings Clause, see supra note 287.
ciling Theory would render the government's uncompensated seizure beyond the reach of the Takings Clause.

Similarly, the attempt to reconcile taxation with takings on the ground that taxation applies to a large group of people, while takings single out individuals or small groups, is hard to square with the second fixed point. Consider, for example, the case of mass confiscations of land for large-scale public works, such as the state-backed dislocation of over four thousand residents of Poletown, Detroit, initiated in the early 1980s to make room for a General Motors plant. The seizure of people's homes must count as a taking, even if the seizure targets a large number of people in a concentrated area. It should not matter to the takings analysis that the affected homeowners were a significant voting bloc and had the ability to organize, ample reason to fight, and, as a consequence, the power to make themselves heard in the halls of government. Of course, most Poletown residents received some compensation. Yet the status of an uncompensated mass seizure on the scale of a Poletown would be uncertain under the singling out Reconciling Theory.

Finally, because of the vagueness of the "benefits" concept, the attempt to distinguish taxes from takings on the grounds that the taxes provide implicit, in-kind compensation creates—at least for those who reject Epstein's takings project—the specter of an even more indeterminate Takings Clause, one that extends the pervasive uncertainty surrounding regulatory takings to the realm of eminent domain. After all, if (given the fixed point of taxation jurisprudence) even highly progressive, redistributive income taxation is not a taking because it supposedly provides the taxpayer with some form of implicit, in-kind compensation for her taxes, then the operative notion of in-kind compensation must be an extremely attenuated one. Such a broad understanding would force courts, in every case in which a plaintiff asserts a claim for compensation under the Takings Clause (whether as a result of eminent domain or regulation), to analyze the entire profile of the individual claimant's interactions with the government—including her taxes—to determine whether the person is entitled to compensation or whether instead she would

290. See generally Jeanie Wylie, Poletown: Community Betrayed (1989). The mass confiscation of property in Poletown was not wholly anomalous. Indeed, such mass confiscations were typical of the public works projects engineered by Robert Moses in New York in the middle of the twentieth century. Over 1,500 apartments, for example, were destroyed to make way for just one mile of the Cross-Bronx Expressway. See Robert A. Caro, The Power Broker: Robert Moses and the Fall of New York 863–76 (1974). The construction of the Lincoln Center campus housing Fordham Law School was part of a series of Robert Moses redevelopment projects that involved the dislocation of tens of thousands of poor Manhattan residents. See id. at 20. Indeed, over the span of his career, Moses likely oversaw the condemnation of the homes of more than 500,000 people. See id. at 19–20.

291. See, e.g., Wylie, supra note 290, at 82.
likely be implicitly compensated in kind through the receipt of government benefits. \(^{292}\)

C. Composite Reconciling Theories

These weaknesses in the Reconciling Theories discussed above can be ameliorated to a certain extent by combining several of their elements into composite theories that can then be used to identify with more subtlety the boundary between takings and taxation. In this Part, I discuss two such theories. The first would incorporate the elements of all three of the Reconciling Theories discussed in Part II—fungibility, singling out, and in-kind compensation—while the second would focus on the first two elements.

The first composite Reconciling Theory would thus define taxes as obligations imposed on nonarbitrarily defined subgroups to pay fungible property to the state under circumstances in which the state can rationally claim that the taxpayer will receive offsetting in-kind compensation. Under this theory, a government action affecting property could not qualify as a tax (and would be properly subject to takings scrutiny) if it (1) affected a nonfungible property interest; (2) intentionally singled out a property owner for disparate treatment; or (3) in all likelihood would fail to provide implicit, in-kind compensation.

Such a composite theory would accommodate the fixed points within takings law that the individual theories fail to categorize as takings. It would treat as takings both mass confiscations of nonfungible property, as occurred in Poletown, and ad hoc seizures of fungible property. It would also limit the scope of the necessarily deferential in-kind compensation analysis to claims brought by the owners of fungible property affected by regulations that do not single them out for unfavorable treatment. In other words, the in-kind compensation analysis would apply only to the category of government conduct that most closely resembles taxation.

A second possibility would be to craft a composite Reconciling Theory that separates the first two elements (fungibility and singling out) from the third (just compensation). It would treat as taxes obligations imposed on nonarbitrarily defined subgroups to pay fungible property to the state, without regard to in-kind compensation. As long as a regulation affected fungible property and did not arbitrarily single out property owners, it would not constitute a taking. If the regulation either (1) targeted nonfungible property or (2) intentionally singled out a property owner (even the owner of fungible property), however, it would be sub-

\(^{292}\) As I have already discussed, such a broad analysis would be impossible. See supra Part II.C. As a result, it would in practice reduce to something resembling a public-choice analysis of whether the claimant falls within a category of property owners who were consistently unable to protect their own interests in the political process.

\(^{293}\) Fungible property would be understood as property that the complainant (or, perhaps a reasonable property owner in the claimant's position) would view as interchangeable with other pieces of property or money.
ject to heightened takings scrutiny. Such a theory could be paired with either a traditional just compensation analysis or the more amorphous in-kind compensation theory. If attached to the in-kind compensation theory discussed above, it would leave the state free to take property without (explicit) compensation from parties who appear able to protect their interests (over the long run) through the political process.

The second composite theory’s division of just compensation from the other two elements identified is more consistent with the broad structure of takings doctrine, which treats the taking of property as a concept separate from the requirement of compensation. The Takings Clause does not prohibit takings; it simply prohibits the taking of property without just compensation. If something is not a taking, compensation (in-kind or otherwise) should not be an issue.

As with the other Reconciling Theories this Article has explored, adopting this resolution of the tension between takings and taxation would generate a substantial category of Regulatory Taxings. Any nonarbitrary, broadly applicable regulation of fungible property would be beyond the reach of the Takings Clause. In addition, this Reconciling Theory would likely require the introduction of distinctions among classes of property owners. Because much of their property would be fungible in the relevant sense, large-scale owners of commercial property confronted with broadly applicable regulations would be entitled to substantially less takings protection than would individual owners of nonfungible property. This theory would also resolve some of the controversy surrounding land-use exactions. It would place legislated exactions targeting large-scale commercial developers in a category very close to taxation, subjecting such exactions to rational basis review. In contrast, it would place ad hoc exactions aimed at individual homeowners in a category very close to takings, thereby justifying heightened scrutiny of such measures. In short, this theory would require a considerable reworking of current takings doctrine.

It is important to recognize, however, that, as a definition of the boundary between takings and taxation, this Reconciling Theory would not constitute a substantive theory of the Takings Clause. That is, it would not definitively identify which situations rise to the level of takings and which do not. Instead, it would define a zone (that is, taxation and its substantive equivalents) in which government action would be more or less free from judicial takings scrutiny. It would, however, leave somewhat open, although not completely indeterminate, the question of precisely what will (or should) constitute a taking within the zone of heightened scrutiny.

294. In this respect, the composite theory would identify as wrongly decided the same cases identified by the translation rule.

295. In other words, the identification of a particular government action as one that affects nonfungible property or singles out property owners is merely a threshold inquiry to determine the propriety of applying heightened takings scrutiny. It decidedly does not
D. Narrowing the Takings Doctrine

Apart from any particular Reconciling Theory, the foregoing discussion of the conflict between takings and taxes suggests a number of possible changes in takings law that would serve to bring that doctrine, particularly as it relates to compensation for losses sustained due to regulation, into less direct conflict with the Court's constitutional treatment of taxation.

1. Fungible Property. — First, as with money, government action affecting fungible property should rarely be considered a taking. As the Court suggested in Leonard, even the state's confiscation of fungible property should not count as a taking unless it fails to resemble a "tax" for some other reason (for example, because it singles out a property owner in the relevant respect).\footnote{296} A fortiori, the same would be true for the mere regulation of fungible property.

In order to decrease the tension between takings and taxes without falling into pure formalism, the operative understanding of fungibility must be one in which property is fungible because, from the owner's perspective (or, perhaps, from the perspective of a reasonable person in the owner's position\footnote{297}), it is interchangeable in market transactions with another piece of property or with money.\footnote{298} Adherence to such an understanding, however, does not require opposition to the formulation of clear legal rules about the status of particular pieces of property or a commitment to a time-consuming and ultimately indeterminate inquiry into each person's subjective feelings towards her property.

Rather, it would be easy enough to craft general presumptions that would yield the correct conclusion for the vast majority of claimants. Land in the hands of a large developer or agribusiness consortium, for example, could be presumptively fungible. Conversely, land would be presumed never to be fungible in the hands of a homeowner or small farmer. Intellectual property could similarly be presumed fungible in the hands of a large pharmaceutical or chemical conglomerate, though not in the hands of an inventor or author.

2. Singling Out. — The tension between takings and taxes also suggests that the breadth of a particular regulation is a crucial consideration in determining whether a taking has occurred. While a large-scale confiscation of core nonfungible property, such as the family homes taken in Poletown, could never constitute a Regulatory Taxing, the number of people affected by government regulation should at least be relevant when considering a claimant's allegation that the government has taken

---

\footnote{296}{Leonard & Leonard v. Earle, 279 U.S. 392, 396–97 (1928).}
\footnote{297}{See supra note 155.}
\footnote{298}{See supra notes 144–154 and accompanying text.}
his property. On this view, the Court was wrong in *Lucas* when it suggested that the generality of a land-use regulation was utterly irrelevant to the takings analysis.

As with fungibility, there is some evidence that the Court already considers the generality of a regulatory provision in determining whether or not it constitutes a regulatory taking, its contrary statements in *Lucas* notwithstanding. For example, sensitivity to the relationship between a regulation's generality and its fairness was very likely at work in the Court's rejection of the takings claim in *Tahoe-Sierra*. Consideration of the generality of the government action being challenged should be a central, though not necessarily dispositive, part of any regulatory takings inquiry.

3. *Just Compensation*. — Finally, even when the nonfungible property interests of a class of property owners have been treated adversely or when a property owner has been singled out for adverse treatment under one regulatory provision, courts should be receptive to the possibility that the complaining property owner will be (or has already been) compensated in kind by favorable treatment under other regulatory measures. The consideration of such in-kind compensation, however, requires a more flexible notion of just compensation than the one embodied in current takings doctrine.

This is particularly true both in the context of regulatory takings and also when the Court is considering the effects of a particular government action on repeat players who can extract concessions in one round of legislative action on the basis of past losses. To focus on the losses imposed on such players by one defeat without considering past (or future) victories is to guarantee that such claimants will be routinely overcompen-

---


300. Id. at 1027 n.14 ("[A] regulation *specifically directed to land use* no more acquires immunity by plundering landowners generally than does a law specifically directed at religious practice acquire immunity by prohibiting all religions.").


302. The Court has already indicated its acceptance of such a pragmatic compensation inquiry in its discussions of taxation. As it noted in *Dane*, "the system of taxation has not yet been devised which will return precisely the same measure of benefit to each taxpayer or class of taxpayers, in proportion to payment made, as will be returned to every other individual or class paying a given tax." *Dane v. Jackson*, 256 U.S. 589, 598 (1921); see also *Houck v. Little River Drainage Dist.*, 239 U.S. 254, 265 (1915) ("[T]here is no requirement of the Federal Constitution that for every [tax] payment there must be an equal benefit."); *Cole v. City of La Grange*, 113 U.S. 1, 8 (1885) ("[T]he taking of property by taxation requires no other compensation than the taxpayer receives in being protected by the government to the support of which he contributes.").
sated. For such repeat players, takings and "givings" are frequently bound together, though not necessarily in the same provision.303

Several scholars have already suggested that the Court should take "givings" into account when calculating just compensation.304 But they have often done so without questioning the Court's adherence to its traditionally rigid compensation calculus.305 Yet, as Levinson has forcefully argued, once one accepts the principle of in-kind compensation, there is no logical stopping point for limiting the various forms of compensation that courts should consider or for restricting the relevant time period, whether past or future, to which courts should look.306

As the law now stands, once the court determines that a taking has occurred (an inquiry that includes consideration of reciprocity of advantage), the claimant typically receives as compensation the full market value of the affected property.307 This notion of damages fits well with a Takings Clause for which application is limited to actual expropriations of property by the state. On such a view, either the state has taken an owner's property completely or has not taken it at all. But this binary analysis breaks down in the more fluid context of regulatory takings, where the question whether property has been taken is more typically a matter of degree. It seems unfair for a court to grant the same compensation to a property owner who, in light of the average reciprocity of advantage created by government regulation, has barely suffered a loss as it would to a property owner who, all things considered, will likely derive little average reciprocity of advantage from government action.

The Court has shown some willingness to consider whether a plaintiff has received in-kind compensation, but it has traditionally done so in the context of determining whether a taking has occurred. In Tahoe-Sierra, for example, the Court refused to focus exclusively on losses imposed in the short term by a development moratorium, noting that such losses would likely be offset in the long term by the potential benefits to property owners from a coherent regulatory strategy for development in the Lake Tahoe basin.308 Similarly, in Penn Central, the Court considered

303. See Bell & Parchomovsky, Givings, supra note 262, at 596-98; see also Levinson, Framing, supra note 198, at 1351-52 ("Instead of framing and assessing particular instances of wealth redistribution one at a time, the post-New Deal Court has implicitly aggregated the economic benefits and burdens of pluralist politics over time and scope into a single, unified transaction . . . .").

304. See Levinson, Framing, supra note 198, at 1316-17; see also Barnhizer, supra note 265, at 298 (proposing "givings recapture mechanism" to counteract the high cost of flood-plan property acquisition programs).

305. See Barnhizer, supra note 265, at 298; Bell & Parchomovsky, Givings, supra note 262, at 596-98.

306. Levinson, Framing, supra note 198, at 1339-45.

307. United States v. 50 Acres of Land, 469 U.S. 24, 29 (1984) (observing that "[t]he Court has repeatedly held" that just compensation is to be measured by full market value of property at time of taking).

the fact that the plaintiff had been awarded "valuable" development rights that it could "transfer[]" to other property owners. But, in both cases, instead of considering whether such in-kind benefits amounted to just compensation, the Court treated the question as relevant only to determining whether a taking had occurred. It makes little sense to consider reciprocity of advantage when determining what should constitute a taking but ignore it when assessing what should constitute "just compensation."

The point is not just that courts should take "givings" into account within the traditional just compensation analysis. The Court should go further and extend the flexibility it typically displays toward the analysis of whether a regulatory taking has occurred to include the question, once a taking has been found, of what compensation is due. The result would be a shift from the current binary understanding of just compensation to a more flexible theory under which the damages due to a successful regulatory takings claimant would more closely resemble the compensatory logic of monetary damages for other constitutional violations of property rights. Instead of mechanically awarding the full market value of the item of property that has been "taken," the law would look to the net harm suffered by the claimant.

The Court took a small step in the direction of a net loss just compensation analysis with its decision in Brown v. Legal Foundation of Washington. In that case, the Court stated that the proper measure of damages is "the property owner's loss rather than the government's gain." It therefore refused to compensate the plaintiffs for interest income earned on their Interest On Lawyer Trust Accounts (IOLTA) when that interest could not have been earned but for the state-created program that in turn appropriated the interest to fund legal services for the indigent. In other words, the plaintiff's lost interest, which the Court assumed arguendo to be a taking, was offset by the state's in-kind compensation (the creation of the IOLTA program that made the plaintiff's loss possible), yielding a net loss of zero.

E. Theoretical Implications

My argument for narrowing the scope of regulatory takings doctrine based upon the irreconcilability of that doctrine, at least in its current

---

311. See, e.g., Piver v. Pender County Bd. of Educ., 835 F.2d 1076, 1082 (4th Cir. 1987) ("The basic purpose of damages under 42 U.S.C. § 1983 is compensatory.... [A]n award of substantial compensatory damages... must be proportional to the actual injury incurred.").
313. Id. at 1410.
314. See id. at 1419–20.
form, with the constitutional law of taxation, is concededly a pragmatic one. In that respect, this Article is in line with recent scholarly calls for a less theory-driven approach to defining the contours of takings law. But while my principal goal has not been to add to the voluminous literature arguing for one or another fundamentally normative approach to the Takings Clause, the pressure generated by the tension between takings and taxation has distinct theoretical implications.

For example, the in-kind taxation cases discussed in Part II arguably reflect one of the few instances in which courts have accepted Radin's argument that property not closely linked to personal identity should be granted a lower level of takings protection. Even more significantly, the composite Reconciling Theory I have proposed in this Part reinforces the plausibility of public-choice theories of the Takings Clause. Regulations that intentionally single out individual property owners are likely to harm politically powerless groups in ways that broadly applicable regulations may not. And regulations targeting nonfungible property may well serve as proxies for regulations that single out. In other words, the government actions identified as most problematic by the composite Reconciling Theory are also the actions that would be identified by public-choice theorists as meriting the closest scrutiny.

Even the idea of expanding just compensation along the lines suggested by the in-kind compensation Reconciling Theory lends itself to a public-choice understanding of the Takings Clause. Levinson correctly argues that pushing the in-kind compensation analysis beyond a certain point is incompatible with certain substantive approaches to the Takings Clause. This is particularly true of theories that identify takings as deviations from some baseline, whether that baseline is measured in terms of individual wealth or of equal treatment. If the net is spread widely enough, either temporally or in terms of the scope of government actions considered, it is virtually impossible to determine whether (and how much) the government is in fact treating a property owner "unequally" or depriving him of wealth.

The indeterminacy generated by the pressure to take a broader perspective on in-kind compensation might be viewed as a reason for thinking that the mechanisms for protecting property owners from abusive government regulation should not be primarily judicial, but rather struc-

316. See, e.g., Haar & Wolf, supra note 18, at 2158-68 (arguing that the Supreme Court should move away from the "bumpy and murky path of regulatory takings" to a more "manageable and intelligible" set of inquiries).
317. See Radin, Personhood, supra note 22, at 1004-05.
318. See LeVore, supra note 10, at 308; Treanor, Original Understanding, supra note 15, at 856. In addition, given the problem of determining the proper baseline for comparison, public-choice theory may help to determine when people are actually being singled out.
319. See Peñalver, supra note 103, at 258 n.153.
320. See Levinson, Framing, supra note 198, at 1336-38.
tural and political.\textsuperscript{321} The possibility of applying such an approach to the Takings Clause should not be dismissed out of hand. The Supreme Court has conceded, since \textit{M'Culloch v. Maryland}, that the principal safeguards against excessive taxation are similarly nonjudicial.\textsuperscript{322} And the power to tax is not obviously less dangerous than the power to regulate or to take.\textsuperscript{323}

But even an understanding of the Constitution that views its mechanism for protecting property rights as primarily structural and political need not completely eliminate the basis for judicial scrutiny of takings claims. William Treanor has argued that the original intent of the Framers was for the Takings Clause to serve as a backup against the failure of the political process to protect property owners.\textsuperscript{324} And there might well be reason to think that the structural safeguards of property built into the Constitution are likely to fail in certain systemic ways ascertainable in a judicial proceeding.

Treanor, for his part, has argued that political safeguards might be especially ineffective when regulations single out a property owner or affect certain traditionally disenfranchised groups, groups unable to engage in legislative logrolling.\textsuperscript{325} In a somewhat different vein, William Fischel has argued that the structural safeguards against abusive regulation in place at the state and federal levels are not sufficient to protect property owners from locally enacted regulation.\textsuperscript{326} He therefore calls for heightened judicial scrutiny of local government regulation affecting property that cannot easily be removed from the jurisdiction.\textsuperscript{327}

Although it does not provide a means of selecting among the various accounts of when political processes are likely to fail, the in-kind compensation Reconciling Theory coheres particularly well with such public-choice, process-failure theories of takings. Moreover, the consistency between the results yielded by the composite theory and a public-choice analysis of takings suggests that, unlike the version of the definitional Reconciling Theory that grounded its distinction between takings and taxation on the difference between general obligations to pay the government and government action affecting specific property interests, the composite theory cannot be accused of embracing formalisms to resolve the tension between takings and taxation.

\textsuperscript{321} Ely, supra note 176, at 92–98; Fischel, Paradox, supra note 177, at 889–94 ("[I]n the long run, democratic political processes are firmer guarantees of individual freedoms, including economic freedoms, than any intellectual apparatus imposed upon them.").

\textsuperscript{322} See supra note 68 and accompanying text.

\textsuperscript{323} As Chief Justice Marshall famously said in \textit{M'Culloch v. Maryland}, "the power to tax involves the power to destroy." 17 U.S. (4 Wheat.) 316, 431 (1819).

\textsuperscript{324} See Treanor, Original Understanding, supra note 15, at 855–56.

\textsuperscript{325} See id. at 856.


\textsuperscript{327} See id.
CONCLUSION

The tension between the law of taxation and recent takings doctrine is undeniable. In light of the broad consensus surrounding the Court’s constitutional tax jurisprudence and the confusion that characterizes its takings jurisprudence, most courts and scholars, if put to the choice, would conclude that it is the law of taxation, and not the law of takings, that should serve as the fixed point for resolving (or at least shrinking) that tension. Few scholars, however, have explored in depth the implications of the constitutional law of taxation for takings jurisprudence.

Looking at takings through the lens of taxation yields a narrower domain for the Takings Clause. Some scholars have attempted to reconcile the Court’s apparently disparate analyses by (1) redefining property for takings purposes to mean nonfungible property, (2) distinguishing takings from taxes on the ground that takings single out property owners for uniquely adverse treatment, or (3) embracing the notion that, unlike takings, the government implicitly compensates taxpayers for their payment of taxes to the state. Each of these Reconciling Theories bridges the gap between takings and taxation at the cost of creating a large category of Regulatory Taxings. But each of these Reconciling Theories also fails to take into account certain paradigmatic examples of takings that virtually all agree should be compensated. The weaknesses apparent when viewing these theories in isolation can be largely cured, however, by combining them into a composite theory and adopting an understanding of taxation (for the purposes of defining the proper scope of takings scrutiny) as an obligation imposed on nonarbitrarily defined subgroups to pay fungible property to the state.

The analysis offered in this Article does not pretend to be a panacea for the takings puzzle. To begin with, it does not offer a substantive vision of precisely what constitutes a taking of property. Instead, by embracing the traditional exclusion of taxation from takings scrutiny, it contributes to the definition of takings law largely by subtraction. That is, it identifies a set of government actions affecting property that should not be subject to the heightened scrutiny the Court has chosen to impose through its takings jurisprudence. It does not, however, stake out a definitive position on the question of what standards the Court should apply within that realm of heightened scrutiny.

Moreover, the boundary this Article identifies between takings and taxation, while an improvement on the current confused state of affairs, is not a particularly sharp one. Policing the line between subjective fungibility and nonfungibility will leave ample room for disagreement, though perhaps not as much as is often assumed. Moreover, determining precisely when state action singles out a property owner in the sense necessary to generate a takings violation will be no simple task. Nevertheless, by focusing attention on those two factors, this Article strives to substantially narrow the scope of the takings debate.