

# A VEXATIOUS PROBLEM AMONG MANY: IN LIGHT OF THE CONFLICT BETWEEN THE FIFTH AND SIXTEENTH AMENDMENTS, IS TAXATION AN UNCOMPENSATED TAKING?

MARK R. JUNDT<sup>†</sup> AND VERNON R. PEDERSON<sup>††</sup>

## I. INTRODUCTION

The only two things in life that are certain are Death and Taxes, so the popular lamentation goes. The Sixteenth Amendment to the Constitution of the United States provides that “Congress shall have power to lay and collect taxes on incomes, from whatever source derived.”<sup>1</sup> As all taxpaying Americans know, the government utilizes its powers under the Sixteenth Amendment to collect its citizens’ money and utilize it, ideally, for public good. The benefits of taxation are vast and override even the necessity of such a system. The roads we drive on, the public schools that educate us, and the government officials that lead us are among the countless direct benefactors of the powers given to Congress by the Sixteenth Amendment.

Despite these praises, there is a contravening clause found in the Constitution. The Fifth Amendment provides in part that “private property [shall not] be taken for public use, without just compensation.”<sup>2</sup> Although this simple sentence sat mostly dormant for an extended period of time, more and more courts are effectively championing its cause within the last century. Its cause is simple: to protect private individuals from bearing the burden of many.<sup>3</sup>

In analyzing whether taxation is a taking, this article first introduces takings jurisprudence generally.<sup>4</sup> The article then applies that jurisprudence

---

<sup>†</sup>Mr. Jundt is an attorney licensed in Minnesota and practicing in Minneapolis.

<sup>††</sup>Justice Pederson is a retired North Dakota Supreme Court Justice. Prior to joining the Court, Justice Pederson spent twenty-one years trying eminent domain cases for the North Dakota State Highway Department. He currently resides in Fargo, ND.

1. U.S. CONST. amend. XVI.

2. U.S. CONST. amend. V.

3. *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

4. See discussion *infra* Part II (analyzing the foundation, origins, and purpose of the Takings Clause).

to the topic of taxation.<sup>5</sup> Finally, the article analyzes the nuances of taxation as a possible taking, along with suggested solutions.<sup>6</sup>

## II. TAKINGS JURISPRUDENCE

The Takings Clause is a simple sentence, the poetic prose of which has baffled scholars, lawyers, and judges for several centuries. The language is seemingly straightforward: “nor shall private property be taken for public use, without just compensation.”<sup>7</sup> To the Congress which enacted this Amendment, their intention was likely obvious. As time dusted over the wording and the legislators long since passed on, the meaning became not as simple as it originally seemed. Questions that typically arise challenge the meaning of nearly every word. What is a “taking”? Must it be actual? Physical? Total? What constitutes private property? Did Congress intend only land? What about personal property? And finally, could even certain rights be considered private property?

To be clear, there is a lot at stake when analyzing the government’s power to take private property. Even when the government takes only a portion of an individual’s property, the results can be exceptionally detrimental. It has been said that “the government does not simply take a single ‘strand’ from the ‘bundle’ of property rights: it chops through the bundle, taking a slice of every strand.”<sup>8</sup> The government’s taking of even a portion of an individual’s property is such a detrimental event because it effectively deprives the individual of all his or her property rights.<sup>9</sup> When the government permanently occupies physical property, “the owner has no right to possess the occupied space himself, and also has no power to exclude the

---

5. See discussion *infra* Part III (analyzing taxation, specifically in light of the requirements of the Takings Clause).

6. See discussion *infra* Part IV. As a qualifying caveat, there is very little on this subject in published existence. Whether it is the complexity of the issue or the vexatious public nature of the problem, a mere three articles were turned over during the research of this topic. All three articles are referenced herein. Due to the scarcity of academic (and judicial, for that matter) review on this subject, many of the findings in this work are theoretical conclusions drawn by the authors and applied via current takings jurisprudence. As an additional note, the reader should keep in mind that this topic was chosen and researched in a purely academic setting. The title and topic of this paper do not reflect any aspect of the writers’ political or ideological views. Aside from arguments regarding the amount and appropriation of taxes, taxation—no matter how justified—is a foundational aspect of democracy, and thus is necessary regardless of the burdens borne by each citizen. This paper goes to great lengths to embody the non-monetary results of taxation *vis-à-vis* an orderly, democratic society.

7. U.S. CONST. amend. V.

8. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982) (quoting *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979)).

9. See *id.* (“Property rights in a physical thing have been described as the rights ‘to possess, use and dispose of it.’” (quoting *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945))).

occupier from possession and use of the space.”<sup>10</sup> This power, the power to exclude, “has traditionally been considered one of the most treasured strands in an owner’s bundle of property rights.”<sup>11</sup> Additionally, “the permanent physical occupation of property forever denies the owner any power to control the use of the property; he not only cannot exclude others, but can make no nonpossessory use of the property.”<sup>12</sup> Furthermore:

[E]ven though the owner may retain the bare legal right to dispose of the occupied space by transfer or sale, the permanent occupation of that space by a stranger will ordinarily empty the right of any value, since the purchaser will also be unable to make any use of the property.<sup>13</sup>

It is clear that the government’s taking of private property is not a matter to be taken lightly.

To effectively determine, however, whether a particular governmental action is a taking, it is first necessary to define the fundamental purpose of the Takings Clause. The purpose is to prevent the government from “forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”<sup>14</sup> Essentially the Takings Clause is a fairness measure; another check or balance to further protect citizens from the powers of the government. It may be properly viewed “as a means of encouraging work, saving, and investment by providing security for the fruits of economic endeavors.”<sup>15</sup>

It is true that “[t]o permit government destruction of privately created values . . . is to discourage the work and saving and investment that created those values.”<sup>16</sup> If the pride in the individual ownership of the fruits of labor and investment is taken away, then what point is there in exerting such efforts? Along the lines of this analysis, the Takings Clause could be argued to serve an economic purpose as well. The protection of the property of private individuals would ensure the security of such property and would thus encourage and facilitate further investment and savings.<sup>17</sup>

---

10. *Id.*

11. *Id.* at 435-36 (citing *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979); RESTATEMENT OF PROPERTY § 7 (1936)).

12. *Id.* at 436.

13. *Id.*

14. *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

15. William K. Jones, *Confiscation: A Rationale of the Law of Takings*, 24 HOFSTRA L. REV. 1, 8 (1995) [hereinafter *Confiscation*].

16. *Id.* at 23.

17. *Id.* at 8.

It is also important, in determining whether a particular governmental action is a taking, to define what the Takings Clause is not. It is not a complete bar of the government's possession of previously private property. The Takings Clause does not prohibit or restrain the government from utilizing its power to take private property for public use.<sup>18</sup> Instead, it merely "places a condition on the exercise of that power."<sup>19</sup> It is generally agreed, and courts have consistently held, that "[t]he Fifth Amendment does not proscribe the taking of property; it [merely] proscribes taking without just compensation."<sup>20</sup>

In summation, the Takings Clause identifies the boundary of the government's power of eminent domain, but does not prohibit this power.<sup>21</sup> It requires that if the government takes private property for public use, the individual owners are to be justly compensated for their loss, so those individuals do not unjustly bear a public burden by themselves.<sup>22</sup> The clause "stands as a shield against the arbitrary use of governmental power."<sup>23</sup>

Sometimes the most difficult questions are those concerning "just compensation." What is just compensation? How should it be calculated? Is the mere physical value of the property appropriate? How about the business within its walls, if applicable? What about goodwill? Since the Fifth Amendment was codified in 1791, these questions have baffled lawyers, clogged courts, and caused more than one law student to pull out his or her hair.

### III. TAKINGS ANALYSIS *VIS-À-VIS* TAXATION

For over a century, courts have recognized the contravening nature of the power to collect taxes and the Takings Clause.<sup>24</sup> In the late nineteenth century, the Court of Appeals of New York stated that "[t]he right of taxation and the right of eminent domain rest substantially on the same

---

18. *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194 (1985).

19. *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 314 (1987).

20. *Williamson County*, 473 U.S. at 194.

21. *Id.*

22. *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

23. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980).

24. *See People ex rel Griffin v. Mayor of Brooklyn*, 4 N.Y. 419, 424 (N.Y. 1851) (analyzing the constitutionality of a local assessment to landowners for the improvements to a street to which they were adjacent, and in holding that the assessment was an appropriate usage of the tax powers of the government, stating that "[p]rivate property may be constitutionally taken for public use in two modes: that is to say, by *taxation* and by right of *eminent domain*" (emphasis in original)); *People ex rel Post v. Mayor of Brooklyn*, 6 Barb. 209, 209 (N.Y. Ch. 1849) (stating that the issues of taxation and the taking of private property "appear to be somewhat blended").

foundation.”<sup>25</sup> A few years earlier, addressing a similar issue, the court had cemented this similarity, stating “it is by no means easy to trace the dividing line between the two.”<sup>26</sup>

Customarily, takings analysis directly follows the wording of the Takings Clause. Therefore, it is appropriate to determine first whether tax affects a taking of private property.<sup>27</sup> Next, it must be determined whether the taking is for a public purpose.<sup>28</sup> The final question to ponder is whether there is just compensation.<sup>29</sup>

#### A. DOES TAXATION “TAKE” PROPERTY?

“[N]or shall private property be taken . . .”

The “taking” of property can be summarized into two general types: (1) per se takings and (2) regulatory takings. Per se takings occur in situations when the government has done something which completely deprives the individual owners of a portion, or all, of their property.<sup>30</sup> Per se takings typically embody a more simple analysis. The government has taken complete control over formerly private property. The courts have strictly applied this analysis, even in situations where the property that was taken was minimal.<sup>31</sup> A generic example of a per se taking is where the government wants to make way for a railroad or interstate. The government “takes” all of the property within the path of the road, and therefore compensation is due.

Over time, the courts have broadened the application of the Fifth Amendment to situations where there may not be a physical invasion, per

---

25. *Griffin*, 4 N.Y. at 422.

26. *Post*, 6 Barb. at 214.

27. See discussion *infra* Part III.A (analyzing whether taxation actually “takes” property).

28. See discussion *infra* Part III.B (analyzing whether that which taxation funds is a “public use”).

29. See discussion *infra* Part III.C (examining whether that which a taxpayer receives in return for tax dollars may be considered “just compensation”).

30. *Pumpelly v. Green Bay Co.*, 80 U.S. 166, 181 (1871). Acting under state statutes, the Green Bay Company constructed a dam that caused the river to overflow and inundate the plaintiff’s farm upstream. *Id.* at 177. The Court found that the flooding acted as a completed destruction of the value of the land, and therefore concluded that the land was taken from the plaintiff as a result of the statute which allowed such dam construction. *Id.* at 181. The Court ruled “that where real estate is actually invaded by superinduced additions of water, earth, sand, or other material, or by having an artificial structure placed on it, so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the Constitution.” *Id.*

31. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 420 (1982). A New York statute required landlords to permit local cable companies to maintain cable facilities on their premises in order to provide service to local tenants. *Id.* at 421. The rooftop space required for the equipment was only a few feet at most, but the Court found that a taking occurred via the statute requiring the landlord to allow the cable companies this space. *Id.* at 441.

se, but where the ownership rights of the property owner are infringed upon to the point where the owner is deprived of all “use and enjoyment” of the property.<sup>32</sup> Courts have found a taking to exist even when the landowner still retains the right to possess the property.<sup>33</sup> Such a taking is known as a regulatory taking.

*Pennsylvania Coal Co. v. Mahon*<sup>34</sup> brought about the birth of modern day regulatory takings. Regulatory takings exist in situations where the government institutes some regulation, which effectively deprives the landowner of certain rights in the ownership of their property.<sup>35</sup> In *Pennsylvania Coal*, the court solidified the breadth of the Fifth Amendment by holding that “while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.”<sup>36</sup> The courts waiver as to what specifically needs to be deprived. However, courts have found that even the deprivation of reasonable investment-backed expectations may be protected.<sup>37</sup>

The first step in determining whether taxation constitutes a taking is to determine whether money is “private property”<sup>38</sup> within the meaning of the Fifth Amendment. Although the most probable original intent of Congress was in reference to the taking of real property, as early as the late nineteenth century compensable takings were found when the government seized

---

32. *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 864 n.14 (1987) (Brennan, J., dissenting).

33. *United States v. Causby*, 328 U.S. 256, 261-62 (1946). Plaintiffs owned a piece of land near an airport where they lived and raised chickens. *Id.* at 258. Military aircraft from the nearby airport passed overhead at such low altitudes that it caused noise and glare to the point that plaintiffs had to abandon their chicken farm. *Id.* at 259. The noise and glare also resulted in sleeplessness and anxiety. *Id.* The court awarded compensation for diminution in value, finding that the government had taken an “easement of flight.” *Id.* at 261.

34. 260 U.S. 393 (1922).

35. *Pa. Coal*, 260 U.S. at 415.

36. *Id.* The Pennsylvania Coal Company executed a deed in 1878, which conveyed title to the surface of the property but reserved the right to remove all of the coal. *Id.* at 412. In 1921, the State of Pennsylvania enacted the Kohler Act, which forbade the mining of coal in such a way as to cause subsistence of any structure used as a human habitation. *Id.* at 412-13. The statute required columns of coal to be left below in order to prevent subsistence of the surface above. *Id.* at 413. The statute admittedly destroyed Pennsylvania Coal’s previously existing rights to all of the coal below the surface. *Id.* The Court found that the regulation had “gone too far” and therefore the company was owed just compensation. *Id.* at 415-16.

37. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1034 (1992). The plaintiff had purchased two parcels of land in which he intended to build homes. *Id.* at 1006-07. Subsequent to the plaintiff’s purchase the State of South Carolina enacted the Beachfront Management Act, South Carolina Code Section 48-39-250, which barred the landowner from erecting any permanent habitable structures on his two parcels, thus destroying most of the value that the land held prior to the regulation. *Id.* at 1007. The Court ruled for the landowner, holding that the effect of the regulation on the value of the land was relevant. *Id.* at 1031-32.

38. *Griffin v. Mayor of Brooklyn*, 4 N.Y. 419, 422 (N.Y. 1851) (“Money is property.”)

tangible personal property.<sup>39</sup> Over time, the protection of personal property under the Fifth Amendment has found increased support, leading scholars to note: “[T]he protection of personal property against seizure or destruction parallels the protection afforded to real property.”<sup>40</sup>

While money is personal property, courts have gone further to recognize money also as a protected property interest, finding that even interest earned in bank accounts “is the ‘private property’ of the owner of the principal.”<sup>41</sup> The Supreme Court found that the retention of interest accrued on money placed with the clerk of the circuit court pending distribution to creditors was a taking in *Webb’s Fabulous Pharmacies, Inc. v. Beckwith*.<sup>42</sup> In *Webb*, a statute allowed the clerk of the circuit court to place funds that it was holding in interest bearing accounts and to retain the interest accrued as payment for services rendered.<sup>43</sup> Plaintiffs, who were entitled to the distribution of the money, contested that they should be allowed the benefit of the interest accrued, and that keeping it was a taking by the circuit court.<sup>44</sup> The Court held that the retention of the interest was in fact a taking, and that “services rendered” did not constitute sufficient compensation.<sup>45</sup>

In *Brown v. Legal Foundation of Washington*<sup>46</sup> the Court further supported the idea that interest accrued in an account may be “‘property’ of the owner of the principal.”<sup>47</sup> In *Brown*, the State of Washington created an interest-bearing trust account, which allowed lawyers to place money in an interest-bearing trust for their clients.<sup>48</sup> The interest generated, however, was kept by the state and transferred to charitable organizations offering legal services to the poor.<sup>49</sup> The Court found no taking because the program at issue “create[d] income where there had been none before, and the income thus created would never benefit the client under any set of circumstances.”<sup>50</sup>

Even upon the determination that money is private property within the meaning of the Takings Clause, the issue is still not rested. An element of

---

39. See, e.g., *United States v. Russell*, 80 U.S. 623, 631-32 (1871) (holding that the temporary seizure of river steamers for military purposes was found to be a taking).

40. *Confiscation*, *supra* note 15, at 26.

41. *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 172 (1998).

42. *Webb’s Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164-65 (1980).

43. *Id.* at 155-56.

44. *Id.* at 159 n.5.

45. *Id.* at 164-65.

46. 538 U.S. 216 (2003).

47. *Brown*, 538 U.S. at 220 (quoting *Phillips*, 524 U.S. at 172).

48. *Id.* at 220-21.

49. *Id.* at 221-23.

50. *Id.* at 226.

the takings analysis is that, that which is taken be “a specific, non-fungible asset.”<sup>51</sup> A fungible<sup>52</sup> asset is an asset that is non-unique (i.e., replaceable). Thus, a non-fungible asset is a specific, unique asset (i.e., a piece of land). In almost every case the classification of property as a non-fungible asset is nothing more than a cursory thought. This is because, ordinarily when property is taken—whether personal or real—it is nearly always a specific asset (for example, thirty acres of land or a car dealership). Money represents a unique case, however, because it is not necessarily a “specific asset” which is taken via taxation, but is instead a *type* of asset. When an individual is required to pay a tax,<sup>53</sup> the requirement is that a specific dollar amount be paid. The requirement does not, however, identify a specific source from which the dollar amount must be paid.<sup>54</sup> Therefore, when the requirement provides that a specific dollar amount is owed, it can be paid from any number of sources out of the general assets of the taxpayer.<sup>55</sup>

Considering the above argument, tax may not be a taking because it does not require a specific, non-fungible asset. In fact, the asset is highly fungible. One dollar can be replaced with any other, and those dollars will be exactly the same.<sup>56</sup> In opposition to this argument, money may be found to be a specific, non-fungible asset because of the source requirements inherent in most tax laws: income tax requires payment from specific money earned while working, sales tax is charged upon the sale or purchase of a specific item, and inheritance tax is charged upon the dollar amount inherited.

Additionally, perspective is an important consideration. If, instead of classifying that which is owed for taxes as “money” the classification was labeled “assets,” the analysis would change. With respect to assets, money becomes a specific, non-fungible item. One could not use clothing to pay for groceries, or buy a car with household goods. A television could not be

---

51. Eric Kades, *Drawing the Line Between Taxes and Takings: The Continuous Burdens Principle, and Its Broader Application*, 97 NW. U. L. REV. 189, 198 (2002).

52. Fungible means “1) being of such a nature that one part or quantity may be replaced by another equal part or quantity in the satisfaction of an obligation <oil, wheat, and lumber are *fungible* commodities>. 2) interchangeable.” *Merriam-Webster Online Dictionary*, <http://www.merriam-webster.com/dictionary/fungible> (last visited May 16, 2008).

53. It does not matter which type of tax is at issue, whether sales, income, or property tax.

54. For example, “United States Dollars, serial numbers X through Y.”

55. The IRS does not care with which dollars you pay your taxes, just that you pay the dollar amount owed.

56. Theoretically, the only type of money that may be non-fungible would be collector’s edition money (e.g., old coins) because they have an intrinsic value separate from their stated original value. For example, a Buffalo nickel is certainly worth more than five cents, and no two are alike. Therefore, while technically still currency, they are still highly non-fungible.



mailed to the electric company to pay the electric bill. Therefore, the requirement of *monetary payment* (dollars and cents) is arguably specific.

The issue of whether the asset is specific and non-fungible is merely an element of the takings analysis. It is not enough to conclude the analysis on this single factor. With the determination that personal property has a parallel protection to real property under the Fifth Amendment and the knowledge that money is personal property, the issue of whether taxation is a taking is likely resolved. Via the powers given to Congress under the Sixteenth Amendment, taxes are collected through several different avenues such as income tax, property tax, sales tax, and excise tax. Through the powers granted by the Sixteenth Amendment, the government physically takes a portion of each taxpayer's assets, effectively absolving them of all of their rights, ownership, and use in the assets.

Following the determination that money's classification is property, it is important to analyze the proportion of what is taken, in comparison to a benchmark. Since taxation does not take *all* of a citizen's money, it is necessary to determine *how much* is taken. Taking too high a percentage would have the effect of a full taking; too low a percentage equates to a less likely chance that a taking would be found.<sup>57</sup>

In *Lucas v. South Carolina Coastal Counsel*,<sup>58</sup> the Supreme Court first introduced the analysis that courts should use when considering this issue.<sup>59</sup> The court labeled the analysis the "denominator" problem.<sup>60</sup> In the denominator problem, a percentage calculation is determined by dividing the remaining property value by the value pre-regulation.<sup>61</sup>

In *Lucas*, petitioner purchased two beachfront lots in South Carolina for \$975,000.<sup>62</sup> Petitioner intended to develop the lots by building single-family homes as the owners of adjacent plots had done.<sup>63</sup> There were no regulations at the time of the petitioner's purchase to bar such plans.<sup>64</sup> In 1988, however, the South Carolina Legislature enacted the Beachfront Management Act, which effectively barred petitioner's plans.<sup>65</sup> Upon appeal the Court reversed and remanded, found that a taking had occurred, and asserted that in order for South Carolina to win its case, it must do

---

57. *Cf.* *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 384 (1926) (noting that as much as a fifty percent (50%) diminution in value would not, in itself, constitute a taking).

58. 505 U.S. 1003 (1992).

59. *Lucas*, 505 U.S. at 1003.

60. *Id.* at 1054 (Blackmun, J., dissenting).

61. *Id.*

62. *Id.* at 1006-07.

63. *Id.* at 1007.

64. *Id.*

65. *Id.*

something more than merely state that the petitioner's use would be contrary to public interest; it must prove that the petitioner's intended use of the land is prohibited in some other way, such as by nuisance.<sup>66</sup>

In order to calculate the takings "factor" with respect to taxation as delineated by the court in *Lucas*, it is crucial to first determine the classification that is to be utilized as pre-regulation value. There are two outcomes to this analysis. If, as discussed above, the property demanded by the government in the form of taxation is to be defined as "income," then the denominator problem would result in a much higher percentage taken. For example, say an individual makes \$100,000 a year and pays \$30,000 in taxes. Utilizing "income" as the relevant "denominator," the calculation would be as follows:

$$\$70,000^{(\text{income after tax})}/\$100,000^{(\text{income before tax})} = 70\% \text{ remaining}$$

*(Therefore, a 30% diminution in value.)*

If, instead, the property paid to the government is defined as a portion of net worth, the result would be drastically different. When "net worth" becomes the "denominator," the ratio of property taken drastically diminishes. For example, assuming the same facts as above (\$30,000 in taxes paid yearly), and a net worth of \$500,000, the calculation would be as follows:

$$\$470,000^{(\text{net worth after tax})}/\$500,000^{(\text{net worth before tax})} = 94\% \text{ remaining}$$

*(Therefore, a 6% diminution in value.)*

Although it is arguable that even a thirty percent (30%) diminution in value from the "income" perspective does not equate to a taking worthy of just compensation, it is obvious that it is a much more persuasive case in comparison to the six percent (6%) diminution that results from the "net worth" perspective. The "denominator problem" illustrates the impact that different perspectives have on the eventual takings analysis. While valuing the effect of annual taxation on net worth may result in a *de minimus* diminution in value, valuing the effect of annual taxation on annual income results in a completely different effect. So drastic is the difference, in fact, that when applied to the very same facts, one perspective could lead a court to find the diminution so minor as to not be classified as a taking, while the other perspective could lead that very same court to a completely different result. Therefore, as the denominator problem further illustrates, the perspective utilized in classifying that which is taken is a key component of the takings analysis. Assuming *arguendo* that the "income" perspective is

---

66. *Id.* at 1031-32.

persuasive as the appropriate denominator, a thirty percent (30%) diminution in value does equate to a taking under modern takings jurisprudence, the analysis continues in order to determine whether a valid public use exists, and if just compensation has been paid.

B. IS THERE A PUBLIC USE?

“...for public use ...”

In order to exercise the power to take property, it is assumed that the government must take the property for a public use. The entire point of taxation is to provide the public with services. Common knowledge shows that the government utilizes tax dollars to provide public facilities, build and maintain roads, provide police and fire protection, fund social programs, and pay for the governance itself.

What becomes more of an issue, however, is what occurs when tax dollars are used to subsidize certain projects that arguably benefit only a select section of the population. The original language of the Takings Clause with respect to “public use” was theoretically set to address this issue. However, the courts’ interpretation of public use has changed over time.<sup>67</sup> The interpretation has always been between a narrow and a broad interpretation of public use.<sup>68</sup> The narrow view generally “defined public use as an actual use by the public.”<sup>69</sup> The broad view generally defined public use as any use “associated with public advantage, convenience, or benefit.”<sup>70</sup> The modern courts have essentially sided with the broad interpretation of public use, meaning “virtually every challenged regulation will have a colorable public purpose.”<sup>71</sup> Although modern courts have generally sided with a very liberal interpretation, a definitive line has never been drawn.

Most uses of tax dollars would meet even the narrowest interpretation of public purpose. A large percentage of tax dollars are spent on the funding of government, the maintenance of roads, and national security. There is no question that these uses are appropriately for public purpose. The question that remains is what is to be said of tax dollars that are utilized for the funding of sports stadiums or the subsidization of certain businesses.

---

67. Stephen J. Jones, *Trumping Eminent Domain Law: An Argument for Strict Scrutiny Analysis Under the Public Use Requirement of the Fifth Amendment*, 50 SYRACUSE L. REV. 285, 291 (2000) [hereinafter *Trumping Eminent Domain Law*].

68. *Id.* at 286.

69. *Id.* at 291-92.

70. *Id.* at 292.

71. Jed Rubenfeld, *Usings*, 102 YALE L.J. 1077, 1080 (1993).

The less directly a public benefit can be eschewed from the use of tax dollars, the more apt a court would find that there was not a proper public use, and therefore the tax is simply unconstitutional.<sup>72</sup>

Considering that a large majority of tax dollars are spent to directly serve citizens in one way or another, the issue of public use—narrow or broad—is likely to be satisfied. The most important issue to determine, and yet to be discussed, is whether the taxpayer is justly compensated for taken property.

### C. IS THERE JUST COMPENSATION?

“. . . *without just compensation.*”

Just compensation is the foundational root and purpose of the Takings Clause. The Takings Clause does not prohibit the exercise of the power of eminent domain; it merely provides a requirement that when the power is exercised, the deprived property owner is compensated.<sup>73</sup> Courts have boldly stated that there is a “right to recover just compensation for property taken by the United States for public use in the exercise of its power of eminent domain. [This] right [is] guaranteed by the Constitution.”<sup>74</sup>

Some scholars have explained that “just compensation” is a property owner’s insurance against risk.<sup>75</sup> The support of this theory is that “private insurance is unavailable to protect owners against the possibility of government confiscation. The just compensation requirement provides insurance against that risk.”<sup>76</sup> This theory echoes the founding principal that just compensation, and thus the Takings Clause, “encourage[es] work, saving[s], and investment by providing security for the fruits of economic endeavors.”<sup>77</sup> Imagine a scenario where the government is allowed to utilize the powers of eminent domain arbitrarily. Property owners would live in fear that at any time, Uncle Sam could appear at their doorstep with an apology, a hug, and a swift boot to the curb, but nothing else. With this constant fear, what would be the driving force to invest, save, or improve one’s assets?

---

72. *Trumping Eminent Domain Law*, *supra* note 67, at 289-96.

73. *Williamson County Reg’l Planning Comm’n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194 (1985).

74. *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 315 (1987) (quoting *Jacobs v. United States*, 290 U.S. 13, 16 (1933)).

75. *Confiscation*, *supra* note 15, at 6.

76. *Id.*

77. *Id.* at 8.

It is important to note that compensation does not have to come in monetary form. The real question is whether the public good, served by the tax dollar, effectively equates to just compensation. In order to determine whether this is true, it is necessary to capture that which taxpayers receive in return for tax dollars.

Tax dollars pay for protection such as national security and police and fire protection; for governance at the local, state, and federal levels; for infrastructure such as roads and waterways; and for the education of a majority of citizens through the funding of public schools and universities. Tax dollars also take care of the sick and the elderly through programs such as Medicare and Medicaid; the poor through welfare; and the disabled through disability aids and programs. Additionally, tax dollars establish an entire range of social programs that touch each citizen of this country.

Arguments are made every day that it is unfair to be taxed for programs that certain citizens will never use. Courts have held, however, that benefits are gained simply by the fact that the services are available for use in the instance of need.<sup>78</sup> In *United States v. Sperry Corp.*,<sup>79</sup> the Court found that compensation was not due when the United States had taken two percent of tribunal awards granted against the Iranian government.<sup>80</sup> The United States had established the Iran-United States Claims Tribunal to arbitrate claims brought by Americans against the government of Iran.<sup>81</sup> The two percent withheld from the award was intended to pay for the tribunal.<sup>82</sup> The Court found that the complainant had “benefit[ed] directly from the existence and functions of the Tribunal”<sup>83</sup> and had essentially received just compensation.<sup>84</sup> The Court classified the amount taken as a “user fee,” paid in exchange for the benefit of the Tribunal.<sup>85</sup>

Taxation is analogous to the user fee charged in *Sperry*. A percentage of a citizen’s assets are taken by the government in order to pay for the services that the government provides. In place of taxes, the government could easily charge a “democracy user fee” which would serve the exact purposes of the current taxation system. Some would argue that taxation is

---

78. *Massachusetts v. United States*, 435 U.S. 444, 468 (1978) (plurality opinion).

79. 493 U.S. 52 (1989).

80. *Sperry Corp.*, 493 U.S. at 63.

81. *Id.* at 55.

82. *Id.* at 57.

83. *Id.* at 63.

84. *Id.* at 64.

85. *Id.* at 62.

in fact a democracy user fee because taxation, as Oliver Wendell Holmes, Jr. once theorized, is essentially like “buying civilization.”<sup>86</sup>

Despite the user fee parallel, taxation itself becomes complicated when applied to one of the fundamental purposes of the Takings Clause: the Takings Clause is meant to protect individuals from bearing a disproportionate public burden.<sup>87</sup> Taxation effectively spreads the burden of paying for governmental services throughout the population. The problem, however, lies in the disproportionate amount at which individuals pay taxes. Consider, for example, the progressive nature of the United States’ income tax system. The higher an individual’s yearly income, the greater percentage of that income is taken, and vice versa. The fundamental flaw in the just compensation analysis *vis-à-vis* taxation, is the determination of “value” received in exchange for the increasingly higher tax burden. For example, no one could argue that Bill Gates gets a proportionately greater benefit from the government than a poor, starving law student. Mr. Gates, however, pays a vast multiplier more in taxes the amount of the law student. In fact, it is arguable that the law student may actually receive a greater benefit from the government (via student loans or public schooling) than Mr. Gates, at a far lesser cost to the student.

Theoretically, “gains from government[al] programs should exceed the losses such programs inflict.”<sup>88</sup> The outcome of the determination of gains and losses of governmental programs depends upon perspective. To compare the amount that a student pays in taxes to the proportionate benefit received, the gains exceedingly outweigh the losses, as the student likely directly benefits from those governmental programs. However, to compare the amount that Bill Gates pays in taxes to the proportionate benefit that he receives, the losses appear to tremendously override the gains. Ignoring the independent taxpayer-to-taxpayer results, however, and looking at society as a whole, the overall gains arguably exceed the overall losses.

In *Brown*, the Court found “that the just compensation require[ment of] the Fifth Amendment is measured by the property owner’s loss rather than the government’s gain.”<sup>89</sup> Under this analysis, the taxes that Bill Gates pays may be a taking to the extent that they exceed the benefit that he receives. Some scholars have concluded that only strictly proportional tax

---

86. FELIX FRANKFURTER, MR. JUSTICE HOLMES AND THE SUPREME COURT 71 (Harvard Univ. Press 1961).

87. See Kades, *supra* note 51, at 195 (“[T]he primary purpose of the Takings Clause [is] avoiding unfair allocation of the burdens of public projects.”).

88. *Confiscation*, *supra* note 15, at 10.

89. *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 235-36 (2003).

rates, such as a flat percentage irrespective of income levels, satisfy the demands of the Takings Clause.<sup>90</sup>

Irrespective of the above example, the perspective needs to be that of the “big picture” in order for a functioning democracy to subsist. With this analysis, the individual burdens borne by each taxpayer culminate into a benefit that outweighs the losses. Through the aggregation of all services, paid for out of a single Treasury, the economies of scale<sup>91</sup> allow for a cheaper per unit cost than if each would be purchased separately. Therefore, in a “total is greater than the sum of all parts” approach, unfair allocation of burdens is avoided. Taxation “couples burdens on a broad swath of the population with benefits from the use of tax revenues sprinkled over a similarly large portion of society.”<sup>92</sup> In contrast, “[t]akings . . . burden one or a relatively narrow subset of property owners for projects with much wider social benefits.”<sup>93</sup>

#### IV. FURTHER ANALYSIS

Even upon concluding that the Sixteenth Amendment is not in conflict with the Fifth Amendment, there may be simple classification changes that could be made to more effectively reconcile these two Amendments. For example, it could be useful to implement a local, versus federal, tax. Finally, it would be effective to employ a broader expansion of the usage of “special assessments.”

##### A. LOCAL VERSUS FEDERAL TAX

It is not contested that the purpose of the Takings Clause is to prevent a small number of individuals from bearing the burden of the public as a whole.<sup>94</sup> Under this purpose, an all-encompassing local tax (state or regional) may more effectively meet the financial needs of a nation. Furthermore, this local tax would not cross the lines drawn by takings jurisprudence.

---

90. See generally Richard A. Epstein, *An Outline of Takings*, 41 U. MIAMI L. REV. 3 (1986) (examining, in part, “large numbered takings”).

91. “Economies of scale” is defined as a “reduction in cost of production due to a large number of items produced.” *Merriam-Webster Online Dictionary*, <http://www.merriam-webster.com> (last visited May 2, 2008).

92. Kades, *supra* note 51, at 203.

93. *Id.*

94. *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

Imagine the 635,000 citizens of the state of North Dakota<sup>95</sup> paying for an equal share of the national services that the United States Government offers. Further imagine the disproportionate nature of the tax dollars spent in comparison to the services received. In contrast, imagine the 36 million citizens of the state of California,<sup>96</sup> also paying for an equal share of the services that the government offers. To wrap oneself around this argument, it is necessary to look at the individual North Dakota and California citizen. If each citizen is of equal income class, each will pay the same amount in federal taxes. The California citizen, however, gets much more “bang for their buck”; they have the benefit of the availability of many more programs, the effect of many more services, and even are provided with more interstates on which to drive. The benefit that the California citizen receives is arguably much greater than the individual burden. The North Dakota citizen, on the other hand, has fewer governmental programs available. However, the North Dakota citizen continues to pay the same amount of money, paying proportionate tax for disproportionate benefits.

The argument above is flawed, however, because to look at taxation in a regional sense takes away the “requirement” aspect of taxation as a burden. North Dakota citizens may freely move to California, for example, and receive more for their tax dollars. In order to more effectively level the playing field, and in an attempt to institute regional fairness, all federal tax could be substituted for a state tax alone. Under this system, the cost of the aggregate services offered could be divided up by each state and charged in a proportionate nature to each citizen of a state based upon that state’s access to services divided by its population. The result may go towards alleviating disproportionate burdens and the use of a fair ratio. The pendulum could thus swing more towards equilibrium by allowing a greater portion of taxpayers to receive “just compensation” for their tax dollars.

## B. SPECIAL ASSESSMENTS

Typically, special assessments are levied upon property owners within a certain area that would directly benefit from a particular project.<sup>97</sup> Special assessments usually pay for local streets or neighborhood projects.<sup>98</sup> While the burden is spread over relatively few individuals, the benefit is also very

---

95. U.S. Census Bureau—North Dakota, <http://quickfacts.census.gov/qfd/states/38000.html> (last visited May 16, 2008).

96. U.S. Census Bureau—California, <http://quickfacts.census.gov/qfd/states/06000.html> (last visited May 16, 2008).

97. *Kadzban v. City of Grandville*, 502 N.W.2d 299, 301 (Mich. 1993).

98. *Id.* at 302.



specific.<sup>99</sup> The property owners pay for improvements to their specific neighborhoods.<sup>100</sup> Theoretically, the benefit may be classified as monetary in nature via an increased property value. Irrespective of this fact, special assessments more effectively allocate burdens only to individuals that ideally are directly benefiting from them.<sup>101</sup>

It is easy to see that special assessments are likely not uncompensated takings due to the specific nature of their benefits and burdens. The special assessments may constitute a taking with respect to the deprivation of a certain dollar amount, but they provide compensation that is more than adequate in the form of a direct benefit derived. With respect to special assessments, there exists a direct burden-to-benefit link. The compensation outcome is typically overwhelming. The thousand dollars that a home owner pays in special assessments pales in comparison to the wider, well-lit street that is received in return.

Although conceptually impossible to administer due to the sheer size and scope of government programs and expenditures, special assessments would be the best way to constitutionally levy taxes. A possible hybrid of the two systems above may work, however, whereby all federal services such as military and governance (services which affect all citizens equally) could be divided commensurately among all citizens. Meanwhile, all other services could be funded locally or regionally to ensure a more direct benefit received by those citizens.

## V. CONCLUSION

Taxation is a necessary evil; it is a burden and a taking. Taxation is not, however, unconstitutional. The Fifth Amendment requires that if the government takes private property for public use, the government pays for it.<sup>102</sup> Looking at the nation as a whole, the overall benefit derived pays for the burden that each individual taxpayer bears. Through a combination of social benefit and economies of scale, the taxation system burdens some while benefiting all. And, by leveraging each individual's tax dollars via volume, the taxation system garners a higher output than would otherwise be possible.

Imagine instead of paying all of your taxes last year (e.g., income tax or sales tax) you attempted to personally pay for the services provided by the government and typically funded by tax dollars. How much military

---

99. *Id.* (citing *Kuick v. Grand Rapids*, 166 N.W.2d 979 (Mich. 1918)).

100. *Id.*

101. *Id.*

102. U.S. CONST. amend. V.

could you fund? How much highway could you personally pay for in a year? By aggregating each individual tax burden, a result is obtained that is greater than the sum of the individual burdens. Therefore, the benefit outweighs the burden, and the taking effectuated by the Sixteenth Amendment is justly compensated.

Realistically, the “big picture” is the only perspective that does democracy justice. Therefore, it is exceedingly adequate to utilize this perspective when analyzing the takings issue. Under this perspective, the burden that each individual suffers is paid back tenfold in the form of an orderly and just society with functional programs and adequate services. As Justice Holmes once stated, “[t]axes are what we pay for [a] civilized society.”<sup>103</sup> The burden each individual suffers, be it Bill Gates the Entrepreneur or Phil Gates the Law Student, is more than adequately compensated by the overall benefit received.

---

103. *Compania General de Tabacos de Filipinas v. Collector of Internal Revenue*, 275 U.S. 87, 100 (1927) (Holmes, J., dissenting).