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THE MOVEMENT TO DESTROY THE INCOME TAX AND THE IRS: WHO IS DOING IT AND HOW THEY ARE SUCCEEDING

by

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I. INTRODUCTION

The passage of the Sixteenth Amendment to the United States Constitution[1] in 1913[2] enabled the federal government to enact a progressive federal income tax,[3] thereby acquiring a new source of funds, although the federal income tax initially was fairly limited in scope. From 1913 until 1941, when the United States entered World War II, only a small number of Americans paid the income tax. It was, in effect, a class tax only paid by those at the very top of the income brackets. When the United States entered World War II the federal income tax was expanded so that most citizens paid something towards it and, after the cessation of hostilities, the federal income tax remained in place as a mass tax. Not only did the general public pay the federal income tax, but taxpayers felt that the income tax system was fair. A Gallup poll taken during World War II revealed that eight out of ten Americans felt that their taxes were fair.[4] Further, as the tax was expanded it became a major source of revenue for the federal government during and after World War II, thereby enabling the federal government to grow in size and power.

However, from the time the income tax was enacted, there has been a movement to repeal or undermine the income tax by financial elites who not only stand to benefit enormously but who are personally and philosophically offended at the idea of being subject to an income tax and an

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

2. On February 3, 1913, Delaware became the 36th state to ratify the 16th Amendment to the U.S. Constitution, which authorized the income tax. At the time there were 48 states in the U.S.; therefore, Delaware's ratification of the Amendment provided the necessary 75 percent required. *See* Len Burman, *Happy Birthday, Income Tax*, TAX POL'Y CENTER (Feb. 5, 2013), http://taxvox.taxpolicycenter.org/2013/02/05/happy-birthday-income-tax/; Sheldon D. Pollack, *Origins of the Modern Income Tax, 1894-1913*, 66 TAX LAW. 295, 320–24 (2013) [hereinafter Pollack, *Modern Income Tax*].

3. Congress added the income tax on individuals in section II of the Underwood Tariff Act of 1913. The Act begins at chapter 16, 38 Stat. 114 (1913). Section II begins at 38 Stat. 166. Section II, Parts A to F, address the obligations of individuals to pay the income tax.

4. Robert Borosage, *Talking Taxes*, THE AM. PROSPECT (May 22, 2005) [hereinafter Borosage, *Talking Taxes*], http://prospect.org/article/talking-taxes-0.

expanded and powerful federal government. The wealthy who were dismayed by the federal government's increasingly prominent role in the lives of ordinary Americans recognized that removing, or at least reducing, the federal government's access to funds would consequently reduce the federal government's influence and power. These early opponents were careful to hide their agenda.

From the beginning they had the common sense to present themselves as defenders of the United States Constitution, and not as people looking out for their money. They use right-wing networks to spread their message and control political figures by providing or withholding campaign funds. They have lavishly funded think tanks which all say the same thing, producing an echo effect—all which is done to achieve their goal of eviscerating the power of the federal government to tax business and the wealthy.

One way to destabilize and de-legitimize the federal government is to prevent it from acquiring funds.[5] This movement has used a several-pronged approach: (1) attack the legitimacy of the federal government itself, (2) attack the progressive income tax, and (3) attack the manner in which the tax is collected. If you can convince the public that the federal government is at best, incompetent and wasteful, and at worst, evil, then the public will object to funding that government. Leading political figures have denounced the income tax as theft and the Internal Revenue Service as an out-of-control, rogue agency. Grover Norquist, currently the most influential figure in conservative politics, has famously stated that he wants to reduce government to the size that it can be "drowned in a bathtub."[6] However, our government represents our uniquely American way of life; to say that you wish to destroy this government is to say that you wish to destroy America. If taxpayers do not perceive the government as legitimate and the tax system as fair, then they will find ways to avoid complying with the tax system—which is exactly what the financial elites seek to accomplish.

How did we get to the point as a nation that we have changed from viewing the fulfillment of our taxpaying obligations as a patriotic duty to holding our government and the federal income tax in contempt? How did we get to the point that we elect leaders who denounce the government they represent and serve? How did we get to the point that those leaders encourage noncompliance with the law and even violence?[7]

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5. *See* Marjorie E. Kornhauser, *Legitimacy and the Right of Revolution: The Role of Tax Protests and Anti-Tax Rhetoric in America*, 50 BUFF. L. REV. 819, 820–824 (2002).

6. *See infra* note 246 and accompanying text.

7. *See* the statement from Don Fierce, the 1993 director of strategic planning for the Republican National Committee: "Washington is financially and morally bankrupt and because of that it is the glue that binds economic and social

Part II of this Article reviews the United States government's early struggles to obtain funding. A government unable to perform even basic functions such as defense will lose legitimacy. Therefore, steady, reliable revenue is necessary for a government to survive. The Articles of Confederation, under which the United States operated during the Revolutionary War, and for a period of time thereafter until the passage of the United States Constitution, did not give the newly created central government the power to collect taxes directly to fund the war and other government operations, but rather the central government could only request that the individual states contribute to the national treasury. Further, the Articles of Confederation only created a legislative branch; there was no provision for an executive or judicial branch. Therefore, there was no government agency that could create a structure or system for tax collection and enforcement. Without a steady, reliable source of revenue, the government could not directly fund the war effort, nor could it easily borrow funds from other countries. No one is eager to lend to an entity which does not have a determinable means for repayment. The government's inability to levy or collect taxes almost destroyed our new nation at its inception. The government's ability to levy and collect taxes and enforce the tax laws under the United States Constitution and its ability to put down the early tax rebellions legitimized the federal government.

Part III considers how a government can persuade the populace to comply with the tax laws. Methods of duress, such as penalties, threats of imprisonment, and audits provide a backstop way of ensuring compliance from recalcitrant taxpayers, but are not effective or practical for a country

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conservatives. These are people that love their country but hate their federal government. Where is the evil empire? The evil empire is in Washington." DAN BALZ & RONALD BROWNSTEIN, STORMING THE GATES: PROTEST POLITICS AND THE REPUBLICAN REVIVAL 15 (1996) [hereinafter BALZ & BROWNSTEIN, STORMING THE GATES]; *see also* Eric Kleefeld, *Bachmann: We're Not Going To Obey Health Care Law—'We Don't Have To*,*'* TPM (Mar. 15, 2010, 2:34 PM), http://talkingpointsmemo.com/dc/bachmann-we-re-not-going-to-obey-health-care-law-we-don-t-have-to-video (noting Representative Bachmann's belief that using the "deem and pass" parliamentary procedure represents "taxation without representation," and that, if used, would make an "illegitimate" law that the people could ignore and thus refuse to pay taxes); Dana Milbank, *The Republicans Who Stirred the Tea*, WASH. POST, Mar. 22, 2010, at A1 (noting that numerous Republican elected officials encouraged the raucous tea party protests outside of Congress during the health care debate by themselves waiving protest signs and the Gadsden "Don't Tread on Me" flag from the House balcony); Ted Barrett et al., *Protestors Hurl Slurs and Spit at Democrats*, POLITICALTICKER (Mar. 20, 2010), http://politicalticker.blogs.cnn.com/2010/03/20/protesters-hurl-slurs-and-spit-at-democrats/ (recounting how Tea Party activists protesting the health care bill on Capitol Hill repeatedly screamed epithets and spit on Representatives John Lewis, Emanuel Cleaver, and Barney Frank).

with a large population and a representative form of government. Taxpayers comply voluntarily with their obligations when they have internalized a taxpaying ethos. It was not until World War II that average Americans willingly accepted the imposition of the income tax on them. During World War II, the general population developed a taxpaying ethos because they developed a sense of trust that the income tax was being fairly administered and that other taxpayers were complying with their taxpaying duties—a social contract basis for tax compliance.

Additionally, the general population developed a sense of trust that the federal government was using the tax revenues to provide social benefits—a quid pro quo basis for compliance. During World War II, the federal government used the tax revenues to fund the war effort. Subsequent to World War II, the federal government continued to provide social benefits so that taxpayers continued to demonstrate a tax paying ethos. Part III recounts how the modern income tax became an accepted part of our tax system and explains the means that the federal government successfully employed to create a taxpaying ethos in the general population.

However, not all Americans supported the imposition of the income tax nor did they support the steadily increasing role the federal government played in the lives of average Americans. From the time of Franklin D. Roosevelt's presidency, this group has steadily worked to eviscerate the income tax, which would also have the effect of underfunding the federal government, thus reducing its power. Part IV explores how a small group of financial elites have used think tanks, the media, and politicians to achieve their goals to undermine faith in the federal government in general, as well as faith in the fairness of the income tax system itself, particularly its administration. From the time of Franklin D. Roosevelt's presidency, this group of financial elites has patiently and steadily worked to achieve these goals.

Their efforts finally began to bear fruit during the Reagan administration, which passed the largest tax cuts in United States history, despite the fact that these tax cuts created huge deficits. Just as importantly, these financial elites were able to market an anti-tax, anti-government philosophy that has at least superficial appeal and is an easily understood message. They have created distrust in the general population toward federal government and a sense of grievance that the tax system is unfair and that the Internal Revenue Service is a rogue, out-of-control agency victimizing innocent taxpayers. As a result, the Internal Revenue Service is now subject to restrictions that impede its ability effectively to administer the tax system, thereby further eroding the taxpaying ethos and compliance with the tax laws. The Article concludes that if this erosion in compliance attitudes continues, it will reach a level of magnitude such that a tipping point will be reached and noncompliance will be an acceptable norm.

II. A GOVERNMENT'S PERCEIVED LEGITIMACY EMPOWERS IT TO TAX

A. *The Lack of a Taxing Power Threatens the Early Federal Government*

Without the ability of the federal government to both impose and collect taxes, the founding fathers might have failed in their quest to establish this new nation. A government needs a steady, reliable source of revenue in order to function and establish basic institutions such as a military to defend against a foreign enemy and protect the borders, a state department to negotiate trade treaties with other countries, and a treasury department to manage a currency. Reasonable minds can differ as to the proper role and scope of the federal government, but even those of the libertarian persuasion concede that a federal government serves a valid purpose and must exist to provide basic functions.[8]

Great Britain was one of the greatest powers at the time of our Revolutionary War, and in order for our army to prevail, political fervor and a sense of justice might have been necessary, but not sufficient: an army needs guns, clothing, and food—all of which require money. The British were able to deploy 25,000 experienced, well-equipped troops[9] in the field while "the Continental Congress struggled to [maintain] an army of 10,000 men."[10] Under the Articles of Confederation, the Continental Congress could spend money but did not have the power to levy or collect taxes; instead, it had to rely on the individual states to send funds to the central government.[11]

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8. *See* the Libertarian Party Platform as adopted at the Convention of May 2012, at Las Vegas, Nevada, wherein the Libertarian Party formally acknowledges the need for the government to provide a military (section 3.1 of Statement of Principles), a department of state (section 3.3 of Statement of Principles), and a judicial system to protect property and other rights (section 1.5 of Statement of Principles). *Libertarian Party Platform*, LIBERTARIAN PARTY, http://www.lp.org/platform (last visited Oct. 22, 2013).

9. By the time of the American Revolution, Great Britain already had an efficient tax collection system in place which enabled Great Britain to easily finance its war. *See* Arthur J. Cockfield, *How Tax Law Created the Modern World, Presentation at the University of Baltimore Annual Meeting of the Law and Society Association* (July 8, 2006) [hereinafter Cockfield, *Tax Law*] (unpublished draft for comments) (on file with author).

10. SIMON JOHNSON & JAMES KWAK, WHITE HOUSE BURNING 15–16 (2012) [hereinafter JOHNSON & KWAK, WHITE HOUSE BURNING].

11. *Id.* at 21 (citing ARTICLES OF CONFEDERATION of 1781, art. VIII ("Congress could assess contributions to the 'common treasury, which shall be supplied by the several States, in proportion to the value of all land within each State, granted to, or surveyed for, any Person,' but 'the taxes for paying that

Without a reliable, steady source of revenue, the new nation faced tremendous difficulty in supplying the Continental Army.[12] In 1779, John Jay, president of the Second Continental Congress,[13] "exhorted" the states to contribute to the central government in support of the war: "Recollect that it is the price of the liberty, the peace[,] and the safety of yourselves and posterity, that now is required."[14] However, without an executive branch "the central government had no enforcement powers over the states and could not compel" the states to contribute.[15]

To compensate for the shortfall in funds from the states, the Continental Congress issued paper money in order to pay the soldiers and to pay for supplies, but without funds backing up the continental currency, it fell in value.[16] Due to a lack of basic supplies such as food, clothing, and shelter, "2,500 men died at Valley Forge," and "[a]nger over irregular pay ... contribute[d] to the Pennsylvania Mutiny of 1783, which prompted Congress to relocate from Philadelphia to Princeton, New Jersey."[17]

Not only could the central government not depend on tax revenues from the states, it could not easily borrow from other countries if repayment

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proportion shall be laid and levied by the authority and direction of the legislatures of the several States, within the time agreed upon by the United States, in Congress assembled.'")). The Articles of Confederation were created on November 15, 1777; however, the document was not ratified by the 13 founding states until March 1, 1781. Nevertheless, between the dates of creation and ratification, the Continental Congresses acted as if the Articles were controlling.

12. *Id.* at 16.

13. The First Continental Congress met on September 5, 1774; the Second Continental Congress met on May 10, 1775. After the Articles were actually ratified on March 1, 1781, the term used to describe Congress was the United States in Congress Assembled. The last President of the United States in Congress Assembled was Cyrus Griffin who resigned in November 1788—shortly before the United States Constitution was ratified on March 4, 1789.

14. JOHNSON & KWAK, WHITE HOUSE BURNING, *supra* note 10, at 21 (citing John Jay, Circular Letter from Congress of the United States of America to Their Constituents, September 13, 1779, in 15 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1779, at 1052, 1062 (1909)).

15. *Id.* The Articles of Confederation only provided for a federal legislative body; no provision was made for an executive or judicial branch (the state courts were to hear any federal issues). In particular, the lack of an executive branch hampered the Continental Congress's ability to meet the financial demands of the war. *Id.*

16. The credit of the United States was so poor that in the 1780s, "some claims on the . . . government could be bought for less than 15 cents on the dollar." *Id.* at 15.

17. *Id.* at 16.

from tax revenues could not be assured.[18] Fortunately for the United States, France was contemporaneously embroiled in a power struggle with Great Britain, and therefore willing to lend the central government money (and also provided ships and troops), enabling the Americans to ultimately prevail in their quest for independence.[19] The Treaty of Paris ended the war on September 3, 1783.[20]

B. *Early Tax Wars*

However, defeating Great Britain did not ensure survival as a nation. History books are littered with examples to this present day of countries that succeeded in throwing off colonial rule only to founder when attempting to self-govern. Not only did the United States have British sympathizers still within its borders, but the budding nation would also have to convince even those who had fought the British that this new government had the authority to rule, including the power to tax. Some of the biggest challenges to the new government's authority came from veterans of the American Revolutionary War, particularly over the new government's authority to levy and collect taxes. The two most significant, early threats to the new nation arose from Shays' Rebellion and the Whiskey Rebellion.

After the Revolutionary War ended, the states had to pay not only their own debts, but also contribute to payment of the central government's war debt. However, while parts of the country started to recover economically from the war, the rural regions of the country were struggling. Merchants on the eastern seaboard were relatively prosperous, but farmers in remote areas survived on subsistence farming, and farmers, particularly in those areas, began to rebel against taxes imposed by the states to pay their debts. The most well-known rebellion was Shays' Rebellion in Massachusetts, named after its leader, Daniel Shays.[21]

The Massachusetts assembly "had taken an aggressive approach" to paying its war debts, which benefited the "few who held interest-bearing state notes."[22] Taxes in Massachusetts were already high, and when the State

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18. Spain and the Netherlands were also persuaded to lend money despite the high risk of nonpayment. *Id.*

19. *Id.*

20. The Treaty of Paris was signed at the Hotel d'York (now 56 Rue Jacob) on September 3, 1783. John Adams, Benjamin Franklin, and John Jay signed on behalf of the United States; David Hartley signed on behalf of Great Britain. The United States in Congress Assembled ratified the treaty on January 14, 1784.

21. *See* WILLIAM HOGELAND, THE WHISKEY REBELLION 52–53 (2006) [hereinafter HOGELAND, WHISKEY REBELLION]. Daniel Shays had been a captain in the Continental Army. Cockfield, *Tax Law*, *supra* note 9, at 28.

22. HOGELAND, WHISKEY REBELLION, *supra* note 21, at 53. The Massachusetts Assembly paid interest on the notes based on their face value, so that

decided to pay off the war debt quickly, the taxes became even higher. Those who could not pay the taxes, such as farmers and small businesses, saw their property sold at foreclosure. After petitions and meetings did not provide relief, the debtors staged a court riot at Northampton in 1786 and attempted to seize a federal arsenal in Springfield in 1787.[23] Massachusetts repealed the onerous taxes,[24] but 14 of the participants were subsequently tried and sentenced to death for treason (although they were pardoned before execution).[25]

At the same time, Americans wanted to push west and develop the land. They hoped that the Mississippi River would open up trade, but the states were not willing to invest in the infrastructure necessary to develop the West or the Mississippi River, nor were the states able to stop the conflict between settlers and Indians.[26] The central continental government did not have the financial means to accomplish the settlers' goals either. Furthermore, Great Britain was encouraging Indians to attack the settlers.[27] As a result, settlers in Ohio, Kentucky, western Virginia, and North Carolina considered declaring themselves as independent or aligning with Spain.[28] In an alarmed response, even those who had been deeply committed to state sovereignty and opposed a strong central government began to recognize that a federal government with the power to raise money through taxation was paramount to halting insurrection, assuring settlers' safety in the West, and assisting in the development of trade.[29]

State delegates met in Philadelphia from May 14 to September 17, 1787, initially intending to amend the Articles of Confederation but ended up creating the Constitution of the United States. One of the most contentious issues was whether the federal government or solely the individual states

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even if a $1 note, on which interest of 25 percent was to be paid, had depreciated in value to only $0.02, the note holder still received the $0.25 interest payment. The tax levied by the state to pay the interest on these notes was onerous enough, but Massachusetts exacerbated the burden by deciding to pay off the principal amount of the notes raising taxes even more. Farmers in particular felt victimized by the creditor class that held the notes and was being paid from the taxes. *Id.*

23. *Id.*

24. *Id.*

25. Cockfield, *Tax Law*, *supra* note 9, at 28 (citing *Treason Trials in the United States*, 46 ALB. L.J. 345, 345 (1892)).

26. HOGELAND, WHISKEY REBELLION, *supra* note 21, at 56–57.

27. *Id.* at 57.

28. *Id.* The idea of forming an alliance with Spain was not so farfetched given that Spain had provided some financial support during the Revolutionary War.

29. *Id.* at 56, 57–62.

would have the power to tax.[30] George Washington was reluctant to serve as the new nation's first President if the federal government did not have the power to tax but instead had to rely on the states to raise and send money to the federal government. In a letter to Thomas Jefferson, George Washington stated that he was willing to accept "any tolerable compromise" except for the amendment preventing direct taxation.[31] As also noted by one of the participants, "[Tax] connects with . . . almost all other powers and [tax] at least will in process of time draw all other[s] after it."[32] In other words, the

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30. Cockfield, *Tax Law*, *supra* note 9, at 29 (citing CALVIN H. JOHNSON, RIGHTEOUS ANGER AT THE WICKED STATES: THE MEANING OF THE FOUNDERS' CONSTITUTION 151 (2005)).

31. Letter from George Washington to Thomas Jefferson (Aug. 31, 1788), *in* 30 THE WRITINGS OF GEORGE WASHINGTON FROM THE ORIGINAL MANUSCRIPT SOURCES, 1745-1799, at 79, 82–83 (John C. Fitzpatrick ed., 1939)

> The merits and defects of the proposed Constitution have been largely and ably discussed. For myself, I was ready to have embraced any tolerable compromise that was competent to save us from impending ruin; and I can say, there are scarcely any of the amendments which have been suggested, to which I have *much* objection, except that which goes to the prevention of direct taxation; and that, I presume, will be more strenuously advocated and insisted upon hereafter, than any other. *Id.*

32. Cockfield, *Tax Law*, *supra* note 9, at 30 (second and third alteration in original) (citing Brutus I, New York Journal (Oct. 18, 1787), *in* 13 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 408 (Merrill Jensen et al. eds., 1976)).

Most historians believe that "Brutus" was Robert Yates, who was a New York delegate at the Constitutional Convention held in Philadelphia in 1787, and also a delegate to the New York state ratifying convention in Poughkeepsie in 1788. He opposed the adoption and ratification of the Constitution, in great part because he feared that a powerful federal government would overwhelm the power of the individual states. One of the federal powers that gave him grave concern was the proposed power to tax. His 16 essays in rebuttal to the Federalist Papers were published in the *New York Journal* between 1787 and 1788. The essays were addressed to the Citizens of the State of New York. *See Introduction to Brutus I*, New York Journal (Oct. 18, 1787), *in* 13 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 411 (John P. Kaminski et al. eds., 1981).

> The legislative power is competent to lay taxes, duties, imposts, and excises;—there is no limitation to this power, unless it be said that the clause which directs the use to which those taxes, and duties shall be applied, may be said to be a limitation: but this is no restriction of the power at all, for by this clause they are to be applied to pay the debts and provide for the common defence and general welfare of the United States; but the legislature have authority to contract debts at their discretion; they are the sole judges of what is necessary to provide for the common defence,

power over taxation was the foundation for all other government powers. While Virginia debated whether to ratify the Bill of Rights, James Madison's source said that the opposition was reducible "to a single point, the power of direct taxation."[33]

Nevertheless, the United States Constitution was ratified on March 4, 1789, replacing the unsuccessful Articles of Confederation under which the new nation had been governed since 1776.[34] The new Constitution gave

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> and they only are to determine what is for the general welfare; this power therefore is neither more nor less, than a power to lay and collect taxes, imposts, and excises, at their pleasure; not only [is] the power to lay taxes unlimited, as to the amount they may require, but it is perfect and absolute to raise them in any mode they please. No state legislature, or any power in the state governments, have any more to do in carrying this into effect, than the authority of one state has to do with that of another. In the business therefore of laying and collecting taxes, the idea of confederation is totally lost, and that of one entire republic is embraced. It is proper here to remark, that the authority to lay and collect taxes is the most important of any power that can be granted; it connects with it almost all other powers, or at least will in process of time draw all other after it; it is the great mean of protection, security, and defence, in a good government, and the great engine of oppression and tyranny in a bad one.

Id. at 414–15.

33. James Madison's source was Hardin Burnley, a member of the Virginia House of Delegates. In a letter to James Madison dated November 28, 1789, Burnley advised Madison regarding the problems in obtaining the Virginia House's approval of the Bill of Rights. Burnley believed that at least some of the opposition to the Bill of Rights was really opposition to the U.S. Constitution, in particular the power of Congress to tax. In his letter to George Washington on December 5, 1789, Madison included portions of Burnley's letter. *See* 12 THE PAPERS OF JAMES MADISON 1789-1790, at 455–56, 458–59 (Charles F. Hobson et al. eds., 1979).

34. *See* Robert N. Clinton, *A Brief History of the Adoption of the United States Constitution*, 75 IOWA L. REV. 891 (1990) (providing a concise explanation of the ratification of the Articles of Confederation and then later the United States Constitution). The new Constitution also created executive and judicial branches in addition to the existing legislative branch.

George S. Boutwell, whom Abraham Lincoln appointed as the first Commissioner of Internal Revenue during the Civil War (and who later served as Secretary of the Treasury under Ulysses S. Grant), observed that if the Articles of Confederation had provided the federal government with the power to tax, the federal government might well have continued to operate under the Articles. Boutwell noted this in an essay he wrote in 1895 in which he criticized the U.S. Supreme Court's decision to strike down the income tax of 1894 as unconstitutional.

> By the Articles of Confederation the general government had no power to levy taxes, and yet it had power to incur debts. At

Congress the power "To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare," and "To borrow Money on the credit of the United States."[35] When Washington took the oath of office on April 30, 1789, the United States was in dire fiscal condition.[36] In 1790, the federal government owed $54 million, of which $12 million was owed to foreigners. In addition, the individual states had debts of $25 million. Yet, between 1784 and 1789, the Continental Congress had been able to raise only $4.6 million, and half of that was borrowed.[37]

The first tax that the federal government imposed was the tax on whiskey at a rate of 7 cents per gallon.[38] Secretary of the Treasury Alexander Hamilton presented the idea to Congress as a tax on a luxury item, and Congress liked the idea because it would not tax landowners.[39] Congress might not have fully appreciated the fact that the whiskey tax was not simply a tax on a commodity that people bought and consumed as a luxury. Many farmers, especially in the western areas of the country, had little access to hard cash but rather, relied on barter. Landlords would take advantage of poor tenant-farmers and either demand astronomical amounts of crops or refuse to take crops at all in payment of rent. However, whiskey was as good as hard cash, and farmers could use whiskey to pay down debts, and laborers were often paid in whiskey rather than cash.[40] For these poor people, taxing whiskey was practically a tax on income. Distillers in western Pennsylvania in particular relied on the manufacture and sale of whiskey as their principal

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> the end of ten years its insolvency was apparent, and its incapacity, as a government, had been demonstrated to the thoughtful men of the country. The downfall of the [Articles of] Confederation was due to its inability to levy taxes; and the Constitution of the United States had its rise in that experience. With the power to levy taxes, even with all its other infirmities on its head, the [Articles of] Confederation might have outlasted, and it is probable that it would have outlasted, the eighteenth century.

George S. Boutwell, *The Income Tax* (pt. 1), 16 N. AM. REV. 589, 590–91 (1895) [hereinafter Boutwell, *Income Tax*].

35. U.S. CONST. art. I, § 8.

36. JOHNSON & KWAK, WHITE HOUSE BURNING, *supra* note 10, at 15.

37. *Id.* (citing DAVIS RICH DEWEY, FINANCIAL HISTORY OF THE UNITED STATES 57 (2d ed. 1903)).

38. Cockfield, *Tax Law*, *supra* note 9, at 29.

39. HOGELAND, WHISKEY REBELLION, *supra* note 21, at 62–64. Whiskey was the preferred, "cheap drink of the laboring classes." *Id.* at 63.

40. *Id.* at 67.

source of income.[41] Therefore, the whiskey tax was a significant burden on small farmers and laborers and generated outrage as a result.

In the fall of 1791, gangs on the western frontier began attacking the tax collectors, and over the course of the next two years, the attacks morphed from isolated, albeit vicious, attacks to an organized, regional movement that was determined to resist federal authority in general.[42] Many of the perpetrators were war veterans who were farmers, laborers, and hunters who were expert marksmen.[43] The rebels were not necessarily opposed to taxation in general, and many had fought in the Revolutionary War; however, they resented a system which seemed to redistribute wealth from small farms and businesses to a few wealthy federal bond holders.[44] For some, the rebellion had morphed into a "secessionist insurgency" against the United States itself.[45] In the fall of 1794, Washington raised 13,000 federal troops and crushed the rebellion.[46] Both George Washington and Alexander Hamilton believed that suppressing the rebellions had unified the country and helped the nation to flourish financially.[47] In a letter to his sister-in-law about the Whiskey Rebellion, Hamilton expressed his belief that "the insurrection will do us a great deal of good and add to the solidity of everything in this country."[48] In a subsequent letter to her, Hamilton boasts that, "Our insurrection is most happily terminated. Government has gained from it reputation and strength."[49] The new federal government had proven that it could perform and was perceived by Americans as having legitimacy.

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41. Cockfield, *Tax Law*, *supra* note 9, at 29. The best whiskey was produced by small distillers in the West, "especially from the Forks of Ohio, whose 'Monongahela Rye' possessed consistent strength and purity. The region achieved brand recognition. Its whiskey was known by name in Philadelphia and New Orleans." HOGELAND, WHISKEY REBELLION, *supra* note 21, at 66.

42. HOGELAND, WHISKEY REBELLION, *supra* note 21, at 7.

43. *Id.* at 7–8.

44. *Id.* at 8–9.

45. *Id.* at 7.

46. *Id.* Of the original 35 rebels who were charged with treason, two men were convicted of treason: John Mitchell and Philip Vigol; however, both men were pardoned by George Washington. Cockfield, *Tax Law*, *supra* note 9, at 29.

47. HOGELAND, WHISKEY REBELLION, *supra* note 21, at 239–40.

48. *Id.* at 276 (quoting Letter from Alexander Hamilton to Angelica Church (Oct. 23, 1794)).

49. *Id.* (quoting Letter from Alexander Hamilton to Angelica Church (Dec. 8, 1794)).

III. WHY DO TAXPAYERS COMPLY WITH THE TAX LAWS?

A. *The Role of Sanctions in Fostering a Taxpaying Ethos*

What motivates taxpayers to comply with their tax filing and payment responsibilities? One way to understand this is to consider three types of sanctions: symbolic, instrumental, and expressive. Professor Michael Kirsch has examined the imposition of sanctions from an instrumental, expressive, and symbolic perspective in the context of tax-motivated expatriation, but which has broader implications and can be applied here.[50] Symbolic sanctions do not seek to change or stop the target's undesirable behavior; instead, the purpose of symbolic sanctions is to reassure the public that "something" is being done about the problem.[51] Instrumental sanctions are intended to change the target's behavior by changing the cost-benefit analysis. Expressive sanctions are intended to change the target's behavior by changing the target's norms.[52]

An example of a symbolic sanction is legislation banishing expatriates, which sends the signal that Congress is cracking down on tax cheats.[53] Expatriates are a small, yet visible and controversial group; enacting legislation designed to punish them provides the public with a sense of satisfaction that something has been accomplished regarding tax evasion, despite the fact that expatriation is a technique rarely used to avoid tax.[54] Symbolic sanctions might buttress or reinforce existing taxpayer compliance norms and signal to other taxpayers that they are not "chumps" for fulfilling their tax obligations. However, the danger with symbolic sanctions is that they are only symbolic. If society in general, and the government in particular, merely engages in empty gestures designed to placate the public, eventually the public becomes cynical. No one likes to be played for a fool.

Instrumental sanctions attempt to modify behavior by changing the cost-benefit analysis.[55] For example, taxpayers who do not properly file and pay their taxes are subject to sanctions in the form of penalties,[56] audits, and

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50. *See* Michael S. Kirsch, *Alternative Sanctions and the Federal Tax Law: Symbols, Shaming, and Social Norm Management as a Substitute for Effective Tax Policy*, 89 IOWA L. REV. 863 (2004) [hereinafter Kirsch, *Alternative Sanctions*].

51. *Id.* at 921.

52. *Id.*

53. *Id.* at 923–25.

54. *Id.* at 876 ("More than 255,000,000 million [sic] individuals hold United States citizenship, yet, on average, fewer than 600, or 0.00023%, renounce or otherwise lose citizenship annually."). *Id.*

55. *Id.* at 893–912.

56. These include penalties for failure to file, failure to pay, underpayment, civil fraud, and criminal fraud.

incarceration.[57] (Taxpayers who fail to pay what is owed must also pay interest on the underpayment, but that is not really punitive in nature; rather, the interest is intended to prevent the taxpayer from receiving an interest-free loan from the federal government during the period from when the payment is due until the payment is made.) Therefore, a taxpayer who contemplates cheating on his taxes must weigh the benefit of not paying the tax against the costs associated with being audited or paying penalties.

The cost-benefit analysis underlying instrumental sanctions assumes that taxpayers will always act as rational wealth maximizers.[58] In order to act in a manner that rationally maximizes wealth, taxpayers must have all the necessary and accurate information when deciding how to act. However, taxpayers do not. For example, taxpayers assume that the risk of being audited is much higher than it actually is.[59] (Human beings tend to overemphasize information that comports with what they already believe and tend to dismiss information that does not.)[60] The audit rate was 0.49 percent in 2000 and 1.03 percent in 2007.[61] (Of course, taxpayers are not a monolith, but represent people with very diverse backgrounds. The compliance rate for the self-employed is very low: sole proprietors report on 43 percent of their business income.[62] Entrepreneurs also tend to be risk-takers. Therefore, that group might well minimize the risk of being audited or not being able to talk their way out of any negative consequences.) However, even though taxpayers believe that the risk of being audited is much higher than it actually is, that misperception alone does not explain taxpayer compliance.

57. Although the possibility of incarceration for criminal tax fraud is remote, several high profile cases, such as Richard Hatch from Survivor and actor Wesley Snipes, perhaps create the impression that incarceration for criminal tax fraud is more common than it actually is. This Article will focus more on penalties and audits, as they are the two most common instrumental sanctions.

58. Richard Lavoie, *Patriotism and Taxation: The Tax Compliance Implications of the Tea Party Movement*, 45 LOY. L.A. L. REV. 39, 45–46 (2011) [hereinafter Lavoie, *Patriotism and Taxation*].

59. Richard Lavoie, *Flying Above the Law and Below the Radar: Instilling a Taxpayer Ethos in Those Playing by Their Own Rules*, 29 PACE L. REV. 637, 640–42 (2009) [hereinafter Lavoie, *Flying Above the Law*]. Tax protestors have begun to share this information with each other and some are now openly challenging the IRS to take action against them in the confident belief that nothing will be done.

60. *Id.* at 675 (citing Clifford R. Mynatt et al., *Confirmation Bias in a Simulated Research Environment: An Experimental Study of Scientific Inference*, 29 Q.J. EXPERIMENTAL PSYCHOL. 85–95 (1977)).

61. *Id.* at 641 note 20 (noting that "[o]f course the audit rate is somewhat understated as it omits errors detected by information matching and other computer screening techniques that are typically rectified through written correspondence only"). *Id.*

62. 1 TAXPAYER ADVOCATE SERV., NATIONAL TAXPAYER ADVOCATE 2012 ANNUAL REPORT TO CONGRESS 7 (2012).

Studies have revealed that the levels of risk aversion in taxpayers to being audited are not sufficiently high to account for compliance.[63]

This is not to say that instrumental sanctions do not have their place or that they do not induce some measure of tax compliance. Studies have demonstrated that tax compliance increases as penalties and enforcement activity escalate, at least up to a point.[64] In addition, the presence of instrumental sanctions might reinforce other norms that taxpayers hold that encourage them to comply.[65] Furthermore, audits and penalties reassure compliant taxpayers that the government is monitoring the system and endeavoring to detect and punish cheaters. However, the government must walk a fine line when reassuring the public that cheaters are being punished. If the public perceives that tax evasion is rampant, then compliant taxpayers may well believe that they are fools to report their taxes accurately. There is evidence that the "publicity about taxpayer evasion and government efforts to stop evasion seem less likely to have pernicious effects on society when the government publicizes specific examples of noncompliance, as compared to general stories about rampant tax cheating."[66]

Most importantly, the cost-benefit model does not fully explain the level of voluntary compliance in the United States because most people do not base every decision on pure economics or the potential for maximizing wealth. Rather, people want and need to satisfy a myriad of values and goals. Further, a tax system cannot be based solely on threats and coercion—at least not in a country of this size and with a democratic form of government. The government needs taxpayers to fulfill their obligations in a spirit of cooperation for tax administration to be effective. One way for the government to foster this cooperation is to create a tax morale that favors

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63. *See* Lavoie, *Flying Above the Law*, *supra* note 59, at 642 (citing James Andreoni, Brian Erard & Jonathan Feinstein, *Tax Compliance*, 36 J. ECON. LITERATURE 818, 846 (1998) (noting that misperceptions of audit rate cannot explain observed compliance rate); BENNO TORGLER, TAX COMPLIANCE AND TAX MORALE: A THEORETICAL AND EMPIRICAL ANALYSIS 4 (2007) (noting that estimated level of risk aversion in the United States would need to be much higher to explain the compliance rate)).

64. *Id.* at 647.

65. *See* Leandra Lederman, *The Interplay Between Norms and Enforcement in Tax Compliance*, 64 OHIO ST. L.J. 1453 (2003) [hereinafter Lederman, *Tax Compliance*] (demonstrating that enforcement sanctions such as auditing and penalties can buttress norms-based appeals for compliance).

66. Leslie Book, *The Poor and Tax Compliance: One Size Does Not Fit All*, 51 U. KAN. L. REV. 1145, 1150, note 18 (2003) (citing Steven M. Sheffrin & Robert K. Triest, *Can Brute Deterrence Backfire, in Perceptions and Attitudes*, *in* 2 TAXPAYER COMPLIANCE 193, 210, 212–13 ("suggesting that general stories about the tax gap likely lowers morale and leads people to believe others are cheating, but that particularized stories are not likely to have a similar effect")).

compliance. Tax morale represents a conglomeration of factors that have an impact, either positive or negative depending on the circumstances, on taxpaying attitudes. Societies with high tax morale will have high voluntary compliance, and societies with low tax morale will have widespread evasion and cheating. High tax morale fills in the gap, so to speak, as to what explains taxpayer compliance in the United States to the extent that penalties and audits do not.

Society can create high tax morale through the use of expressive sanctions. Expressive sanctions seek to change the target's behavior by changing or altering norms.[67] The goal of the expressive form of sanctions is to encourage the target to internalize a new norm, thereby causing the target to consequently change its behavior.[68] Robert McAdams' esteem-based theory of norm development theorizes that the enactment of expressive legislation publicizes to the relevant community that a consensus on certain behavior exists. After individuals become aware of this consensus, they are more likely to experience a gain in esteem by complying with the norm (or alternatively lose esteem by failing to comply). For purposes of expressive sanctions, "the term 'social norms' means 'informal social regularities that individuals feel obligated to follow because of an internalized sense of duty, because of a fear of external non-legal sanctions, or both.'"[69] Simply put, if a sufficient number of people in a social group or community adopt a norm, those who comply with it gain esteem and those who violate the norm garner disapproval.[70]

Lavoie uses the term "tax ethos" to describe this social norm. Tax ethos connotes a widely held social belief (an internalized norm) that one should not cheat on his or her taxes.[71]

> [A] taxpaying ethos represents a pervasive cultural norm that is internalized by members of the society and therefore strongly influences their behavior in favor of faithfully complying with the tax laws."[72] Stated another way, taxpaying ethos is a descriptive phrase identifying a cultural

67. Kirsch, *Alternative Sanctions*, *supra* note 50, at 913.

68. *See, e.g.*, Diane L. Fahey, *Can Tax Policy Stop Human Trafficking?*, 40 GEO. J. INT'L L. 345 (2009).

69. Kirsch, *Alternative Sanctions*, *supra* note 50, at 913, n.219 (citing Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 340 (1997)); *see also id.* (citing Robert Cooter, *Expressive Law and Economics*, 27 J. LEGAL STUD. 585, 587 (1998) (stating that a social norm is "a consensus in a community concerning what people ought to do . . . [that] affects what people actually do") (alteration by Kirsch)). *Id.*

70. *Id.* at 917–18.

71. Lavoie, *Flying Above the Law*, *supra* note 59, at 642–43.

72. *Id.* at 643.

> dynamic that values adhering to (and disfavors disobeying) the tax laws, while tax morale refers to the various factors that may contribute to creating such a taxpaying ethos within a particular society.[73]

As Lavoie notes, tax ethos can be one of the factors that affects tax morale in that if there is a strong tax ethos in a society, tax morale should be correspondingly higher. We need a tax ethos because we cannot rely only on threats and the fear of punishment to compel compliance. Not only would this require a much larger IRS, but would also create an atmosphere that is unconducive for tax morale.

Two perceptions or beliefs can create the foundation for a taxpaying ethos among the general public if the beliefs are widely held: a social contract and quid pro quo. A social contract exists in a society when taxpayers not only perceive a tax as legitimate or fair and fairly collected (a type of trust in their government), but also that others are honestly reporting and paying their fair share of taxes (a type of trust in other members of society). Quid pro quo exists when taxpayers believe that their taxes are being used to provide benefits to the taxpayer or to society in general—benefits that the taxpayer believes have value or worth (again, a type of trust in government). As noted by Lavoie, "[t]axpayers' willingness to pay taxes increases if they understand the implicit quid pro quo received in exchange for their taxes and they if [sic] perceive that others are reciprocating by paying their share of the tax burden as well."[74] Lavoie also states with regard to the quid pro quo aspect of tax ethos that

> This relationship continues to hold true even when the quid pro quo takes the form of "public goods," which the government would provide to all citizens even if a particular taxpayer did not contribute toward them. Thus, individuals perceive benefits and are willing to pay for government activities even if the benefits are amorphous with no direct link to the individuals, like government grants for pure scientific research.[75]

As discussed *infra*, there is a deliberate campaign to destroy tax ethos with the purpose of destroying the progressive federal income tax. The social contract basis for taxpaying ethos can be eroded if taxpayers believe that others are not paying their fair share or if the nontaxpaying norm of a subgroup gains widespread acceptance. Part IV of this Article details how

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73. *Id.*
74. Lavoie, *Patriotism and Taxation*, *supra* note 58, at 46.
75. *Id.*

there has been a deliberate campaign by a segment of society to destroy taxpayers' belief in the social contract through both of the above-mentioned methods. This same small segment also seeks to create doubt in taxpayers that their government is using tax revenues responsibly.

B. *Creation of a Taxpaying Ethos in the United States*

1. *Early Attempts to Create a Federal Income Tax*

Prior to enactment of the modern federal income tax in 1913,[76] the federal government derived most of its revenues primarily from tariffs, customs duties on imports, from some internal excises taxes (for example on the sale of alcohol and tobacco), and from the sale of public lands. However, during times of crisis, such as war, the federal government had to find other sources of revenue in order to meet the expanded demands on the federal government. For example, during the War of 1812, revenues from tariffs dropped during the pre-war embargo against Great Britain and during the War itself.[77] Secretary of the Treasury Alexander J. Dallis suggested "enactment of an inheritance and income tax which he thought could 'be easily made to produce $3 million.' However, the war ended before the proposal could be enacted . . . ."[78]

Later, from 1861 to 1865,[79] the country was embroiled in a Civil War, and the federal government's expenditures rose from $67 million in 1861 to $1.3 billion by 1865.[80] The federal government could not raise such large sums from tariffs and excise taxes alone. Therefore, the Civil War saw the country's enactment of the first income tax (at least in the North),[81] the rates of which were steadily raised during the War as the need for funds increased.[82] The general public tolerated the tax because it was perceived as

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76. Underwood Tariff Act, ch. 16, 38 Stat. 114 (1913).

77. JOHNSON & KWAK, WHITE HOUSE BURNING, *supra* note 10, at 6.

78. HAROLD DUBROFF, THE UNITED STATES TAX COURT: AN HISTORICAL ANALYSIS 2 (1979) [hereinafter DUBROFF, TAX COURT].

79. Actual hostilities commenced when Confederate forces attacked Fort Sumter in South Carolina on April 12, 1861. Robert E. Lee surrendered at Appomattox on April 9, 1865, and President Andrew Johnson issued a Proclamation on May 9, 1865, proclaiming an end to hostilities. *See* DAVID J. EICHER, THE LONGEST NIGHT: A MILITARY HISTORY OF THE CIVIL WAR 819 (2001); *see also Important Proclamations*, N.Y. TIMES (May 10, 1865), http://www.nytimes.com/1865/05/10/news/important-proclamations-belligerent-rights-rebels-end-all-nations-warned-against.html.

80. DUBROFF, TAX COURT, *supra* note 78, at 2.

81. *Id.* at 3 (citing Act of Aug. 5, 1861, ch. 45, § 49, 12 Stat. 309).

82. Initially, incomes below $600 were exempt from the tax; incomes between $600 and $10,000 were taxed at a rate of 3 percent; incomes above $10,000

a temporary measure required by the exigencies of War and because most of the burden was shouldered by the more affluent. This first federal income tax was not a significant source of government revenues; in 1866, at the tax's height, it raised $73 million out of federal revenues totaling $559 million.[83] Furthermore, within a few years of the War's end the country had returned to a budget surplus, and, under pressure from banking and commercial interests in the Northeast, the income tax was repealed, effective 1872.[84] The short-lived nature of the Civil War-era income tax and its limited scope (both in terms of the amount of revenue generated and the number of taxpayers subject to it) were factors that were not conducive to creating a social contract or quid pro quo basis for compliance in the general public.[85]

Almost immediately after the repeal of the Civil War's income tax, the country experienced a severe recession and financial panic in 1873 which hit farmers in the South and Midwest particularly hard because prices for their crops dropped, whereas the cost of feed, fuel, and other supplies did not. No sooner had the country begun to recover from the recession of 1873 when it was caught in the grip of a depression, which again hurt farmers and

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were taxed at a rate of 5 percent. *Id.* (citing Act of July 1, 1862, ch. 119, § 90, 12 Stat. 473). As the War progressed and the federal government needed more funds, the rates were increased so that by 1865, incomes between $600 and $5,000 were taxed at a rate of 5 percent and incomes above $5,000 were taxed at a rate of 10 percent. *Id.* (citing Act of Mar. 3, 1865, ch. 78, 13 Stat. 479).

83. *Id.* at 3. By 1872, when the tax was repealed, it raised $14 million out of federal revenues totaling $374 million. *Id.*

84. *Id.* at 3–4 (citing Act of July 14, 1870, ch. 255, § 6, 16 Stat. 257). Prior to its repeal, the amount of income exempt from tax was steadily increased and the tax rates were reduced. *See id.* (citing Act of Mar. 2, 1867, ch. 169, § 13, 14 Stat. 478; Act of July 14, 1870, ch. 255, §§ 6, 8, 16 Stat. 257, 258).

Merchants, in particular, preferred tariffs and excise taxes because these taxes made locally produced goods cheaper and more attractive to buyers than the imported goods on which these taxes were imposed. The Republican Party controlled Congress for most of the late nineteenth century. Industrial and manufacturing interests controlled the postwar Republican Party and these interests preferred "high import tariffs to protect themselves from foreign competition." However, these tariffs increased the cost of consumer goods, which hurt lower- and middle-income people, "especially those in the South and West who did not benefit from protectionism." As a result of these tariffs, the federal government had a "consistent budget surplus from the end of the war through 1893." JOHNSON & KWAK, WHITE HOUSE BURNING, *supra* note 10, at 35–36.

85. *See* Bryan T. Camp, *Tax Administration as Inquisitorial Process and the Partial Paradigm Shift in the IRS Restructuring and Reform Act of 1998*, 56 FLA. L. REV. 1, 37–44 (2004) [hereinafter Camp, *Tax Administration*], (detailing the history of the unique collection problems associated with the Civil War-era income tax).

small businesses in particular.[86] The first attempt at a permanent income tax arose from a populist and agrarian movement rebelling against the government's reliance on tariffs and internal excise taxes to fund its activities, as well as the regular presence of economic recessions and depressions. Tariffs favored the merchant class because it made domestic goods more attractive over imported goods. However, tariffs tax consumption, and therefore, fall more heavily on lower-income people who must use a greater percent of their income to purchase goods (the same being true for internal excise taxes). In addition, economic power was increasingly concentrated in the hands of banks, railroads, and other industrial and financial interests. The populist movement wanted "cheap money, regulation or [break-up] of the monopolies, and the imposition of an income tax."[87]

Out of this economic turmoil arose a coalition of populists, southern and western Democrats, and some moderate Republicans who joined together in 1894 to enact what was hoped to be the first permanent federal income tax.[88] This income tax was intended to reduce tariffs and compensate for the shortfall by taxing the wealthy (although it only taxed the wealthiest 2 percent of the population and at a rate of 2 percent, with an exemption of $4,000).[89] This first permanent income tax was unusual in that it arose because the public (at least, the less-affluent members of the public) demanded that the government impose the tax (a bottom-up demand, so to speak). Previously, taxes were usually proposed by the government and then imposed on the public (a top-down demand, so to speak). True, even from the days in Great Britain dating back to 1100 with the Charter of Liberties[90] and from our country's early history, the masses of citizens had demanded a say in the government's imposition of a tax. However, this demand found expression in the populace wanting a voice or representation in the government which then devised and imposed the tax. Conversely in this instance, the public itself generated the demand for the tax. It was the public, not the government, which was behind the demand for this tax. Unsurprisingly, the wealthy denounced the tax as "socialism, communism and devilism" devised by "'the professors with their books, the socialists with their schemes,' and 'the anarchists with their bombs.'"[91]

86. DUBROFF, TAX COURT, *supra* note 78, at 4.

87. *Id.*

88. *Id.* (citing Act of Aug. 27, 1894, ch. 349, § 27, 29 Stat. 553). President Grover Cleveland, "who favored reduced tariffs but opposed . . . an income tax, allowed it to become law without his signature." *Id.*; *see also* Pollack, *Modern Income Tax*, *supra* note 2, at 301–06.

89. DUBROFF, TAX COURT, *supra* note 78, at 4–5.

90. The British aristocracy began to demand that the King could not levy taxes without consulting them. *See* Cockfield, *Tax Law*, *supra* note 9, at 6–7.

91. DUBROFF, TAX COURT, *supra* note 78, at 5. "In a republic like ours, where all men are equal, this attempt to array the rich against the poor or the poor

Almost immediately, the tax was challenged as unconstitutional in *Pollock v. Farmers' Loan & Trust Co.*[92] on three grounds as: (1) a direct tax instead of "apportioned among the states on the basis of population,"[93] (2) not uniform throughout the U.S. because it exempted incomes under $4,000,[94] and (3) "imping[ing] on the rights of state and local governments by taxing the interest on obligations issued by [those] bodies."[95] The United States Supreme Court had held previously "that direct taxes included only land and capitation taxes,[96] and had upheld the constitutionality of the Civil War income taxes."[97] Nevertheless, in *Pollock*, the Supreme Court held that the federal government could not tax state and local obligations, that "taxes on income from real and personal property were direct taxes," and that the law was "so infected with unconstitutionality" that the whole thing needed to be struck down.[98]

2. *The Sixteenth Amendment and the Modern Income Tax*

For the poor, especially immigrants, economic conditions in the United States at the beginning of the twentieth century only worsened, so that most workers lived in extreme poverty while wealth became

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against the rich is socialism, communism, devilism . . . ." 26 CONG. REC. 6695 (1894) (statement of Sen. John Sherman).

> The nonmigrating European feels a parental superiority and duty toward us. European professors announce to American professors, who publish and believe it, the birth of a brand new political economy for universal application. From the midst of their armed camps between the Danube and the Rhine, the professors with their books, the socialists with their schemes, the anarchists with their bombs, are all instructing the people of the United States in the organization of society, the doctrines of democracy, and the principles of taxation. Little squads of anarchists, communists, and socialists cross the ocean and would have us learn of them. No wonder, if their preaching can find ears in the White House.

26 CONG. REC. 3564 (1894) (statement of Sen. David B. Hill).

92. DUBROFF, TAX COURT, *supra* note 78, at 5 (citing 157 U.S. 429, *modified*, 158 U.S. 601 (1895)).

93. *Id.* (citing U.S. CONST. art. I, § 9).

94. *Id.* (citing U.S. CONST. art. I, § 8, cl. 1).

95. *Id.* (citing U.S. CONST. amend. X).

96. *Id.* (citing Hylton v. United States, 3 U.S. (3 Dall.) 171, 174 (1796)).

97. *Id.* (citing Springer v. United States, 102 U.S. 586 (1880)). *See also* Boutwell, *Income Tax*, *supra* note 34, (criticizing the Supreme Court's reasoning in *Pollock* that a tax on the rents from land and on income from stocks and bonds was a direct tax).

98. *Id.*

increasingly concentrated in the hands of monopolies.[99] Additionally, in 1907, the country experienced another financial crisis with a run on the banks. Only the efforts of J.P. Morgan, who provided loans to threatened banks, prevented the financial system from collapsing.[100] Although Republicans controlled the White House, the Senate, and the House of Representatives, several midwestern Republican senators again forged an alliance with Democrats who were in favor of a progressive federal income tax.[101] In order to save the Payne-Aldrich-Tariff Bill,[102] the conservative Republicans had to compromise with the coalition and agree to: (1) "amend the [United States] Constitution to permit an income tax without

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99. Ahmed A. White, *The Crime of Economic Radicalism: Criminal Syndicalism Laws and the Industrial Workers of the World, 1917-1927*, 85 OR. L. REV. 649, 673–74 (2006).

> The realities of industrial labor . . . were not only independent aspirations to protest. These conditions reflected themselves in a work-life that was, for many workers, nothing short of a living hell: unremunerative, physically dangerous, and devoid of any intrinsic meaning. In mines, mills, and factories throughout the country, workers toiled long hours for meager pay, often in places far too hot or cold, amid noisy machinery, suffused in noxious gasses and dust, in dank and darkness, and under the control of evermore rigorous and authoritarian structures of control. This reality was overlaid by more immediate causes of dissatisfaction with the lived experience of industrial capital: chronic poverty, which was often reflected in inadequate housing, malnutrition, and exposure to disease; disenfranchisement, ghettoization, and other forms of social exclusion; and, for many, a recognition that the social and legal order was designed not to uplift and enlighten them, but to facilitate their utter exploitation.

Id. at 673. *See also* Laurie Serafino, *Life Cycles of American Legal History Through Bob Dylan's Eyes*, 38 FORDHAM URB. L.J. 1431, 1453–54 (2011).

> Like African Americans abused and misused by plantation owners, immigrants were discriminated against, exploited by industrial bosses, and neglected by politicians. Sweatshops flourished; industrial accidents caused tragedies such as the Triangle Fire in 1911; and laws mandating a minimum wage, regulating maximum working hours regulations, and prohibiting child labor did not exist. Workers had virtually no rights or protections, and working conditions were atrocious.

Id. at 1453.

100. SIMON JOHNSON & JAMES KWAK, 13 BANKERS: THE WALL STREET TAKEOVER AND THE NEXT FINANCIAL MELTDOWN 26–27 (2010).

101. DUBROFF, TAX COURT, *supra* note 78, at 6–7.

102. *Id.* at 7 (citing Act of Aug. 5, 1909, ch. 6, § 38, 36 Stat. 112).

apportionment," and (2) enact a corporate income tax.[103] By 1913, two-thirds of the states necessary for its ratification had approved the Sixteenth Amendment to the United States Constitution, which provided that, "The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration."[104] In 1913, Congress enacted the Internal Revenue Act of 1913—the predecessor to the present federal income tax as now codified in Title 26 of the United States Code—and which President Woodrow Wilson signed into law.[105] The 1913 Act was relatively modest in its scope with low rates and a "generous exemption," so that out of a population of 97 million, only 358,000 individual income tax returns were filed for the 1913 tax year.[106] Again, it is significant that the demands from the general public for the enactment of the modern income tax were not based on social contract or quid pro quo theories that "we are all in this together," but rather, were based on a sense that a small segment of society was benefiting the most and, therefore, should contribute something to the federal fisc.

A government agency was needed to administer this new tax system. In 1861 and 1862, when Congress had enacted legislation temporarily creating an income tax to finance the Civil War,[107] Congress also created the Bureau of Internal Revenue [hereinafter "the Bureau"] to administer the income tax.[108] Although the income tax was repealed after the Civil War, the Bureau remained in existence to administer what few internal revenue taxes remained—such as on alcohol and tobacco—and to perform certain miscellaneous duties, such as administering the bounty for United States

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103. *Id.* It was believed that the corporate income tax would not run afoul of the Supreme Court's decision in *Pollock* because it was described as an excise tax on the right to do business in the corporate form and was measured by the corporation's income. The Supreme Court blessed the corporate income tax in Flint v. Stone Tracy Co., 220 U.S. 107 (1911). *Id.*; *see also* Pollack, *Modern Income Tax*, *supra* note 2, at 316, n.129.

104. *Id.* (citing U.S. CONST. amend. XVI); *see also supra* note 2.

105. Underwood Tariff Act, ch. 16, 38 Stat. 114 (1913); *see also supra* note 3. President Theodore Roosevelt had spoken up in favor of a progressive income tax during his administration, but took no action on that score. His successor, William Howard Taft, also made statements in support of a progressive income tax but also did not take personal action to further its enactment. DUBROFF, TAX COURT, *supra* note 78, at 6.

106. DUBROFF, TAX COURT, *supra* note 78, at 8.

107. *See* Act of Aug. 5, 1861, ch. 45, § 49, 12 Stat 309; *see also* Act of July 1, 1862, ch. 119, § 90, 12 Stat. 473.

108. DUBROFF, TAX COURT, *supra* note 78, at 13–14; *see also* Camp, *Tax Administration*, *supra* note 85.

sugar producers, certifying Chinese laborers, and collecting the tax on opium and oleomargarine.[109]

In 1914, World War I [hereinafter "WWI"] began in Europe, and, although the United States would not officially enter the conflict until the spring of 1917, the United States immediately experienced financial repercussions from the War as a result of (1) reduced revenues from customs receipts due to trade reduction with Europe, and (2) increased government expenditures as the United States made preparations to enter the conflict.[110] As a result, the federal government incurred a deficit of $400,000 in 1914, which increased to $13 billion by 1919.[111] In response, Congress enacted the Revenue Acts of 1916,[112] 1917,[113] and 1918[114] [hereinafter "the WWI Revenue Acts"].[115] Each one of these revenue measures increased the number of taxpayers who were required to file returns so that by 1917, 3.5 million individuals filed income tax returns and by 1920, the number had increased to 7 million, or 6.6 percent of the population.[116] Nevertheless, the tax remained a "class tax" and was paid only by taxpayers in the upper economic strata. Perhaps there was a rough justice to this, considering that the rich became richer from the War.[117] Again, as with the Civil War income tax, the federal government did not attempt to expand the tax to the general public with appeals to their sense of tax ethos via the social contract or quid pro quo. However, in contrast to the federal individual income tax imposed during the Civil War, the individual income tax of 1913, the corporate income tax, and the excess profits tax were significant sources of federal revenues. For example, in 1920, federal revenues totaled $6.7 billion of which $3.9 billion, or 55 percent, was derived from the income and excise taxes.[118]

After WWI ended and the federal government once again had revenue surpluses, Congress was under pressure to reduce the income tax, and the Revenue Act of 1921 reduced the individual and corporate tax

109. DUBROFF, TAX COURT, *supra* note 78, at 14.

110. *Id.* at 8–9. On April 6, 1917, the United States Congress declared war on the German Empire. ARTHUR S. LINK, WOODROW WILSON AND THE PROGRESSIVE ERA, 1910–1917, at 282 (1954).

111. DUBROFF, TAX COURT, *supra* note 78, at 9.

112. Revenue Act of 1916, ch. 463, 39 Stat. 756.

113. War Revenue Act of 1917, ch. 63, 40 Stat. 300.

114. Revenue Act of 1918, ch. 18, 40 Stat. 1057.

115. DUBROFF, TAX COURT, *supra* note 78, at 9–10.

116. *Id.* at 10–12; *see also* LAWRENCE H. SELTZER, THE PERSONAL EXEMPTIONS IN THE INCOME TAX 62 (1968) [hereinafter SELTZER, PERSONAL EXEMPTIONS].

117. *See* LIAQUAT AHAMED, LORDS OF FINANCE 90–91 (2009).

118. DUBROFF, TAX COURT, *supra* note 78, at 10.

rates.[119] However, the income tax was too firmly entrenched to be completely repealed. From 1918 to at least 1979, income and profits taxes have rarely yielded less than half of the annual government receipts, and in some years they have yielded considerably more than half**.** Therefore, significantly reducing or eliminating the income tax would greatly reduce federal tax revenues and incapacitate the federal government.

The Sixteenth Amendment and the subsequent income tax laws were approved because the less wealthy believed it would shift some of the tax burden onto the wealthy. There was an evolving perception among the less affluent that the income tax would increase fairness in the tax system. Therefore, the idea of a federal income tax was not only accepted by the general public, but was embraced and demanded. However, the purpose of this early income tax (and who would pay it) was radically different from its purpose during World War II and thereafter.

Initially, the purpose of the tax was to provide some relief for the less wealthy, as the government would be able to rely less on tariffs and excise taxes for revenue. Furthermore, the majority of the public perceived that the wealthy and large corporations derived most of the economic benefit from this country and therefore should pay something. As described *infra*, the purpose, and thus the nature, of the income tax needed to change during World War II in order for the tax to metamorphose from a class tax to a mass tax, and this change has persisted to the present day, but is increasingly under assault by segments of the wealthy once again.

3. Transition from a "Class Tax" to a "Mass Tax"[120]

a. Educating the American Public About the Income Tax

The federal income tax changed within a relatively short period of time from a tax begrudgingly paid by only the wealthy to a tax also paid by cooperative middle- and lower-income classes. World War II enabled this transition as it allowed the government to create a taxpaying ethos in the majority of the citizenry—a tax ethos that remained in place for decades after the War ended. During World War II, the government used tools such as the media, popular public figures, and appeals to American values such as patriotism to educate the public about this greatly expanded tax system and to persuade the public to accept their taxpaying obligations. These tools helped create the perception among the general public that everyone had a

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119. *See* Revenue Act of 1921, ch. 136, 42 Stat. 227.

120. *See* Carolyn C. Jones, *Class Tax to Mass Tax: The Role of Propaganda in the Expansion of the Income Tax During World War II*, 37 BUFF. L. REV. 685 (1989) [hereinafter Jones, *Class Tax to Mass Tax*].

part to play in the war effort—a social contract basis for compliance—and the awareness that the tax revenues were providing the men on the front lines with guns, ammunition, planes, and other necessities—a quid pro quo basis for compliance. As demonstrated *infra*, within a relatively short period of time the general public's perception of, and compliance with, the federal income tax underwent dramatic changes.

Between 1918 and 1932, an average of 5.6 percent of the population was covered by taxable returns, with the maximum coverage in 1920 of 11.4 percent and a low in 1931 of 2.5 percent. The low in 1931 was attributable to the Great Depression.[121] Despite the economic hardship of the Great Depression, President Franklin D. Roosevelt did not seek to broaden the base of the federal income tax beyond the very wealthy, so that from 1933 to 1939, an average of 3.7 percent of the population was covered on taxable returns.[122] "As a result, the individual income tax accounted for a lower percentage of federal revenue during the pre-war period of Roosevelt's presidency than it had from 1925 to 1932."[123] Roosevelt did not seek to expand the scope of the income tax to include middle- and lower-income class Americans, in part because the continuing Depression made such an expansion difficult, and perhaps partially for fear of triggering tax revolts, such as had occurred during 1932.[124] Further, the federal income tax's reputation was sullied by association with the tiny fraction of the American public whom Roosevelt described as "a small, but powerful group which has fought the extension of [the] benefits of democracy, because it did not want to pay a fair share of their cost."[125] The taxpaying classes' reputation was not improved by the many loopholes the wealthy used to avoid their taxes.[126]

By 1938, the public still supported the idea of taxing the wealthy, but did not support the idea of imposing the tax on low-income wage earners.[127]

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121. *Id.* at 688 (citing SELTZER, PERSONAL EXEMPTIONS, *supra* note 116).

122. *Id.* at 689 (citing SELTZER, PERSONAL EXEMPTIONS, *supra* note 116).

123. *Id.*

124. *Id.* (referring to violence in Mississippi and Kentucky, where sales tax protestors attempted to force their way into the governors' offices, as well as threats of violence over taxes in New York and Louisiana).

125. *Id.* at 691 (alteration in original) (citing campaign address at Worcester, Massachusetts (Oct. 1936), *in* 5 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 524–25 (S. Rosenman ed., 1938)).

126. In 1937, Congress held hearings detailing the tactics used by 67 wealthy families to evade taxation. "Foreign and domestic personal holding companies, hobby losses, incorporated yachts and country estates, and personal service corporations" were among the devices used by the "well-to-do" to avoid taxation. *Id.* at 691–92 (citing *Revenue Act of 1937: Hearings Before the House Committee on Ways and Means*, 75th Cong. (1937)).

127. *Id.* at 693 (citing PUBLIC OPINION, 1935-1946, at 316 items 12 & 16, 317 items 20 & 22 (Hadley Cantril ed., 1951)). If inflation occurred, lower-income

However, by the fall of 1939, it was clear to Treasury Secretary Henry Morgenthau, Jr. that the United States would become involved in the wars in Europe and Asia and that involvement would require the United States to change its income tax structure.[128] First, the war itself would need to be funded, and current government revenues were insufficient for the task.[129] Second, the war would create both shortages of goods and increased consumer spending power so that there was a real risk of inflation as consumers competed for scarce goods and drove up prices.[130] The income tax could be both a source of funding for federal expenditures and also a way to tamping down consumer purchasing power.[131] However, the government faced the dilemma of how to get the public to accept the idea of an income tax on all economic classes as up to this time, the federal income tax was viewed as something only the very wealthy paid.[132] The government needed to find a way to justify the federal income tax and make it acceptable to the public. The problem faced by the Franklin D. Roosevelt administration [hereinafter "FDR Administration"]was changing public perception of the income tax from a measure designed to curb the economic and political power of the wealthy, to a perception that everyone should sacrifice for the common good. As explained by Professor Jones:

> Because income taxpayers had been portrayed as members of a despised class during the years before World War II, there was little in the rationale for the income tax during the 1930's that justified income taxation of average Americans. Further, efforts to redistribute wealth by tapping the resources of middle income taxpayers had proved

taxpayers would be disadvantaged in their ability to afford goods at a time when they would be asked to contribute some of their income toward taxes. *See id.* at 724.

128. *Id.* at 693.

129. "Federal budget expenditures increased more than twelve times from 1940 to 1945." *Id.* at 686 (citing BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, SER. Y 605–37, HISTORICAL STATISTICS OF AMERICA 1123–24 (1975)). "[T]he income tax rolls increased from about 7 million . . . in 1940 to more than 42 million in 1945." *Id.* (citing BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, SER. Y 402–411, HISTORICAL STATISTICS OF AMERICA 1110 (1975)).

130. *See id.* at 724–25 (citing Letter from James R. Brackett to Fred Smith (Aug. 4, 1943), Treasury/Correspondence; General Records of Assistant Dirs. James Rogers and William Lewis, January to July 1943; Records of the Office of War Info., Record Grp. 208 (available in National Records Center, Suitland, Md.)).

131. *Id.* at 686.

132. *Id.* at 736.

> unsuccessful during the 1930s and did not provide a promising justification for a mass income tax.[133]

The wealthy paid the federal income tax because they had to and not because of either (1) a recognition that their lives were enhanced by the benefits the government provides (a quid pro quo basis for compliance) or (2) respect for the social contract that "we are in this together" and need to pay their fair share because others are doing so. As initially the idea of an income tax was tied to an economic measure against the "economic royalists," the FDR Administration" needed to find a way to make the tax "legitimate" in order to impose the tax on a mass scale. The FDR Administration needed to find a philosophical basis or rationale that the general public would accept as a good reason for paying this newly imposed tax. In other words, Franklin D. Roosevelt was going to have to create a taxpaying ethos among the general population. Professor Jones posits that the FDR Administration was able to do this because of the messages and structures that were created during the War. The FDR Administration obtained citizen cooperation (1) through an intense education campaign as to why and how the tax should be paid changing the perception as to the nature of the income tax, and (2) by imposing withholding on wages at the source which meant that taxpayers were current on their payments as opposed to having to save up to pay the tax bill later.

As a result of the Revenue Acts of 1940 and 1941, the number of taxable returns increased from 7.4 million to 27.6 million.[134] For the less wealthy, the income tax became a fact of life so that Professors Surrey and Warren stated that the income tax had "changed its morning coat for overalls" and had "spread from the country club group district down the railroad tracks and then over to the other side of the tracks."[135] The FDR Administration was able to achieve this change mainly by tying the tax to the

133. *Id.* at 733. In 1938, "only 10 percent of families had incomes of $3,200 or over. A subsistence . . . income for a family of four was variously set at between $800 and $2,000. [Approximately] [s]eventy-four percent of American families earned less than $2,000." *Id.* at 690 (citing MARK LEFF, THE LIMITS OF SYMBOLIC REFORM 94 (1984)). Congress at that time "increased surtaxes on those with incomes over $50,000, making a top bracket of 79 percent for income over $5 million." *Id.* at 690–91 (citing LEFF, *supra*, at 142). For three years after that, only John D. Rockefeller qualified for this top bracket. *Id.* at 691 (citing LEFF, *supra*, at 144–45).

134. *Id.* at 694 (citing BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, SER. Y 402–11, HISTORICAL STATISTICS OF AMERICA 1110 (1975)). The 1942 Act also included a "Victory Tax" which was a 5 percent gross income tax on all income over $624. "Taking the Victory Tax into account, the income tax rolls increased from 13 million to 50 million in one year." *Id.* at 695.

135. *Id.* at 695 (citing RANDOLPH E. PAUL, TAXATION IN THE UNITED STATES 318 (1954) [hereinafter PAUL, TAXATION]).

war effort and shared sacrifice (and not to the New Deal economic programs).[136] One can understand how this appeal would be effective for the duration of the War, but many expected the tax to disappear for most Americans once the war ended.

One tool the FDR Administration employed during the War to create a taxpaying ethos was using the media to disseminate information to the public as to how the funds were being used in the war effort and how to comply with their taxpaying obligations. The FDR Administration made frequent use of media to "get the message out" that Uncle Sam needs your help.[137] During World War II, Americans owned 57 million radio sets that reached over 90 percent of the population.[138] The Treasury Department and the Office of War Information would broadcast their own programs, sometimes featuring Treasury Secretary Morgenthau or other administration officials, who would explain and encourage tax compliance.[139] Short advertisements and spot announcements during entertainment programming containing war messages such as, "Join the WAC," or "Pay Your Taxes" also proved effective.[140] Other times, popular radio shows such as The *Roy Rogers Show* and *The Great Gildersleeve*, and popular personalities such as the Andrews Sisters and Burns and Gracie would urge the public to support the war by paying their taxes.[141] Encouraging the public to support the war contributed to Americans' feeling that they all had a part to play in the war effort and were "in this together"—the social contract basis for compliance.

The FDR Administration also used movies to encourage Americans to pay their taxes. Given that each week, "80 million Americans—two-thirds

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136. *Id.* at 720.

137. *See* Lavoie, *Patriotism and Taxation*, *supra* note 58, at 53–54.

138. Jones, *Class Tax to Mass Tax*, *supra* note 120, at 709 (citing Plans for the Coordination of the Government's Wartime Use of Radio 1941-42, *in* PETER H. ODEGARD PAPERS (available in Franklin D. Roosevelt Library, Hyde Park, N.Y.); BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, SER. R 93–105, SER. A 288–319, HISTORICAL STATISTICS OF AMERICA 796 (1975)).

139. *Id.* at 709–10.

140. *Id.* at 712 (citing Allocation Schedule for War Information Messages, Week Beginning February 21, 1944 (final), Radio Bureau Allocations: Records of the Deputy Director, Records of the Office of War Information, Record Group 208, National Records Center, Suitland, Md.).

141. *Id.* at 711–725. In the introduction to the *Burns and Allen* radio show that aired February 5, 1945, the announcer states early in the show:

> Say, here's a very important message. Uncle Sam is asking us to file our regular March fifteenth income tax returns early this year. The money is need[ed] for victory. If you have made more than five hundred dollars during 1944 you must file a return—regardless of withholding tax . . . .

Id. at 712.

of the population—saw at least one movie," it made sense to use such a popular media.[142] The Treasury Department commissioned Disney to make an animated short, *The New Spirit*, starring Donald Duck.[143] In *The New Spirit*, Donald Duck fills out his tax forms after hearing a radio announcement that it is "your privilege, not just your duty, but your privilege to help your government by paying your tax and paying it promptly."[144] Donald then "races from Hollywood to Washington" to file his return and "the film shows how tax revenues are transmuted into guns, planes, and ships" while a narrator exhorts that, "Taxes will keep democracy on the march."[145] Through popular movies and radio programs, taxpayers were shown how the government used tax revenues to create benefits such as the public defense—a quid pro quo basis for compliance.

The FDR Administration also made extensive use of written materials, such as pamphlets that were distributed to governors, mayors, town clerks, heads of education, and larger employers; posters that were sent for display in banks, department stores, libraries, post offices, and office buildings; newspaper cartoons and editorials; and magazines such as the *Magazine War Guide*.[146] These materials all emphasized the important role the average citizen could play in the war effort including "Taxes to beat the Axis."[147] All this messaging and information helped create the impression that the tax was not coercive but rather a citizen's choice or voluntary assumption in service to the country.[148] It also helped assuage the guilt of those who were not serving in the armed services by giving them a way to participate in the war effort. A taxpayer who complied with his or her taxpaying obligations felt as though he or she played an important role in the war effort and as though he or she was carrying a part of the load. In other words, this messaging promoted the notion that we are "all in this together"—part of the social contract. Some Americans served overseas;

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142. *Id.* at 716 (citing CLAYTON R. KOPPES & GREGORY D. BLACK, HOLLYWOOD GOES TO WAR: HOW POLITICS, PROFITS AND PROPAGANDA SHAPED WORLD WAR II MOVIES 1 (1987)).

143. *Id.* (citing THE NEW SPIRIT (Disney 1942), U.S. Government Film Collection, Motion Picture Collection FAA 188 (Library of Congress, Washington, D.C.)). Treasury Secretary Morgenthau was heard to exclaim that, "If we can get people to pay taxes with that God-awful Mickey Mouse, we will have arrived socially." *Id.* at 735 (citing Group Meeting (9:45 a.m., Dec. 15, 1941), *in* 473 MORGENTHAU DIARIES 28 (Franklin D. Roosevelt Library, Hyde Park, N.Y.)). Mickey Mouse was eventually replaced by Donald Duck in the film. *Id.* note 271.

144. *Id.* at 716 (quoting THE NEW SPIRIT, *supra* note 143).

145. *Id.*

146. *Id.* at 705–09.

147. *Id.* at 723 (quoting THE NEW SPIRIT, *supra* note 143).

148. *Id.* (noting that there were very few public announcements that mentioned penalties for failing to file or pay). *Id.* note 265.

others contributed at home through economic support through war bonds and taxes. Although appeals to patriotism during peacetime have not been particularly effective, appeals during wartime are.[149] This makes sense considering people react differently to threats to their safety and lives, as is natural during wartime. While Americans on the mainland of the United States might not have felt physically threatened, they could identify with loved ones and friends who were serving in the European and Pacific fronts and risking their lives.[150]

The FDR Administration also saw the income tax as a tool for fighting inflation. With the increased employment because of the War and shortages of consumer goods, the country faced a serious risk of inflation as Americans competed for consumer goods, thereby driving up prices. The FDR Administration attempted to explain the problem to the public in a second Walt Disney movie starring Donald Duck, *The Spirit of '43*, in which Donald struggles with his conscience between being a "spendthrift [or] a Scrooge."[151] Donald Duck is reminded that "every dollar you spend for something you don't need is a dollar—to help the Axis."[152] However, the government's appeals to the public to exercise fiscal restraint were not particularly effective.[153] Despite the fact that inflation affected the everyday lives of taxpayers, it was difficult to get the public to see the connection between such an abstract concept as inflation and their own behavior. This also explains why appeals to patriotism, at least for a period of time, can be effective. People understand the concept of physical danger and threats to safety when the threat is imminent.

b. Changing the Taxpayer's Payment Method

The FDR Administration also had to change the existing payment system for the income tax and then educate the mass of new taxpayers regarding the new payment system and tax forms. Prior to 1943, federal income taxes were not collected at the source (e.g., by the employer withholding the tax from the employee's wages), and were not paid in the current year when incurred, but rather were paid in quarterly installments in

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149. *Id.* at 722–23; *see also* STEVEN A. BANK ET AL., WAR AND TAXES (2008); Joel Slemrod, *Cheating Ourselves: The Economics of Tax Evasion*, 21 J. ECON. PERSP. 25, 39–40 (2007).

150. Jones, *Class Tax to Mass Tax*, *supra* note 120, at 722.

151. *Id.* at 726 (citing THE SPIRIT OF '43 (Disney 1943), U.S. Government Film Collection, Motion Picture Collection FAA 256 (Library of Congress, Washington, D.C.)).

152. *Id.*

153. *Id.* at 725–26.

the following year.[154] Thus, the 1941 tax obligations based on salary income were paid in quarterly installments in 1942. Lower-income taxpayers in particular struggled to make the quarterly payments because they often had not set aside funds for that purpose. Thus, the lack of withholding at the source of income and the delay in payment until the year following the tax accrual made it impractical, if not impossible, for the federal government to collect the tax.

The solution was to have employers withhold the estimated tax due from employees' wages so that the tax was collected concurrently. However, this created a new problem as to how to transition to this system, as a "bunching" problem would be created during the first year the system was imposed. "Under the existing tax system, Year 1's tax liability was paid in Year 2. If, in Year 2, the tax payments were made current, a taxpayer would be required to pay Year 1's and Year 2's taxes in Year 2."[155] In the Current Tax Payment Act of 1943, Congress solved the problem by partially forgiving the lower of the 1942 or 1943 tax liability and "[u]nforgiven tax liabilities could be paid over the next two years."[156] If it had not been for the exigencies of war, the government might not have been able to obtain the public's willingness to struggle through the chaotic first year or two of the transition to this new tax and system of payment.

The FDR Administration again made use of the media to explain to the new taxpayers how to file and pay their taxes, assuring the public that the obligation was not unduly confusing or burdensome. Taxpayers were reminded frequently in public service announcements over the radio as to the deadlines for filing taxes. These public service announcements sometimes used actors playing "ordinary" people such as factory workers or housewives who exclaimed how easy it was to fill out the new forms and how withholding relieved their worries about payment. The Treasury Department also recognized that the tax forms had to be simplified and explained if it were to obtain the public's cooperation and compliance with their new tax obligations. The Treasury Department enlisted the services of Judge Clarence V. Opper and Judge Marion J. Harron of the Tax Court in creating and endorsing the new tax forms.[157]

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154. *Id.* at 695 (citing PAUL, TAXATION, *supra* note 135, at 328–29, 332).

155. *Id.* at 696.

156. *Id.* at 697 (citing Current Tax Payment Act of 1943, Pub. L. No. 78-68, § 6, 57 Stat. 126, 145–49 (1943)). However, the tax returns for March 1944 included tax obligations from three different years: the first quarter estimated tax payments for 1944 on 1944 income, withholding and estimated tax payments for 1943 income, and the unforgiven portion of the 1942 taxes. *Id.* at 698.

157. *See id.* at 730–32. In September 1943, some taxpayers were required to file an estimated tax declaration form as part of the transition to a system for the current payment of the tax. The September 15, 1943 declaration form proved to be particularly challenging. After it took Treasury Secretary Morgenthau one and one-

The government also turned to the movies for assistance in explaining the new system and forms to the public. As discussed *supra*, the Walt Disney animated short, *The New Spirit*, portrayed an initially irritated Donald Duck filling out his tax form and finding it easier than he had anticipated.

Not only does withholding tax at the source of the income solve the problem of having taxpayers find the funds to pay a tax bill at the end of the year, but also makes the tax payment less noticeable to taxpayers.[158] Taxpayers are paying the tax with money they have never seen in their paychecks because it has been withheld from their gross income. It is less emotionally intrusive to have money withheld than to have to write a check and send the money in to the Treasury Department. Withholding becomes a routine, unobtrusive way of paying one's tax obligation, thereby increasing compliance.[159]

The creation of these two foundations for tax compliance (social contract and quid pro quo) is one reason why the public did not demand that the federal income tax be repealed after the end of World War II. Despite World War II ending, Americans did not necessarily feel safe from outside threats—in particular from the Soviet Union and, to a lesser extent, China. During the Truman, Eisenhower, and Kennedy administrations, Americans worried that the Soviet Union would take over the United States, either through a direct attack or from the inside by communist infiltration. The Cold War posed a common threat to all Americans and bound the country together in a continued sense that we are all in this together—or, at least, we are facing annihilation together. A strong federal government could protect the country from attack. Despite the fact that in 1953 the Bureau of Internal Revenue was rocked with a corruption scandal by top administration officials, support for the income tax and overall faith in the tax system remained strong.[160] Contemporaneously, the post-World War II era continued to be a time during which Americans could see the connection between their taxes and government benefits. For example, veterans attended college with assistance from the federal government.[161] The government also

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half hours and the assistance of two aides to complete the 55 computations the form required, he recognized that the form had to be simplified or the public would be outraged. *Id.* at 731–32.

158. *Id.* at 697.

159. *Id.*

160. *See* Camp, *Tax Administration*, *supra* note 85, at 87. In 1953, the House Ways and Means Committee spent two years investigating allegations of misconduct and corruption at what was then called the Bureau of Internal Revenue. A number of top officials were charged with crimes and the Bureau of Internal Revenue was reorganized into the Internal Revenue Service. *Id.* at 89.

161. *See* Servicemen's Readjustment Act of 1944, Pub. L. No. 78-346, § 400, 58 Stat. 284, 287–90 (commonly referred to as the G.I. Bill). As a result of the

poured money into the space program and national defense, which generated employment.[162]

IV. THE CAMPAIGN TO DESTROY TAX ETHOS AND THE INCOME TAX

A. The Cabal

Not everyone was in favor of Roosevelt's New Deal, the increased power and size of the federal government, and the enactment of the federal income tax. The initially small, but very determined, cabal of men who wanted to eviscerate, if not outright repeal, the federal income tax and render the federal government impotent were businessmen and not politicians, although these businessmen would later recruit politicians, academics, and religious leaders to further the movement's goals.[163]

Some of the names of the men and the corporations they ran are familiar; others are less well-known, but no less important to the movement. The early members included Lemuel Ricketts Boulware, the head of General

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education benefits provided by the G.I. Bill, 7.8 million veterans enrolled in education or training programs by the time the G.I. Bill expired on July 25, 1956. *The GI Bill's History*, U. S. DEP'T OF VETERANS AFF., http://gibil.va.gov/benefits/history_timeline/index.html (last visited Oct. 26, 2013).

162. *See, e.g.*, ROBERT B. REICH, SUPERCAPITALISM (2007). For example, in the 1970s, the federal government provided half of the funding for research and development of the nation's telecommunications industry and 70 percent of the funding for the nation's aircraft industry. *Id.* at 59.

163. *See* KIM PHILLIPS-FEIN, INVISIBLE HANDS: THE MAKING OF THE CONSERVATIVE MOVEMENT FROM THE NEW DEAL TO REAGAN 6 (2009) [hereinafter PHILLIPS-FEIN, INVISIBLE HANDS]. The anti-New Deal, anti-income tax movement began during the FDR Administration and continued after World War II, despite the fact that business and labor had worked together during WWII to defeat the Axis.

> But at the same time, despite all these changes, it remained difficult for the men who had fought the New Deal in the 1930s to let go of the battle. All they could see in the postwar order was a landscape of defeat. After all, from their perspective, the war had created a newly gargantuan federal government. In the late 1940s, top marginal income tax rates were about 90 percent, and corporate tax rates remained high as well. The government had steady revenue sources that it had never possessed before. Nor were they comforted by the new ideology of Keynesian consumerism, for it implied that the disposable income of workers, not the patient saving and canny investment of entrepreneurs and owners, mattered most for economic health.

Id. at 33.

Electric who became famous for his union breaking tactics;[164] the three DuPont brothers (Irénée, Lammot, and Pierre) who made fortunes during the two World Wars from their plastics which were used extensively by the military;[165] J. Howard Pew, president of Sun Oil;[166] Sterling Morton, head of the Morton Salt Company;[167] Leonard Read, who with Jasper Crane[168] in 1946 founded the still highly influential Foundation for Economic Education (“FEE”);[169] and William J. Baroody, who helped develop the American Enterprise Institute (“AEI”), another leading political right-wing think tank, was an overseer for the Hoover Institute at Stanford University, and was also involved in the Center for Strategic and International Studies at Georgetown University, both of which are influential conservative intellectual organizations.[170] Sometime later on board was Joseph Coors, who, together

164. Boulware became so effective at destroying labor unions that some of his tactics were later labeled as “Boulwarism.” *Id.* at 99–101.

165. *Id.* at 3–5. In 1934, the DuPont brothers founded the American Liberty League, one of the first groups organized to overthrow the New Deal. The name was carefully chosen to create the impression that the group’s concern was defending the U.S. Constitution and not protecting the members’ wealth. *Id.* at 10.

166. *Id.* at 70. Despite the rise of the fundamentalist religious movement in the country beginning in the 1930s, Pew despaired of its efficacy to the conservative cause: “We can never hope to stop this Country’s plunge toward totalitarianism until we have gotten the ministers’ thinking straight.” *Id.*

167. In 1956, Sterling Morton sent a $500 check to the conservative *Manion Forum* (a weekly radio program expressing opposition to the federal income tax) with a note expressing his support for the repeal of the Sixteenth Amendment, which had allowed the creation of the federal income tax. *Id.* at 85.

168. Leonard Read served as the general manager for the Los Angeles Chamber of Commerce; Jasper Crane was a retired DuPont Chemical vice president. *Id.* at 16–19, 27.

169. Jasper Crane, one of the first trustees for the FEE, believed it was essential that the movement clarify its goals and articulate its theoretical underpinnings. Crane believed that appeals to emotion would be important later but that initially those who wished to undo the New Deal and return to laissez-faire unfettered capitalism should be able to explain their principles. FEE, which is located in Irvington, New York, is still an important think tank today. *Id.* at 27–30, 265.

170. *Id.* at 62–67. “[H]e took a faltering organization, which he joined in 1954, and invested his tireless energy, his wisdom, his amazing intellectual capacity, and his boundless love for humanity and built it into a significant force in public policy research: the American Enterprise Institute for Public Policy Research.” *William J. Baroody, Sr. (Introductory Remarks)*, AEI (Dec. 11, 1980), http://www.aei.org/article/society-and-culture/william-j-baroody-sr-introductory-re remarks/Tohttp://www.aei.org/article/society-and-culture/william-j-baroody-sr-intro ductory-remarks/. The papers of William J. Baroody were given to the Library of Congress by his sons and span from 1943 to 1983. The bulk of the papers deals with the years 1954 to 1980 and documents his leadership role in the American Enterprise

with Paul Weyrich[171] formed the Heritage Foundation, probably the most influential think tank for the political right.[172] Joseph Coors also helped fund the Federalist Society, an organization of conservative law students and professors,[173] and Paul Weyrich founded the American Legislative Exchange

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Institute. DONNA ELLIS ET AL., WILLIAM J. BAROODY: A REGISTER OF HIS PAPERS IN THE LIBRARY OF CONGRESS 4 (Manuscript Div., Library of Cong. 2005).

171. Paul Weyrich was a staff member for Senator Gordon Allott of Colorado at the time. PHILLIPS-FEIN, INVISIBLE HANDS, *supra* note 163, at 171.

172. In addition to its research mission, the Heritage Foundation "runs a full-service media relations shop, ready to assist reporters, editors[,] and producers 365 days of the year." The Heritage Foundation, *About Heritage*, www.heritage.org /about. Similarly, the Heritage Foundation also provides analysts who "help members of Congress and their staff prepare for congressional hearings by providing valuable insight on foreign or domestic policy issues. Congressional staffers come to Heritage regularly to receive custom-tailored briefings on the latest Heritage research related to their committee assignment or legislative priority." *Id*. The Heritage Foundation also helps broadcast research performed by other conservative activists. "The conservative movement includes a wide array of think tanks, scholars, public interest law groups, activists, philanthropists, film makers, and many others to spread the idea that liberty is the best way of governing society. We feature some of the best work being done by conservatives and pro-liberty activists around the world." *Id*. Some of the early contributors to the Heritage Foundation were Dow Chemical, General Motors, Mobil, Pfizer, Chase Manhattan Bank, and Richard Mellon Scaife. PHILLIPS-FEIN, INVISIBLE HANDS, *supra* note 163, at 172.

173. In 1980, Steven Calabresi, a student at Yale Law School; Lee Liberman Otis; and David McIntosh, students at the University of Chicago Law School were dissatisfied with the liberal viewpoint of many of their professors and decided to organize. The Federalist Society's first major event was a symposium held in April of 1982, which was financially underwritten in large part by the Olin Foundation. Today, the Federalist Society has a membership of 45,000 lawyers and law students, 13,000 are dues-paying members. In 2010, the Federalist Society had revenues of $9,595,919. MICHAEL AVERY & DANIELLE MCLAUGHLIN, THE FEDERALIST SOCIETY: HOW CONSERVATIVES TOOK THE LAW BACK FROM LIBERALS 1–3 (2013). Not only are four U.S. Supreme Court justices members of the Federalist Society (Antonin Scalia, Clarence Thomas, Samuel Alito, and John Roberts), but every federal judge appointed by George H.W. Bush and George W. Bush was either a member of or approved by the Federalist Society. Those federal judges, in turn, hire Federalist Society members as law clerks. Additionally, during the Reagan Administration and both Bush Administrations, Federalist Society members held key position in the White House and the Department of Justice. *Id.* at 2, 7–8, 11, 22–27, 30–42.

Although it violated federal law, during George W. Bush's administration, Department of Justice officials used political ideology as a litmus test when hiring career attorneys and summer interns. Law students and recent law school graduates who were Federalist Society members were given preference, while students and graduates who belonged to liberal organizations, such as the American Constitution Society were rejected. *Id.* at 35–42.

Council ("ALEC") which promotes conservative ideas at the state level.[174] These organizations are funded and supported by a small group of ultra-rich sponsors. As explained by David C. Johnson in his article on alleged tort reform (another pet project of the conservative movement):

> Right-wing organizations in this network all receive major general operating support, project grants and coordinated strategic guidance from a core group of interlocking, ultra-conservative foundations that has been working for nearly thirty years to alter public attitudes and move the national agenda to the right. This core group of right-wing foundations includes the Scaife, Castle Rock (endowed by the Adolph Coors Foundation in 1993), Bradley, Olin and Koch Foundations.[175]

The movement faced an uphill battle, especially after World War II because "the flexible hybrid of capitalism and the welfare state pioneered in the United States had proved capable of military triumph over Germany, Italy, and Japan."[176] Further, the bitterness and violence between rich and poor, labor and capitalists that had marked the early twentieth century in this country had largely disappeared. It is beyond the scope of this Article to discuss in great detail the reasons for the changing economic and political climate during the 1950s and 1960s; however, by the 1970s, the country experienced chronic economic problems in the form of "stagflation"[177] and an oil embargo by OPEC.[178] The economic downturn provided conservative economic ideas an opportunity to take root because these ideas were no longer competing against "good times."

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174. DAVID C. JOHNSON, COMMONWEAL. INST., THE ATTACK ON TRIAL LAWYERS AND TORT LAW 4 (2003), http://www.commonwealinstitute.org/cw/files/AttackTrialLawyersTortLaw.pdf [hereinafter JOHNSON, TORT LAW].

175. *Id. See also* PEOPLE FOR THE AMERICAN WAY, BUYING A MOVEMENT: RIGHT-WING FOUNDATIONS AND AMERICAN POLITICS 32 (1996), http://www.pfaw.org/media-center/publications/buying-movement. http://pfaw.org/pfaw/general/default.aspx?oid=2052 Lynde Bradley, Joseph Coors, and Fred Koch all helped to create or fund the John Birch Society. The Allegheny Foundation is also a Scaife-funded Foundation. *Id.*

176. PHILLIPS-FEIN, INVISIBLE HANDS, *supra* note 163, at 31.

177. "Stagflation" is an unusual economic phenomenon wherein the country experienced both high unemployment and high prices. Ordinarily, one would expect high prices when there is high employment and people have money to spend and compete for goods.

178. OPEC is an acronym for the Organization of Petroleum Exporting Countries.

B. Philosophical Foundation for Reducing Income Tax Rates

In 1974, Professor Robert Mundell attended a conference sponsored by the American Enterprise Institute, at which he presented his economic theory which later became known as supply-side economics.[179] Professor Mundell argued that, among other things, tax cuts stimulate economic growth.[180] Mundell theorized that tax cuts initially reduce tax revenues, but individuals and businesses, freed from the crippling restraint of taxation, will then invest more in businesses, which will in turn expand their operations, thus increasing the tax base and generating even greater tax revenues than before. Jude Wanniski, a journalist who sometimes wrote for the Wall Street Journal, was inspired by Professor Mundell's theory and wrote several commentaries about it, including *The Mundell-Laffer Hypothesis–A New View of the World Economy* which was published in *The Public Interest* quarterly, an academic journal edited by Irving Kristol.[181] This commentary contained a footnote written by Mundell summarizing the tax-cut part of his economic theory and providing the intellectual foundation for the Reagan-era tax cuts.[182] In this footnote, Mundell explains that there is one ideal tax rate for maximizing government revenues. A rate that is too high reduces economic output and reduces government revenues. However, a rate that is too low, at least during times of less than full employment, has the effect of eventually raising output and the tax base, thereby increasing government revenues at least sufficiently enough to service the interest on any government bonds that were issued to finance the deficit.

> Taxes should be cut and government spending maintained through deficit financing only when a special condition exists, a condition Mundell and Laffer say exists now. "There are always two tax rates that produce the same dollar revenues," says Laffer. "For example, when taxes are zero, revenues are zero. When taxes are 100 per cent, there is no production, and revenues are also zero. In between these extremes there is one tax rate that maximizes

179. Robert Mundell was a professor of economics at Columbia University.

180. Bruce Bartlett, *The Origin of Modern Republican Fiscal Policy*, N.Y. TIMES ECONOMIX BLOG (Mar. 20, 2012), http://economix.blogs.nytimes.com/2012/03/20/the-origin-of-modern-republican-fiscal-policy [hereinafter Bartlett, *Modern Republican*].

181. Jude Wanniski, *The Mundell-Laffer Hypothesis–A New View of the World Economy*, 39 PUB. INT. 31 (Spring 1975). At the time, Arthur Laffer was a professor at the University of Chicago's graduate school of business. In his article, Wanniski notes that there was no joint Mundell-Laffer paper, but rather Mundell wrote the economic theory and Laffer provided data support. *Id.* at 32, note 1.

182. *Id.* at 49–50, note 4.

> government revenues." Any higher tax rate reduces total output and the tax base, and becomes counterproductive even for producing revenues. U.S. marginal tax rates are now, they argue, in this unproductive range and the economy is being "choked, asphyxiated by taxes, says Mundell. Tax rates have been put up inadvertently by the impact of inflation on the progressivity of the tax structure. If the tax rate were below the rate that maximizes revenues, tax cuts would reduce tax revenues at full employment. But a multiplier effect operates if the economy is at less than full employment, and the tax cut then raises output and the tax base, besides making the economy more efficient. Even if a bigger deficit emerges, sufficient tax revenues will be recovered to pay the interest on the government bonds issued to finance the deficit. Thus, future taxes would not have to be raised and there would be no subtraction from future output. Tax cuts, therefore, actually can provide a means for servicing the public debt.[183]

In 1976, Wanniski made his most important contribution to supply-side economics by writing *Taxes and a Two-Santa Theory*.[184] As shall be explained *infra*, Wanniski argued that Democrats are the spending Santa Claus and Republicans should be the tax-cut Santa Claus.[185] Wanniski attributes the success of the Democrats in winning elections to knowing "the first rule of successful politics is Never Shoot Santa Claus."[186] Reagan agreed and in 1980, ran on a platform that advocated tax cuts, with little emphasis on deficit reduction. Despite the fact that the deficit increased markedly during his first term, he won reelection in 1984, which convinced

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183. *Id.*

184. The Two-Santas article was published on March 6, 1976, in The National Observer, a weekly published by the Dow Jones. The National Observer ceased publication after 1977 and as a result, it is impossible to obtain a copy from its archives. However, Congressman Jack Kemp, discussed *infra*, kept the article alive by handing out copies. The article has been reproduced by Bruce Bartlett on his blog. *See* Bruce Bartlett, *Jude Wanniski: Taxes and a Two-Santa Theory*, CAPITAL GAINS AND GAMES BLOG (May 6, 2010), http://capitalgainsandgames.com/blog/bruce-bartlett/1701/jude-wanniski-taxes-and-two-santa-theory [hereinafter Wanniski, *Two Santas*].

185. Bartlett, *Modern Republican*, *supra* note 180. As Bruce Bartlett observes in his introduction to the Two-Santas article, Irving Kristol immediately recognized the political possibilities in Wanniski's proposal to turn the Republicans to the party of tax-cuts as opposed to the party of balanced budgets. Wanniski, *Two Santas*, *supra* note 184.

186. Bartlett, *Modern Republican*, *supra* note 180.

his fellow Republicans that tax cuts were a winning position.[187] Grover Norquist, the Republican enforcer of no tax increases, has claimed that he owes much of his tax pledge to Wanniski's Two-Santas Theory.[188]

Wanniski initially states that we need both Santas, and that the Democrats are suited to be the spending Santa, just as the Republicans are meant to be the Santa of tax cuts. However, as the article progresses, it becomes increasingly clear that tax-cut Santa can and should destroy spending Santa. In his rather short Two-Santas Theory article, Wanniski reviews the economic history of the United States from the Coolidge Administration beginning in the 1920s to the Ford Administration in 1976 and claims to prove that every time the government had cut tax rates, prosperity ensued, yet when the government raised tax rates, as a result of either economic difficulties or to balance the budget, the country suffered economic calamity.[189] The only factor Wanniski considers is tax rates, ignoring any other possible explanations or factors to account for economic conditions. He singles out for particular praise and emulation Presidents Warren Harding and Calvin Coolidge, as well as their Secretary of the Treasury, Andrew Mellon.

> The GOP's heyday was in the 1920s, when, acting on the advice of Treasury Secretary Andrew Mellon . . . the Republicans cut tax rates no less than five times. Mellon, the embodiment of the Republican Santa Claus argued that a cut in tax rates would provide business an incentive to expand, increase prosperity, expand the tax base, and thereby provide more revenues to the Government than would have accrued without a tax cut.[190]

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187. *Id.* During Reagan's first term, the budget deficit rose from 2.7 percent of gross domestic product in 1980 to 6 percent by 1983. *Id.*

188. *Id.* Interestingly, in a 2005 e-mail to Ben Bernanke, the then-chairman of the President Bush's Council of Economic Advisors, Wanniski wrote that "[t]he Grover Norquist idea of opposing all tax increases is dumb, and Grover knows I believe that." *Id.*

189. Arthur Laffer continues to adhere to Wanniski's point of view regarding our country's economic history, as evidenced by his recent comments on the radio in which he repeated portions of Wanniski's historical account and continued the narrative through the tax cuts of the George W. Bush Administration. *The Rich are Taxed Enough* (NPR, Intelligence Squared, broadcast Mar. 3, 2013) (transcript), http://intelligencesquaredus.org/debates/past-debates/item/775-the-rich-are-taxed-enough. Intelligence Squared hosted a panel of four economists divided into two teams who debated the proposition that the rich are taxed enough: Robert Reich and Mark Sandy who opposed the proposition, and Arthur Laffer and Glenn Hubbard who supported it.

190. Wanniski, *Two Santas*, *supra* note 184.

The country, euphoric over the good times, elected Calvin Coolidge in 1924 in a landslide victory. The New York Times, at the time an enthusiastic supporter of Mellon's policies, predicted prosperity for America as had never been seen before. Coolidge continued the policy of tax cuts, and according to Wanniski, "[t]he next four years were as glorious as the Times had forecast."[191] Franklin D. Roosevelt then assumed the presidency and was "the prototype of the Democratic Spending Santa Claus."[192] According to Wanniski, Roosevelt's misguided tax and spend policies prolonged the Great Depression by eight years.[193] Wanniski also found regrettable Dwight D. Eisenhower's eight years in office during the 1950s, as President Eisenhower listened to his economic advisors and rejected any consideration of tax cuts; instead, putting his efforts toward balancing the budget—as a result, economic stagnation ensued.[194]

Wanniski acknowledges that Democrats at times play both Santas, but, are temperamentally inclined to be spending Santa, reluctantly cutting taxes only when politically expedient. To his great relief, Wanniski believes that Ford and Reagan understood the potency of tax cuts. Therefore, rather than kill spending Santa quickly by shooting him, Ford and Reagan killed him slowly by expanding the private sector through tax cuts, thus eliminating the need for spending Santa.

> Both President Ford and Ronald Reagan are inching toward the Mellon approach. Still[,] they each insist in one way or another that tax reduction be bound to spending cuts. This is an improvement on the straightforward demand that the Spending Santa be shot. But as the Two-Santa Claus [T]heory holds that the Republicans should concentrate on tax-rate reduction.[sic] As they succeed in expanding incentives to produce, they will move the economy back to full employment and thereby reduce social pressures for public spending. Just as an increase in Government spending inevitably means taxes must be raised, a cut in tax rates—by expanding the private sector—will diminish the relative size of the public sector. All the United States needs now to

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.* Wanniski is correct that Eisenhower believed firmly in balanced budgets, and although he did balance the federal budget, unemployment rose from 2.6 percent to 6.9 percent during his time in office. *Id.*

> prosper is a Coolidge in the White House, a Mellon at Treasury, and GOP tax-cutting St. Nick.[195]

During World War II, Americans understood that they were paying the income tax because "Uncle Sam needs your help," and "Taxes to fight the Axis." These short, pithy slogans enabled Americans to understand why paying taxes is patriotic. The anti-tax movement has been able to articulate a philosophy that appears to say that not paying taxes would be good for and would help America.[196] The right-wing has been very effective in creating and promoting a philosophy that is very understandable to voters. With regard to taxes, voters understand the message, "Cut taxes, get government out of the way, and the economy will take off." The anti-tax conservatives recognized that this is a much more attractive philosophy and message than, "We need to balance the budget and to do so we must cut services."

For the last 30 years, the anti-tax conservatives have trumpeted the Wanniski-Laffer-Reagan tax cut philosophy embodied in the first message to great effect. It is difficult to think of a similar message from the left-wing since the Reagan Administration regarding taxes. During World War II and the first few decades thereafter, Americans might not have had a sophisticated grasp of the theory behind the progressive income tax, but they could see and understand the connection between paying taxes and benefits, and could understand the argument that everyone needs to chip in. Between 1972 and 1999, conservatives created at least 60 new organizations with mission statements modeled after the Heritage Foundation, which emphasizes free enterprise, limited government, individual freedom, traditional American values, and a strong national defense.[197] In 2004, Pollster Celinda Lake asked a group of white Midwestern swing voters what conservatives stood for and most of the voters repeated the above

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195. *Id.* Interestingly, when President Bill Clinton, a Democrat, began his first term in 1992 facing enormous budget deficits, he put his social spending programs on hold; instead, President Clinton cut spending and raised taxes in order to balance the budget, which he succeeded in doing, without hurting economic growth. JOHNSON & KWAK, WHITE HOUSE BURNING, *supra* note 10, at 77.

196. During the 2008 presidential campaign, then vice-presidential candidate Joe Biden defended the Democratic Party's proposal to raise taxes on individuals earning more than $250,000 by stating, "It's time to be patriotic . . . . Time to jump in. Time to be part of the deal. Time to help get America out of the rut." Republican vice-presidential candidate Sarah Palin rebuked Biden saying, "[T]o the rest of America that's not patriotism. . . . Raising taxes is about killing jobs and hurting small businesses and making things worse." Michael Falcone, *On Tax Policy and Patriotism*, N.Y. TIMES, September 19, 2008, at A14.

197. Ari Berman, *Big $$ for Progressive Politics*, THE NATION, Oct. 16, 2006.

catchphrases. However, when the voters were asked what liberals stood for, half of them answered that they didn't know.[198]

C. Ronald Reagan, Massive Tax Cuts: Massive Deficits

President Reagan became a firm believer in the efficacy of tax cuts and, in 1981, pushed through the biggest tax cut in United States history.[199] However, the economic boom did not materialize; the federal budget deficit ballooned and unemployment increased to 10 percent.[200] In fact, the tax cuts contributed to record peacetime deficits.[201] In 1982, the federal deficit was more than double that of 1981, and in 1983 it grew to $343 billion, almost three times larger from when Reagan took office. As a result, the government was borrowing almost one dollar out of every three it spent.[202]

Republicans are fond of saying that tax revenues increased during these years. They did, but not because of increased productivity by business. As the government hemorrhaged red ink because of the tax cuts, the Reagan Administration and its Congressional allies searched for new sources of revenue to pay for the operational expenses of the federal government. First,

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198. Id.

199. JOHNSON & KWAK, WHITE HOUSE BURNING, *supra* note 10, at 88, note 118. The second or third largest tax cut in history (depending on how you measure it) was the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA), pushed through by George W. Bush, and discussed more fully *infra*.

> The largest as a share of GDP was the 1981 Reagan tax cut; the second largest was the 1964 Kennedy-Johnson tax cut. In 2010, when fully phased in, EGTRRA was projected to reduce tax revenues by $176 billion, or 1.1 percent of GDP (as then projected by the CBO), making it larger than the Revenue Act of 1978. In real dollar terms, EGTRRA was the second-largest tax cut in modern history. We exclude the major tax cuts enacted as a result of the end of World War II.

Id. (*citing* CONG. BUDGET OFFICE, PAY-AS-YOU-GO ESTIMATE: H.R. 1836, ECONOMIC GROWTH AND TAX RELIEF RECONCILIATION ACT OF 2001 (2001), http://www.cbo.gov/publication/13098 [hereinafter CBO, ESTIMATE]).

200. DAVID CAY JOHNSTON, PERFECTLY LEGAL: THE COVERT CAMPAIGN TO RIG OUR TAX SYSTEM TO BENEFIT THE SUPER RICH—AND CHEAT EVERYBODY ELSE 123 (2003) [hereinafter JOHNSTON, PERFECTLY LEGAL].

201. JOHNSON & KWAK, WHITE HOUSE BURNING, *supra* note 10, at 68. Government revenues fell from 19.6 percent of GDP in 1981 to 17.3 percent in 1984. They grew later on in the decade but never exceeded 18.4 percent of GDP. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, HISTORICAL TABLES, BUDGET OF THE U.S. GOVERNMENT, FISCAL YEAR 2012, at 24–25 table 1.2 (2011), http://www.whitehouse.gov/sites/default/files/omb/budget/fy2012/assests/hist.pdf.

202. JOHNSON & KWAK, WHITE HOUSE BURNING, *supra* note 10, at 68.

they raised excise taxes, such as the nickel-a-gallon tax on gasoline (which Reagan referred to as revenue enhancers as opposed to calling them tax increases);[203] then increased the Social Security tax. The tax burden of both of these increases is felt more keenly by low and middle class income tax payers.[204]

Beginning in 1983, the White House began claiming that Social Security was in deep trouble and required additional funding in order to remain solvent. Alan Greenspan headed a commission that reported that in 31 years, Social Security would start operating in the red. Critics of Greenspan's findings noted that economic growth and slightly less generous inflation increases would solve any potential funding problems.[205] Senator Daniel Moynihan, a Democratic senator from New York known for his expertise on Social Security, scoffed at the idea that Social Security was in trouble and labeled the calls for an increase in Social Security taxes as "thievery" designed to hide the pernicious effect of the Reagan tax cuts on the economy and the government.[206] Many Americans might recognize that the federal government is incurring substantial debt, but might not be able to discern that the cause is the drop in the income tax rates nor recognize that the debt would be even higher were it not for the increased social security and excise taxes.

Nevertheless, Social Security tax rates and the wage ceiling were increased so that from 1984 to 2002, the government collected $1.7 trillion more in Social Security taxes than the agency paid out in benefits.[207] As noted by Professor Johnston:

> The rise in the maximum Social Security tax has been sharp. In 1970 the maximum tax was $327. Three decades later the

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203. *Id.*

204. Excise taxes on necessities, such as gasoline, hurt the poor more because the tax is a larger percent of their disposable income as opposed to wealthier individuals. Consumers can try to curtail their need for the taxed items, but can do so by only so much. Social Security is also felt more keenly by lower and middle class income taxpayers. One reason is that wage income is subject to the tax, whereas investment income is not. Second, Social Security is not paid on all wage income, but rather only up to a specific ceiling amount. In 2003, the ceiling was $87,000 and up to $116,800 by 2012. Employees pay a tax of 6.2 percent on this wage income. However, once the ceiling is reached, any excess wages are free from the tax, enabling higher income wage earners to save more. Employers are required to "match" this 6.2 percent tax, but most economists agree that the employee bears the burden because the employer figures in the matched amount when determining salaries.

205. JOHNSTON, PERFECTLY LEGAL, *supra* note 200, at 124.

206. *Id*.

207. *Id.* at 120, www.ssa.gov.

> maximum was $4,724 or more than 14 times as much. In 2003 it was almost $5,400, an amount matched by the employer. For a married couple both earning the $87,000 maximum subject to the total tax, it comes to $21,576 or more than $400 paid to the government each week.[208]

Rather than tell the American people the truth, their leaders in Congress assured the public that the extra money being paid into Social Security would go into a trust fund and would earn interest. Of course, no such thing occurred. Instead, the money was used to compensate for the shortfall in federal revenues caused by the Reagan tax cuts for the wealthy. From 1983 to 2003, the government spent almost $5.4 trillion more than it took in from income, estate, gift, and excise taxes. However, the government debt grew by only $3.6 trillion because of the extra Social Security taxes that were paid in and used for the operational expenses of the federal government.[209] "In effect[,] the government took dollars from Joe Lunchpail so that the rich could stuff even more into their silk pockets."[210]

However, tax cuts are now the centerpiece of Republican economic policy, regardless of how the economy is fairing. When economic times are good (an increasing rarity), then taxes should be reduced in order to return the money to its rightful owners. When the economy is bad, cutting taxes will create economic stimulation. Most taxpayers do not have the time or ability to study in depth how the federal budget or the income tax system operates; therefore, taxpayers do not see how fallacious or circular the tax cut arguments are. The mantra is "cut taxes." As the government incurs massive debt, taxpayers develop the impression that the federal government is irresponsible and out of control; therefore, it is throwing good money after bad to continue to fund the federal government with taxpayers' hard-earned money. As the government continues to lose funding, it is then forced to cut services or borrow money to meet expenses. This service reduction and mounting debt further reinforces taxpayers' belief that government is incompetent and cannot manage its affairs, leading to the argument that taxes should be cut even more.

David Stockman, former budget director to Ronald Reagan, expressed disgust with the tax cuts at all times philosophy, despite its detriment to the country:

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208. *Id.* at 126.

209. *Id.* at 125.

210. *Id.* at 126. These amounts were computed by Jarrett Murphy from National Income and Product Accounts, Bureau of Economic Analysis, Commerce Department. Furthermore, from 1983 to 1986, taxes other than Social Security and Medicare totaled less than half of all federal spending.

> [“]Well, it’s become in a sense an absolute. Something that can’t be questioned, something that’s gospel, something that’s sort of embedded into the catechism and so scratch the average Republican today and he’ll say [‘]Tax cuts, tax cuts, tax cuts,[’”] he explained. [“]It’s rank demagoguery,[”] he added. [“]We should call it for what it is. If these people were all put into a room on penalty of death to come up with how much they should cut, they couldn’t come up with $50 billion, when the problem is $1.3 trillion. So, to stand before the public and rub raw this anti-tax sentiment, the Republican Party, as much as it pains me to say this, should be ashamed of themselves.[”][211]

Until the latter part of Reagan’s second term, the Republican Party was still controlled by more moderate Republicans such as then Senate majority leader Bob Dole who believed in balanced budgets.[212] However, the antitax group continued to gain influence and power, led by Newt Gingrich who had been serving in the House of Representatives since 1978. Gingrich assembled a group of more radical antitax conservatives and by the end of George H.W. Bush’s term as president, this group had gained control of the Republican Party.[213] Although they occasionally pay lip service to the idea of balanced budgets, they are surprisingly frank in stating that their real agenda is cutting taxes. For example, former House Majority Leader Dick Armey stated that, “Balancing the budget in my mind is the attention-getting device that enables me to reduce the size of government . . . . If you’re anxious about the deficit, then let me use your anxiety to cut the size of the government.”[214] Grover Norquist, the tax cut enforcer of the Republican Party, is also very open about the fact that he only cares about tax cuts, not the deficit.[215]

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211. *See David Stockman, 60 Minutes* (CBS television broadcast Oct. 31, 2010).

212. JOHNSON & KWAK, WHITE HOUSE BURNING, *supra* note 10, at 73.

213. *Id.* at 73–78. *See also* Balz & Brownstein, Storming the Gates, *supra* note 7, at 117.

214. BALZ & BROWNSTEIN, STORMING THE GATES, *supra* note 7, at 154.

215. In 2011, when Congress was debating whether or not to raise the debt ceiling, Norquist stated, “Anyone who says we have a deficit problem is either a Democrat who wants to raise taxes or a Republican who’s dimwitted and doesn’t understand what he is talking about.” JOHNSON & KWAK, WHITE HOUSE BURNING, *supra* note 10, at 79.

D. More Tax Cuts and More Debt

On August 10, 1993, President Bill Clinton signed legislation raising taxes, mostly on higher income taxpayers.[216] Clinton was able to get his tax increase legislation passed by emphasizing fiscal responsibility and balanced budgets as opposed to ideological or policy arguments that the progressive income tax is fair. The tax increase passed without a single Republican vote.[217] As a result, the federal government's annual budget operated in the black and the deficit began to shrink.[218] As a result, in January of 2001, when George W. Bush entered the White House, the Congressional Budget Office was projecting budget surpluses for the next decade, including a surplus of $796 billion.[219]

However, in 2010 the budget actually ran a deficit of $1.3 trillion—a difference of over $2 trillion. How did the federal government go from projected surpluses to deficits during the George W. Bush administration? On June 7, 2001, Bush signed his tax cut package into law and lowered rates on the rich, eliminated the estate tax for one year and gave more than half of the $1.3 trillion tax cut (to be spread over ten years) to the richest 1 percent.[220] The Economic Growth and Tax Relief Reconciliation Act of 2001

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216. Omnibus Budget and Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 312.

217. *See U.S. Senate Roll Call Votes 103d Congress – 1st Session,* U.S. SENATE, http://www.senate.gov/legislaive/LIS/roll_call_lists/roll_call_vote_cfm.cfm ?congress=103&session=1&vote=00247#position. The Roll Call states that the 50 Democratic senators voted for the tax increase and the 50 Republican senators voted against it. Vice President Al Gore voted in favor of the tax increase, breaking the tie votehttp://www.senate.gov./legislative/LIS/roll_call_vote_vote. In the House of Representatives, all 175 Republican representatives voted against the tax increase. *See U.S. House of Representatives Roll Call Votes 103d Congress – 1st Session,* U.S. HOUSE OF REPRESENTATIVES, http://clerk.house.gov./evs/1993/roll199.xml.http:// www.house.gov/evs/1993/roll406.xml.

218. Interestingly, Bruce Bartlett, a Treasury official during the Reagan Administration acknowledged that Clinton's economic policies were praiseworthy, noting that Clinton returned the federal budget to a surplus. *See* Bruce Bartlett, *Those Were the Days*, N.Y. TIMES, (Jul. 1, 2004), http://www.nytimes. com/2004/07/01/opinion/those-were-the-days.html ("Bringing the federal budget into surplus is obviously an achievement. After inheriting a deficit of 4.7 percent of gross domestic product in 1992, Mr. Clinton turned this into a surplus of 2.4 percent of G.D.P. in 2000 . . . .").

219. CONG. BUDGET OFFICE, THE BUDGET AND ECONOMIC OUTLOOK: FISCAL YEARS 2002 TO 2011, at 2, Table 1-1 (2001), http://www.cbo.gov /publication/12958.

220. Pub. L. No. 107-16, 115 Stat. 38. JOHNSTON, PERFECTLY LEGAL, *supra* note 200, at 129. The Center on Budget and Policy Priorities estimated that the 2001 tax cut would cost $4.1 trillion in its second decade from 2012 through 2021,

(EGTRRA) was the second or third largest tax cut in modern history.[221] EGTRRA lowered tax rates for almost all taxpayers, increased deductions and exemptions for high-income households, and made it easier to shield retirement funds from taxation.[222]

By 2003, the projected budget surpluses from the Clinton Administration were gone, but George W. Bush argued that additional tax cuts would act as an economic stimulus and with Republicans wavering under extreme pressure from organizations such as Grover Norquist's Americans For Tax Reform, discussed *infra*, Congress passed the Jobs and Growth Tax Relief Reconciliation Act of 2003 (JGTRRA).[223] This tax cut bill lowered the tax rate on capital gains and dividends and also accelerated some of the 2001 tax cuts that originally had been scheduled to begin years later.[224] This tax cut primarily benefited the wealthy whose investments generate capital gains and dividends. Middle class taxpayers also have investments, but mostly in the form of the equity in their homes and their retirement savings which are largely shielded from taxation. These tax cuts were then extended through 2010 by the Tax Increase Prevention and Reconciliation Act of 2005 (TIPRA).[225] In 2010, with the support of President Barack Obama, the tax cuts were extended again until 2012.[226] When fully phased in, 67 percent of the tax cuts went to the richest 20 percent of households. Households making between $40,000 and $50,000 saw an average 2010 tax reduction of $962, but households making more than $1 million received an average reduction of $168,052.[227]

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exclusive of additional interest on the larger national debt. JOHNSON & KWAK, WHITE HOUSE BURNING, *supra* note 10, at 90, n.125.

221. JOHNSON & KWAK, WHITE HOUSE BURNING, *supra* note 10, at 88.

222. CBO, ESTIMATE, *supra* note 199.

223. Pub. L. No. 108-27, 117 Stat. 752.

224. *Id.*

225. Pub. L. No. 109-222, 120 Stat. 345. The expiration date of these tax cuts in 2010 was due to the manner in which Congress enacted the legislation. In the Senate, most measures require 60 votes in order to end debate and move to a vote; a filibuster permits 41 senators to prevent a vote. However, the budget reconciliation process provides an exception to the filibuster rules for bills that change revenue and mandatory spending laws. The budget reconciliation process was created by the Congressional Budget and Impoundment Control Act of 1974 and was intended to expedite budgetary legislation. Pub. L. No. 93-344, 88 Stat. 297. However, bills passed through this process sunset automatically after ten years. However, when the tax cuts are due to expire as a matter of course, the anti-tax group argues that allowing the cuts to expire is tantamount to a tax increase.

226. Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, Pub. L. No. 111-312, 124 Stat. 3296. President Obama signed the legislation on December 17, 2010.

227. Tax Policy Center, *Individual Income and Estate Tax Provisions in the 2001–08 Tax Cuts with AMT Patch Extended, Distribution of Federal Tax Change*

In 2000, George W. Bush had also pledged that he would not touch the excess Social Security taxes that were being collected, claiming that $2 trillion in Social Security revenues were safe in a lockbox.[228] Just two months after he took the oath of office, he reiterated his promise that Social Security taxes would only be spent on Social Security and not for other programs.[229]

> By then *The Wall Street Journal* had already concluded that [George W.] Bush intended to pick the lock on the Social Security box. [George W.] Bush's economic plan, the *Journal* reported, uses "all of the Social Security surpluses … to fund the government for the next two years, and to spend well over $100 billion of Social Security funds in each of the following three years."[230]

What makes the passage of these tax cuts all the more remarkable is that there was not much public support for them. Most taxpayers preferred higher domestic spending over tax cuts and also favored tax cuts going to middle-income Americans instead of high-income taxpayers. Polls revealed that a slight majority of taxpayers favored tax cuts when the question was asked in the abstract, but when taxpayers were asked if they wanted the then surplus used for Social Security or Medicare, support for the tax cuts became very low.[231] Nevertheless, Congress repeatedly enacted legislation giving tax cuts to the wealthy. The underlying reason behind this legislation is that members of Congress are beholden to the special interest groups and lobbyists who fund their campaigns, as opposed to their constituents, who have difficulty grasping who actually benefits from this tax legislation.

E. Grover Norquist: Tax Cut Enforcer

In 2012, George H.W. Bush snapped, "Who the hell is Grover Norquist, anyway?"[232] Of course the former President knew who Norquist

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by Cash Income Level, 2010, Brookings Institution table T08–0156 (July 2, 2008), http://www.taxpolicycenter.org/numbers/displayatab.cfm?Docid=1865.http://www.taxpolicycenter.org/numbers/displayatab.cfm?Docid-1865&DocTypeID=1.

228. JOHNSTON, PERFECTLY LEGAL, *supra* note 200, at 128.

229. *Id.* at 127.

230. John D. McKinnon & Shailagh Murray, *Bush Offers $2.13 Trillion Budget, Launching Era of Deficit Spending*, WALL ST. J., Feb. 5, 2002.

231. JOHNSON & KWAK, WHITE HOUSE BURNING, *supra* note 10, at 88, n.115.

232. Felicia Sonmez, '*Who the hell is Grover Norquist, anyway?' asks George H.W. Bush*, WASH. POST (July 13, 2012), http://www.washingtonpost.com/blogs/post-politics/post/who-the-hell-is-grover-norquist-asks-

is,[233] but his point was that Norquist is not an elected official, yet wields enormous political power.[234] The former President was referring to Norquist's threats to punish any Republican member of Congress who votes for a tax increase. Norquist is president of Americans for Tax Reform [hereinafter "ATR"], an advocacy group which campaigns for lower taxes at the federal and state level.[235] But ATR is not just any advocacy group; it is the well-funded, central clearinghouse for all far right-wing conservative causes.

> Norquist has also built a solid working alliance with the Fortune 500 corporate elite and its K Street lobbyists. "What he's managed to do is to chain the ideological conservatives together with the business guys, who have the money, and to put that money to work in the service of the conservative

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george-hw-bush/2012/07/13/gJQAEzuViW_blog.html (reporting on an interview the former President gave to Parade Magazine).

> The 41st [P]resident . . . was asked how he feels about Norquist's anti-tax pledge, given his own retraction of his "no new taxes" pledge as president. "The rigidity of those pledges is something I don't like," Bush responded. "The circumstances change and you can't be wedded to some formula by Grover Norquist. It's—who the hell is Grover Norquist, anyway?"

233. Norquist claims credit for the former President's presidential defeat when he ran for a second term in 1992. During his first successful campaign in 1988, Bush had famously promised, "No new taxes." However, when faced with a looming, large deficit, he realized that income taxes would have to be increased. An infuriated Norquist claims that he punished George H.W. Bush to send a message to other Republican leaders not to stray from the commandment not to raise taxes. Drake Bennett, *Grover Norquist, the Enforcer*, BLOOMBERG BUSINESSWEEK, (May 26, 2011), http://www.businessweek.com/magazine/content/11_23/b423100668562 9.htm [hereinafter Bennett, *The Enforcer*]. As observed by Alan Brinkley, a Columbia University historian, "I don't know of anyone outside of government who has had this kind of influence on politics before . . . . He is sui generic, I think, not a politician, not visible very often in the media, but remarkably powerful." *Id.*

234. For example, White House visitor's logs indicate that Norquist visited the White House 74 times over a five year period during George W. Bush's presidency. Alison Fitzgerald, *No-Tax 'Zealot' Norquist Emerges as Biggest Barrier to U.S. Deficit Deal*, BLOOMBERG, (May 24, 2011), http://www.bloomberg.com/news/2011-05-24/norquist-emerges-as-barrier-to-u-s-debt-deal.html [hereinafter Fitzgerald, *Zealot*].

235. Norquist has also compared the arguments for imposing the estate tax on the wealthiest Americans to the morality of the Holocaust. ("[T]he morality that says it's OK to do something to a group because they're a small percentage of the population is the morality that says that the Holocaust is OK because they didn't target everybody, just a small percentage.") *See Fresh Air* (NPR radio broadcast Oct. 2, 2003), http://www.npr.org/templates/story/story.php?storyId=1452983.

> movement," says Roger Hickey of the Campaign for America's Future, who's repeatedly clashed with Norquist. "And he picks big issues." Besides taxes, Norquist is also the go-to-guy on virtually all of the right's favorite agenda items, from privatization of Social Security and Medicare to school vouchers and deregulation.[236]

Norquist got his start in 1986 when President Reagan asked Norquist to run an ad hoc group called Americans for Tax Reform, then a White House in-house operation created to build support for Reagan's 1986 tax bill.[237] Soon afterward, Norquist took ATR private and has run it ever since.[238] ATR has received funding from RJ Reynolds, Philip Morris, Microsoft, US Tobacco, and AOL TimeWarner, among others.[239] One of ATR's most effective tools in becoming indispensable to the far right-wing has been the well-known Wednesday morning meetings. They began in 1993 with the purpose of rallying conservatives against then President Clinton's healthcare plan.[240] The meetings began initially with around a dozen attendees but now have grown to about 100.[241] The meetings are attended by representatives from the National Rifle Association, The Christian Coalition, the Heritage Foundation, Republican National Committee members, and House and Senate leaders, together with conservative media reporters and editors.[242]

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236. Robert Dreyfuss, *Grover Norquist: 'Field Marshall' of the Bush Plan*, THE NATION, April 26, 2001 [hereinafter Dreyfuss, *Field Marshall*].

237. Americans for Tax Reform, *Federal Taxpayer Protection Pledge Questions and Answers*, http://www.atr.org/federal-taxpayer-protection-questions-answers-a6204.

238. Dreyfuss, *Field Marshall*, *supra* note 236.

239. *Id.* The most recent data available is from 1999 when ATR received $7 million in funding.

240. *Id. See* Americans for Tax Reform, *Who is Grover Norquist?*, http://www.atr.org/about-grover.

241. *Id. See* John Cassidy, *Wednesdays with Grover*, THE NEW YORKER, Aug. 1, 2005 [hereinafter Cassidy, *Wednesdays*]; *see also* Laura Blumenfeld, *Sowing the Seeds of GOP Domination*, WASH. POST, Jan. 12, 2004, at A01 [hereinafter Blumenfeld, *Sowing the Seeds*].

242. Dreyfuss, *Field Marshall*, *supra* note 236. Norquist has served on the ten-person executive council of the Tax Relief Coalition, established by the National Association of Wholesaler-Distributors, the National Association of Manufacturers, the National Federation of Independent Businesses, and the U.S. Chamber of Commerce. More than 700 corporations and trade associations have joined the Tax Relief Coalition with 80 of these corporations paying $5,000 each to be part of its steering committee. *Id.*

Norquist is able to boast that, as of June 1, 2011, 236 U.S. House Representatives and 41 U.S. Senators from the 112th Congress have signed his Tax Pledge in which they promise to never raise taxes.[243] He has also acquired, as of June 17, 2011, the signatures of 1,263 state legislators, in addition to 13 governors, five lieutenant governors, four attorney generals, three secretaries of state, three treasurers, one auditor, and one member of the Board of Equalization.[244] The Tax Pledge is not just a piece of paper; it is a weapon. Woe to the politician who reneges on this promise or even shows signs of weakening. During the primary race for the Republican presidential nomination in 1988, then frontrunner Bob Dole refused to sign the pledge and subsequently lost the Republican presidential nomination to George H.W. Bush, who had signed the pledge.[245] However, in 1990, faced with the large Reagan-era budget deficits and debt, George H. W. Bush raised taxes.[246] After George H.W. Bush did so, Norquist targeted Bush for defeat when he ran for reelection in 1992.[247] In 1994, after Republicans gained control of the House, some Republicans protested the size of the tax cut proposed by the House leadership. Norquist launched a direct mail attack against the group's leader, forcing the group to back down.[248] Norquist's revenge is not confined to politicians at the federal level. He has sought to defeat Republican legislators in primary elections who have voted to raise taxes in violation of the pledge.[249] When Abel Maldonado, a state senator

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243. Americans for Tax Reform, *Current List of Taxpayer Protection Pledge Signers for the 112th Congress*, http://www.atr.org/current-list-taxpayer-protection-pledge-signers-a5597. *See also* Bennett, *The Enforcer*, *supra* note 233. The Taxpayer Protection Pledge for U.S. Representatives recites as follows: "I, ______, Pledge to the Taxpayers of the _____________District of the State of ______________and all the people of this state that I will oppose and vote against any and all efforts to increase taxes." Americans for Tax Reform, *Taxpayer Protection Pledge*, http://www.atr.org/userfiles/StatePledge.pdf.

244. Bennett, *The Enforcer*, *supra* note 233.

245. *Id.*; JOHNSON & KWAK, WHITE HOUSE BURNING, *supra* note 10, at 79.

246. In his 1988 campaign for the presidency, George H.W. Bush promised not to raise taxes, famously stating at the Republican National Convention, "Read my lips: no new taxes." George H.W. Bush, *1988 Republican National Convention Acceptance Address* (Aug. 18, 1988), http://www.americanrhetoric.com/speeches/georgehbush1988rnc.htmhttp://www.americanrhetoric.com/speeches/georgehbush1988rnc.htm. However, in 1990, faced with increasing federal deficits and a weak economy, he negotiated a deal with the Democrats and raised taxes. Omnibus Reconciliation Act of 1990, Pub. L. No. 101-508, 104 Stat. 1388. Grover Norquist claims that he helped defeat George H.W. Bush to punish him for this transgression. Bennett, *The Enforcer*, *supra* note 233.

247. Bennett, *The Enforcer*, *supra* note 233.

248. JOHNSON & KWAK, WHITE HOUSE BURNING, *supra* note 10, at 80; Bennett, *The Enforcer*, *supra* note 233.

249. Cassidy, *Wednesdays*, *supra* note 241

from California, voted for a tax increase proposed by then Republican governor Arnold Schwarzenegger, Norquist successfully targeted Maldonado for defeat when he ran for lieutenant governor.[250]

Norquist has spent the last 30 years building a powerful coalition of hardcore, far right-wing conservatives opposed to tax increases for any reason.[251] Norquist's ultimate goal is to reduce the government to the size it can be "drowned in a bathtub."[252] He has not yet succeeded; however, he was instrumental in damaging the credit rating of the United States. The debt-ceiling standoff in Congress in the summer of 2011 was due in large part to members' of Congress unwillingness to violate the tax pledge they had

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> In the past few years, a lot of states and cities have been facing budget deficits, which they are legally obliged to close. You might think this justifies higher taxes, but Norquist doesn't. He's just brutal to Republican tax raisers. In Virginia, for example, he's getting involved in this year's Republican primaries and trying to unseat a number of legislators who voted for higher taxes. It's a similar story in other states.
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> *Id*.
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> For those who do not cooperate, Norquist plays enforcer. Democrats are "bad guys," but errant Republicans are "evil.". . . . On the Internet access tax vote, he targeted two Republican [U.S. S]enators from Tennessee and Ohio: "We're going to get [Lamar] Alexander and [George] Voinovich to behave.
>
> . . .
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> When Alabama Gov. Bob Riley (R) tried to pass a state tax increase, Norquist helped defeat it. "We're going to keep him on life support," he said. "We'll put him in a freezer, as an example," He gave the Alabama state party chairman an award for opposing the hike. Instead of a plaque, Norquist sent him a sword with a steel blade.

Blumenfeld, *Sowing the Seeds*, *supra* note 241.

250. *See* Fitzgerald, *Zealot*, *supra* note 234. Norquist issued a press release saying that because of Maldonado, "California is closed for business." *Id.* Norquist also distributed videos on YouTube, and wrote opinion pieces in California newspapers and blogs. *Id.*

251. He has also compared bipartisanship to "date rape." *See* Cassidy, *Wednesdays*, *supra* note 241. http://www.newyorker.com/archive/2005/08/01/05081on_onlineonly01?printable=true

252. In the meantime, Norquist has other goals as well. For example, he wants to dismantle and privatize state pension plans and the trillions of dollars of public funds held as investments for retirees. "Just 115 control $1 trillion in these funds," he says. "We want to take that power and destroy it." Dreyfuss, *Field Marshall*, *supra* note 236. In addition, destroying the Democratic Party appeals to him. "Democrats used to anger him, Norquist said. He's past angry now. 'Do you get mad at cancer? We'll defeat and crush their institutions, and the trial lawyers will go sell pizza.'" Blumenfeld, *Sowing the Seeds*, *supra* note 241.

signed, bringing the nation to the verge of a default. "'Congress was willing to cause severe economic damage to the entire population,' marvels Paul O'Neill, George W. Bush's former Treasury Secretary, 'simply because they were slaves to an idiot's idea of how the world works.'"[253]

Although Norquist's Wednesday morning meetings of far right-wing activists might be the most well-known, they are not unique. There were weekly Wednesday night meetings for the under-30 crowd known as the Third Generation held at the Heritage Foundation, and there are monthly meetings of the Federalist Society in Washington D.C.'s Chinatown, and meeting of the Saturday Evening Club at a French restaurant organized by R. Emmett Tyrrell of *The American Spectator* (a far right-wing magazine) for leading conservative writers and pundits. There is also the annual national Conservative Political Action Committee meeting where hundreds of grass-roots activists from around the country gather.[254]

The right-wing also has singled out federal judges for special attention. The Law & Economic Center at George Mason University School of Law treats federal judges to two-week seminars at resorts where they are educated in advanced legal and economic theories advocating a hands-off approach to the "free market."

As explained by the National Committee For Responsive Philanthropy, Moving a Public Policy Agenda:

> The Law and Economics Center mission is to educate judges in how to apply principles of economic analysis to the law. By 1991, the Center had provided such training—with seminars held at resort locations to enhance their attractiveness—to over 40 [percent] of the federal judiciary.
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> ...
>
> Like the Center for the Study of Market Processes, the [Law and Economics Center] is run independently of George Mason, with corporate and foundation sponsors covering all travel, lodging, and meal expenses for the most powerful players in the legal system—judges.[255]

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253. Tim Dickinson, *Grover Norquist: The Billionaires' Best Friend*, ROLLING STONE MAG., Aug. 5, 2012.

254. Robert Borosage, *The Mighty Wurlitzer*, THE AM. PROSPECT, (May 5, 2002), http://prospect.org/cs/articles?article=the_mighty_wurlitzer [hereinafter Borosage, *Wurlitzer*].

255. JOHNSON, TORT LAW, *supra* note 174, at 42. The Law and Economics Centers founded by Henry G. Manne is not only at George Mason but also at Emory University and the University of Miami. It receives funding from the Sarah Scaife Foundation. *Id.* George Mason University Foundation, Inc., the George Mason University, and George Mason School of Law also receives funding from the Charles G. Koch Charitable Foundation, John M. Olin Foundation, and The Lynde

F. Think Tanks and Media

The right-wing has also turned to media to broadcast its message, and given its lavish funding and extensive, well-organized networks, the right-wing has a powerful machine with which to do so.

> With all that ideological money, institutional heft, coordination, and credentialing, the right has perfected what the CIA used to call a "mighty Wurlitzer"—a propaganda machine that can hone a fact or a lie, broadcast it, and have it echoed and recycled in Fox News commentary, in *Washington Times* news stories, in *Wall Street Journal* editorials, by myriad right-wing pundits, by Heritage seminars and briefing papers, and in congressional hearings and speeches. Privatization of Social Security, vouchers for school, Vince Foster's supposed murder, Hillary's secret sex life—you name it—the right's mighty Wurlitzer can ensure that a message is broadcast across the country, echoed in national and local news, and reverberated in the speeches of respectable academics[,] as well as rabid politicians.[256]

These organizations, through the media, put out the same message, creating a "multiplier" effect and give the impression that there is consensus

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and Harry Bradley Foundation (according to records from 1989 to 2002). *Id.* at 43–44.

256. Borosage, *Wurlitzer*, *supra* note 254. By way of example of the echo and multiplier effect, so that some message becomes conventional wisdom or accepted fact, Robert Borosage uses David Brock's smearing of Anita Hill during the Senate hearings to confirm Clarence Thomas as a justice for the United States Supreme Court. Brock had denigrated Professor Hill as "a little slutty and a little nutty," which was repeated by conservative pundits.

> With no factual basis, Brock trashes Hill—"a little slutty and a little nutty" was the quote chosen for effect —in *The American Spectator*, with a circulation of 30,000. Rush Limbaugh then reads from the article on his radio show, broadcast to two million people. Conservative pundits recycle the charges in columns and radio shows across the country. Brock turns the article into a book at the Free Press, which gets George Will to hype the book in a column. The *Wall Street Journal* devotes virtually an entire editorial page to excerpts. That ensures that the book is treated seriously in *The New York Times Book Review* and kindred publications. And so it goes. A biased, politically inspired hatchet job becomes a bestseller, clothed in the praise of conservative pundits.

Id.

or widespread support for their opinions and policies, that "everyone thinks so."

> The Right's organizations use sophisticated market methods to "translate"—packaging ideas to appeal to people's deeper feelings and values—and disseminate messages designed to alter underlying public opinions to be supportive of their shared ideology. Even single words or phrases, selected for their effectiveness, are shared by multiple voices to reinforce the right wing message. This in turn leads to public support for their organizations and ideology, puts public pressure on legislators to support their issues, and elects public officials who support their agenda and appoint judges and agency officials who carry out their policies.[257]

The right-wing amplifies its message, creating the impression that diverse groups all think the same thing. Very few people know that only a handful of the ultra-wealthy are behind this "diversity of opinion." As a result,

> [L]ayer upon layer of seminars, studies, conferences, and interviews [can] do much to push along, if not create, the issues, which then become the national agenda of debate. . . . By multiplying the authorities to whom the media are prepared to give a friendly hearing, [conservative donations] have helped to create an illusion of diversity where none exists. The result can be an increasing number of one-sided debates in which the challengers are far outnumbered, if indeed they are heard at all.[258]

Talk show radio and cable news in particular have played an important role in broadcasting the anti-tax, anti-government message. Rush Limbaugh has been the top-rated radio host for the last 20 years,[259] and Fox News has been the dominant cable news channel since 2002.[260] Rush Limbaugh is not alone, however. As of spring 2011, the top eight talk radio

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257. JOHNSON, TORT LAW, *supra* note 174, at 10.

258. *Id.* at 16 (quoting SALLY COVINGTON, THE STRATEGIC PHILANTHROPY OF CONSERVATIVE FOUNDATIONS, NATIONAL COMMITTEE FOR RESPONSIVE PHILANTHROPY (1997)). http://www.mediatransparency.org/movement.htm

259. Zev Chafets, *Late-Period Limbaugh*, N.Y. TIMES, July 6, 2008.

260. Jacques Steinberg, *Fox News, Media Elite*, N.Y. TIMES, Nov. 8, 2004; Jacques Steinberg, *Fox News Finds its Rival Closing In*, N.Y. TIMES, June 28, 2008.

shows featured conservative hosts. The top eight were: (1) Rush Limbaugh, (2) Sean Hannity, (3) Michael Savage, (4) Glenn Beck, (5) Mark Levin, (6) Dave Ramsey, (7) Neal Boortz, and (8) Laura Ingraham.[261] Admittedly, there probably is a great deal of overlap in the listening audiences. Every weekday, and sometimes on weekends, these conservative talk show hosts preach the anti-government, anti-tax message to their audience.

A more recent tactic by the anti-tax movement has been to use a fake grass-roots organization to create the impression that average Americans, fed up with taxes, have spontaneously organized and banded together to fight back: the Tea Party. Historically, objections to taxes have tended to be lodged against specific taxes or the purpose for which they were used (e.g., war) but this new objection, as voiced by the Tea Party movement, is against taxation in general.[262] However, the Tea Party is organized and funded by FreedomWorks, an organization that, until recently, was run by Dick Armey, the former House majority leader for the Republicans. FreedomWorks is funded by the same right-wing group of billionaires as the other organizations, such as Heritage Foundation and the Manhattan Institute.[263]

During World War II, the FDR Administration made effective use of media, particularly radio, in communicating its message to the American people that paying the income tax was patriotic. Even after the end of World War II, television shows continued to portray the income tax, and the IRS, in a positive light for several decades. Although the taxpayers expressed fear of running afoul of the IRS, most of the early episodes note the social contract basis for complying with taxpaying obligations and emphasize the benefits the public receives from the government's use of their tax revenues.

Beginning in the 1940s, radio and television sitcoms began to air episodes (especially around March, which was the month in which the return date formerly fell, or April) in which taxpayers had to file their annual tax returns.[264] One notable change over the years is in the number of episodes: 15 in 1940, 25 in the 1950s, 12 in the 1960s, ten in the 1970s, eight in the 1980s, 17 in the 1990s, and four from 2000 to 2007.[265] The high number of episodes in the 1940s and 1950s reflects the fact that for many taxpayers, the

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261. *The Top Talk Radio Audiences,* TALKERS MAG., (Spring 2011), http://talkers.com/top-talk-radio-audiences/. Glenn Beck and Neal Boortz are no longer hosting programs. Boortz recently retired and Glenn Beck became so controversial that he was switched to cable television.

262. Lavoie, *Patriotism and Taxation*, *supra* note 58, at 66, n.106 (describing the movement as AstroTurf).

263. Paul Krugman, *Tea Parties Forever*, N.Y. TIMES, Apr. 13, 2009, at A21.

264. Lawrence Zelenak, *From the Great Gildersleeve to Homer Simpson: Six Decades of the Federal Income Tax in Sitcoms*, 117 TAX NOTES TODAY 1265 (Dec. 27, 2007).

265. *Id.*

federal income tax was a new experience.[266] The spike in the 1990s might well reflect the fact that Congress was holding highly publicized hearings attacking the Internal Revenue Service, discussed *infra*.[267]

Many of the episodes featured plots in which a taxpayer would have to decide whether or not to be truthful on his or her tax return. Particularly in the earlier episodes, the taxpayer is anguished over either an honest mistake or a deliberate omission of some items of income (usually in relatively small amounts). Although many of the taxpayers expressed fear that they will face prison, the Internal Revenue Service agents were not portrayed unsympathetically and thanked the taxpayer for his or her honesty when he or she confesses to the understatement and corrects the return. Many of the taxpayers expressed pride that "they did the right thing" and paid their fair share of tax because of all the benefits they receive from living in this country.[268] However, in some of the later episodes in the 1990s and 2000s, there is some evidence of decreasing respect for the income tax system.[269]

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266. *Burns and Allen*: *Income Tax Problems* (radio broadcast Mar. 1, 1950). In the show, George explains to Gracie why the government needs the money:

> The government needs our tax money to run the country. Part of it goes to pay the salaries of the President, the cabinet, and the congressmen. And the government needs the money to run the Army and the Navy. . . . . And don't forget that our government is spending millions of dollars on European recovery.

Id.

267. *See e.g.,* Camp, *Tax Administration*, *supra* note 85, at 79–80; *see also* Diane L. Fahey, *The Tax Court's Jurisdiction over Due Process Collection Appeals: Is it Constitutional?* 55 BAYLOR L. REV. 453, 457–58 (2003) [hereinafter Fahey, *Collection Appeals*] (discussing the Senate Finance Committee hearings that led to the enactment of the IRS Restructuring and Reform Act).

268. *See* Lawrence Zelenak, *Justice Holmes, Ralph Kramden, and the Civic Virtues of a Tax Return Filing Requirement*, 61 TAX L. REV. 53, 62–63 (2007) (discussing *The Honeymooners: Income Tax* (CBS television broadcast Mar. 7, 1953)). Ralph Kramden finds that he owes $15 which he could pay by using the money he had saved for a new bowling ball. Instead, he gives the money to a priest who stops by to ask for a donation for the poor. Ralph decides he will work an extra shift to earn the money for the tax and tells his wife, Alice: "I didn't mean what I said before about income taxes. Boy, we should give everything to the government. We're living in a great country. This is the greatest country in the world. We've got parks for the kids. Everybody's free to say what they think and do and please. It's a great place." *Id.*

269. LAWRENCE ZELENAK, LEARNING TO LOVE FORM 1040 (2013). For example, in an episode of the sitcom *Roseanne*, the taxpayers cheat on their taxes and bitterly denounce the IRS and the Code to IRS employees who are rude and sarcastic. Roseanne and Dan Connor must determine whether they need to include $400 on their income tax return that Roseanne earned selling magazine subscriptions. When one of their children asks whether the parents cheat on their

Although no one would argue that sitcoms represent the reality of most viewers' daily life, sitcoms do reflect or arise out of a society's culture. Viewers watch a program because in some way that sitcom speaks to them. Despite the jokes in the earlier sitcoms about the IRS and the complexity of the forms, most of the characters end up "doing the right thing" and paying their taxes. The later sitcoms where characters justify or laugh about noncompliance, might also well reflect a deteriorating tax ethos.

Thus, the earlier storylines reflected the taxpayer's (1) recognition that our lives are enhanced by the benefits the government provides (a quid pro quo basis for compliance), and (2) respect for the social contract that "we are in this together" and need to pay our fair share because others are doing so. As discussed *supra*, threats are insufficient to obtain taxpayer compliance with their taxpaying obligations. As noted by Lavoie, "Taxpayers' willingness to pay taxes increases if they understand the implicit quid pro quo received in exchange for their taxes and they if perceive [sic] that others are reciprocating by paying their share of the tax burden as well."[270]

G. *The Internal Revenue Service Under Attack*

1. *1998 Senate and House Hearings into Alleged Abuses*

Our tax system can only function if most taxpayers comply voluntarily with their reporting and payment responsibilities. As noted by Professor Camp:

> The tax determination process ultimately rests on taxpayers disclosing their financial affairs and paying what they owe

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taxes, Roseanne says no, but then winks and nods simultaneously, indicating that she and her husband do, in fact, cheat. Roseanne and Dan then go visit an IRS office for assistance, but the IRS employee they encounter is sarcastic and rude. The employee explains that Roseanne did not receive a Form 1099 for the $400 because a Form 1099 is not required for amounts less than $600. "The answer is there in writing. Sorry there are no pictures." Roseanne responds angrily that "No human being can really understand these things, you know that. That's why you've got to go get some $200 an hour lawyer to explain the crap to you, you know. And I can't afford $200 an hour." Another IRS employee then retorts, "We don't write the stinking laws. You got a complaint, talk to the idiots in Congress." Roseanne bitterly erupts that, "The poor people and us regular people, we're paying more taxes than the rich people, 'cause they've got all the lawyers to figure out all the loopholes." The Connors return home and complete their tax return, with the implication that they did not include the $400 in their income.

Id. at 92, 93–94, 112 (quoting *Roseanne: April Fool's Day* (ABC television broadcast Apr. 10, 1990).

270. Lavoie, *Patriotism and Taxation*, *supra* note 58, at 46.

> through withholding or otherwise without overt government compulsion. . . . . It is each citizen's self-enforcement of the legal duty that keeps . . .the tax. . .system running smoothly. With over 130 million individual tax returns and over 80 million other returns (not including information returns) filed in [the] calendar year 2001, the system depends on the veracity, if not the kindness, of taxpayers.[271]

The IRS obtains information about taxpayers through tax and information returns and audits; however, the IRS employs these tools solely for the purpose of encouraging compliance.[272] It is through use of this information that the IRS is able to monitor, verify, and enforce the law, stated otherwise, to require taxpayers to determine their correct tax liability and pay it. However, beginning particularly with Ronald Reagan, the anti-tax, anti-federal government cabal bitterly denounced the federal government in general and the IRS in particular. Many Americans are familiar with Ronald Reagan's words when he took the oath of office to serve as president of this country, "Government is not the solution to the problem; government is the problem." On other occasions, he had stated that the most dreaded words in the English language were, "I'm from the government and I'm here to help you." He also famously denounced the federal income tax as "unAmerican."[273] Reagan was not alone in his denouncements of our government and tax system. Congressmen Jack Kemp also called for the abolishment of the income tax and the IRS:

> The Internal Revenue Service as it exists today is incompatible with a free society. It is intrusive and by its very nature, contrary to the fundamental rights of citizens …. [T]he abuses will continue as long as the present tax [C]ode and the IRS remain …. To tax not only income, but also savings, investments, and assets, the government must

271. Camp, *Tax Administration*, *supra* note 85, at 5–6.

272. I.R.M. 1.2.13.110 ("The primary objective in selecting returns for examination is to promote the highest degree of voluntary compliance on the part of taxpayers.") The Internal Revenue Manual, or I.R.M., is the penultimate guide for IRS personnel.

273. President Reagan's Remarks During Tax Bill Signing Ceremony (Oct. 22, 1986) *reprinted in* 33 TAX NOTES 413 (Oct. 27, 1986) ("Blatantly unfair, our tax code became a source of bitterness and discouragement for the average taxpayer. It wasn't too much to call it 'unAmerican.'"). *See also* Louis E. Wolcher, *Senseless Kindness: The Politics of Cost-benefit Analysis*, 25 LAW & INEQ. 147, 184 (2007) (Reagan remarked during a speech to the Representatives of the Future Farmers of America on July 28, 1988, that "The 9 most terrifying words in the English language are, I'm from the government and I'm here to help.").

> be all-knowing, by definition, the fundamental rights of privacy and fairness must be violated.[274]

This anti-government, anti-tax rhetoric eventually affects Americans' attitudes towards the tax system and the government that tax system funds and empowers. Eventually, the public no longer believes that the government is fulfilling its social contract responsibility to administer the tax system fairly, and no longer believes that the government is fulfilling its quid pro quo responsibilities by using taxpayer money wisely for benefits. The constant denouncements of the IRS by government officials and political leaders created a false impression that the IRS and the federal government were exceeding their authorized powers and paved the way for the public to believe the false testimony given during the 1998 Senate Finance Committee hearings concerning the IRS. Although the accusations leveled against the IRS were soon debunked, the atmosphere created by the false testimony enabled Congress to pass legislation restraining the IRS's ability to carry out its tax collection duties. This in turn has led to reduced tax morale and increased cheating.

Beginning in September of 1997, the Senate Finance Committee held hearings in which former and current IRS agents and taxpayers recounted horror stories of alleged agency abuse of innocent taxpayers. Senator William Roth of Delaware was the force behind most of the hearings, which he arranged to be held in a Senate committee room specifically designed for intelligence briefings with walls that supposedly are able to block electronic eavesdropping and also included posted guards who searched those who wished to enter the room. At one point, six IRS agents testified from behind a black curtain, with their voices electronically distorted and their identities concealed,

> the way turncoat mobsters who feared [that] their godfathers would have them whacked were allowed to testify. At a time when some members of Congress were describing government law enforcement agents as "jack-booted thugs," the impression that the IRS was a government Mafia that could have you killed for breaking its code of silence was unmistakable.[275]

These anonymous agents and taxpayers recounted dramatic stories of armed IRS agents bursting into the homes and businesses of innocent

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274. Richard W. Rahn, *The IRS Choice: Tax Reform or Self-Destruction*, *in* THE IRS V. THE PEOPLE: TIME FOR REAL TAX REFORM 31 (Jack Kemp & Ken Blackwell eds., 1999).

275. JOHNSTON, PERFECTLY LEGAL, *supra* note 200, at 147–48.

taxpayers while making threats, and, in one instance, allegedly ordering a teenage girl to change her clothes while a male agent watched, and of agents issuing subpoenas solely to harass their enemies.[276]

In April of 1998, Senator Roth and the Senate Finance Committee held additional, yet equally sensational hearings, which led Senators Trent Lott of Mississippi and Frank Murkowski of Alaska to denounce the IRS's "Gestapo-like tactics."[277] Representative Bill Archer, Chair of the House Ways and Means Committee, thundered that "Criminals have more rights in this country than taxpayers do. It shouldn't be that way. That's wrong and we're going to fix it."[278] In addition to denouncing the IRS as an out-of-control rogue agency, members of Congress denounced the Code as a monstrosity that no honest taxpayer could understand in order to determine honestly and accurately one's correct tax liability. Representative Bill Archer claimed that "income is a subjective term. No two people agree on precisely what is income for tax purposes."[279] Senator Roth belittled the Code as "a mine field [sic] for most Americans, and even too complex to be efficiently and consistently administered by the Internal Revenue Service."[280] Implicit in these statements is the belief that a taxpayer's true liability cannot be determined with any degree of accuracy; therefore, any action on the part of the IRS to collect the tax is unreasonable and an arbitrary exercise of government power.[281] If Americans believe these congressional leaders as to what the problem with government is, Americans are going to believe in their proposed solutions.

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276. *Id.* at 148.

277. *Id.* at 149. *See also* David Cay Johnston, *I.R.S. Commissioner Promises Full Inquiry*, N.Y. TIMES, May 2, 1998.

> The committee heard about armed raids, corrupt audits of large corporations, a botched effort to frame former Senator Howard H. Baker Jr. on bogus tax charges and pervasive cover-ups by management, although Democrats on the panel emphasized that they were hearing only one side of the story and should treat some of the testimony skeptically.

Id.

278. Camp, *Tax Administration*, *supra* note 85, at 82 (*citing* Representative Bill Archer, News Conference (Oct. 21, 1997) (transcript available on LEXIS in FDCH Political Transcripts)).

279. Camp, *Tax Administration*, *supra* note 85, at 83 (*citing* Representative Bill Archer, News Conference (Sept. 30, 1997) (transcript available on LEXIS in FDCH Political Transcript)). As noted by Professor Camp, "Archer was trying to segue into his favorite reform: consumption tax. *Id.* at 78 note 435.

280. Camp, *Tax Administration*, *supra* note 85, at 84, (*citing IRS Oversight, Hearings Before the Senate Comm. on Finance*, S. HRG., 105-598, at 2 (1998)).

281. Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 400–07 (1997) [hereinafter McAdams, *Origin*].

However, virtually every accusation leveled against the IRS was repudiated after thorough investigations by the General Accounting Office, Justice William Webster (a former FBI Director who the Senate Finance Committee appointed to investigate the accusations), the New York Times, Tax Notes, and the Wall Street Journal.[282] For example, David Cay Johnston, then an investigative reporter for the New York Times found that "[m]ost of the crucial testimony in the 1997–98 hearings that preceded the new law, contending abuses by I.R.S. agents has proved to be unfounded, based on false or misleading testimony or disproved in subsequent court actions."[283] Judge Weber also found the accusations leveled against the IRS to be unfounded. "'No evidence was found of systematic abuses by agents,' Judge Webster reported, although his investigators did find 'isolated and individual' examples of misconduct. Judge Webster concluded that there was 'no evidence in the use-of-force incidents to suggest that . . . agents are overly aggressive, use force unnecessarily, or are improperly trained.'"[284] Even more significantly, the General Accounting Office's investigation failed to find abuse of power by the IRS:

> Generally, we found no corroborating evidence that the criminal investigations described at the hearing were retaliatory against the specific taxpayer. In addition, we could not independently substantiate that IRS employees had vendettas against these taxpayers. Our investigation did find that decisions to initiate the investigations were reasonably based on the information available to the IRS at the time and were documented in agency files when they were made. Further, we found no evidence that IRS employees had acted improperly in obtaining and executing search warrants.[285]

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282. JOHNSTON, PERFECTLY LEGAL, *supra* note 200, at 157–58.

283. Camp, *Tax Administration*, *supra* note 85, at 81, n.428, (*quoting* David Cay Johnston, *Inquiries Find Little Abuse by Tax Agents*, N.Y. TIMES, Aug. 15, 2000, at C1).

284. JOHNSTON, PERFECTLY LEGAL *supra* note 200, at 157–58.

285. GENERAL ACCOUNTING OFFICE, REPORT TO THE CHAIRMAN, COMMITTEE ON FINANCE, U.S. SENATE, TAX ADMINISTRATION: INVESTIGATION OF ALLEGATIONS OF TAXPAYER ABUSE AND EMPLOYEE MISCONDUCT ¶ 2 (1999) *reprinted in* 2000 TAX NOTES TODAY 80-13 (Tax Analysts Doc. No. 2000-11630). However, despite the investigations debunking Senator Roth's accusations against the IRS, he co-authored a book in which he continued to denounce the IRS as a rogue agency. *See* WILLIAM V. ROTH, JR. & WILLIAM H. NIXON, THE POWER TO DESTROY 14 (1999) (describing the IRS as an agency with "unchecked power" and having a "culture of isolation that protects it against interference and oversight").

It strains credulity to believe that the members of the Senate Finance Committee could have spent a year gathering these stories and not been aware that they were fabrications. Indeed, Senator Roth attempted to suppress the report of the General Accounting Office which disproved the accusations and only through the efforts of Tax Notes, using the Freedom of Information Act, was the report released.[286]

2. Congressional Restrictions on IRS Enforcement Powers

Nevertheless, after the second round of hearings, the Senate voted 97 to zero to pass the Internal Revenue Service Restructuring and Reform Act of 1998 [hereinafter "RRA 98"].[287] The House followed suit and President Clinton signed the bill into law on July 22, 1998. RRA 98 made a number of significant changes in the structure of the IRS, many of which are beyond the scope of this Article;[288] however, one provision in particular had the effect of handcuffing IRS employees, making them fearful they could lose their jobs as a result of complaints by disgruntled or vindictive taxpayers. The provision is commonly referred to as the Ten Deadly Sins. RRA 98 mandated that IRS employees would be fired if found to have engaged in any of ten acts, which included violating a taxpayer's constitutional or civil rights, threatening an audit for personal gain, making a false statement under oath or falsifying or destroying documents to conceal mistakes.[289] Certainly,

286. JOHNSTON, PERFECTLY LEGAL, *supra* note 200, at 156.

287. Pub. L. No. 105-206, 112 Stat. 6851.

288. *See generally* Camp, *Tax Administration*, *supra* note 85; *see also* Fahey, *Collection Appeals, supra* note 267.

289. The ten deadly sins contained in RRA 98 are: (1) willful failure to obtain the required approval signatures on documents authorizing the seizure of a taxpayer's home, personal belongings, or business assets; (2) providing a false statement under oath with respect to a material matter involving a taxpayer or taxpayer representative; (3) with respect to a taxpayer, taxpayer representative, or other employee of the Internal Revenue Service, the violation of (A) any right under the Constitution the United States; or (B) any civil right established under (i) tit. VI or VII of the Civil Rights Act of 1964; (ii) tit. IX of the Education Amendments of 1972; (iii) the Age Discrimination Employment Act of 1967; (iv) the Age Discrimination Act of 1975; (v) section 501 or 504 of the Rehabilitation Act of 1973; or (vi) tit. I of the Americans with Disability Act of 1990; (4) falsifying or destroying documents to conceal mistakes made by any employee with respect to a matter involving a taxpayer or taxpayer representative; (5) assault or battery on a taxpayer, taxpayer representative, or other employee of the Internal Revenue Service, but only if there is a criminal conviction, or a final judgment by a court in a civil case, with respect to the assault or battery; (6) violations of the Internal Revenue Code of 1986, Department of Treasury regulations, or policies of the Internal Revenue Service (including the Internal Revenue Manual) for the purpose of retaliating against, or harassing, a taxpayer, taxpayer representative, or other

committing any of these acts would be egregious behavior on the part of an IRS employee. However, IRS employees feared being accused, even unjustly, and subjected to investigations by the Department of the Treasury's Inspector General for Tax Administration.[290] Well-known tax protestors such as Irwin Schiff, who had served time in prison for tax fraud, began to hold seminars teaching people how to use the new law to evade taxes.[291]

Collection efforts by IRS personnel immediately plummeted because of (1) concerns of being falsely accused under the Ten Deadly Sins, and (2) the shift of IRS personnel from enforcement to service.[292] Levies on and seizures of taxpayer assets dropped from 3,669,090 in 1997 to 2,505,259 in 1998.[293] Even more dramatically, levies and seizures dropped to 504,161 in 1999 to 220,174 in 2000.[294] Taxpayers who had influence with their Congressperson were able to use that influence to resolve cases in the taxpayers favor:

> In Nashville, a revenue agent said anyone there could get a tax case resolved favorably if the taxpayer had enough influence to get a senator or congressperson to complain to the IRS. "We just collapse," the 14-year veteran said. "Please don't call us tax collectors in the newspaper," one longtime revenue officer in New York said. "We don't collect taxes anymore. We aren't allowed to."[295]

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employee of the Internal Revenue Service; (7) willful misuse of the provisions of section 6103 of the Internal Revenue Code of 1986 for the purpose of concealing information from a congressional inquiry; (8) willful failure to file any return of tax required under the Internal Revenue Code of 1986 on or before the date prescribed therefore (including any extensions), unless such failure is due to reasonable cause and not to willful neglect; (9) willful understatement of Federal tax liability, unless such understatement is due to reasonable cause and not to willful neglect; and (10) threatening to audit a taxpayer for the purpose of extracting personal gain or benefit. *See* Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, 112 Stat. 685.

290. *See e.g.,* Amy Hamilton, *Ten Deadly Sins: Effective Tool or Invitation to Employee Harassment?* 85 TAX NOTES 1360 (1999); *see also* Ann Murphy & David Higer, *The Ten Deadly Sins: A Law with Unintended Consequences*, 96 TAX NOTES 871 (2002).

291. JOHNSTON, PERFECTLY LEGAL, *supra* note 200, at 152.

292. Leandra Lederman, *Tax Compliance and the Reformed IRS*, 51 U. KAN. L. REV. 971, 982 (2003) [hereinafter Lederman, *Tax Compliance*].

293. *Id.* at 984.

294. *Id.*

295. JOHNSTON, PERFECTLY LEGAL, *supra* note 200, at 154. Johnston also uncovered evidence suggesting that IRS supervisors refused to support the conclusions of IRS agents who were auditing big oil companies like Unocal and Chevron. *Id.* at 254–55. Similar accusations arose in 2004 relating to the IRS's audit

If taxpayers are convinced that the IRS is a rogue agency that abuses power, they are less likely to comply voluntarily with the civic duty and pay the proper tax. At first, tax cheats will abuse the system but as time goes on, honest taxpayers will develop a contempt for the law and fail to comply.

> Donald Alexander, the Nixon administration tax commissioner, was astonished at what his party, the party of law and order, had done to breed disrespect for tax law enforcement. Alexander, who had gone on to become a prominent Washington tax lawyer, said he would have none of the fashionable Republican view that law enforcement was good, audits were bad. And he believed that weakening the IRS was an unprincipled way to restrain the growth of government because the benefits went to the sharpers at the expense of the honest.
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> "It's a dumb law," Alexander said of the reform act and its Ten Deadly Sins. "When someone can fail to meet his or her tax obligations without a worry about having enforcement actions taken, then other creditors are going to come in first and get paid, and the deadbeat taxpayer wins."
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> ...
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> [T]he decline in tax rates paid by the largest companies and the increased willingness of rich Americans to hide income and to undervalue gifts were the predictable results of slashing the number of auditors and then handcuffing those that remained. . . . . "The fewer traffic policemen you have, the more chances people are going to take," he said. "And as people find that their neighbors are not paying their fair share, they are encouraged to not pay their share, either."[296]

Nevertheless, the IRS, under the new Commissioner, Charles Rossotti, did exactly that and cut the number of audits for all income levels

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of Micrel, Inc. *See* Warren Rojas, *Agent says IRS Used Disclosure, Circular Referrals to Block Audit*, 104 TAX NOTES 687 (2004) (discussing IRS agent accused of wrongdoing after making public allegations of collusion between corporation under examination and senior IRS executives).

296. JOHNSTON, PERFECTLY LEGAL, *supra* note 200, at 155, 166. *See also* DONALD L. BARTLETT & JAMES B. STEELE, THE GREAT AMERICAN TAX DODGE: HOW SPIRALING FRAUD AND AVOIDANCE ARE KILLING FAIRNESS, DESTROYING THE INCOME TAX, AND COSTING YOU (2000) (discussing the rise in tax evasion and Congress' role in limiting IRS enforcement of the tax laws).

except for poor taxpayers who received the Earned Income Tax Credit.[297] Other than being audited in 1997, Commissioner Rossotti had no background in tax, although he was a successful entrepreneur who had founded American Management Systems, which contracted with government agencies to integrate technology and management.[298] In the fiscal year 2000, assigning IRS personnel to customer service instead of examination of returns reduced examination programs by 605 staff years, and in the fiscal year 2001, the number of professional staff in audit and field collection was approximately 21 percent lower than before 1987.[299] Under his watch, the audit rate for taxpayers making more than $100,000 fell so that the odds of being audited were one in 145.[300] The risk for S Corporations, favored by doctors, lawyers, and other wealthy professionals fell to one in 233. Additionally, audits of gift and estate tax returns also sharply dropped. In 1997, for gifts of $1 million or more, IRS auditors had recommended more taxes in four out of five audited returns, with the average return understating the value of the gift by $303,000, a relatively large amount.[301] However, a provision in the 1997 Taxpayer Relief Act required the IRS to audit gift tax returns within three years or accept them as filed. Prior to the change in the law, gift tax returns oftentimes were not audited until the donor had died and the estate tax return was filed. When the number of IRS auditors was reduced to 78 agents, audits of these complicated gift tax returns were reduced to 31 minutes, creating an incentive for wealthy taxpayers to understate the value of gifts and avoid paying the proper amount of tax.[302]

The taxpayers who saw their risk of being audited increase were recipients of the EITC. In fact, in 2000, the odds of being audited were one in 47, making them approximately three times more likely to be audited than the affluent. They were even somewhat more likely to be audited than

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297. The earned income tax credit, [hereinafter "EITC"] is a welfare system for the working poor administered through the tax system. The EITC is a way of giving poor, but working, taxpayers money by means of a refundable tax credit, meaning that the taxpayer receives back more in taxes than the taxpayer actually paid. The amount of the refund rises as the taxpayer earns more up to a point and then begins to fall until it is phased out when income reaches a certain level. The amount of the credit is also dependent upon whether the taxpayer has one or two (and at times, three) children, although a small credit is provided for very poor working taxpayers with no children.

298. JOHNSTON, PERFECTLY LEGAL, *supra* note 200, at 159, 163.

299. Lederman, *Tax Compliance*, *supra* note 292, at 982–83 (noting that a staff year consists of 2000 hours).

300. JOHNSTON, PERFECTLY LEGAL, *supra* note 200, at 166.

301. *Id.* at 167.

302. *Id.* at 168.

businesses with assets between $1 million and $5 million, whose audit rate was only one in 49.[303]

In more recent years, the situation has not improved. The net tax gap was $385 billion in 2006 (the most recent year the IRS has been able to estimate).[304] Given that there are 116 million households in the United States, this means that each household is paying a "surtax" of approximately $3,300 to subsidize noncompliance by others.[305] One would expect Congress to take action and fund the IRS so that it could effectively pursue noncompliant taxpayers. However, Congress has actually reduced the IRS's budget in the last several years,[306] despite that that in 2012, the IRS collected approximately $2.52 trillion on a budget of approximately $11.8 billion, which is a return on investment of approximately 214 to one.[307] In a letter to Congress last year, former Commissioner Douglas H. Shulman informed Congress that the then proposed cuts to the IRS budget would result in

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303. *Id.* at 169. Congress was willing to provide the IRS with $100 million in funds specifically earmarked for audits of EITC recipients. *Id.* at 134. However, to reduce taxpayer complaints about long waits or unanswered phone calls, Commissioner Rossotti ordered auditors and tax collectors to staff the phones, contributing to the reduction in the number of audits of other taxpayers. *Id.* at 166.

304. 1 TAXPAYER ADVOCATE SERVICE, 2012 ANNUAL REPORT TO CONGRESS 7 (2012) [hereinafter ADVOCATE, REPORT]. The net tax gap reflects the amount by which tax liabilities exceed tax collection after accounting for late payments and enforced collections. The gross tax gap—the amount of tax due, but not paid timely, and before enforced collections—was estimated to be $450 billion.

305. *Id.*

306. For purposes of appropriations, the IRS is treated as a domestic discretionary program, generally subject to the same funding rules as all other such programs. *Id.* at 35. Although there has been discussion of the "program integrity cap adjustment" mechanism whereby new funding is appropriated for IRS enforcement programs, the Taxpayer Advocate is concerned that this mechanism will actually have a deleterious effect on voluntary compliance**.** *Id.* at 38. The IRS's budget was reduced from the fiscal year 2010 to the fiscal year 2011, and from the fiscal year 2011 to the fiscal year 2012, and faces the possibility of future cuts. *Id.* at 35. *See also* Alan Fram, *Watchdog: Growing IRS workload causing problems*, WASH. TIMES (Jan. 11, 2012), http://www.washingtontimes.com/news/2012/jan/11/watchdog-growing-irs-workload-causing-problems/?page=all ("Congress cut the IRS budget to $11.8 billion this year. That is $300 million less than last year and $1.5 billion below the request by President Barack Obama, who argued that boosting the agency's spending would fatten tax collections and provide better service for taxpayers.").

307. ADVOCATE, REPORT, *supra* note 304, at 35 (*citing* GOVERNMENT ACCOUNTABILITY OFFICE, FINANCIAL AUDIT: IRS'S FISCAL YEARS 2012 AND 2011 FINANCIAL STATEMENTS 65 (2012), http://www.gao.gov/assets/650/649881.pdf; DEPARTMENT OF THE TREASURY, FY 2013 BUDGET IN BRIEF, http://www.trerasury.gov/about/budget-performance/budget-in-brief/Documents/11.%20IRS_508%20-%20passed.pdf.

reduced revenue collection seven times that of the cuts.[308] According to the Taxpayer Advocate, another way of looking at it is that for every dollar the IRS spends, it is able to collect $7 in return.[309]

The IRS's budget problems do not only affect its ability to pursue the collection of delinquent amounts. The IRS is unable to respond effectively to taxpayers' requests for assistance and information, which leads to further erosion in taxpayers' willingness to comply voluntarily with their taxpaying obligations. Despite the fact that of the 140 million individual taxpayers who filed tax returns for the fiscal year 2011, 59 percent paid preparers to prepare and file their returns and another 30 percent used tax software programs to assist them in preparing the returns themselves,[310] the IRS has been inundated with phone calls and correspondence from taxpayers requesting information and assistance. In each of the last two fiscal years, the IRS has received more than 115 million phone calls and has become increasingly unable to answer them.[311] Furthermore, the IRS's ability to process taxpayer correspondence in a timely manner has also declined from the fiscal years 2004 to 2012. The IRS receives more than 10 million letters from taxpayers each year in response to IRS adjustment notices.[312]

Given its fiscal constraints and additional demands on its time, the IRS now only audits one percent of individual taxpayers, and the majority of these audits are conducted by automated correspondence due to the high cost of face-to-face audits. Almost three out of four audits of individual taxpayers are now limited to issue examinations conducted by mail. As a result, the

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308. ADVOCATE, REPORT, *supra* note 304 at 35, n.9 (referencing a letter from Douglas H. Shulman, Commissioner of Internal Revenue, to the Chairman and ranking members of the House Committee on Ways and Means, its Subcommittee on Oversight, and the Senate Committee on Finance). http://Democrats.waysandmeans.house.gov/sites/Democrats.waysandmeans.house.gov/files/media/pdf/112/Rep_Lewis_IRS-Letter.pdf. *See also id.* at 36 n.11 (*citing* CHARLES O. ROSSOTTI, MANY UNHAPPY RETURNS: ONE MAN'S QUEST TO TURN AROUND THE MOST UNPOPULAR ORGANIZATION IN AMERICA 278 (2005) (stating that the most difficult part of his job was dealing with the IRS's budget, much to the astonishment of his business associates. "When I talked to business friends about my job at the IRS, they were always surprised when I said that the most intractable part of the job, by far, was dealing with the IRS budget. The reaction was usually 'Why should that be a problem? If you need a little money to bring in a lot of money, why wouldn't you be able to get it?'").

309. ADVOCATE, REPORT, *supra* note 304, at 35.

310. *Id.* at 6.

311. *Id.* at 9. For the taxpayers who are able to speak with someone at the IRS, the time the taxpayers must wait on hold has increased from just over two and a half minutes in the fiscal year 2004 to nearly 17 minutes in the fiscal year 2012. *Id.*

312. *Id.*

IRS in the fiscal year 2011 only conducted traditional face-to-face audits for just one of every 360 taxpayers.[313]

3. *Erosion in Taxpaying Ethos*

Prior to the RRA 98, the IRS's avowed mission was to collect the "true" tax liability owed by the taxpayer. Similarly, prior to the RRA 98, the IRS mission statement was as follows:

> The purpose of the Internal Revenue Service is to collect the proper amount of tax revenue at the least cost; serve the public by continually improving the quality of our products and services; and perform in a manner warranting the highest degree of public confidence in our integrity, and fairness.[314]

Underlying this mission statement was the belief that a taxpayer's true tax liability could be determined and should be collected. However, certain members of Congress used the RRA 98 hearings to convince the public that a true tax liability could never be determined, hence painting the tax system arbitrary and therefore untrustworthy.[315] Subsequent to the RRA 98, the IRS's mission statement was changed to the following: "Provide America's taxpayers with top quality service by helping them understand and meet their tax responsibilities and by applying the tax law with integrity and fairness to all."[316]

Clearly, the new mission statement makes no reference to determining the taxpayer's correct liability or to its collection. However, to ensure continued taxpayer compliance, taxpayers must be convinced that others are paying their taxes and in the proper amounts. There has been an alarming decrease in taxpayers' attitudes towards their taxpaying

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313. *Id.* at 35 (*citing* INTERNAL REVENUE SERVICE, FISCAL YEAR 2011 ENFORCEMENT AND SERVICE RESULTS (2011), http://www.irs.gov/pub/newsroom/fy_2011_enforcement_results_table.pdf).

314. *See* Press Release, Internal Revenue Service, *New IRS Mission Statement Emphasizes Taxpayer Service* (Sept. 24, 1998), http:// irs.gov/pub/irs-news/ir-98-59.pdf [hereinafter IRS Press Release]. S*ee also* IRS, *The Agency, Its Mission and Statutory Authority*, http://wwwirs.gov/uac/The-Agency,-its-Mission-and-Statutory-Authority (last visited Oct. 23, 2013) [hereinafter IRS, *Mission*].

315. McAdam*s, Origin*, *supra* note 281, at 400–07.

316. IRS, *Mission*, *supra* note 314, http://wwwirs.gov/uac/The-Agency,-its-Mission-and-Statutory-Authority. The new mission statement was mandated by RRA 98 which required the IRS "to review and restate its mission to place a greater emphasis on serving the public and meeting taxpayers' needs." Press Release, IRS, *supra* note 314.

responsibilities which became quite obvious immediately after the RRA 98 hearings.

> In 1999, 87 percent of respondents said that cheating on taxes was unacceptable; in 2001, only 76 percent. In 1999, 96 percent of respondents agreed that it is everyone's duty to pay their fair share of taxes; in 2001, 91 percent. And in 2001, respondents were skeptical that cheaters would be caught. A plurality of respondents (37 percent) said that cheaters were less likely to be audited in 2001 than in the past. Only one in three thought the odds of detection had increased.[317]

This concern about the erosion in taxpayers' attitudes towards compliance was echoed by the Internal Revenue Service's Oversight Board, which placed some of the blame on the decline in the IRS's monitoring activity. "The Oversight Board is concerned that broad decline in enforcement activity increases our reliance on voluntary compliance, and fears that the public's attitudes towards voluntary compliance is beginning to erode."[318]

Even more alarmingly, in her 2012 Annual Report to Congress, Taxpayer Advocate Nina Olson reported that in a statistically representative national survey by the Taxpayer Advocate Service, or TAS, of over 3,300 taxpayers who operate businesses as sole proprietors, only 16 percent said that they believed the tax laws are fair. Only 12 percent believed that taxpayers pay their fair share of taxes.[319] Additionally, 73 percent of the surveyed taxpayers said that the "wealthy have ways of minimizing their Federal taxes that are not available to the average taxpayer," and only 12

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317. Camp, *Tax Administration*, *supra* note 85, at 8 (citing Leonard E. Burman, *Urban Institute Testimony on Tax Fraud, Evasion*, 2003 TAX NOTES TODAY 133-26 (July 11, 2003) (reporting the statement of Leonard E. Burman before the House Committee on the Budget)).

318. IRS OVERSIGHT BD., 2002 ANNUAL REPORT 2, http://www.treasury.gov/irsob/board-reports_archive.shtml. *See also* Leandra Lederman & Stephen W. Mazza, *Addressing Imperfections in the Tax System: Procedural or Substantive Reform?*, 103 MICH. L. REV. 1423, 1440 note 52 (2005) (citing IRS OVERSIGHT BD., 2004 ANNUAL REPORT 11 (2004), http://www. treasury.gov/irsob/board-reports_archive.shtmlhttp://www.treas.govirsob/documents /2004_annual_report (reporting a continuing decrease in the percentage of Americans who feel that it is not at all acceptable to cheat on their income taxes)).

319. ADVOCATE, REPORT, *supra* note 304, at 3. The Taxpayer Advocate went on to state that she "finds this extraordinary lack of public trust in the method by which our government is funded profoundly disturbing." *Id.*

percent said that "everyone pays their fair share of taxes."[320] This survey reveals an alarming erosion in the taxpayer beliefs that (1) the income tax itself is fair, and (2) it is administered in a way that is fair. Furthermore, according to a Gallup poll in 1999 (shortly after the Senate Finance Committee hearings on the IRS), 49 percent of Americans surveyed thought that their taxes were unfair, compared to 45 percent who called them fair. In comparison, during World War II, Gallup polls found that eight out of 10 Americans believed their taxes were fair.[321]

The Taxpayer Advocate also expressed great concern that the manner in which the IRS is being funded will lead to further erosion of voluntary taxpayer compliance. The IRS's inability to respond to taxpayers requests for assistance and information in a timely manner ultimately will have a deleterious effect on taxpayers' attitudes towards voluntary compliance. Several appropriations acts in recent years have given the IRS additional funding through the "program integrity cap adjustment" mechanism, whereby new funding can be appropriated for IRS enforcement programs (but not for IRS taxpayer assistance activities). The program integrity cap adjustment mechanism requires that the relevant agency show that the requested additional funding will generate a return on investment greater than 1:1. The IRS is able to compute the dollars that can be collected from its examination, collection, and documents-matching functions, but cannot quantify the return on investment from additional taxpayer services. Therefore, the IRS can receive additional funding only for enforcement-type activities.[322]

The Taxpayer Advocate believes that increased funding for collection and enforcement, but not assistance, will erode voluntary compliance in two ways. First, on the taxpayers' end of compliance, the erosion will occur because taxpayer services are significant drivers of tax compliance. In order to promote voluntary compliance, the IRS needs to be able to publish tax forms and instructions, as well as educate taxpayers, tax return preparers, and tax software manufacturers.[323] Second, on the IRS's end of compliance, the erosion will occur because an enforcement only cap adjustment will force the IRS to become more of a hardcore enforcement agency.

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320. *Id.*

321. Borosage, *Talking Taxes*, *supra* note 4. http://prospect.org/cs/articles ?article=talking_taxesInterestingly, a Gallup poll taken after the attacks on September 11, 2001, found that 61 percent of Americans thought their taxes were fair, compared to 34 percent who said they were unfair. *Id.* This lends further credibility to the theory that Americans rally around their government when the country faces a threat.

322. ADVOCATE, REPORT, *supra* note 304, at 38–39.

323. *Id.* at 39.

However, for the fiscal year 2011, 98 percent of IRS tax collections resulted from front-end voluntary compliance. Two percent of total IRS tax collections were the result of enforcement activity at the back-end of compliance.[324] As noted by the Taxpayer Advocate, "[i]n our effort to enforce the laws against noncompliant taxpayers, we must take care to avoid steps that may alienate compliant taxpayers and thereby jeopardize the existing tax base."[325] Although only two percent of tax collections are the result of enforcement activity, that activity is vital to ensuring that other taxpayers comply voluntarily. If compliant taxpayers believe that the IRS is taking action against noncompliant taxpayers, they do not feel like "chumps" for voluntarily filing and paying.

The danger presented by the unrelenting campaign to undermine the tax system is that a new norm might be established—that it is patriotic and moral *not* to fulfill one's taxpaying duties. As noted by Lederman:

> One model of tax compliance . . . suggests that a norm of compliance can gradually erode as enforcement decreases until the norm "tips" to one of noncompliance. Once there is a norm of noncompliance, the psychic costs of evasion are lower, so authorities likely will have to increase enforcement above the previous level to restore the previous level of compliance. In other words, the model suggests that it is difficult for the government to disturb an existing equilibrium reflecting a norm of noncompliance but that it can be done with increased enforcement.[326]

The danger that a new, noncompliance norm might become established is exacerbated by the fact that government officials, including members of Congress, denounce not only the IRS, but the income tax itself. Professor Cass Sunstein observes that politicians can serve as

> potential norm entrepreneurs . . . alerting the public to the existence of a shared complaint and suggesting a collective solution. Under certain circumstances, the enactment of legislation may lower the cost to individuals of expressing the new norms, resulting in a norm bandwagon that encourages an ever-increasing number of people to reject a previously popular norm. Eventually, a tipping point is reached, where the new norm becomes generally accepted

324. *Id.*
325. *Id.*
326. Lederman, *Tax Compliance*, *supra* note 292, at 1509–10.

> and adherence to the old norm produces social disapproval.[327]

V. CONCLUSION

When the income tax required expansion to include most American households, the federal government deliberately created a taxpaying ethos by creating the widely accepted norm that one should fulfill his or her income tax obligation. To achieve voluntary compliance, the federal government recognized the importance of educating the public as to why the tax was necessary and how to comply with their taxpaying obligations. Among the tools the government employed to educate the populace and reinforce the norm were written and broadcast media. In addition, the government emphasized the connection between the tax revenues and the concomitant benefits those revenues provided the American people. Furthermore, the government created an effective enforcement system: the IRS. As a result, the social contract and quid pro quo bases for compliance created a taxpaying ethos or norm. Americans developed (1) a sense of trust in their fellow Americans—that they were paying their fair share, and (2) a sense of trust in the tax system itself—that enforcement was fair and the government used the revenues appropriately.

There is a deliberate campaign to destroy this trust, and a new norm of noncompliance is beginning to take root. The anti-tax financial elites have an easily understood philosophy: cut taxes and we all prosper. There is evidence to the contrary, but relatively few people have the resources to ferret out this truth. Also, supporters of the income tax cannot point to a cogent, easily understood argument they have been offered in support of the income tax. Americans do not see the connection between the tax cuts and the increased federal deficit because neither congressional leaders nor the media explains it to them.

Furthermore, the IRS is so underfunded and understaffed that it cannot provide the education and assistance taxpayers need in order to comply with their taxpaying obligations. The anti-tax financial elites have been successful not only in convincing Americans that their taxes are too high, but have also succeeded in developing strategies, networks, and funding to achieve their goals. The taxpaying ethos was created in a relatively short period of time during World War II. Similarly, once a tipping point is reached, a nontaxpaying ethos can quickly become the norm.

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327. Kirsch, *Alternative Sanctions*, *supra* note 50, at 916 (citing Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 912 (1996)).