The Futility of Tax Protester Arguments

Allen Madison
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By Allen D. Madison*

“We perceive no need to refute these [tax protester] arguments with somber reasoning and copious citation of precedent; to do so might suggest that these arguments have some colorable merit.”

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* Assistant Law Professor, University of South Dakota School of Law. LL.M., Georgetown University Law Center; J.D., Hofstra University School of Law; M.B.A, Michigan State University-The Eli Broad Graduate School of Management; B.A, Michigan State University. Many thanks to Professors Wendy Hess, John Dexter, Christine Allie, Sean Kammer, and John Plecnik for helpful comments on previous drafts; Messrs. Ben P. McGreevy (University of Idaho School of Law) and Beau Barrett (University of South Dakota School of Law) for excellent research assistance; Ms. Teresa Carlisle for her administrative support; and the editorial board and staff of the Thomas Jefferson Law Review, especially Ms. Teigan Alford for her diligent editorial assistance.

1. Crain v. Comm’t, 737 F.2d 1417, 1418 (5th Cir. 1984) (per curiam).
I. INTRODUCTION

When a tax professional makes known he or she is a tax professional, there are three common responses: (1) commentary on the choice of profession, such as, “Isn’t that boring?” (2) a request for tax advice, such as, “Can I deduct . . . ?” or (3) a tax protest argument, such as, “Is it true that income tax is unconstitutional?” The focus of this Article is the third question—the answer to which is a resounding no. The instinct is to respond to tax protest arguments as the Crain court did; that is, by refusing to address them.\(^2\) Unfortunately, it is easy to find materials promoting tax protest arguments and difficult to find the arguments refuted. The Crain court was right in refusing to respond because courts are not

\(^2\) See id. (refusing to address the substance of tax protest claims and granting the government’s request for sanctions against the tax protesters). Tax protesters are sometimes referred to using the alternate “protestor” spelling.
responsible for educating the public on the misinformation, misunderstanding, and misrepresentation in tax protester arguments. Academics, on the other hand, have a responsibility to educate the public on such matters.

The subject of tax protesters could cover any number of things. At one end of the spectrum, one could think of people who complain about paying taxes as tax protesters. At the other end of the spectrum, one could think of people who would damage the property of the sovereign or take up arms against the sovereign as tax protesters as well. For people raised in the United States, the most well-known incident involving property damage is the Boston Tea Party. Colonists did not want to pay a tax on tea sitting in ships in the Boston Harbor so they destroyed the tea. An example of violent protest is the Whiskey Rebellion. A mob of 500 armed men attacked the tax collector’s house in Western Pennsylvania in response to the collection of tax on whiskey. President George Washington led a militia of 13,000 to Western Pennsylvania to put down the rebellion.

There are other types of tax protesters that do not fit well along such a continuum. In Great Britain, the press refers to tax protesters as a group that holds demonstrations to highlight the fact that others are not paying enough tax. A tax resister may also be considered a type of tax protester. A tax resister is someone who disagrees with governmental policies and, as a result, refuses to pay taxes to fund such policies. For example, Henry David Thoreau would be considered a tax resister because he refused to pay taxes in protest of slavery and the involvement of the United States in the Mexican-

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3. Many friends, family members, and acquaintances of the author could fit into this category.
5. Id. at 312–13; see also Sidney Ratner, Taxation and Democracy in America 27 (1967).
7. See Topshop’s Flagship London Store Hit by Tax Protest, BBC Mobile News (Dec. 4, 2010, 6:49 PM), http://www.bbc.co.uk/news/uk-11918873. This type of tax protester will organize a group of like-minded people to chant and blow whistles in such a manner as to force a business to shut down. Id. In 2010, tax protesters forced the flagship store of a retail chain to shut down for a day. Id. The reason the tax protesters sought to interfere with the retail chain is that the owner lives in a tax haven. Id.
American war. Some tax resisters have turned into full-blown tax protesters.9

The type of tax protesters discussed in this Article are those who refuse to pay income tax on the basis of some nonsensical legal argument that he or she does not owe tax. According to tax protesters, income tax is voluntary, not required by a valid law, unconstitutional, or collected illegally by the Internal Revenue Service.10 There is a dearth of scholarship on the subject of such tax protester arguments.11 The main purpose of this Article is to fill that gap.

The IRS publishes a paper on its website every year to address tax protester arguments.12 This paper provides authorities and precedents addressing many tax protester arguments.13 However, the paper is enforcement oriented—in essence advancing a “because I say so” position.14 The arguments that tax protesters continue to advance show that the tax protesters do not grasp the full import of the authorities and precedents in the IRS’s paper. None of the arguments has ever succeeded.15

10. See infra Part IV.
14. See id.
15. Jon Siegel, Income Tax Myths, JON SIEGEL’S INCOME TAX PROTESTORS PAGE, http://docs.law.gwu.edu/facweb/jsiegel/Personal/taxes/cases.htm (last visited Nov. 13, 2012) (“Every court that has ever ruled on a tax protestor argument has rejected it, so it’s pretty amazing to see tax protestors claiming that court decisions support them.”). Daniel B. Evans, The Tax Protestor FAQ, EVANS-LEGAL.COM (Nov. 28, 1998), http://evans-legal.com/dan/tpfaq.html. [A] judge will rule against the tax protestor arguments described in this FAQ 100% of the time. Not 95% of the time, or even 99.999% of the time. 100.00%. . . .[W]hen forced to confront the fact that their ideas about the U.S. Constitution and the Internal Revenue Code are refuted by hundreds of
Although these tax protester arguments never win, a problem persists. Despite the futility of tax protester arguments, tax protesters regularly challenge the IRS and go to court.\footnote{16} It should be noted that up-to-date numbers on the tax protester problem are difficult to gauge because the IRS is prohibited by statute from tracking the problem.\footnote{17} But if anything, the problem appears to be getting worse.\footnote{18}

To add insult to injury, some tax protesters often succeed in convincing others to join them in protest. A high profile example is Wesley Snipes.\footnote{19} Tax protesters Mr. Eddie Ray Kahn and Mr. Doug Rosile convinced Mr. Snipes that he did not owe taxes because he did not earn gross income from sources within the United States as defined in Section 861 of the Internal Revenue Code.\footnote{20} Mr. Rosile court decisions, and that not a single judge has ever agreed with their crackpot arguments, tax protesters retreat into paranoid delusions, claiming that there is an elaborate and complicated conspiracy among all of the officials of the IRS, all of the members of Congress, every federal judge, and most of the legal profession . . . . There are a handful of people who have avoided criminal (but not civil) penalties by convincing a jury that they were too stupid or delusional to understand the tax laws and their violations were not ‘willful,’ but no one has ever won against the IRS in a tax collection case using one of the frivolous arguments described in this FAQ.

Id.

16. For a recent case, see United States v. Hopkins, Nos. 11-2114, 11-2115, 2013 WL 425980, at *1 (10th Cir. Feb. 5, 2013) (affirming the tax evasion convictions of a doctor and his wife who became involved in tax-protester groups and stopped paying taxes apparently on the basis that the income tax is voluntary—he stopped “volunteering”).


20. See id.; see also United States v. Snipes, 611 F.3d 855, 859–60 (11th Cir. 2010).

The centerpiece of [the tax scheme presented to Mr. Snipes by Messrs. Kahn and Rosile] was the ‘861 argument’ that the domestic earnings of individual Americans do not qualify as ‘income’ under 26 U.S.C. § 861,
promoted this “Section 861 argument” to thousands of taxpayers despite the fact that it is patently incorrect application of the Code. Mr. Snipes was released from federal prison in April 2013 after serving most of his three-year sentence for misdemeanor tax crimes. In addition, Larry Williams, father of actress Michelle Williams, fell victim to tax protesters. Although he avoided jail time for the serious allegations of the government, the government had him arrested in Australia for extradition back to the U.S. to answer the allegations.

Another problem with tax protesters is that they waste government resources. Courts sometimes refuse to spend time responding to tax protester arguments in order to conserve such resources. While courts may impose sanctions and penalties to recover some costs, these sanctions and penalties do not change the

because the earnings to not come from a listed ‘source’. The IRS launched a criminal investigation of Wesley Snipes after the agency received the April 2001 altered form 1040X for the year 1997, demanding refund of over seven million dollars based upon the ‘861’ argument.

21. See infra Part IV.I.
24. Id. at 3, 199.
25. See Coleman v. Comm’r, 791 F.2d 68, 73 (7th Cir. 1986) (“Even $1,500 cannot cover the indirect costs of this litigation—including the costs that befell serious litigants, who must wait longer for their cases to receive judicial attention.”); Crain v. Comm’r, 737 F.2d 1417, 1418 (5th Cir. 1984) (“[W]e are not obliged to suffer in silence the filing of baseless, insupportable appeals presenting no colorable claims of error and designed only to delay, obstruct, or incapacitate the operations of the courts or any other governmental authority. Crain’s present appeal [making tax protester arguments] is of this sort.”).
26. E.g., Crain v. Comm’r, 737 F.2d 1417, 1417 (5th Cir. 1984) (“We perceive no need to refute these [tax protester] arguments with somber reasoning and copious citation of precedent; to do so might suggest that these arguments have some colorable merit.”). Numerous courts have relied on Crain for the proposition that responding to tax protester claims is not necessary. E.g., Vandagriff v. Comm’r, No. 12-9001, 2012 U.S. App. LEXIS 13235, at *2 (10th Cir. 2012); Sanderson v. Comm’r, No. 06-2947, 2007 U.S. App. LEXIS 19544, at *2 (8th Cir. 2007); Barzeski v. Comm’r, No. 05-4012, 2006 U.S. App. LEXIS 7583, at *2 (3d Cir. 2006); Wnuck v. Comm’r, 136 T.C. 498, 499 (2011); Wheeler v. Comm’r, 127 T.C. 200, 204 n.9 (2006).
fact that there are other people whose claims must be put on hold while a tax protester makes futile claims.\textsuperscript{27}

Although the IRS’s yearly publication provides a plethora of legal arguments as to why tax protester arguments are frivolous, this Article presents a more approachable breakdown of the issues for those who have not delved into the material in detail. It demonstrates that when viewed through the appropriate historical, political, and legal perspective, tax protester arguments are indeed futile. To provide a context for the framework and analysis, Part II provides a history of taxation with particular focus on income tax in the United States and modern tax protesters. To provide a framework for the analysis of tax protester arguments, Part III sets forth the structure of the political legal system of the United States, finishing with the structure of the United States tax system. The analysis in Part IV addresses several tax protester arguments. Part V concludes that the arguments of tax protesters are unfounded legally and otherwise. And although their potential victims are protected under current law, it is up to tax professionals to educate them.

\textbf{II. SELECTED TAX HISTORY}

One of the underlying assumptions that tax protesters appear to make is that taxes are an assault on our liberty. This view of taxation is wrong when viewed in the proper context as set forth below. Instead of the inverse relationship between liberty and civilization to taxation that tax protesters appear to have in mind, the relationship is more direct. If we want more civilization and more liberty, we must be willing to pay taxes to secure these benefits for our society.\textsuperscript{28} If we do not care about civilization and freedom then perhaps our government would not pester us for taxes. Perhaps our government would then leave us alone in our defenseless ignorance.

\begin{quote}
\textsuperscript{27} See Coleman, 791 F.2d at 73 (lamenting the economic costs that litigants incur while waiting for their cases to be heard because the court is deciding frivolous tax protester claims).
\textsuperscript{28} See \textsc{Adam Smith}, \textsc{II An Inquiry into the Nature and Causes of the Wealth of Nations} 384 (Edwin Cannan ed., University of Chicago Press 1976) (1776) (“\textit{Every tax . . . is to the person who pays it a badge . . . of liberty.”}); \textsc{I M. De Secondat Baron de Montesquieu}, \textsc{The Spirit of Laws} 247 (Thomas Nugent trans., Robert Clarke & Co. 1873) (1776) (“\textit{It is a general rule . . . that taxes may be heavier in proportion to the liberty of the subject . . . .”}).
\end{quote}
A. The Beginnings

Every civilized country has had a tax system of some sort.\(^{29}\) Taxes existed even before coined money.\(^{30}\) Perhaps that is why Justice Oliver Wendell Holmes said, “Taxes are what we pay for civilized society . . . .”\(^{31}\) It is understandable that taxation remains a part of civilization. A government cannot survive without it.\(^{32}\)

The earliest of taxes was a corvée, which means forced labor.\(^{33}\) Another of the early taxes was the tithe, a landowner’s contribution to the church (which also served as the government) of a percentage of his crops.\(^{34}\) These two types of taxes persisted for centuries as the only ones.\(^{35}\) Eventually these types of taxes proliferated, taking on all shapes and sizes.\(^{36}\)

Throughout history, the imposition of taxes gave rise to tax rebellions, protests, and other unrest. The earliest protest occurred around 2350 B.C.E., when the people of a region in Mesopotamia

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29. CHARLES ADAMS, FOR GOOD AND EVIL—THE IMPACT OF TAXES ON THE COURSE OF CIVILIZATION 2 (1993) (“There is no known civilization that did not tax.”). BURG, supra note 4, at ix (“Taxes appear to have coincided with the beginnings of advanced civilization.”). See William D. Samson, History of Taxation, in THE INTERNATIONAL TAXATION SYSTEM 21, 22 (Andrew Lymer & John Hasseldine ed., 2002) (“In the ancient civilisations, taxation arose independently such that taxes, like writing, characterised civilised society.”); see also Diana Shoe Stores Co. v. Dep’t of Revenue, 125 N.E.2d 71, 72 (1955) (noting that “the power of taxation is inherent in every independent government”); Languille v. State, 4 Tex. App. 312, 321 (1878) (“The power of taxation is inherent in every sovereignty, and without it no constitutional government, that has for its object the advancement of civil liberty, can exist.”).

30. See Taxes in the Ancient World, U. PA, ALMANAC (Apr. 2, 2002), http://www.upenn.edu/almanac/v48/n28/AncientTaxes.html; The earliest taxes appear to reach back to 3600 B.C., but the use of metal as a standard for money goes back only to the second millennium B.C., and coined money goes back only to the first millennium B.C. CAROLYN WEBBER & AARON WILDAVSKY, A HISTORY OF TAXATION AND EXPENDITURE IN THE WESTERN WORLD 38, 38–40, 91–92 (1986).


32. See WEBBER & WILDAVSKY, supra note 30, at 38 (“Financial administration and government . . . are inseparable. The ruler cannot survive without getting—and spending.”) (footnotes omitted).

33. BURG, supra note 4, at viii; WEBBER & WILDAVSKY, supra note 30, at 68 (“Corvée, the mandatory contribution of personal labor to the state, was the earliest form of taxation for which records exist . . . .”).

34. BURG, supra note 4, at viii; WEBBER & WILDAVSKY, supra note 30, at 71.

35. BURG, supra note 4, at viii.

36. Id. at xvi (“From fairly simple beginnings . . . governments devised increasingly comprehensive forms of taxation . . . until in some nations nearly every conceivable type of human activity or article of consumption became taxed . . . .”).
(ancient Iraq) removed a dynasty that imposed harsh taxes then replaced it with a new ruler to implement tax reform. The new ruler lasted about ten years, after which the tax reforms went by the wayside. Although history books have compiled descriptions of hundreds of such rebellions, it is doubtful that the literature can capture all of them. When a sovereign or king puts down a rebellion, he may have conflicting goals as to whether to record the rebellion. On one hand, the sovereign might want potential tax evaders to fear reprisal. On the other hand, if most subjects pay taxes willingly, the sovereign might not want any documentation of its violent actions crushing a rebellion.

B. United States Tax History

The colonial times in the United States illustrate some of the many types of taxes that developed since the corvée and the tithe. The colonial governments imposed poll taxes, property taxes, income taxes, retail license excises, import duties, export duties, tonnage or poundage fees, church taxes, school taxes, and other local taxes. The colonies had some variation in the composition of the taxes imposed. The northern colonies focused on property taxes, poll taxes, and income taxes. The middle colonies focused on

37. See id. at 9.
38. See id. at 9–10.
39. See id. at xvii.
40. See Alvin Rabushka, Taxation in Colonial America 268 (2008) (listing different types of taxes imposed in colonial times).
41. Poll taxes are sometimes referred to as capitation or head taxes. Id. at 169. It is a tax on one’s existence. Id. For example, colonial Massachusetts imposed a poll tax on “every male freeman sixteen years or older.” Id.
42. Colonial income taxes were different than income taxes today. See id. at 169–70. It was sometimes called a faculty tax in that the government would assess a taxpayer on the basis of his faculties or abilities rather than an accounting of the taxpayer’s taxable income. Id.
43. A tonnage or poundage is similar to a duty except that instead of imposing the tax on the value of a shipment, as in a duty, the tax is imposed on the volume of a shipment. Id. at 28. A ton was a cask for liquids equal to about 252 gallons in today’s units of measurement. Id. Similarly, poundage is a tax based on the weight of goods. Id.
44. See id. at 163–95, 355–94, 454, 769–92 (discussing the taxes imposed in colonial Massachusetts, Maine, Connecticut, Rhode Island, and New Hampshire); see also Webber & Wildavsky, supra note 30, at 363.
import duties and excise taxes. The southern colonies focused on duties for imports and exports.

England also imposed taxes on colonists, which led to the separation of the United States from England. In 1765, England imposed a stamp tax on colonists. The law required printed materials to have a tax stamp affixed to it, which one had to purchase from the government. In 1773, England imposed a colonial tax on tea, which resulted in the well-known Boston Tea Party.

The people of Boston did not want to pay the tax on tea that arrived there from England—they wanted to send it back without paying the tax. The governor of Boston tried to keep the tea in Boston and have the duty paid, but the protesters went aboard the ships and destroyed all the tea in protest of the tax imposed without representation in parliament. This event was one of the culminating events of our Revolutionary War in 1775.

The first United States constitution, the Articles of Confederation, did not authorize the federal government to impose taxes directly on its citizens. The federal government intended to receive its financial livelihood from contributions made by the states raised by each state’s own taxes. Around the time of the drafting of


46. See id. at 236–61, 421–33, 532–55, 665–711, 835–63 (discussing the taxes imposed in colonial Virginia, Maryland, North Carolina, South Carolina, and Georgia); see also Webber & Wildavsky, supra note 30, at 363.

47. See Burg, supra note 4, at 249–57.

48. See id. at 260–61; see also The Stamp Act, 1765, 59 Geo. 3, c. 12 (Eng.).

49. The Tea Act, 1773, 59 Geo. 3, c. 44 (Eng.). See Burg, supra note 4, at 273–74.


51. Id. at 276.

52. Christian G. Fritz, American Sovereigns: The People and America’s Constitutional Tradition Before the Civil War 131 (2008) (“Madison, along with other Americans, clearly understood [the Articles of Confederation] to be the first federal Constitution.”).

53. See generally Articles of Confederation of 1781.

54. See Articles of Confederation of 1781, art. VIII, para. 1 (“All charges of war, and all other expenses that shall be incurred for the common defense or general welfare, and allowed by the United States, in Congress assembled, shall be defrayed out of a common treasury, which shall be supplied by the several States . . . .”); see also Pauline Maier, Ratification 11 (2010) (“Congress depended on annual payments—requisitions—from the states to make interest and principal payments on the war debt and to cover current expenses.”).
the Constitution, however, many were unhappy with the situation because the federal government had not received much money under that system. The Constitution therefore provides Congress the authority to tax on a federal level.

There were explicit limits on Congress’s authority to tax. The Constitution permitted Congress to impose direct taxes only if apportioned. Likewise, indirect taxes had a limitation—Congress could only impose them if uniform. Unfortunately the meaning of the terms ‘direct’ and ‘indirect’ taxes as used in the Constitution is unclear. It appears the drafters did not define direct and indirect taxes. Little did the drafters know that tax protesters would try to capitalize on the failure to sufficiently define these terms.

Some authorities say a direct tax is one where the taxpayer pays the tax directly to government on the basis of the value of the item being taxed, such as property tax on the ownership of houses and

55. See Letter from Henry Lee to George Washington (Feb. 16, 1786) in THE PAPERS OF GEORGE WASHINGTON: CONFEDERATION SERIES 560–61 (W. W. Abbot & Dorothy Twohig eds., 1994) (suggesting to George Washington that the government was in desperate need of money); see also MAIER, supra note 54, at 11 (“The basic problem was, as one of Washington’s correspondent’s put it with admirable succinctness, ‘no money.’”).

56. See U.S. CONST. art. I, § 8, cl. 1 (“The Congress shall have Power to lay and collect Taxes, Duties, Imposts, and Excises . . .”).

57. See id., § 2, cl. 3 (“Representatives and direct Taxes shall be apportioned among the several States . . .”). But see Hylton v. United States, 3 U.S. (3 Dall.) 171, 174 (1796) (“The rule of apportionment is only to be adopted in such cases where it can reasonably apply; and the subject taxed, must ever determine the application of the rule.”).

58. See id., § 8, cl. 1 (“[A]ll Duties, Imposts, and Excises shall be uniform throughout the United States.”).

59. The distinction has become less important since the passing of the Sixteenth Amendment of the Constitution. See U.S. CONST. amend. XVI (“The Congress shall have power to lay and collect taxes on incomes, from whatever source derived . . .”). Students, however, still ask their tax law professors to explain the difference.

60. See Hylton, 3 U.S. at 175 (“[T]he direct taxes contemplated by the Constitution . . . are only two, . . . a capitation, or poll tax, . . . and a tax on land”); see also Pollock v. Farmers’ Loan & Trust Co., 158 U.S. 601, 640 (1895) (Harlan, J., dissenting); see also RATNER, supra note 5, at 18 (“The framers of the Constitution and those who ratified it did not clearly and exhaustively define the term ‘direct taxes.’”); see also THE RECORDS OF THE FEDERAL CONVENTION OF 1787 350 (Max Farrand ed., 1966) (“Mr. [Rufus] King [of Massachusetts] asked what was the precise meaning of direct taxation? No one answd [sic].”).

61. See discussion infra Part IV.D (addressing the tax protester argument that income taxes are direct taxes that are unconstitutional unless apportioned).
land. Similar authorities say an indirect tax in general is one where the taxpayer does not pay it directly to the government. Rather, an intermediary collects the tax and passes it on to the government. A modern example is a sales tax. Excise taxes, like a tax on cigarettes, also fit into the category of indirect taxes under this definition.

Looking at the history of these terms, however, these definitions lose their borders. In early cases, the meaning of direct and indirect taxes had some fluidity. Despite some serious lack of clarity around the time of ratification, prior to 1895, it appears that the consensus was that direct taxes included only capitation and property taxes. The issue arose in Hylton v. United States, decided in 1796 not long after the Constitutional Convention. In the context of a tax on horse carriages, the Supreme Court said, “[T]he direct taxes contemplated by the Constitution . . . are only two, . . . a capitation, or poll tax, . . . and a tax on land.” Because a tax on carriages is neither a capitation nor a property tax, the Court held that the tax was an indirect tax and therefore did not violate that rule of apportionment.

The federal government imposed various types of taxes over the years following the Revolution, but it did not impose an income tax until 1861 to help fund the Civil War. This tax act would be the first in a series that expired in 1872. A taxpayer challenged one of these acts, the 1864 Act, in Springer v. United States. The Supreme Court held that the tax was not a direct tax subject to apportionment because it was neither a capitation tax nor a property tax.

62. E.g., Hylton, 3 U.S. at 175; Springer v. United States, 102 U.S. 586, 599 (1881); Pollock, 158 U.S. at 637.
63. See, e.g., Pollock, 158 U.S. 601.
64. Hylton, 3 U.S. at 175.
65. Id.
69. See id. at 602.
Although the income tax expired in 1872, Congress reinstated it in 1894.\(^{70}\) In 1895, however, the Court took a remarkable stance on the term ‘direct taxes.’ The 1894 Act imposed tax on incomes from various sources, including income from property and employment.\(^{71}\) The Supreme Court in *Pollock v. Farmers’ Loan & Trust Co.* provided a separate treatment for the tax on some of the different sources of income.\(^{72}\) For the tax on income or rent derived from property, the Court applied the rule of apportionment, reasoning that a tax on income derived from property is tantamount to a tax on property, which made the tax a direct tax and unconstitutional.\(^{73}\) Although the Court invalidated only the tax on income derived from property but not the tax on income from other sources (such as salaries or dividends), *Pollock* made it difficult for Congress to impose a broad-based income tax because to do so Congress needed the authority to impose tax on income from all sources.\(^{74}\)

A 1909 act imposing tax on corporate income added to the confusion.\(^{75}\) In *Flint v. Stone Tracy Co.*, the taxpayer challenged a tax on the income of a corporation on the basis that *Pollock* had made the income tax unconstitutional.\(^{76}\) The Supreme Court distinguished the tax on income from property from a tax on corporate income, which the Court held is not a direct tax subject to the apportionment requirement.\(^{77}\) Rather, a corporate income tax is an excise tax on the privilege of doing business as a corporation rather than a tax on property.\(^{78}\)

In 1913, the Sixteenth Amendment became effective and fixed the defect found by the Supreme Court in *Pollock*.\(^{79}\) The Sixteenth

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71. *Id.* (“[T]here shall be . . . levied . . . upon the gains, profits, and income . . . whether . . . derived from any kind of property, rents, interest, dividends, or salaries, or from any profession, trade, employment, or vocation . . ., or from any other source whatever, a tax of two per centum.”).
73. *See id.* at 628–37.
74. *See id.*
77. *Id.* at 151.
78. *Id.*
79. *See U.S. CONST.* amend. XVI (providing that a tax on income does not have to be apportioned).
Amendment provides the government the authority to lay and collect taxes on incomes from whatever source derived without regard to the apportionment requirement.\textsuperscript{80} Congress then enacted the modern income tax in 1913, and the Supreme Court gave its stamp of approval in 1916 in \textit{Brushaber v. Union Pacific Railroad Co.} on the basis of the Sixteenth Amendment.\textsuperscript{81}

For the most part, the definition of direct taxes became irrelevant with the Sixteenth Amendment. In 2012, however, the Supreme Court had the opportunity to sort out the confusing history of the meaning of direct tax as used in the Constitution in \textit{National Federation of Independent Business Owners v. Sebelius}.\textsuperscript{82} The Court punted, however, on the definition of direct tax.\textsuperscript{83} At issue was whether a penalty for failing to have health insurance constitutes a direct tax.\textsuperscript{84} The Court did not distinguish between a direct tax and an indirect tax and appeared to avoid even referring to indirect taxes.\textsuperscript{85} Rather, the Court said only that the penalty is not a direct tax.\textsuperscript{86}

The income tax laws between 1913 and 1939 were interspersed among numerous revenue acts enacted on a semi-yearly basis.\textsuperscript{87} In 1939, the revenue statutes were codified as the Internal Revenue Code of 1939.\textsuperscript{88} The 1939 Code was repealed and replaced by 1954 by the Internal Revenue Code of 1954.\textsuperscript{89} In 1986, the 1954 Code was updated and renamed the Internal Revenue Code of 1986.\textsuperscript{90}

\textsuperscript{80} Id.
\textsuperscript{81} Brushaber v. Union Pac. R.R. Co., 240 U.S. 1, 20 (1916).
\textsuperscript{83} See id. at 2655 (Scalia, J., dissenting).
\textsuperscript{84} See id. at 2598 (“Even if the taxing power enables Congress to impose a tax on not obtaining health insurance, any tax must still comply with other requirements in the Constitution. Plaintiffs argue that the shared responsibility payment does not do so, citing Article I, § 9, clause 4.”).
\textsuperscript{85} See id.
\textsuperscript{86} Id. at 2599.
\textsuperscript{88} See id.
\textsuperscript{89} Levister v. United States, 260 F.2d 485, 486 (D.C. Cir. 1958).
C. Tax Protesters Under the Modern Income Tax

With our modern income tax came modern tax protesters. The modern tax protester first arose in the late 1940s with an industrialist, Ms. Vivien Kellems, who battled with the IRS over the same issue for years. There was no official passing of the torch, but eventually Mr. Irwin Schiff became the most prominent tax protester with numerous arguments about voluntariness of the income tax and constitutional objections. Two other tax protesters garnered wide support as well, but they each had only one main argument. Mr. Bill Benson argued that the Sixteenth Amendment was not legally effective and Mr. Larken Rose made a complex argument that the Internal Revenue Code makes it so that American citizens are taxed only on income earned outside the United States.

I. Ms. Vivien Kellems

The first modern tax protester, Ms. Kellems, refused to withhold taxes from the paychecks of her employees as required under the Code. Her argument was that the government does not have the authority to force her to collect tax without remuneration for her services. Otherwise, she argued, requiring her to collect taxes was a form of involuntary servitude prohibited under the Thirteenth Amendment. She had other disputes with the government over taxes as well. Kellems was the idol of tax protesters for years. She never went to jail and the courts never addressed her Thirteenth Amendment argument in a published opinion.

Then Mr. Irwin Schiff came along. Schiff, an accountant, became the new face of tax protester arguments and remained so for decades.

91. See discussion infra Parts II.C.1, IV.A.
92. See discussion infra Parts II.C.2–5, IV.B–G.
93. See discussion infra Parts II.C.6, IV.H.
94. See discussion infra Parts II.C.7, IV.I.
96. Id. at 686.
98. E.g., WILLIAMS, supra note 23, at 46.
99. See Kellems, 97 F. Supp. at 683, 686 (referring to Ms. Kellems’ Thirteenth Amendment argument; the conclusions of law do not address the argument).
2. Mr. Irwin Schiff’s 1974 and 1975 Tax Returns

When Mr. Irwin Schiff filed his 1974 and 1975 tax returns, he left most of his tax return blank and asserted in the return that he did not need to provide any information on the basis of the Fifth Amendment protection against self-incrimination.\(^\text{100}\) In May and April, 1978, after he had filed these returns, Schiff appeared as a guest on The Tomorrow Show with Tom Snyder discussing why Americans do not need to pay income taxes.\(^\text{101}\) Six days after his second appearance, the government charged him with willful failure to file his tax returns for 1974 and 1975, to which he made two main arguments.\(^\text{102}\) First, he argued he could not be compelled to file a tax return under the Fifth Amendment protection against self-incrimination.\(^\text{103}\) This argument predicated on the Fifth Amendment is a very common tax protester argument.\(^\text{104}\) Second, he argued he is not a “taxpayer” because “he [had] not chosen to self-assess himself to pay Federal income taxes.”\(^\text{105}\) He reasoned that he is not a taxpayer because he did not disclose his tax liability in his tax return.\(^\text{106}\) Although a court of appeals overturned Schiff’s first conviction, the government obtained a conviction in the second prosecution for failure to file tax returns.\(^\text{107}\) The court sentenced him to six months in jail and imposed a fine of $20,000.\(^\text{108}\) In civil proceedings for the 1974 and 1975 taxable years, he owed an approximate $20,000 in tax

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\(^{100}\) Schiff v. Comm’r, 47 T.C.M. (CCH) 1706 (1984), aff’d, 751 F.2d 116 (2d Cir. 1984). For a more detailed discussion of Fifth Amendment arguments made by tax protestors, see discussion infra Part IV.B.

\(^{101}\) E.g., United States v. Schiff, 612 F.2d 73, 78 (2d Cir. 1979).

\(^{102}\) Id. at 80.

\(^{103}\) Schiff, 47 T.C.M. (CCH) 1706.

\(^{104}\) E.g., Sochia v. Comm’r, 23 F.3d 941, 942 (5th Cir. 1994); Betz v. United States, 753 F.2d 834, 835 (10th Cir. 1985); Boomer v. United States, 755 F.2d 696, 697 (8th Cir. 1985); Parker v. Comm’r, 724 F.2d 469, 470 (5th Cir. 1984); United States v. Stillhammer, 706 F.2d 1072, 1073–74 (10th Cir. 1983); Ueckert v. Comm’r, 721 F.2d 248, 249 (8th Cir. 1983); United States v. Neff, 615 F.2d 1235, 1238 (9th Cir. 1980); United States v. Brown, 600 F.2d 248, 251 (10th Cir. 1979); United States v. Irwin, 561 F.2d 198, 201 (10th Cir. 1977); United States v. Daly, 481 F.2d 28, 29 (8th Cir. 1973); United States v. MacLeod, 436 F.2d 947, 950 (8th Cir. 1971); .

\(^{105}\) Schiff, 47 T.C.M. (CCH) 1706.

\(^{106}\) Id.

\(^{107}\) See Schiff, 612 F.2d at 75, 83 (reversing first conviction because the trial court prejudicially admitted into evidence for the jury to view the video tape of Mr. Schiff on The Tomorrow Show where unsworn individuals opined on Mr. Schiff’s guilt); see also United States v. Schiff, 647 F.2d 163 (2d Cir. 1981) (affirming the second conviction without opinion).

\(^{108}\) Schiff, 47 T.C.M. (CCH) 1706.
and $10,000 in penalties. The court of appeals imposed an additional penalty of $2,500. But Schiff did not give up.


Schiff filed a tax return for 1976 omitting any financial information and instead relied on a Fifth Amendment claim, among other claims. The IRS audited his return and determined he owed close to $200,000 in tax for 1976, 1977, and 1978. The IRS collected the tax by levy. Schiff then sued for a refund claiming, among other things, the government’s actions were unconstitutional. The district court rejected Schiff’s claims, and the court of appeals held him liable for $5,000 in damages for filing a frivolous appeal. But Schiff again did not give up.

109. Id. (setting forth a table showing the tax deficiencies and additions to tax (penalties) determined by the Internal Revenue Service).
111. See Schiff v. United States, 919 F.2d 830, 831 (2d Cir. 1990). Mr. Schiff’s return position as detailed by the court was as follows:

He did not provide financial information in the relevant portions of the return, but instead placed asterisks in the columns and typed in the margin “I DO NOT UNDERSTAND THIS RETURN NOR THE LAWS THAT MAY APPLY TO ME. THIS MEANS THAT I TAKE SPECIFIC OBJECTION UNDER THE 4th or 5th AMENDMENTS OF THE U.S. CONSTITUTION TO THE SPECIFIC QUESTION.” On page two of the return, Schiff also placed asterisks in the columns and typed at the bottom “THIS MEANS THAT SPECIFIC OBJECTION IS TAKEN TO THE SPECIFIC QUESTION ON THE GROUNDS OF THE 4th AND 5th AMENDMENTS OF THE UNITED STATES CONSTITUTION.”

Schiff attached a letter to his Form 1040 addressed to the District Director of the IRS. That letter stated that Schiff had received federal reserve notes in 1976, which he distinguished from taxable dollars. Schiff concluded that federal reserve notes were worthless since he could exchange them only for other federal reserve notes, but not for gold or silver. In support of his contention that federal reserve notes are not dollars, Schiff attached a letter from Russell L. Munk, Assistant General Counsel of the Department of the Treasury, that so stated. That letter also stated that the fact that federal reserve notes could not be exchanged for gold or silver did not render them worthless. The letter concluded by warning Schiff that “there is no legal basis for an argument [sic] that a taxpayer need not file a return of his income, expressed in dollars, on the ground that Federal Reserve Notes are not ‘dollars’ . . . .

Id. For a discussion of tax protester Fifth Amendment claims, see discussion infra Part IV.B.
112. See Schiff, 919 F.2d at 832.
113. Id.
114. See id.
115. Id. at 832–33.
4. Mr. Schiff’s 1979 Through 1985 Tax Years

The government prosecuted Schiff in 1985 for conspiracy to commit fraud, aiding and assisting in the filing of false returns, tax evasion, and filing false returns.\textsuperscript{116} In civil and criminal proceedings for those years, he made three arguments relevant to this discussion. First, he argued an individual must voluntarily file a tax return before the IRS can assess tax, and he did not file a tax return.\textsuperscript{117} Second, he argued that no statute makes him liable for income tax.\textsuperscript{118} Third, he argued he had no income as defined in the Internal Revenue Code.\textsuperscript{119}

The government obtained convictions for three counts of attempted tax evasion and one count for failing to file a corporate income tax return.\textsuperscript{120} He spent four years in jail for these convictions.\textsuperscript{121} He had a civil judgment against him of $2.6 million.\textsuperscript{122} But Schiff still did not give up. While in jail on this occasion, he worked on his book, \textit{The Federal Mafia}, containing his tax protester arguments.\textsuperscript{123} When he got out of jail, he continued to sell materials instructing readers on how to attempt to evade taxation.\textsuperscript{124}

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\textsuperscript{116} \textit{See id.} at 832, 834.
\textsuperscript{117} Schiff v. Comm’r, 63 T.C.M. (CCH) 2572 (1992). For a detailed discussion of this argument, see \textit{infra} Part IV.E.
\textsuperscript{118} \textit{See Schiff}, 63 T.C.M. (CCH) 2572. For a detailed discussion of this argument, see \textit{infra} Part IV.G.
\textsuperscript{119} \textit{See Schiff}, 63 T.C.M. (CCH) 2572. For a detailed discussion of this argument, see \textit{infra} Part IV.F.
\textsuperscript{120} \textit{See United States v. Schiff}, 801 F.2d 108, 109 (2d Cir. 1986).
\textsuperscript{121} \textit{See Irwin Schiff, The Federal Mafia: How the Government Illegally Imposes and Unlawfully Collects Income Taxes} 192 (1999) (noting that Mr. Schiff had been released from jail in 1988 after serving twenty months for his 1985 convictions); \textit{see also id.} at 256 (noting that Mr. Schiff was in the process of serving another six months in jail for violating the parole for his 1985 convictions); \textit{see also United States v. Cohen}, 510 F.3d 1114, 1116 (9th Cir. 2007) (noting that Mr. Schiff was finally released from his 1985 convictions in 1991).
\textsuperscript{123} \textit{See United States v. Heath}, 525 F.3d 451, 453 (6th Cir. 2008); \textit{see also Schiff}, supra note 121, at 205, 239 (noting he was writing from prison).
\textsuperscript{124} \textit{See Schiff}, 2004 WL 1879497.
\end{flushright}
5. Mr. Schiff’s 1997 Through 2002 Tax Years

In 2005, the government prosecuted Schiff for his 1997 through 2002 tax years. He had made nearly $4 million selling books on how to evade taxes. He hid the money from the IRS in an offshore bank account. This time he was charged with tax evasion, but the government did not stop there. He was also charged with aiding and assisting tax evasion through all of his marketing activities as well as conspiracy. He argued to the jury that tax law is voluntary. He also argued that the Code does not make anyone liable for an income tax. He was sentenced to 13.5 years. He is projected for release in 2017.

6. Mr. William Benson

Another modern tax protester who became well-known among the tax protester community is Mr. William Benson. His recognition among tax protesters is for his challenges to the Sixteenth Amendment. Benson has taken the position that the government did not have the power to tax income.

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126. See id. at ¶ 5.
127. See id. at ¶ 42.
128. See id. at 13 ("Count 17, 26 U.S.C. 7201, Attempt to Evade and Defeat Payment of Tax For Tax Years 1979–1985"); see also MICHAEL I. SALTMAN, IRS PRACTICE & PROCEDURE ¶ 7A.02[1][a] (2nd ed. 2002) (noting that Section 7201 is the most serious tax evasion provision).
130. Transcript of Jury Trial at 287, United States v. Schiff, No. CR-S-04-119-KJD (LRL) (D. Nev. 2005) ("Why pay income taxes? No law says you have to. Come on in and we’ll show you why you don’t have to pay. And you don’t have to pay because it’s voluntary in my view."). Id. at 5240 ("I believe the [tax] laws are constitutional because I believe that they are voluntary.").
131. Id. at 287 ("If the Government will even show me any statute in this Code that says I have to pay income taxes or I gotta keep books and records for income tax purposes, I’ll plead guilty right now and I’ll save the court the expense of the trial.").
not, from a legal standpoint, ratify the Sixteenth Amendment of the Constitution.134 Inspired by what Benson perceived as injustice, he and another author researched the history of the Sixteenth Amendment after evidence of the improper ratification of the Amendment was excluded in a trial for which he had served as defense counsel’s paralegal.135 Among other things, he checked the Amendment’s official records for ratification.136 He found what he thought were problems with the record.137 Benson wrote a book, The Law That Never Was, with M.J. “Red” Beckman that sets forth his reasons for claiming that the Sixteenth Amendment is defective.138

Other taxpayers have attempted to rely on Benson and Beckman’s research.139 In some of these cases, Benson either testified or was hired to testify as to his position.140 Even though the courts hearing his position rejected the argument on a uniform basis, Benson later pressed the Sixteenth Amendment claim in his own cases. In U.S. v. Benson, prosecutors obtained a conviction for tax evasion, but the court of appeals overturned the sentence because the government relied on an improper witness.141 The Department of Justice, on remand, obtained another conviction that succeeded.142 Benson was sentenced to four years in jail.143

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134. See United States v. Benson, 561 F.3d 718, 720 (7th Cir. 2009).
136. Id. at xvi.
137. See BILL BENSON, THE LAW THAT NEVER WAS, VOLUME II: THE FRAUD OF THE 16TH AMENDMENT AND PERSONAL INCOME TAX (1986). See generally BENSON & BECKMAN, supra note 135 at xvi (presenting the “evidence” he found that the Sixteenth Amendment was improperly ratified).
138. BENSON, supra note 137.
139. E.g., Brown v. Comm’r, 693 F.3d 765 (7th Cir. 2012), aff’d, T.C.M. 2011–83; United States v. Foster, 789 F.2d. 457, 459 (7th Cir. 1986); United States v. Thomas, 788 F.2d 1250, 1254 (7th Cir.1986).
Like Schiff, Benson continued to press his contentions after such claims landed him in prison. Benson’s website made the following claim:

After serving time in federal prison for not paying his United States income taxes, Bill Benson still does not pay income taxes and yet our federal government chooses not to arrest him. Why? Because now he can use this book, which he has written: ‘THE LAW THAT NEVER WAS’ in his defense.

Although Benson was not thrown in jail for making this assertion, the government eventually enjoined him from selling some of his materials through the web.

7. Mr. Larken Rose

In recent years, taxpayers have made more complicated arguments. Mr. Larken Rose is a proponent of the argument that domestic taxpayers are not required to report their domestic income under Section 861. Like Benson, Rose advised others on making the Section 861 argument before making the argument himself with respect to his returns. Like Schiff and Benson, despite serving time in jail because the arguments failed in court, Rose continues to suggest his arguments are correct.

No good came to these tax protesters for challenging the government. Ms. Kellems lost her position as a respected industrialist. Mr. Schiff went to jail for tax crimes for three different convictions and is still in jail. Mr. Benson and Mr. Rose have both

144. In 2001, Benson unsuccessfully sued the Oklahoma Secretary of State to compel him to inform the U.S. Secretary of State that Oklahoma had never ratified the Sixteenth Amendment. Benson v. Hunter, 45 P.3d 444, 444–45 (Okla. Civ. App. 2001). Benson’s case was dismissed with the Court of Appeals stating, “All of Taxpayer’s arguments have been previously made, rebutted, and adjudicated . . . .” Id. at 447.


146. In 2007, Benson was permanently enjoined from selling his “Reliance Defense Package” which promoted his tax avoidance techniques, including his Sixteenth Amendment argument. See generally United States v. Benson, No. 04 C 7403, 2008 WL 267055 (N.D. Ill. Jan. 10, 2008), aff’d in part, 561 F.3d. 718 (7th Cir. 2009).


148. See id.
served jail time for convictions of tax crimes as well. All four failed to appreciate some of the basic underpinnings of how our government works and paid the price for these failures.

III. CIVICS 101: LAW AND THE TAX PROTESTER

This Part explains the mechanisms underlying the government’s ability to make, enforce, and interpret law, and provides a framework to analyze the tax protester arguments presented in Part IV. Tax protestor arguments bring into question a number of underlying political and legal principles, including the reasoning that influenced the United States Constitution and Bill of Rights, as well as the law making process and the interpretation of law.

A. Protection Against Tyranny: The United States Constitution

The founders did not design our government from scratch; they considered the modern and historical thinkers of the day as well as the framers’ own mistakes. Using pseudonyms, three of the framers wrote a collection of persuasive newspaper articles in support of the ratification of the Constitution. In these articles—collectively known as The Federalist Papers—James Madison, Alexander Hamilton, and John Jay, deliberated over the proper way to structure the government of the United States. They considered the separation of traditional governmental powers and other safeguards against tyranny eventually leading to the ratification of the Constitution in 1789. Various aspects of the Constitution have important effects on how laws are made and interpreted. Although tax protesters tend to acknowledge the legitimacy of the Constitution, they also tend to misunderstand, misapply, or misrepresent it.

149. See The Federalist No. 47 (James Madison) (incorporating the ideas of Montesquieu and John Locke); see also M. J. C. Vile, Constitutionalism and the Separation of Powers 76 (1967) (suggesting that Montesquieu expanded on Locke’s ideas regarding the separation of powers). The Federalist Papers also cite David Hume. See The Federalist No. 85 (Alexander Hamilton). One of the perceived mistakes of the framers of the Constitution was the failure to provide the federal government the power to tax. See The Federalist No. 12 (Alexander Hamilton) (“[T]he public expectation has been uniformly disappointed, and the treasuries of the States have remained empty.”).


151. See id.

152. See discussions supra Part II.C.1–3, and infra Part IV.A, B, D, & H.
The document that establishes our country as a political entity is the Constitution of the United States.\textsuperscript{153} The Constitution provides for three branches of government: the legislative, executive, and judicial.\textsuperscript{154} Article I grants all legislative powers to Congress.\textsuperscript{155} The legislative powers delineated in Article I are broad. Congress has the power to tax, borrow money, make money, create courts or other tribunals, and “make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers . . . .”\textsuperscript{156} Article II grants all executive powers to a president who enforces federal laws.\textsuperscript{157} Article III grants the judicial power to a Supreme Court and any inferior courts Congress sees fit to create.\textsuperscript{158} These courts have broad jurisdiction over federal crimes and civil actions.\textsuperscript{159}

In summary, Congress writes the laws, the President enforces them, and the courts preside over disputes involving them. The Constitution “constitutes” the government, meaning it defines the government’s parameters.\textsuperscript{160} It gives the government its authority, but it also puts limits on this authority.\textsuperscript{161}

The United States government, as constituted by the Constitution, has a number of features that impact how we live, die, and pay taxes in this country. One feature is that the Constitution has a number of safeguards against tyranny. These safeguards include the separation of powers, checks and balances, and the Bill of Rights. In addition to safeguarding against tyranny, the separation of powers affects how laws get made, enforced, and interpreted. Many arguments made by tax protesters demonstrate a lack of

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\textsuperscript{153} See M’Culloch v. Md., 17 U.S. 316, 400–05 (1819).
\textsuperscript{154} See generally U.S. Const. arts. I, II & III.
\textsuperscript{155} See U.S. Const. art. I, § 1.
\textsuperscript{156} Id., § 8, cl. 1 & 18.
\textsuperscript{157} See U.S. Const. art. II, § 1, cl. 1; id. § 2.
\textsuperscript{158} U.S. Const. art. III, § 1, cl. 1.
\textsuperscript{159} See id., § 2.
\textsuperscript{160} See Joseph Raz, \textit{On the Authority and Interpretation of Constitutions: Some Preliminaries}, in LARRY ALEXANDER, \textit{Constitutionalism: Philosophical Foundations} 153 (1998) (“[T]he constitution is simply the law that establishes and regulates the main organs of government, their constitution and powers, and ipso facto it includes law that establishes the general principles under which the country is governed.”).
\textsuperscript{161} See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 138 (1803) (“An act of congress repugnant to the constitution cannot become a law.”); see also Raz, supra note 160, at 153.
understanding of or appreciation for the separation of powers and the Bill of Rights.

1. Separation of Powers

Tax protesters demonstrate a lack of appreciation for the concept of separation of powers.\(^{162}\) It appears somewhat well accepted among today’s political theorists that the powers that define government are the legislative, executive, and the judicial powers.\(^{163}\) The reason the framers of the Constitution divided the government into three branches is mistrust.\(^{164}\) Their understanding was that each of these three powers should not reside primarily in one branch of the government.

\(^{162}\) See Benson, supra note 137, at 46–48. Some courts had declined to hear Mr. Benson’s Sixteenth Amendment argument under the political question doctrine. See discussion infra Part IV.H. Under the political question doctrine, courts do not decide issues that are entirely within the province of the executive or legislative branch, such as whether a law has been passed or constitution has been ratified. See discussion infra Part IV.H. Mr. Benson appears to argue that that the rule of Ex Parte Young, 209 U.S. 123, 143 (1907), trumps the political question doctrine. See discussion infra Part IV.H. Ex Parte Young held that courts must take jurisdiction over cases within their jurisdiction. Young, 209 U.S. at 143. Mr. Benson does not appear to appreciate the difference between an allegation and a case. See discussion infra Part IV.H. In the cases where a court declined to hear the Sixteenth Amendment issue, the court had taken jurisdiction over the case, which is sufficient to satisfy Ex Parte Young. See discussion infra Part IV.H. Mr. Benson’s allegation of fraud in the ratification of the Sixteenth Amendment was not germane to the case. See discussion infra Part IV.H. Rather, each of the cases where he wanted to allege improprieties in ratifying the Sixteenth Amendment was a case where tax liabilities were at issue. See discussion infra Part IV.H. The court decided the tax liabilities, and it was not necessary to resolve an issue that had been resolved decades prior. See discussion infra Part IV.H.

\(^{163}\) Vile, supra note 149, at 14–15 (“The first element of the [separation of powers] doctrine is the assertion of a division of the agencies of government into three categories: the legislature, the executive, and the judiciary.”); “[S]ince the mid eighteenth century the threefold division has been generally accepted as the basic necessity for constitutional government.”); id. at 3 n.1 (“As far as the actual institutional development is concerned, of course, the basis of the threefold structure had been laid in England by the thirteenth century.”); W. B. Gwyn, The Meaning of the Separation of Powers 5 (1965) (“[T]he famous legislative-executive-judicial analysis of governmental activity . . . was not generally accepted until the second half of the 18th Century.”).

\(^{164}\) See Lisa Schultz Bressman, Edward L. Rubin & Kevin M. Stack, The Regulatory State 5 (2010) (“In these Articles [I, II, and III of the Constitution] . . . it is possible to see the explicit vesting, enumerating, and limiting of power as well as the implicit principles of federalism, separation of powers, and checks and balances . . . [A]ll three implicit principles . . . divide the government to prevent tyranny; they thus rest on a fundamental mistrust of consolidated power.”).
government. Providing too much power to one entity or individual was a source of tyranny to avoid.165

It is because of this separation of powers that the Constitution provides for Congress to make the laws, the President to execute the laws, and the judiciary to interpret the law. The separation, however, is not absolute. There are checks and balances on each branch’s power. For example, Congress has the power to enact laws, but to prevent Congress from abusing this power the President has the authority to veto an act that Congress has approved. Congress’s authority to legislate is in turn a check on the President’s authority to enforce the country’s laws. Perhaps an executive with legislative power would be tempted to legislate minimally so as to rule by will like a despot instead of law.

Tax protesters question the integrity of federal judges.166 To the contrary, however, members of the judiciary appointed under Article III of the Constitution retain their independence as a check against the political nature of the legislature and the executive. They retain their independence through a number of features of their employment. For example, they have lifetime tenure, which means that they will remain when a new political party takes over the other branches. Also, Congress may not reduce their pay.167

Tyranny can take many forms. Consider an individual who controls the legislative, executive, and judiciary power. That individual has absolute power—this individual can do whatever they want whenever they want. As such, a distinction between these powers is unnecessary, under this hypothetical, the separate powers fuse into one—there is no source of accountability. The unity of the three government powers in one person as discussed above could

165. See THE FEDERALIST NO. 47 (James Madison) (“The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny.”).

166. See SCHIFF, supra note 121, at 9 (“The United States government, with the cooperation of a culpable federal judiciary, has been extracting taxes from the American Public in total violation of the law.”); see also WILLIAMS, supra note 23, at 57 (“Since federal judges are part of the Federal government and get paid from the same ‘pocket’ as the prosecuting attorney, their vested interest is to continue to enlarge tax revenues.”).

167. See U.S. CONST. art. III, § 1 (“The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.”).
create, in the minds of the framers, an “oppressor.”\textsuperscript{168} Separating these governmental powers into different branches protects the governed from the government.

2. The Bill of Rights

To further protect against tyranny, the framers also proposed the Bill of Rights, which appears in the first ten amendments to the Constitution.\textsuperscript{169} Although framed in terms of rights, the impetus of the Bill was to limit government.\textsuperscript{170} The colonies lived under British rule by a powerful absentee government.\textsuperscript{171} They wanted to keep it from happening again.\textsuperscript{172}

Here, the Fourth and Fifth Amendments are most relevant to this Article. Tax protester arguments call our tax system into question on the basis of the Fourth and Fifth Amendments to the Constitution.\textsuperscript{173} The Fourth Amendment prohibits the government from using evidence gained from an improper search and seizure against a criminal defendant in a subsequent judicial proceeding.\textsuperscript{174} The test for whether a search or seizure is improper turns on whether the defendant has a reasonable expectation of privacy.\textsuperscript{175}

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\textsuperscript{168} See \textit{The Federalist No. 47} (James Madison).

When the legislative and executive powers are united in the same person or body . . . there can be no liberty, because apprehensions may arise lest the same monarch or senate should enact tyrannical laws to execute them in a tyrannical manner . . . . Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressor.

\textit{Id.} (citing Montesquieu).

\textsuperscript{169} See U.S. \textit{Constitution} amends. I–X.

\textsuperscript{170} See Patrick M. Garry, \textit{Limited Government and the Bill of Rights} 31 (2012) (“The real motivation behind the Bill of Rights was not to strengthen individual autonomy in society; it was to address the Anti-Federalists’ fear of a large, distant, and powerful central government.”).

\textsuperscript{171} \textit{Id.}

\textsuperscript{172} \textit{Id.}

\textsuperscript{173} See Schiff, \textit{supra} note 121, at 21–33; see also discussion infra Part IV.B. regarding Fifth Amendment arguments.

\textsuperscript{174} See U.S. \textit{Constitution} amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .”).

\textsuperscript{175} See United States v. Miller, 425 U.S. 435, 442 (1976) (“We must examine the nature of the particular documents sought to be protected in order to determine whether there is a legitimate ‘expectation of privacy’ concerning their contents.”).
The Fifth Amendment protects individuals, *inter alia*, from “the danger to a witness forced to give testimony leading to the infliction of penalties affixed to the criminal acts.”

Under the Fifth Amendment, an individual may refuse to comply with a government requirement to file a return that seeks information that may tend to incriminate the individual.

**B. Separation of Powers in the Lawmaking Context**

Each branch of the government plays a role in lawmaking and the interpretation and administration of those laws. Tax protestor arguments appear to acknowledge the role of each branch in the lawmaking process. With respect to tax laws, however, tax protestor arguments have questioned the legitimate efforts of each branch.

**1. Legislative Branch**

Some tax protesters fail to recognize that the Internal Revenue Code is a validly enacted statute. Congress enacts, with the President’s approval, all federal legislation, including tax legislation. There are two committees that write the laws that Congress proposes, the House Ways and Means Committee and the Senate Finance Committee. These two committees are political committees, where the majority rules. They receive technical support and guidance from the Staff of the Joint Committee on 176. Ullman v. United States, 350 U.S. 422, 438–39 (1956).

177. See United States v. Sullivan, 274 U.S. 259, 263 (1927) (“If the form of return provided called for answers the defendant was privileged from making he could have raised the objection in the return, but could not on that account refuse to make any return at all.”); see also Garner v. United States, 424 U.S. 648, 665 (1976) (letting stand a conviction arising out of incriminating information provided in a tax return).

178. See Siegel, *supra* note 15 (“Some tax protestors like to argue that we can only be taxed by law, not by some mere ‘code’ like the Internal Revenue Code. These protestors are often under the mistaken impression that the Internal Revenue Code was written by the IRS.”).


Taxation ("JCT").\(^{182}\) The JCT is not a political committee.\(^{183}\) Rather, it houses the subject matter experts on its staff as well as economists that evaluate the financial impact of various legislation.\(^{184}\)

Before a law becomes a law, the proposed law must go through a number of steps. If a Representative or Senator deems it important enough to warrant consideration, a congressional staff person will write a draft of the proposal, a bill.\(^{185}\) Tax legislation generally originates in the House of Representatives, rather than the Senate.\(^{186}\) The Representative will then propose the tax bill to the Committee on Ways and Means in the House of Representatives for consideration.\(^{187}\) If a majority of the members of the Committee approve, the Committee proposes it to the entire chamber.\(^{188}\) If the entire chamber approves, the bill goes to the Senate.\(^{189}\) There, the Senate Finance Committee considers the bill.\(^{190}\) If the Committee approves, the Committee proposes the bill to the full Senate chamber.\(^{191}\) If both chambers approve the bill, it goes to the President who either signs the bill into law or vetoes the bill.\(^{192}\)

The National Archives and Records Administration publishes statutes enacted through the above process in the Statutes at Large.\(^{193}\) This publication, however, is not user-friendly. Congress’s House of

\(^{182}\) See About the Joint Committee, JOINT COMMITTEE ON TAXATION 3, available at https://www.jct.gov/about-us/overview.html (last visited August 12, 2013) ("Members of Congress, particularly Members of the tax-writing committees, have increasingly relied on the nonpartisan, technical expertise of the Joint Committee Staff to assist them in making objective and informed decisions with respect to proposed revenue legislation.").

\(^{183}\) Id. at 1 ("The Joint Committee on Taxation is a nonpartisan committee of the United States Congress, originally established under the Revenue Act of 1926.").

\(^{184}\) See id. ("The Joint Committee operates with an experienced professional staff of Ph.D economists, attorneys, and accountants, who assist Members of the majority and minority parties in both houses of Congress on tax legislation.").

\(^{185}\) See ESKRIDGE ET AL., supra note 181, at 25.

\(^{186}\) U.S. CONST. art. I, § 7.

\(^{187}\) See Rule X, cl. 1(t), Rules of the House of Representatives, 113th Cong. (2013); see also Standing Committees Rule XXV, § 1 (i), Rules of the Senate, 113th Cong. (2013); see also ESKRIDGE ET AL., supra note 181, at 27.

\(^{188}\) See ESKRIDGE ET AL., supra note 181, at 30.

\(^{189}\) See id. at 37.

\(^{190}\) See U.S. CONST. art. I, § 7, cl. 1 ("All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other Bills."); see also ESKRIDGE ET AL., supra note 181, at 37.

\(^{191}\) See ESKRIDGE ET AL., supra note 181, at 37.

\(^{192}\) See id.


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Representatives has an Office of the Law Revision Counsel that has organized current statutes by subject matter into the Code of Laws of the United States of America, often referred to as the United States Code. The United States Code has 51 titles, one of which is Title 26. Title 26 contains the Internal Revenue Code. \(^{194}\) Each provision went through the proper enactment process, and the House’s Office of Revision Counsel has gathered the provisions into Title 26. The Internal Revenue Code is thus lawfully enacted code.

2. Executive Branch

Some tax protesters have questioned whether the IRS is an actual lawfully formed federal agency. Although the Constitution mentions Departments and Offices, it provides no instructions or requirements regarding their creation or governance. \(^{195}\) In other words, the Constitution contemplates government agencies but provides no further guidance. It would appear then, that if Congress enacts a law creating an agency, doing so would not violate the Constitution. \(^{196}\) It also appears that if the President, who is in charge of most federal agencies, \(^{197}\) promulgates a regulation creating an agency, then doing so would also not violate the Constitution. \(^{198}\)

Congress created the Office of the Commissioner of Internal Revenue in 1862. \(^{199}\) The IRS collects taxes with guidance from the Assistant Secretary to the Treasury for Tax Policy. In sum, because the IRS is a lawfully created entity to enforce the Code, tax protester contentions to the contrary indisputably lack merit.

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195. BRESSMAN ET AL., supra note 164, at 5 (“Agencies are not described [in the Constitution]. The Constitution does provide for officers and other elected officials or appointed judges and offices apart from the President, Congress, and judiciary. But the references do not specify the powers or procedures of agencies.”). See generally U.S. CONST. art. I, § 1 et seq.
196. See BRESSMAN ET AL., supra note 164, at 7 (“However wise, the bottom line is that the Constitution imposes few requirements on the creation and operation of agencies.”).
197. See U.S. CONST. art. II, § 1, cl. 1; see also BRESSMAN ET AL., supra note 164, at 11 (discussing executive-branch agencies and independent agencies, the former controlled by the President and the latter has officers appointed by the President for fixed terms and thus outside the President’s direct control).
198. See BRESSMAN ET AL., supra note 164, at 11.
3. Judicial Branch

Tax protesters sometimes suggest that some courts, including the Supreme Court, interpreted law incorrectly. The Constitution provides for the courts to preside over all cases in law and in equity. Congress and federal agencies, of course, have enacted and promulgated numerous laws. This means that the Supreme Court’s job involves interpreting language enacted or promulgated by the other branches. Supreme Court decisions carry finality with them. Legally, the Supreme Court cannot be wrong. The Court can be wrong from a logical, moral, or interpretive standpoint. But it is still the final word on the law. In the words of Justice Jackson, the Supreme Court is not “final because [it is] infallible, but [the Supreme Court is] infallible only because [it is] final.” The Supreme Court can misinterpret the Constitution, a statute, or its own precedent, and it will still be binding.

Under stare decisis, all lower courts are bound by Supreme Court precedent. The Supreme Court itself, however, is not necessarily bound by its own decisions. In addition, the law is subject to change. A Supreme Court decision interpreting old law has no bearing once the law has changed. As will become clear, it appears that tax protesters often fail to appreciate these concepts.

C. Interpretation of the Law

Although the Supreme Court is the final word on interpreting statutes, there are occasions where it defers to the legislature or the
Two occasions where this occurs include: when litigants ask the Court to resolve a political question, and when Congress has delegated some of its legislative authority to a federal agency—a delegation of this kind requires interpretation.

1. Political Question

Political questions are issues that arise from the internal workings or rules of a legislature or federal agency, i.e., the political branches of the government. Resolution of such issues is outside the scope of judicial review. An example of a political question case is *Luther v. Borden*. Rhode Island officials arrested Mr. Martin Luther in his home for insurgency. Mr. Luther sued the officials for breaking and entering. Mr. Luther claimed that actions of the officials were unlawful because their government had been displaced. Mr. Luther asked the Court to recognize the insurgent government. The Court held that the recognition of a state government was a political question, and the Constitution gave that power only to Congress. Recognition of a new state government, as Mr. Luther requested, was outside the Court’s authority.

2. Canons of Construction: Interpretive Guidelines

Interpretation of the law presumes formal textual language, meaning a constitution, formal statute, or valid regulation with language to interpret. When the President says, “[A]sk not what...”
your country can do for you; ask what you can do for your country,” that clearly is not a law. Tax protesters often mistakenly point to pronouncements by government representatives as proof of their incorrect interpretation of tax law.

There are a number of interpretive guidelines that flow from the structure of our government, known as canons of construction. These canons provide basic guidelines to courts involved in interpreting a statute enacted by Congress. Because these guidelines are used by those entrusted with interpreting the law—courts—it makes sense for lawyers and anyone else who wants to determine what a stated law means to rely on such canons as well. Tax protester arguments tend to ignore these basic principles.

The first basic principle is that when interpreting a statute, there is a presumption that the statute is procedurally valid. If, for example, one can find a statutory provision in the United States Code, one does not need to question whether a court will accept that it has actually gone through the process of approval by the House of Representatives, the Senate, and the President. If a reader has a choice between an interpretation that would make the statute unconstitutional and one that does not, the reader should choose the interpretation that makes the statute constitutional. This canon is important because many tax protester arguments question the validity of certain Internal Revenue Code provisions. Indeed invalidity is probably one of the most fundamental arguments tax protesters make, and it runs counter to the most fundamental guidelines for interpretation.

A second basic principle is that mandatory language is treated as mandatory. Mandatory language therefore imposes a duty on individuals. This canon is important because some tax protester...
arguments suggest that the Internal Revenue Code is voluntary rather than mandatory.\textsuperscript{220}

Third, a contextual canon of construction provides that one reading a statute should consider the entire statute. The idea here is that someone reading a statute should not take a specific provision out of context. The importance of this principle should become abundantly clear after reading just one or two tax protester arguments. One of the reasons that tax protesters sometimes succeed in persuading a layperson of the strength of their argument is by taking statutory or constitutional language out of context.\textsuperscript{221}

The final principle is that a statute should be interpreted, if it is so capable, in such a way that it is not invalidated by the Constitution.\textsuperscript{222} In other words, one does not automatically interpret an entire statute as unconstitutional if there is a way to avoid doing so. Thus, when faced with a statute that could be interpreted one way as constitutionally valid and another way that would make the statute appear to conflict with the Constitution, one should interpret it in the first way rather interpreting it as constitutionally invalid.

3. The Rule of Law

The term rule of law means different things to different people. This Article uses the term narrowly to make the point that it should not be easy to bypass the law merely by not acknowledging the law or obvious factual circumstances. Comedian Steve Martin has a routine in which he suggests that there are two words that serve as an excuse to anything: “I forgot.” He poses a hypothetical bank robber before a judge who could say, “I forgot armed robbery was illegal,” and he would be exonerated.\textsuperscript{223}

Ignorance of the law is not a defense for most crimes. The law does not have to tolerate a situation where a criminal defendant claims unawareness of the contraband in the trunk of his car while he was crossing the border. However, ignorance of the law is a defense

\textsuperscript{220} See discussion infra Part IV.C (addressing the tax protester argument that the income tax is voluntary).
\textsuperscript{221} See discussion infra Part IV.
\textsuperscript{222} See Scalia & Garner, supra note 216, at 247 (“A statute should be interpreted in a way that avoids placing its constitutionality in doubt.”).
to tax crimes, but—*willful* ignorance of the law is not a defense. It is important for would-be tax protesters to realize that it would be difficult to live under the rule of law if it were so easy to bypass the law by choosing to be unaware of it. In criminal tax law, tax protesters often claim unawareness that evading tax law is illegal.

### D. The Operation of the Tax System

Our system of taxation involves the enabling provisions of the Constitution, statutes provided by Congress, administrative guidance provided by Treasury and the IRS, and precedent created by the courts. In other words, all three branches of the government contribute to our system of taxation. Unlike many other areas of law, the tax system is rule-oriented as opposed to standards-oriented. Although United States taxpayers fill out tax returns, the process does not reveal the legal framework for taxation. The relevant framework is as follows.

The U.S. Constitution authorizes the federal government to impose taxes. Pursuant to this authority, Congress has codified the Internal Revenue Code in Title 26 of the United States Code. This income tax statute imposes a tax on the taxable income of taxpayers. Although “income” is defined in neither the U.S.

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225. See U.S. Const. art. I, § 8, cl. 1 (“The Congress shall have Power to lay and collect Taxes, Duties, Imposts, and Excises . . .”); see also id. amend. XVI (“The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration.”).


230. U.S. Const. art. I, § 8, cl. 1 (“The Congress shall have Power to lay and collect Taxes, Duties, Imposts, and Excises . . .”); id. amend. XVI (“The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration.”).


232. Id. § 1(a)–(d) (“A tax is hereby imposed on the taxable income of” individuals of various different family statuses.).
Constitution nor the Code, doing so is not necessary because the Code defines “taxable income.” Taxable income is derived from adjusted gross income, which is in turn derived from gross income.

The Code further requires a taxpayer to file a tax return if he or she earns a threshold level of income. If a taxpayer is required to file a tax return, the Code requires the taxpayer to include any tax owed with the return. The filing of a return triggers an assessment on the books of the IRS. The assessment in turn triggers the IRS’s collection authority for underpaid returns. If you fail to file your returns, the IRS may make a return for you. The IRS’s return prepared for a taxpayer also triggers an assessment and its collection authority.

233. See id. § 63.
234. See id. §§ 61, 62.
235. Id. § 6012(a)(1) (“Returns with respect to income taxes under subtitle A shall be made by . . . [e]very individual having for the taxable year gross income which equals or exceeds the exemption amount . . . .”).
236. Id. § 6151(a) (“Except as otherwise provided in this subchapter, when a return of tax is required under this title or regulations, the person required to make such return shall, without assessment or notice and demand from the Secretary, pay such tax to the internal revenue officer with whom the return is filed . . . .”).
237. See id. § 6201; see also SALTMAN, supra note 128, § 10.02 (“For the average taxpayer, assessment is made when he files a return stating his tax liability with the appropriate regional service center.”).
238. See id. § 6303 (“Where it is not otherwise provided by this title, the Secretary shall, as soon as practicable, and within 60 days, after the making of an assessment of a tax pursuant to Section 6203, give notice to each person liable for the unpaid tax, stating the amount and demanding payment thereof.”); see also id. § 6321 (“If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.”); see also id. § 6331(a) (“If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary to collect such tax . . . by levy upon all property and rights to property . . . belonging to such person or on which there is a lien provided in this chapter for the payment of such tax.”); see also SALTMAN, supra note 128, at § 10.01 (“Until an assessment is made, the Service cannot collect tax administratively because both the lien and levy provisions depend on the making of a demand for payment, which in turn assumes the making of an assessment.”).
239. See 26 U.S.C. § 6020(b)(1) (2013) (“If any person fails to make any return required by any internal revenue law or regulation made thereunder at the time prescribed therefor, or makes, willfully or otherwise, a false or fraudulent return, the Secretary shall make such return from his own knowledge and from such information as he can obtain through testimony or otherwise.”).
240. The collection authority arises out of the assessment, which is like a judgment on which to collect. See Cohen v. Gross, 316 F.2d 521, 522–23 (3d Cir. 1963)
If the IRS believes that the taxpayer’s return position is incorrect and that the taxpayer underreported taxable income, the IRS may notify the taxpayer that the IRS requires more tax to be paid. In statutory terms, this notification informs the taxpayer that the IRS has determined a deficiency in the amount the taxpayer owes. The notice is required by law, and informs the taxpayer that the IRS will assess the tax, i.e., reduce the liability to judgment on which to collect after ninety days. The ninety-day period gives the taxpayer the opportunity to file a petition in Tax Court to challenge the IRS’s determination. In statutory terms, a taxpayer who petitions the Tax Court requests that the Tax Court redetermine the IRS’s determination of a deficiency. A taxpayer who willfully fails to file a tax return commits a misdemeanor. A taxpayer who willfully attempts to evade payment of tax commits a felony. Willfulness under these criminal provisions means that the taxpayer had awareness of the legal obligation to pay tax yet tried to avoid it. In other words, ignorance of the law is a defense to these tax crimes. This exception to the general rule that ignorance of the law is no defense in criminal law is important in the tax protester context.

IV. ANALYZING TAX PROTESTER ARGUMENTS

With the factual context and legal framework established, this Part addresses a majority of the most common tax protester arguments. Although it does not exhaust all tax protester arguments, there is no necessity to do so. The arguments enumerated below contain the same mistakes, fallacies, and misrepresentations as those not discussed here. The following arguments represent the most

241. See 26 U.S.C. § 6211 (2013) (providing a definition of a deficiency); see also id. § 6212 (providing authorization to issue a notice of deficiency).
242. See SALTZMAN, supra note 128, § 10.03 (“Before assessment and collection of deficiencies in these taxes may be made, Sections 6212 and 6213 require that the Service must give a taxpayer (1) notice of the deficiency and (2) a 90-day period . . . for filing a petition in the Tax Court for redetermination.”).
243. See id.
245. Id. § 7203.
246. Id. § 7201.
interesting from a historical perspective and are representative of other arguments. Promoters of tax protester arguments will often publish materials containing sub-arguments that are not addressed in court or in legal literature. Accordingly, the arguments chosen here are often memorialized in non-legal writings. The arguments are discussed in the order set forth in Part II.C discussing modern tax protesters.

A. Thirteenth Amendment Involuntary Servitude

Recall Ms. Kellems, the employer who refused to withhold taxes from her employees. Kellems argued under the Thirteenth Amendment’s prohibition of slavery and involuntary servitude, the government does not have the authority to force her to collect withholding tax without remuneration for her services.\textsuperscript{247} Although Kellems used this involuntary servitude argument in the context of an employer withholding taxes for employees,\textsuperscript{248} others have extended the argument to paying income taxes in general.\textsuperscript{249}

The Thirteenth Amendment provides as follows: “Neither slavery nor involuntary servitude . . . shall exist within the United States, or any place subject to their jurisdiction.”\textsuperscript{250} Tax protesters have argued that any time the government requires a taxpayer to do anything for the government, such as filling out an income tax return, it is a form of involuntary servitude prohibited by the Thirteenth Amendment.\textsuperscript{251}

This argument misplaces emphasis on the term “involuntary servitude.” Tax protesters misunderstand the meaning of this term by defining the term out of context. Although many provisions of the Constitution and its amendments protect individuals from the tyranny of the government, involuntary servitude suggests something different. Individuals owe certain duties to their government, such as jury duty and service in the armed forces; these duties are not

\textsuperscript{247} See supra Part II.C.
\textsuperscript{248} See Kellems v. United States, 97 F. Supp. 681, 685 (D. Conn. 1951); see also KELLEMS, supra note 97, at 149–50.
\textsuperscript{249} E.g., United States v. Drefke, 707 F.2d 978, 983 (8th Cir. 1983); Ginter v. Southern, 611 F.2d 1226, 1229 (8th Cir. 1979); Kasey v. Comm’r, 457 F.2d 369, 370 (9th Cir. 1972); Porth v. Brodrick, 214 F.2d 925, 926 (10th Cir. 1954).
\textsuperscript{250} U.S. CONST. amend. XIII, § 1.
\textsuperscript{251} E.g., Drefke, 707 F.2d at 983; Ginter, 611 F.2d at 1229; Kasey, 457 F.2d at 370; Porth, 214 F.2d at 926.
Contrastingly, servitude means labor provided to any employer. Filling out a tax return for the government to assess one’s taxes is not labor. Labor does not involve doing something you are obligated to do for the government. Thus, from looking at the text, one cannot within reason expect filling out a tax return to constitute “servitude” because it is not labor. Therefore, a requirement to fill out a tax return cannot within reason constitute involuntary servitude.

Also, taken in context, involuntary servitude would not include requiring taxpayers to fill out a tax return. The states authored the Thirteenth Amendment to abolish slavery. The drafters used the term “involuntary servitude” to make clear that the provision prohibits any form of slavery. Requiring a taxpayer to fill out a tax return does not enslave the taxpayer in any way, shape, or form. Supreme Court interpretations of the term have followed this line of reasoning. Cases decided in the tax protester context accord as well. The involuntary servitude argument will never succeed.

B. Fifth Amendment Right Against Self-Incrimination

With respect to his 1974 and 1975 tax returns, Schiff argued that the government may not compel a taxpayer to file a tax return under the Fifth Amendment protection against self-incrimination. The Fifth Amendment argument regarding self-incrimination made by

252. See Butler v. Perry, 240 U.S. 328, 330, 332–33 (1916) (holding that a statute requiring all able-bodied males within Florida of a certain age to work on roads without pay did not constitute involuntary servitude within the meaning of the Thirteenth Amendment; citizens owe a duty to their government “such as services in the army, militia, on the jury, etc.”).

253. See ALEXANDER TSESES, THE THIRTEENTH AMENDMENT AND AMERICAN FREEDOM 39, 173 n.7 (2004) (noting one of the proponents of the amendment suggested the proposed language agreed upon “would cover ‘every proposition related to slavery.’” (quoting Senator Charles Sumner); see also CONG. GLOBE, 38th Cong., 1st Sess. 1313–14 (1864) (“That accomplished [the abolition of slavery], and we are forever freed of this troublesome question. We accomplish then what the statement of this country have been struggling to accomplish for years. We take this question entirely away from the politics of the country.”).

254. E.g., Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 69 (1873) (“The word servitude is of larger meaning than slavery, . . . and the obvious purpose was to forbid all shades and conditions of African slavery.”).

255. See Porth, 214 F.2d at 926.

256. See supra notes 100–122; see also Schiff v. United States, 919 F.2d 830, 831 (2d Cir. 1990).
Schiff in court and in his materials is a very common tax protester argument. It simply will not prevail.

The Fifth Amendment says that “[n]o person . . . shall be compelled in any criminal case to be a witness against himself.” A tax protester will often take this language to mean that he could make a blanket Fifth Amendment claim on his tax return. But that is not what the language means. To start, courts do not accept blanket assertions of Fifth Amendment protection because they do not show that the person making the assertions actually considered exposure to criminal liability. Furthermore, when a taxpayer files a tax return, there is no criminal case against him. In fact, the possibility of a criminal case being instituted against a taxpayer on the basis of the information required on a return is remote.

Moreover, in order for the Fifth Amendment to apply to a tax return there must be some possibility that the return requires information that could lead to criminal liability. Such is not the case with modern tax returns, and especially not modern federal income tax returns. For illustration, during the McCarthy era, the government sought to require members of the communist party to report their membership, a crime during those times. The filing of

258. U.S. CONST. amend. V.
259. See, e.g., Schiff v. Comm’r, 47 T.C.M. (CCH) 1706 (1984) (rejecting Mr. Schiff’s omission of return information on the basis of blanket assertions of Fifth Amendment protection), aff’d, 751 F.2d 116 (2d Cir. 1984).
260. E.g., OSRecovery, Inc. v. One Groupe Int’l., Inc., 262 F. Supp. 2d 302, 307 (S.D.N.Y. 2003) (“Johnson’s ritualistic assertions for the Fifth Amendment does not justify his refusal to answer apparently innocuous questions, and no further elaboration has been offered in response to plaintiffs’ application. Indeed, Johnson’s behavior suggests an unprincipled and ill-advised effort to frustrate lawful discovery.”); Schiff, 47 T.C.M. (CCH) 1706 (rejecting Mr. Schiff’s argument).
261. See United States v. Sullivan, 274 U.S. 259, 263–64 (1927) (“It would be an extreme if not extravagant application of the Fifth Amendment to say that it authorized a man to refuse to state the amount of his income because it had been made in crime.”). Thus, taxpayer could not refuse to file a return on the basis of the possibility of self-incrimination. See id.
262. The Supreme Court has held that “the mere possibility [i.e., remote] of incrimination is insufficient to defeat the strong policies in favor of a disclosure called for by statutes” like the income tax and a California statute requiring drivers involved in accidents to identify themselves to others involved. Cal. v. Byers, 402 U.S. 424, 425–30 (1971).
263. See Marchetti v. United States, 390 U.S. 39, 42–46 (1968) (reversing conviction of taxpayer for failure to file an excise tax return used for reporting that one is involved in illegal gambling).
the report very well could have implicated the filer as a criminal. In contrast, modern federal income tax returns do not require taxpayers to provide any information that could implicate the filer as a criminal. Rather, the filer must report only taxable income, which cannot implicate a crime without disclosure of the source. A drug dealer does not have to report on an income tax return that his taxable income came from the criminal activity of drug dealing. He or she must report only the taxable income.

Tax protesters also argue that the income tax provisions of the Internal Revenue Code must be voluntary because otherwise they would violate the Fifth Amendment and other provisions of the Bill of Rights. This argument is wrong. If such an argument were correct, the Bill of Rights would render nearly all criminal laws voluntary. It would essentially make it impossible for the executive branch to enforce the laws.

Another argument under the Fifth Amendment is that the tax law deprives individuals of due process. Due process under the Fifth Amendment requires the government to provide notice and a hearing before depriving an individual of life, liberty, or property. In making this argument, tax protesters fail to appreciate that the civil tax dispute procedures provide notice and a hearing. For disputes as to tax liability, the Internal Revenue Code requires the IRS to issue a statutory notice of deficiency, i.e., a notice that the IRS has determined that taxpayer has underreported his or her tax liability. The statutory notice of deficiency provides notice to the taxpayer that it has ninety days to pay the deficiency in tax. If the taxpayer does not pay the tax, the IRS may assess the amount of tax the IRS has

265. See Schiff, supra note 121, at 21–22.
266. To avoid such issues from interfering with enforcement of the law, courts have adopted an interpretive presumption that statutes do not conflict with the Constitution—the Constitutional-Doubt Canon. See Scalia & Garner, supra note 216, at 247–51.
267. See Schiff, supra note 121, at 21.
268. See Mullane v. Cent. Hanover Bank, 339 U.S. 306, 313 (1950) (“Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.”).
270. Id. § 6213.
determined the taxpayer underreported. Therefore, the statutory notice satisfies the notice requirement of the Fifth Amendment.

If within the ninety-day period the taxpayer decides to dispute the IRS’s determination, the taxpayer may file a petition in the United States Tax Court to re-determine the liability as determined by the IRS. The Fifth Amendment merely requires a hearing; federal tax procedure provides a full-blown trial. The federal procedures to resolve tax liability issues before a taxpayer has to pay the tax thus satisfy the hearing requirement under the Fifth Amendment.

C. Congress Is Not Authorized to Impose an Income Tax

With respect to his 1976, 1977, and 1978 income tax returns, Mr. Schiff raised the argument that the income tax exceeds the authority granted to Congress in Article I of the Constitution. The lack of authority argument relies on an inappropriate selective use of precedent to interpret the Constitution. The argument credits the three taxing clauses in the Constitution and precedent interpreting them while failing to take into account the Sixteenth Amendment. Oddly repetitive, the three original taxing provisions in the Constitution provide as follows:

1. Congress shall have the power to lay and collect direct taxes and uniform indirect taxes.
2. Direct taxes shall be apportioned among the states.
3. No direct tax shall be imposed unless done so in proportion to the census.

It is now well accepted that property tax is a direct tax subject to apportionment. Prior to the Supreme Court’s decision in Pollock v.

271. Id. § 6201.
272. Id. § 6213.
273. See Schiff v. United States, 919 F.2d 830, 831 (2d Cir. 1990); see also SCHIFF, supra note 121, at 11, 20 ("[A] compulsory income tax would violate the Constitution’s three taxing clauses . . . .") (original emphasis removed); see also IRWIN SCHIFF, THE GREAT INCOME TAX HOAX: WHY YOU CAN IMMEDIATELY STOP PAYING THIS ILLEGALLY ENFORCED TAX 254 (1985).
274. U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have Power to lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts, and Excises shall be uniform throughout the United States.").
275. Id. ("[D]irect Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers . . . .").
276. Id. § 9, cl. 4 ("No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or enumeration herein before directed to be taken.").
Farmers’ Loan & Trust Co., however, no one suspected the income tax was a direct tax. *Pollock* held that an income tax can be direct or indirect depending on the underlying source of the income. Further, *Pollock* held, a tax on income where the underlying source is property is a direct tax subject to the apportionment provisions of the Constitution. Nonetheless, the Sixteenth Amendment removed any limitations on Congress’s authority to impose income taxes. In *Brushaber v. Union Pacific Railroad*, the Supreme Court held that the income tax statute at issue passed constitutional muster because it fell within the parameters of the Sixteenth Amendment.

Tax protesters choose to ignore the Sixteenth Amendment and *Brushaber* in favor of the decision in *Pollock* to attempt to invalidate the income tax. The suggestion is that *Pollock* is better written than *Brushaber* and that *Brushaber* did not overturn *Pollock*. In this view, *Pollock* was correct and *Brushaber* did not reverse it. These views reflect a misunderstanding of the effect of Supreme Court decisions on amendments to the Constitution.

Courts interpret the law and follow the doctrine of *stare decisis* with respect to the law that is before them. Generally, the Supreme Court will follow its own precedent to maintain the law’s stability. But a case that serves as precedent in interpreting one law does not serve as precedent for interpreting a different law. The point is that

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278. See *Pollock*, 158 U.S. at 644 (Harlan, J., dissenting).

279. See id. at 637.

280. See Daniel Q. Posin & Donald B. Tobin, Principles of Federal Income Taxation of Individuals 16 (2005) (noting that the Supreme Court “recognized broadly that the purpose of the Sixteenth Amendment was to relieve income taxes from the *Pollock* requirement of apportionment” in Brushaber v. Union Pac. R.R. Co., 36 S.Ct. 236 (1916)).

281. See *Schiff*, supra note 273, at 183–84 (comparing Pollock, “which is written in clear and logical prose,” to Brushaber, which “is written in a style that practically defies understanding.”; “[t]he Brushaber court acknowledged that in upholding the income tax it was not ‘repudiating or challenging the ruling in the Pollock case’”) (citing Brushaber, 36 S.Ct. at 242).

282. See Gerhardt, supra note 206, at 71, 73, 76 (“The inevitable consequence of [adopting a low level of deference to precedent] would be chaos[.] . . . precedents provide a stabilizing influence on constitutional decisionmaking.”).
Pollock became irrelevant after the states ratified the Sixteenth Amendment in 1913, removing any constitutional limitations on taxing income. Any reliance on Pollock makes no sense. Brushaber interpreted the Constitution as it is now—with the Sixteenth Amendment authorizing an unapportioned income tax. Thus, between Pollock and Brushaber, Brushaber is the only one that has any relevance. There is no basis for suggesting that Congress is not authorized to impose an income tax.

D. An Individual Must Voluntarily File a Tax Return Before the IRS Can Assess Tax

In proceedings related to his 1979 through 1985 income tax returns, Schiff argued that the IRS is not authorized to assess a tax unless the taxpayer voluntarily files a tax return. This argument is a highly technical argument that omits part of the law. As a general matter, the way the Code works is that once a tax is assessed, the IRS may enforce collection. When we file a return, we have self-assessed. If a taxpayer has not self-assessed, that does not mean that the IRS is not authorized to assess a taxpayer’s liability, contrary to what tax protesters argue. The IRS may make a return (sometimes called a dummy return) for a taxpayer that does not file a return, which gives the IRS the authority to assess tax. The IRS may also assess tax without a return. The tax protestor contention that a

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283. See supra Part III.C; see also 26 U.S.C. § 6303 (2013) (“[T]he Secretary shall, . . . after the making of an assessment of a tax pursuant to Section 6203, give notice to each person liable for the unpaid tax, stating the amount and demanding payment thereof . . . .”); see also id. § 6321 (“If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount . . . shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.”); see also id. § 6331(“If any person liable to pay any tax neglects or refuses to pay the same . . . it shall be lawful for the Secretary to collect such tax . . . by levy upon all property and rights to property . . . belonging to such person or on which there is a lien provided in this chapter for the payment of such tax”); see also SALTZMAN, supra note 128, § 10.01 (“Until an assessment is made, the Service cannot collect tax administratively because both the lien and levy provisions depend on the making of a demand for payment, which in turn assumes the making of an assessment.”).  

284. See Michael Hatfield, Tax Lawyers, Tax Defiance, and the Ethics of Casual Conversation, 10 FLA. TAX REV. 841, 845 (2011) (“It is commonly understood that our federal income tax system is one of voluntary self-assessment, which simply refers to the requirement that each of us assess his or her own tax liability each year, submitting a check to the IRS on or before April 15.”).  

taxpayer must file a tax return before the IRS can assess is incorrect because the IRS may create a dummy return or collect tax without it.

**E. No Statute Makes a Taxpayer Liable for Income Tax**

One of Schiff’s arguments with respect to his 1979 through 1985 tax years is that the Code does not make any individual liable for income tax.\(^\text{286}\) The argument deserves some discussion because it is such a frequently asserted tax protester argument.\(^\text{287}\) One tax protester even broadcasted a public challenge for someone to show him where the law imposing an income tax is.\(^\text{288}\)

Section 1 of the Code provides, however, that “[t]here is hereby a tax imposed on the taxable income” of every individual.\(^\text{289}\) This first section of the Internal Revenue Code is clear. An individual is liable for income tax. Oddly enough, some tax protester materials fully acknowledge Section 1’s imposition of tax. “True, Section 1 of

\(^{286}\) See discussion supra Part II.C; see also Schiff v. Comm’r, 63 T.C.M. (CCH) 2572 (1992).

\(^{287}\) E.g., Lonsdale v. United States, 919 F.2d 1440, 1448 (10th Cir. 1990) (alleging “no statutory authority exists for imposing an income tax on individuals . . . ”); Celauro v. United States, 411 F. Supp. 2d 257, 269 (E.D.N.Y. 2006) (“The Plaintiffs further assert . . . that the IRS has repeatedly refused to show [Plaintiffs] where in the [Internal Revenue] Code it makes [Plaintiffs] ‘liable for’ the tax they claim is owed.”) (bracketed material in original); United States v. Sasscer, No. Y-97-3026, 2000 WL 1479154, at *1 n.3 (D. Md. Aug. 25, 2000) (“Sasscer makes the puzzling argument that Section 1461 [a provision that makes a withholding agent liable for amounts withheld for income tax] is the only provision in the Internal Revenue Code that imposes liability for payment of a tax on ‘income.’”); Porcaro v. United States, No. 99-CV-60406-AA, 1999 WL 1249329, at *4 (E.D. Mich. Oct. 25, 1999) (“Purportedly in support of his claim, plaintiff submitted a statement along with the Form 1040, in which he argues that no provision of the IRC establishes an income tax ‘liability.’”); Tornichio v. United States, No. 5:97CV2794, 1998 WL 381304, at *2 (N.D. Ohio Mar. 12, 1998) (“Plaintiff argues the Code does not impose a tax ‘liability.’”), aff’d, 173 F.3d 856 (6th Cir. 1999). One attorney made the argument for his clients in three separate appeals. Charczuk v. Comm’r, 771 F.2d 471, 474 (10th Cir. 1985) (questioning “[w]hether there is any Constitutional authority granted to Congress to impose an income tax . . . and if such authority is claimed to exist, what precise words of the Constitution are claimed as authority”); Ficalora v. Comm’r, 751 F.2d 85, 88 (2d Cir. 1984) (arguing “[n]owhere in any of the Statutes of the United States is there any section of law making any individual liable to pay a tax or excise on ‘taxable income’”); Lively v. Comm’r, 705 F.2d 1017, 1018 (8th Cir. 1983) (claiming there was “no law imposing an income tax”).

\(^{288}\) Right2Petition, Irwin Schiff vs. IRS on Fox TV News, YOUTUBE (Oct. 18, 2007), http://www.youtube.com/watch?v=s0yqy06ZEvE. See generally Newman v. Schiff, 778 F.2d 460, 462 (8th Cir. 1985).

the Internal Revenue Code ‘imposes’ a tax on ‘taxable income,’ but it does not make anyone liable for the taxes ‘imposed.’”290

It does not help the tax protester argument that the Code provisions for some excise taxes have language saying who is liable for the tax.291 For example, there used to be an excise tax providing that “[e]ach person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter.”292 The language tax protesters refer to in these excise taxes, however, does not impose the tax. Rather, it merely clarifies who is liable for the tax. These excise tax provisions have separate language imposing the tax, i.e., they start with, “There is hereby a tax imposed on . . . .” The liability discussed arises from the tax imposed, not under a provision assigning liability between parties. Under Section 1, a liability for income tax arises.293 The tax is imposed on an individual only so there is no need to assign the liability. Indeed, an income tax liability cannot be assigned to anyone else.294 The tax protester arguments regarding liabilities are incorrect.

F. There Is No Such Thing as Income in the Internal Revenue Code

Mr. Schiff also argued he had no income as defined in the Internal Revenue Code with respect to his 1979 through 1985 tax years. Tax protesters contend that they are not liable for income tax because the Code does not define it, and the government may not impose a tax that is undefined.295 The Code defines gross income,296 which is intended to be as broad as the concept of income.297 By applying various deductions and exclusions from gross income, the

290. SCHIFF, GREAT INCOME TAX HOAX, supra note 273, at 254.
291. See id. at 255 (referring to an excise tax on wagers and an excise tax on tobacco); see also SCHIFF, supra note 121, at 46–49.
292. SCHIFF, supra note 273, at 255.
295. See SCHIFF, supra note 273, at 162 (“Few Americans realize that Congress has never defined ‘income’ and no such definition can be found anywhere in the Internal Revenue Code. According to the Supreme Court, therefore, no American can be subject to such a tax since the ‘law’ neither defines nor identifies what is being taxed!”) (original emphasis removed).
297. See Comm’r v. Glenshaw Glass Co., 348 U.S. 426, 432–33 (1958) (“We would do violence to the plain meaning of the statute and restrict a clear legislative attempt to bring the taxing power to bear upon all receipts constitutionally taxable were we to say that the payments in question here are not gross income.”).
Code then whittles the gross income down to adjusted gross income and then to taxable income on which the tax is imposed.\textsuperscript{298} Regardless of whether the Code defines income, tax protesters have taxable income on which the law imposes a tax.

Tax protesters suggest that a Supreme Court case supports their argument.\textsuperscript{299} In \textit{Spreckels Sugar Refining Co. v. McClain}, the Supreme Court quoted the court below, referring to:

\begin{quote}
[T]he well-settled rule that the citizen is exempt from taxation unless the same is imposed by clear and unequivocal language, and . . . where the construction of a tax law is doubtful, the doubt is to be resolved in favor of those upon whom the tax is sought to be laid.\textsuperscript{300}
\end{quote}

The most important thing to note is that the quote contains no reference to definitions. Previous iterations of the rule also contain no references to definitions. Rather, there have to be “clear and express words” supporting the government’s intent to tax.\textsuperscript{301} The Code imposes a tax on taxable income,\textsuperscript{302} it defines taxable income,\textsuperscript{303} and it imposes civil and criminal penalties for failing to report or pay the tax.\textsuperscript{304} These are “clear and express” words putting taxpayers on notice of the government’s intent to impose a tax on taxable income. The tax protestor argument is frivolous.

\textbf{G. The Payment of Income Tax Is Voluntary}

In a jury trial for his 1997 through 2002 income tax returns, Schiff claimed that payment of income tax is voluntary.\textsuperscript{305} This

\textsuperscript{298} See 26 U.S.C. § 1(a)–(d) (2013) (“There is hereby imposed on the taxable income . . . .”); see also id. § 62 (“‘adjusted gross income’ means . . . gross income minus the following deductions . . . .”); see also id. § 63 (“‘taxable income’ means gross income minus the deductions allowed by this chapter (other than the standard deduction).”).

\textsuperscript{299} See \textit{Schiff, supra} note 273, at 134, 162 (referring to Spreckels Sugar Ref. Co. v. McClain, 192 U.S. 397 (1904)).

\textsuperscript{300} Spreckels, 192 U.S. at 416.

\textsuperscript{301} United States v. Isham, 84 U.S. (17 Wall.) 496, 504 (1873) (quoting Girr v. Scudds, 11 Exch. 190, 191 (1855)).


\textsuperscript{303} Id. § 63.

\textsuperscript{304} See id. §§ 7201 \textit{et seq.}; see also id. § 6651(a)(1)–(3).

\textsuperscript{305} See Criminal Indictment, \textit{supra} note 129.
argument appears to be the core of his attempt to persuade would-be tax protesters to illegally withhold their taxes from the government.\textsuperscript{306}

Tax protesters often quote the Supreme Court, an IRS annual report, an audit manual, a Form 1040 instruction booklet, and a welcome brochure for new immigrants.\textsuperscript{307} Each quotation refers to the federal income tax system and mentions voluntary assessment, voluntary compliance, or self-assessment.\textsuperscript{308} None of these references to voluntariness have anything to do with whether the income tax is optional.\textsuperscript{309} Rather, such references relate to the fact that taxpayers in the United States fill out their own tax returns without any immediate threat of violence by the government. Instead, the Code requires that you assess your taxes yourself by filing a tax return reporting the facts that give rise to your liability. If you do not do it voluntarily, however, the IRS may find the facts for you.\textsuperscript{310} Once the IRS finds those facts it may collect your tax liability with penalties and interest, throw you in jail, or both.

Reliance on the pronouncements of these government materials, however, is an improper way to interpret the law. Interpretation starts with some authoritative legal text, such as a constitution, statute, or regulation.\textsuperscript{311} None of the voluntariness quotations tax protesters refer to were made in the context of interpreting a statute. Rather, they describe the tax system generally. The specific statutes involved provide for a self-assessment mechanism, i.e., the filing of one’s own tax return without interest or penalties, supported by a compulsory system when a taxpayer fails to partake in the interest-free and penalty-free voluntary mechanism offered by the government. The income tax is not optional.

\textsuperscript{306} See Schiff, supra note 121, at table of contents. The first two chapters of The Federal Mafia are about voluntariness. Id. Chapter 1 is called, “Surprise! The Income Tax is Voluntary,” and Chapter 2 is titled, “Why an Income Tax Must Be Voluntary.” Id.
\textsuperscript{307} Id. at 11.
\textsuperscript{308} See id.
\textsuperscript{309} See discussion supra Part IV.C (addressing the tax protester argument that the income tax is voluntary).
\textsuperscript{310} See discussion supra Part IV.D (addressing self-assessment and “dummy returns”).
\textsuperscript{311} See discussion supra Part III.B; see also Scalia, supra note 216, at 13.
H. The Sixteenth Amendment Was Never Ratified

The most vociferous proponent of the argument that the Sixteenth Amendment was not ratified as a legal matter is Mr. Bill Benson.\footnote{312} He has published a two-volume set of books with his contentions.\footnote{313} The tax protester argument starts by asserting that ratification of the Sixteenth Amendment was improper as a matter of law because of slight differences in the language and punctuation among the states affirming the amendment.\footnote{314} The differences in the language ratified by each state were not material, however. The only differences in the language ratified were capitalization, punctuation, and other typographical errors in wording.\footnote{315} The law recognizes scrivener’s error—technical errors in language are not given effect.\footnote{316} Hence it does not matter if the language was slightly different. Tax protesters have not described how the different language, capitalization, and punctuation changed the substance of the Amendment each state affirmed. Tax protesters have likely not done this because the differences in wording and punctuation in the Amendment do not render any of the ratified language different in substance.

Tax protesters, however, argue that the Secretary of State Secretary Philander Knox, who gave the government’s legal stamp of approval on the Amendment, committed fraud by approving the allegedly deficient affirmations of the states.\footnote{317} This claim is frivolous, however. Secretary Knox had no incentive to risk his career and livelihood for such a fraud. In fact, Secretary Knox was going to be subject to increased tax liability in the form of income taxes like everyone else.\footnote{318}

\footnote{312} See discussion supra Part II.C.\
\footnote{313} See generally BENSON & BECKMAN, supra note 135; BENSON, supra note 137.\
\footnote{314} BENSON & BECKMAN, supra note 135, at 21–24.\
\footnote{315} See id. at 7–9.\
\footnote{316} SCALIA, supra note 216, at 20–21.\
\footnote{317} See BENSON, supra note 137, at 48 (alleging Knox committed fraud); see also id. at 86 (describing how a judge ignored Knox’s fraud).\
\footnote{318} There is another argument regarding the Sixteenth Amendment not made by Mr. Benson, but involving Secretary Knox. See generally Jackson, supra note 11, at 305. Some have argued that Ohio was not a state until the 1950s. Id. President Taft was from Ohio. Id. Since Ohio was not a state when he was elected president, President Taft was not born in the United States. Id. Because he was not born in the United States, he could not have legally served as president. Id. Because he could not be president, his appointment of Secretary Knox to the position of Secretary of State was not valid. Id. Since his appointment as Secretary of State was not valid, his announcement that the Sixteenth Amendment was ratified was not valid. Id.
As evidence of fraud, tax protesters point to a congressional brochure that provides information to the public on how laws are made. According to the brochure, it is important for an “amendment” to be in a form “with the spelling and punctuation exactly the same as it was adopted by the House.” Tax protesters make a weak attempt at supporting this position by referring to the document as a treatise, which masks it with a seemingly legal quality. The document refers to itself as a brochure, however. It is more like a public service document than a statement of laws or rules that citizens or Congress must follow. Tax protester reliance on this brochure, first published in 1953, shows that tax protesters fail to appreciate that no law existed in 1913 requiring that all punctuation and capitalization had to be exact and that there could be no typographical errors. The only law that existed was the department’s own precedent allowing such errors.

Had tax protesters found controlling rules that had been in effect at the time and been able to show that Secretary Knox had failed to follow them, perhaps an assertion of fraud could be moderately plausible. The courts, however, have made it clear they are not the appropriate forums for such an allegation. The brochure tax protesters use does not reflect the law at the time of the Amendment nor does it reflect any law whatsoever.

In addition to referring to the brochure as a treatise, tax protesters would have us believe that the term “amendment” in the document refers to an amendment that is similar to a constitutional amendment. However, they do not hide that the amendment

319. See Benson, supra note 137, at 56 (referring to Edward F. Willett, Jr., United States House of Representatives, Law Revision Counsel, How Our Laws Are Made, H.R. Doc. No. 97-120, at 34, 45 (1981)).

320. Benson, supra note 137, at 56 (quoting the Law Revision Counsel brochure).

321. Willett, Jr., supra note 319.

322. See Memorandum from Office of the Solicitor for Sec’y of State Philander Knox 14–15 (Feb. 15, 1913) (reprinted in Benson & Beckman, supra note 135, at 18–19) (noting that there were errors in the affirmations for the Fourteenth Amendment that were more substantial but permitted).

323. E.g., United States v. Thomas, 788 F.2d 1250, 1254 (7th Cir. 1986) (“We need not decide when, if ever, such a decision may be reviewed in order to know that Secretary Knox’s decision is now beyond review.”); United States v. Benson, 941 F.2d 598, 607 (7th Cir. 1992) (“[N]o hearing is necessary to consider an issue that is ‘beyond review.’”) (quoting Thomas, 788 F.2d at 1254); Brown v. Comm’r, 53 T.C.M. (CCH) 94, at 5 (1987) (citing Thomas, 788 F.2d 1250).

324. See Benson, supra note 137, at 56.
referred to in the brochure is an amendment to a bill in Congress.\textsuperscript{325} The argument is apparently that if a bill in Congress was required to be exact in spelling and punctuation in 1953 then, when the Constitution was undergoing amendment in 1913, there must have been a requirement that such an amendment contain exact spelling and punctuation.\textsuperscript{326} This argument reflects a misunderstanding of how law would work if this were law. Laws are temporal. Moreover, the Sixteenth Amendment was barely a sentence long and an amendment to existing law. The issues with House bill amendments referred to in tax protester materials involve amendments to bills that are not yet laws and often contain hundreds of pages. The tax protesters uncovered no fraud.

The above arguments reflect a profound misunderstanding of how the law operates. Tax protesters have made another argument that shows naiveté. Courts have refused to hear alleged evidence of improper ratification on the basis that the issue constitutes a political question.\textsuperscript{327} As explained \textit{supra}, a political question is one that resolution of which by the courts would encroach on the authority of the legislative or executive branch of the government.\textsuperscript{328} The tax protesters have been unable to show how the ratification could avoid preclusion by the political question doctrine. They say there are exceptions but they do not say how they apply. The example provided relates to an investigation of President Nixon’s cover-up regarding the Watergate break-in by his staff.\textsuperscript{329}

The case referred to, \textit{United States v. Nixon}, involved a special prosecutor with authority to investigate the President for a judicial proceeding—a criminal prosecution.\textsuperscript{330} In contrast, the tax protester who wanted to question Secretary Knox’s determination did not have authority to investigate Secretary Knox and there was no judicial proceeding against Secretary Knox. Rather, there was merely a disgruntled taxpayer questioning Secretary Knox decades later. The tax protester did not understand that the authority to pass an

\begin{flushright}
\textsuperscript{325} See id.
\textsuperscript{326} Id. (“Agreement in wording and punctuation must be exact in ‘mere’ Congressional acts. Obviously, the requirement to be exact must be every bit as, if not more, stringent with regard to proposed amendments to the Supreme Law of the Land.”).
\textsuperscript{327} E.g., \textit{United States v. Stahl}, 792 F.2d 1438, 1440 (9th Cir. 1986).
\textsuperscript{328} \textit{Supra} Part III.C.1.
\textsuperscript{329} \textit{See} BENSON, \textit{supra} note 137, at 50.
\end{flushright}
amendment to the Constitution rests with Congress under Article V of the U.S. Constitution, not with a court hearing a tax evasion case more than half a century later.

Moreover, in 1916, the Supreme Court recognized the legality of the Sixteenth Amendment. As a matter of finality, *Brushaber* resolves the Sixteenth Amendment issue.\(^{331}\) *Brushaber* held that the income tax is valid as a result of the Sixteenth Amendment.\(^{332}\) That opinion is binding. The Court had the power to do so even if there were technical problems with the Sixteenth Amendment.

It has been suggested that efforts of the National Taxpayer Union provide some support for the Sixteenth Amendment argument regarding differing language. The recollection of one tax protester is that the National Taxpayers Union had sufficient support for a balanced budget amendment to the Constitution.\(^{333}\) According to this recollection, the proposed amendment failed because of slight differences in the wording of the amendments affirmed by each state.\(^{334}\) However, that suggestion is incorrect. The proposal actually failed because it did not receive sufficient support from the states.\(^{335}\)

### I. Domestic Income of a US Citizen Is Not Taxable Under Section 861

The most well-known tax protester who championed the Section 861 argument is Mr. Larken Rose. Many tax protesters have used his or similar arguments.\(^{336}\) It is a complex argument predicated on

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332. Id.
333. See *Williams*, supra note 23, at 55.
334. Id.
numerous inaccurate premises. Tax protesters argue that the Constitution and federal statutes and regulations exclude from income tax all income except (1) income earned outside the United States by United States citizens, and (2) income earned in the United States by foreigners, as evidenced by language in the regulations under Section 861.337 They are incorrect.338

Like many tax protester arguments, there are published materials detailing this argument.339 The argument’s reasoning starts with three “clues.” The first clue is that old treasury regulations mention that some income is exempt from taxation by the government pursuant to the United States Constitution.340 The second clue is that current regulations say that some items of income are exempt.341 The third clue is that certain international trade is taxed.342 From these “clues” tax protesters extract a “principle of law”—”[d]on’t assume tax applies to any matters not specifically pointed out.”343 Under this principle, tax protesters note that Section 861 and its regulations determine taxable domestic income and provide that it is only taxable to foreigners and to Americans with income derived from within American possessions, such as Guam or Puerto Rico.344 The argument concludes that most American taxpayers are not foreigners and do not have possessions or foreign income so they do not owe tax.345

There are numerous flaws with this argument. The first major flaw is the suggestion that we would look to Section 861 to find the types of income the Constitution and the Code exclude from tax. The Constitution and the Code are explicit about what is included in gross income and excluded from gross income. Tax protesters appear to be

337. See Rose, supra note 147, at 16.
338. It is interesting to note that Mr. Schiff rejects the Section 861 argument. See generally Irwin Schiff, The Fallacy of Larkin Rose’s 861 Argument, PAYNOINCOMETAX, http://www.paynoincometax.com/861.htm (last visited Aug. 30, 2013).
339. E.g., Rose, supra note 147.
340. See id. at 9.
341. Id. at 17.
342. See id.
343. Id.
344. Id. at 28.
345. See id. at 50 (“The federal ‘income tax’ is and has always been a tax only upon certain international trade, and therefore the vast majority of Americans have never legally owed a dime in federal income taxes, but have been deceived into believing otherwise.”).
aware of what is subject to income tax and what is not. The published materials set forth the limitations ostensibly placed on Congress as to what Congress is authorized to tax. Direct taxes must be apportioned and indirect taxes must be uniform. The materials also note what is excluded from gross income under the Code—gifts, insurance proceeds, and interest from municipal bonds.

Regardless of the fact that the materials point out references in controlling documents explicitly describing things not subject to tax, the argument suggests that Congress and the executive branch have colluded to hide from the public that most income earned by average taxpayers is excluded from taxable income. It appears that tax protesters believe there is some inherent tax law out there somewhere. If there were some inherent tax law, perhaps the Constitution, statutes, and regulations would sometimes accurately describe this mythical body of law and sometimes cover up this mythical body of law. But such is not the case. On a fundamental level, tax protesters either did not appreciate or did not understand what the law is when formulating this argument. Although it has been argued that common law is inherent and courts latch onto bits and pieces in making their decisions, tax law is statutory. There is no inherent tax law—what you see is what you get.

Tax protesters misunderstand Section 861. Section 861 and its regulations determine taxable domestic income. All of the foregoing demonstrates that United States income is taxable for foreigners and for Americans with possessions income. The conclusion that income other than that described in the Section 861 regulations is exempt would not follow from the argument’s premises. Even if the premises were accurate, the reasoning is invalid. Essentially the argument says a taxpayer does not have taxable income if he does not have income described in Section 861. Section 861 says that if you are a foreign taxpayer who earned income in the United States or if you are a domestic taxpayer with foreign income then you have gross income. Section 861 does not say whether you are taxed if you are not a

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346. See id. at 2–3 (outlining limitations derived from the United States Constitution and United States Supreme Court precedent on Congress’ ability to tax, as well as the differences in direct versus indirect taxation).
347. Id. at 9.
348. See id. at 7 (“Rather than removing the literal truth from the law books entirely, the evidence of the Constitutional limits on the taxing power was simply relocated and complicated.”).
foreign taxpayer who earned income in the United States or not a domestic taxpayer with income.

V. CONCLUSION

Tax protester arguments are frivolous and suffer from many defects. The people who make the arguments fail to understand or appreciate how the law works. They also fail to recognize the importance of taxation from historical, philosophical, and economic perspectives. The government is perfectly justified in taxing its citizens.

The tax protesters discussed here have been somewhat lucky. Kellems never went to jail. Schiff’s first prosecution was for failure to file returns, a misdemeanor, rather than tax evasion, a felony. Neither Rose nor Benson is still in jail despite continuing to spread their frivolous arguments to the public. More importantly, and from a global and historical standpoint, none of the above tax protesters have suffered untimely deaths. History is replete with instances where the sovereign responded to tax evasion with lethal violence. Sovereigns, including the federal government of the United States, need taxes to survive. They are entitled to take tax evasion seriously. Evasion of taxes can rightly be considered an attack on the livelihood of the government.

Although at least one protester sees making tax protestor arguments as peaceable protest protected by the First Amendment, it is not so. Free speech involves words symbolic or otherwise. Failing to report or pay taxes is not speech. It involves more than just words. It is an act of defiance against the sovereign. It is not symbolic speech. Symbolic speech might involve burning a flag, but burning a flag does not involve depriving the sovereign of proceeds to which it

350. See, e.g., BURG, supra note 4, at 435 (providing that the Orsini family held Pope Boniface VIII captive until his death in 1303 because he opposed taxes on clergy). See also id. at 130, 442 (noting that in 1381, King Richard II killed tax rebel Wat Tyler, whose dead body was later beheaded); see also id. at 434 (stating that King Richard II killed John Ball by drawing and quartering for his involvement in Wat Tyler’s rebellion); see also id. at 436–37 (noting that in 1578, the Spanish Inquisition burned Francisco de la Cruz at the stake for criticizing Spain’s tax policies); see also id. at 434 (noting that in 1607, Russians killed Ivan Isaevich Bolotnikov for leading a tax uprising); see also id. at 287, 441 (describing how in 1781, Spaniards executed the wife of tax revolutionary Tupac Amaru in front of him, had four horses pull him into pieces, and then placed his head on a post at the entrance of the town of Langui, Peru where the Spaniards captured him).
is rightfully entitled. Making tax protester arguments, conversely, involves depriving the sovereign of such funds.\textsuperscript{351}

Tax protesters are up against more than they apparently appreciate. They are butting against historical underpinnings of taxation,\textsuperscript{352} philosophical justifications for taxation,\textsuperscript{353} and cultural acquiescence to taxation,\textsuperscript{354} in addition to the legal impediments discussed in this paper. Our forefathers separated the powers of the government into three branches. But separating the powers does not mean the government forfeits any of the powers of government. In terms of taxation, there is no reason to think it has any less of a right to suppress tax evasion like any other civilized country—even oppressive ones—that have ever existed. Tax protester arguments tend to reflect misunderstandings or failures to appreciate of how the law works under our government. Failures to appreciate finality, precedent (stare decisis), and context make the arguments futile and frivolous.

Would-be tax protesters should learn from this Article that, contrary to what promoters of tax protester arguments say, it is not particularly easy to convince yourself that you have no legal obligation to pay taxes and thus avoid the willfulness requirement for tax evasion. Courts and juries are free to recognize that someone making tax protester arguments is engaging in willful blindness and therefore is willful. Perhaps courts could also make the potential finding of willful blindness more explicit.\textsuperscript{355} Understanding of willful blindness would not substantively change the law. Those who are

\textsuperscript{351}. The Justice Department’s official position is as follows: “[T]hose who merely express dissatisfaction with the tax laws should not be, and are not, prosecuted. The right to free speech, however, does not extend to acts that violate or incite the imminent and likely violation of the tax laws.” \textit{Regarding Oversight of the Tax Division: Statement Before the Subcomm. on Courts, Commercial and Admin. Law & the Comm. on Judiciary}, 112th Cong. 14 (2012) (statement of Kathryn Keneally, Assistant Attorney General, Tax Division).

\textsuperscript{352}. See discussion supra Part II.

\textsuperscript{353}. See \textit{Compania General de Tabacos de Filipinas v. Collector of Internal Revenue}, 275 U.S. 87, 100 (1927) (Holmes, J., dissenting) (“Taxes are what we pay for civilized society . . . .”); see also \textit{Smith}, supra note 28, at 676 (“The expence of government to the individuals of a great nation, is like the expence of management to the joint tenants of a great estate, who are all obligated to contribute in proportion to their respective interests in the estate.”).

\textsuperscript{354}. See \textit{Hatfield}, supra note 284, at 845 (noting that the United States has “one of the highest voluntary compliance rates in the world”).

\textsuperscript{355}. See generally \textit{Charlow}, supra note 224 (providing a thoughtful discussion of willful ignorance).
legitimately protected by a willfulness requirement—perhaps, for example, those new to the tax system such as new graduates and ex-patriots—would still not be subject to jail time when they were merely unaware of their tax obligations.

Whatever the reason, would-be tax protesters apparently need some educating beyond what the IRS provides in its yearly report. In addition, would-be tax protesters need to know that their arguments will not succeed. They need a better understanding of how the law works so they know why their arguments will not succeed—and could land them in jail. One hope is that this Article is part of the solution.