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The Movement to Destroy the Income Tax and the IRS: Who is doing it and how they are succeeding

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

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I. Introduction

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

However, from the time the income tax was enacted, there has been a movement to repeal or undermine the income tax by financial elites who not only stand to benefit enormously but who are personally and philosophically offended at the idea of being subject to an income tax and an expanded and powerful federal government. The wealthy who were dismayed by the federal government’s increasingly prominent role in the lives of ordinary Americans recognized that removing or, or at least reducing, the federal government’s access to funds would reduce the federal government’s influence and power. These early opponents were careful to hide their agenda. From the beginning they had the sense to present themselves as defenders of the United States Constitution, and not as people looking out for their money. They use right wing networks to spread the message and control political figures by providing or withholding campaign funds. They have lavishly funded think tanks which all say the same thing, producing an echo effect – all of this is done in order to achieve their goal of eviscerating the power of the federal government to tax business and the wealthy.

One way to destabilize and de-legitimize the federal government is to prevent it from acquiring funds. This movement has used a several-pronged approach: (1) attack the legitimacy of the

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1 U.S. CONST. AMEND XVI.
2 On February 3, 1913, Delaware became the 36th state to ratify the 16th Amendment to the U.S. Constitution, which authorized the income tax. At the time there were 48 states in the U.S.; therefore, Delaware’s ratification of the amendment provided the necessary 75% required. See Len Burman, Happy Birthday, Income Tax, TAX POLICY CENTER, Feb. 5, 2013.
3 Congress added the income tax on individuals in Section II of the Underwood Tariff Act of 1913. The Act begins at the Underwood Tariff Act, ch. 14, 38 Stat. 112 (1913). Section II begins at Underwood Tariff Act, ch. 16, 38 Stat. 166 (1913). Section II, Parts A to F address the obligations of individuals to pay the income tax.
federal government itself, and (2) attack the progressive income tax and attack the manner in which the tax is collected. If you can convince the public that the federal government is at best, incompetent and wasteful, and at worst, evil, then the public will object to funding that government. Leading political figures have denounced the income tax as theft and the Internal Revenue Service as an out-of-control rogue agency. Grover Norquist, currently the most influential figure in conservative politics, has famously stated that “he wants to reduce government to the size that it can then be drowned in a bathtub.” However, our government represents our uniquely American way of life; to say that you wish to destroy this government is to say that you wish to destroy America. If taxpayers don’t perceive the government as legitimate and the tax system as fair then they will find ways to avoid complying with the tax system. And that is exactly what the financial elites are accomplishing.

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

Part II of this article reviews the United States government’s early struggles to obtain funds. A government unable to perform even basic functions such as defense will lose legitimacy. Therefore, steady, reliable revenue is a necessity for a government to survive. The Articles of Confederation, under which the United States operated during the Revolutionary War and for a period of time thereafter until the passage of the United States Constitution, did not give the newly created central government the power to collect taxes directly to fund the war and other government operations, but rather, the government could only request that the individual states contribute to the national treasury. Further, the Articles of Confederation only created a legislative branch; there was no provision for an executive or judicial branch. Therefore, there

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6 See e.g., Republican National Committee official Don Fierce stating at Republican National Convention in 1981 at which Ronald Reagan was nominated:

Washington is financially and morally bankrupt and because of that it is the glue that binds economic and social conservatives. These are people that love their country but hate their federal government. Where is the evil empire? The evil empire is in Washington.

See also, Eric Kleefeld, *Bachman: We’re not going to obey the health care law – we don’t have to*, TALKINGPOINTS Memo (Mar. 15, 2010, 10:34 AM), http://talkingpointsmemo.com/2010/03/bachmann-were-not-going-to-obey-health-care-law---we-dont-have-to-video.php (noting Representative Bachmann’s belief that using the “deem and pass” parliamentary procedure represents “taxation without representation,” and that, if used, it would make an “illegitimate” law that the people could ignore and for which they can refuse to pay taxes); Dana Milbank, *The Republicans Who Stirred the Tea*, Wash. Post, Mar. 22, 2010, at A1 (noting that numerous Republican elected officials encouraged the raucous tea party protests outside of Congress during the health care debate by themselves waiving protest signs and the Gadsden “Don’t Tread on Me” flag from the House balcony); Political ticker, *Protestors hurl slurs and spit at Democrats*, (Mar. 20, 2010), http://politicalticker.blogs.cnn.com/2010/03/20/protestors-hurl-slurs-and-spit-at-democrats/recounting how Tea party activists protesting the health care bill on Capitol Hill repeatedly screamed epithets and spit on Representatives John Lewis, Emanuel Cleaver, and Barney Frank.
was no government agency that could create a structure or system for tax collection and enforcement. Without a steady, reliable source of revenue, the government could not directly fund the war effort nor could it easily borrow funds from other countries. No one is eager to lend to an entity which does not have a determinable means for repayment. The government’s inability to levy or collect taxes almost destroyed our new nation at its inception. The government’s ability to levy and collect taxes under the United States Constitution, and the government’s ability to put down the early tax rebellions and enforce the tax laws legitimated the federal government.

Part III then considers how a government can persuade the populace to comply with the tax laws. Methods of duress, such as penalties, threats of imprisonment, and audits provide a backstop way of ensuring compliance from recalcitrant taxpayers but are not effective or practical methods for a country with a large population and a representative form of government. Taxpayers comply voluntarily with their obligations when taxpayers have internalized a taxpaying ethos. It was not until World War II that average Americans willingly accepted the imposition of the income tax on them. During World War II, the general population developed a tax paying ethos because they developed a sense of trust that the income tax was being fairly administered and that other taxpayers were complying with their taxpaying duties: a social contract basis for tax compliance. In addition, the general population developed a sense of trust that the federal government was using the tax revenues to provide social benefits: a quid pro quo basis for compliance. During World War II, the federal government used the tax revenues to fund the war effort. Subsequent to World War II, the federal government continued to provide social benefits so that taxpayers continued to demonstrate a tax paying ethos. Part III recounts how the modern income tax became an accepted part of our tax system, and explains the means that the federal government successfully employed to create the taxpaying ethos in the general population.

However, not all Americans supported the imposition of the income tax nor supported the steadily increasing role the federal government played in the lives of average Americans. From the time of Franklin Roosevelt’s presidency, this group has steadily worked to eviscerate the income tax which would also have the effect of underfunding the federal government, thus reducing its power. Part IV explores how a small group of financial elites have used think tanks, the media, and politicians to achieve their goals to undermine faith in the federal government in general, and faith in the fairness of the income tax system itself and how it is administered, in particular. From the time of Roosevelt’s presidency, this group of financial elites has patiently and steadily worked to achieve these goals. Their efforts finally began to bear fruit during the Reagan administration which passed the largest tax cuts in United States history, despite the fact that these tax cuts created huge deficits. Just as importantly, these financial elites were able to market an anti-tax, anti-government philosophy that has at least superficial appeal and is an easily understood message. They have created in the general population distrust in the federal government and a sense of grievance that the tax system is unfair and that the Internal Revenue Service is a rogue, out-of-control agency victimizing innocent taxpayers. As a result, the Internal Revenue Service is now subject to restrictions that impede its ability to administer the tax system, thereby further eroding the tax paying ethos and compliance.
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The article concludes that if this erosion in compliance attitudes continues, it will reach a level of magnitude that a tipping point will be reached and noncompliance will be an acceptable norm.

II. A Government’s Perceived Legitimacy Empowers it to Tax.

A. The lack of a taxing power threatens the early federal government

Without the ability of the federal government to both impose and collect taxes, the founding fathers might well have failed in their quest to establish this new nation. A government needs a steady, reliable source of revenue in order to function and provide basic institutions such as a military to defend against a foreign enemy and protect the borders, a state department to negotiate trade treaties with other countries, and a treasury department to manage a currency. Reasonable minds can differ as to the proper role and scope of the federal government, but even those of the libertarian political persuasion concede that a federal government serves a purpose and must exist to provide basic functions.7

Great Britain was one of the greatest powers at the time of our revolutionary war, and in order for our army to prevail, fervor and a sense of justice might have been necessary, but they would not have been sufficient: an army needs guns, clothing, and food – all of which require money. The British were able to deploy 25,000 experienced and well-equipped troops8 in the field while the Continental Congress struggled to maintain an army of 10,000 men. Under the Articles of Confederation, the Continental Congress could spend money, but did not have the power to enact or collect taxes, but instead, had to rely on the individual states to send funds to the central government.9 Without a reliable, steady source of revenue, the new nation faced tremendous difficulty supplying the revolutionary army.10 In 1779, John Jay, president of the Second Continental Congress11 exhorted the states to contribute to the central government in support of

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7 See e.g., Libertarian Party Platform as adopted at Convention, May 2012, Las Vegas, Nevada in which the Libertarian Party acknowledges the need for the government to provide a military ($3.1 of Statement of Principles), a department of state ($3.3. of Statement of Principles), and a judicial system to protect property rights ($1.5 of Statement of Principles, available at http://www.lp.org/platform.

8 By the time of the American Revolution, Great Britain had an efficient tax collection system in place which enabled Great Britain to finance easily its war. Arthur J. Cockfield, How Tax Law Created the Modern World, presented at University of Baltimore Annual Law and Society Meeting, July 8, 2006. Draft on file with author.

9 Articles of Confederation, Article VIII. Congress could assess contributions to the “common treasury, which shall be supplied by the several States, in proportion to the value of all land within each State, granted to, or surveyed for, any Person,” but “the taxes for paying that proportion shall be laid and levied by the authority and direction of the legislatures of the several States, within the time agreed upon by the United States in Congress assembled.” The Articles of Confederation were created on November 15, 1777; however, the document was not ratified by the thirteen founding states until March 1, 1781. Nevertheless, between the dates of creation and ratification, the Continental Congresses acted as if the Articles controlled.

10 SIMON JOHNSON & JAMES KWAK, WHITE HOUSE BURNING 16 (2012).

11 The First Continental Congress met on September 5, 1774; the Second Continental Congress met on May 10, 1775; after the Articles were actually ratified on March 1, 1781, the term used to describe Congress was the United States in Congress Assembled. The last president of the United States in Congress Assembled was Cyrus Griffin.
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the war: “Recollect that it is the price of the liberty, the peace and the safety of yourselves and posterity, that now is required.” However, without an executive branch the central government had no enforcement powers over the states and could not compel the states to contribute.

To make up for the shortfall in funds from the states, the Continental Congress issued paper money in order to pay the soldiers and to pay for supplies, but without funds backing up the continental paper, it fell in value. Because of a lack of basic supplies such as food, clothing, and shelter, 2,500 men died at Valley Forge, and anger over irregular pay contributed to the Pennsylvania Mutiny of 1783 which forced Congress to relocate from Philadelphia to Princeton, New Jersey.

Not only could the central government not depend on tax revenues from the states, it could not easily borrow from other countries if repayment from tax revenues could not be assured. Fortunately for the United States, France was embroiled in a power struggle with Great Britain, and, therefore, was willing to lend the central government money (and also provided ships and troops) enabling the Americans ultimately to prevail in their quest to cease being a colony. The Treaty of Paris ended the war on September 3, 1783.

B. Early Tax Wars

However, defeating Great Britain did not ensure that we would survive as a country. The history books are littered with examples to this present day of countries that succeeded in throwing off colonial rule only to founder on their attempts at self-rule. Not only did the United States have British sympathizers within its borders, but the nation would have to convince even those who had fought the British that this new government had the authority to rule, which includes the

who resigned in November 1788 – shortly before the Constitution of the United States was ratified on March 4, 1789.


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

14 Our credit was so poor that in the 1780’s, some claims on the government could be bought for less than 15 cents on the dollar. JOHNSON & KWAK, supra note 10, at 15, fn. 3.

15 Id. at 16.

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

17 Id. Cockfield, supra note 8, at X.

18 The Treaty of Paris was signed at the Hotel d’York (now 56 Rue Jacob) on September 3, 13, 1783. John Adams, Benjamin Franklin, and John Jay signed on behalf of the Americans; David Hartley signed on behalf of Great Britain. The United States in Congress Assembled ratified the treaty on January 14, 1784.
power to tax. Some of the biggest challenges to the new government’s authority arose from veterans of the American Revolutionary War, and, in particular, over the new government’s authority to levy and collect tax. The two most significant early threats to the new nation arose from Shays’ Rebellion and the Whiskey Rebellion.

After the war ended, the states had to pay not only their own debts, but also contribute to the central government’s war debt; however, while parts of the country started to recover economically from the war, the mountainous and rural regions of the country were struggling. Merchants on the eastern seaboard were relatively prosperous, but farmers in remote areas survived on subsistence farming, and farmers, in particular in those areas, began to rebel against taxes imposed by the states to pay their debts. The most well-known rebellion was Shays Rebellion in Massachusetts, named after its leader: Daniel Shays.\(^{19}\) The Massachusetts assembly had taken an aggressive approach to paying its war debts which benefited the few who held interest-bearing state notes.\(^{20}\) Taxes in Massachusetts were already high and when the state decided to pay off quickly the war debt, the taxes were even higher. Those who could not pay the taxes, such as farmers and small businesses, saw their property sold at foreclosure, and, after petitions and meetings did not provide relief, the debtors staged a court riot in Northampton in 1786, and attempted to seize a federal arsenal in Springfield in 1787.\(^{21}\) Massachusetts repealed the onerous taxes,\(^{22}\) but fourteen of the participants were tried and sentenced to death for treason (although they were pardoned before execution).\(^{23}\)

At the same time, Americans wanted to push west and develop the land. They hoped that the Mississippi River would open up trade, but the states were not willing to invest in the infrastructure needed to develop the West or the Mississippi River nor were the states able to stop the conflict between settlers and Indians.\(^{24}\) The central continental government did not have the financial means to accomplish the settlers’ goals either. Further, Great Britain was encouraging Indians to attack the settlers.\(^{25}\) As a result, settlers in Ohio, Kentucky, and western Virginia, Kentucky, and North Carolina began to consider declaring themselves as independent


\(^{20}\) \textit{Id.} at 53. The Massachusetts Assembly paid interest on the notes based on their face value, so that even if a $1 note, on which interest of $.25 was to be paid, had depreciated in value to $.02, the note holder still received $.25. The state tax levied to pay the interest on these notes was onerous enough, but then Massachusetts decided to pay off the principal amount of notes, and raised taxes even more. Farmers in particular felt victimized by the creditor class which held the notes and was being paid off from taxes.

\(^{21}\) \textit{Id.}

\(^{22}\) \textit{Id.}

\(^{23}\) Cockfield, \textit{supra} note 8, at p. 28; \textit{See also} Treason Trials in the United States, 46 ALB. L.J. at 345 (1892-1893).

\(^{24}\) HOGELAND, \textit{supra} note 19, at 56-57.

\(^{25}\) \textit{Id.} at 57.
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or aligning themselves with Spain.\textsuperscript{26} In alarmed response, even those who had been deeply committed to state sovereignty and opposed a strong central government began to recognize that a federal government with the power to raise money through taxation was needed in order to put down insurrection, assure settlers safety in the west, and assist in the development of trade.\textsuperscript{27}

State delegates met in Philadelphia from May 14 to September 17, 1787 initially with the intention of amending the Articles of Confederation, but ended up creating the Constitution of the United States. One of the most contentious issues was whether the federal government or the individual states alone would have the power to tax.\textsuperscript{28} George Washington was reluctant to serve as the new nation’s first president if the federal government did not have the power to tax but instead, had to rely on the states to raise and send money to the federal government. In a letter to Thomas Jefferson, George Washington stated that he was willing to accept any tolerable compromise except for the amendment preventing direct taxation.\textsuperscript{29} As also noted by one of the participants, “Tax connects with … almost all other powers and [tax] at least will in process of time draw all other after it.”\textsuperscript{30} In other words, the power over taxation was the foundation for all other government powers. After Virginia rejected the Bill of Rights, James Madison’s source said that the opposition was reducible “to a single point, the power of direct tax.”\textsuperscript{31}

Nevertheless, the United States Constitution was ratified on March 1, 1789 to replace the unsuccessful Articles of Confederation under which the new nation had been governed since 1776.\textsuperscript{32} The new Constitution gave Congress the power “To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare,” and “To borrow Money on the credit of the United States.”\textsuperscript{33} However, when

\textsuperscript{26} Id. The idea of forming an alliance with Spain was not so farfetched given that Spain had provided some financial support during the Revolutionary War.

\textsuperscript{27} Id. at 56, 57-62.

\textsuperscript{28} Cockfield, supra note 8, at 29. See also CALVIN H. JOHNSON, RIGHTEOUS ANGER AT THE WICKED STATES: THE MEANING OF THE FOUNDER’S CONSTITUTION 216 (2005).

\textsuperscript{29} August 31, 1788, 30, Writings of George Washington from the original manuscript sources (John C. Fitzpatrick, et al, ed. 1931-1944) 39 Volumes.


\textsuperscript{31} Id. at 173, citing Madison to Washington (December 5, 1789) in 12 Papers of James Madison (William T. Hutchinson & William M.E. Rachel, eds., 1962-1991) 17 volumes.

\textsuperscript{32} See Robert N. Clinton, A Brief History of the Adoption of the United States Constitution, 75 IOWA L. REV. 891 (1990) for a concise explanation of the ratification of the Articles of Confederation and then later the United States Constitution. The new Constitution also created executive and judicial branches in addition to the already existing legislative branch.

\textsuperscript{33} U. S. CONST., Art. I, § 8.
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Washington took the oath of office in April 30, 1789, the United States was in dire fiscal condition. In 1790, the federal government owed $54 million, of which $12 million was owed to foreigners. In addition, the individual states had debts of $25 million. Yet, between 1984 and 1789, the Continental Congress had been able to raise only $4.6 million and half of that was borrowed.\(^{34}\)

The first tax that the federal government imposed was the tax on whiskey at a rate of 7 cents per gallon.\(^{35}\) Secretary of the Treasury Alexander Hamilton presented the idea to Congress as a tax on a luxury item, and Congress liked the idea because it wouldn’t tax landowners.\(^{36}\) Hamilton and Congress might not have fully appreciated the fact that the whiskey tax was not simply a tax on a commodity that people bought and consumed as a luxury. Many farmers, especially in the western areas of the country, had little access to hard cash but rather, relied on barter. Landlords would take advantage of poor tenant-farmers and either demand astronomical amounts of crops or refuse to take crops at all in payment of rent. However, whiskey was as a good as hard cash, and farmers could use whiskey to pay down debts, and laborers oftentimes were paid in whiskey rather than cash.\(^{37}\) For these poor people, taxing whiskey was, in effect, a tax on income. Distillers in western Pennsylvania in particular relied on the manufacture and sale of whiskey as their principal source of income.\(^{38}\) Therefore, the whiskey tax was a significant burden on small farmers and laborers and generated outrage.

In the fall of 1791, gangs on the western frontier began attacking the tax collectors, and, over the course of the next two years, the attacks morphed from isolated albeit vicious attacks to an organized, regional movement that was determined to resist federal authority in general.\(^{39}\) Many of the perpetrators were war veterans who were farmers, laborers, and hunters and who were expert marksmen.\(^{40}\) The rebels weren’t necessarily opposed to taxation in general, and many had fought in the revolutionary war; however, they resented a system which seemed to them to redistribute wealth from small farms and businesses to a few wealthy federal bond holders.\(^{41}\) For

\(^{34}\) JOHNSON & KWAK, supra note 10, at 14, citing DAVIS RICH DEWEY, FINANCIAL HISTORY OF THE UNITED STATES 57 (2nd ed., 1903).

\(^{35}\) Cockfield, supra note 8, at 29.

\(^{36}\) HOGELAND, supra note 19, at 62-63. Whiskey was the preferred, cheap drink of the laboring class.

\(^{37}\) Id. at 67.

\(^{38}\) Id. at 29. The best whiskey was produced by small distillers in the West, “especially from the Forks of Ohio, whose ‘Monongahela Rye’ possessed consistent strength and purity. The region achieved brand recognition. Its whiskey was known by name in Philadelphia and New Orleans.” Id. at 66.

\(^{39}\) Id. at 7.

\(^{40}\) Id. at 7-8.

\(^{41}\) Id. at 8-9.
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some, the rebellion had morphed into a secessionist insurgency against the United States itself.\textsuperscript{42} In the fall of 1794, Washington raised 14,000 federal troops and crushed the rebellion.\textsuperscript{43} The new federal government had proven that it could perform and that it was perceived as having legitimacy by the majority of Americans.

III. Why do Taxpayers Comply with the Tax Laws?

A. The Role of Sanctions in Fostering a Tax Paying Ethos

What motivates taxpayers to comply with their tax filing and payment responsibilities? One way to understand this is to consider three types of sanctions: symbolic, instrumental, expressive. Professor Michael Kirsch has examined the imposition of sanctions from an instrumental, expressive, and symbolic perspective in the context of tax-motivated expatriation, but which has broader implications and can be applied here.\textsuperscript{44} Symbolic sanctions do not seek to change or stop the target’s undesirable behavior; instead, symbolic sanction’s purpose is to reassure the public that “something” is being done about the problem.\textsuperscript{45} Instrumental sanctions are intended to change the target’s behavior by changing the cost benefit analysis. Expressive sanctions are intended to change the target’s behavior by changing the target’s norms.

An example of a symbolic sanction is legislation banishing expatriates which sends the signal that Congress is cracking down on tax cheats.\textsuperscript{46} Expatriates are a small, but visible and controversial group; enacting legislation designed to punish them provides the public with a sense of satisfaction that something has been accomplished about tax evasion, despite the fact that expatriation is a technique rarely used to avoid tax.\textsuperscript{47} Symbolic sanctions might buttress or reinforce existing taxpayer compliance norms, and send the signal to other taxpayers that they are not “chumps” for fulfilling their tax obligations. However, the danger with symbolic sanctions is that – they are symbolic. If society in general, and the government in particular, merely engages in empty gestures designed to placate the public, eventually the public becomes cynical. No one likes to be played for a fool.

\textsuperscript{42} Id. at 7.

\textsuperscript{43} Id. Of the original thirty-five rebels who were charged with treason, two men were convicted of treason: John Mitchell and Philip Vigol; however both men were pardoned by George Washington.


\textsuperscript{45} Id. at 921.

\textsuperscript{46} Id. at 923-25.

\textsuperscript{47} Id. at 876 (“More than 255,000,000 million individuals hold United States citizenship, yet, on average, fewer than 600, or 0.000023%, renounce or otherwise lose citizenship annually.”)
Instrumental sanctions attempt to change behavior by changing the cost/benefit analysis. Taxpayers who do not properly file and pay their taxes are subject to sanctions in the form of penalties, audit, and incarceration. (Taxpayers who fail to pay what is owed also must pay interest on the underpayment but that is not really a penalty, but rather, the interest is intended to prevent the taxpayer from receiving an interest-free loan from the federal government during the time the payment is due until the payment is made.) Therefore, a taxpayer who contemplates cheating on his taxes must weigh the benefit of not paying the tax against the cost associated with being audited or paying penalties.

The cost benefit analysis underlying instrumental sanctions assumes that taxpayers will always act as rational wealth maximizers. In order to act in a manner that rationally maximizes wealth, taxpayers must have all necessary and accurate information before them when deciding how to act. However, taxpayers do not. For example, taxpayers assume that the risk of being audited is much higher than it actually is. (Human beings tend to overemphasize information that comports with what they already believe and tend to dismiss information that does not.) The audit rate was .49% in 2000 and 1.03% in 2007. (Of course, taxpayers are not a monolith, but represent people with very diverse backgrounds. The compliance rate for the self-employed is very low: sole proprietors report on 43% of their business income. Entrepreneurs also tend to be risk-takers. Therefore, that group might well discount the risk of being audited or of not being able to talk their way out of any negative consequences.) However, even though taxpayers believe that the risk of being audited is much higher than it actually is, that misperception does

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48 Id. at 894, 913.

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


52 Richard Lavoie, Flying Above the Law and Under the Radar: Instilling a Taxpayer Ethos in those Playing by their Own Rules, 29 PACE L. REV. 640-42 (2009). Tax protestors have begun to share this information with each other and some now openly challenge the IRS to take action against them in the confident belief that nothing will be done.


54 Lavoie, supra note 52, fn. 20 (noting that “Of course the audit rate is somewhat understated as it omits errors detected by information matching and other computer screening techniques that are typically rectified by written correspondence only.”)

not explain taxpayer compliance. Studies have revealed that taxpayer levels of risk aversion to being audited are not sufficiently high to account for compliance.\(^{56}\)

This is not to say that instrumental sanctions do not have their place or that they do not induce some measure of tax compliance. Studies have demonstrated that tax compliance increases as penalties and enforcement activity escalate, at least up to a point.\(^{57}\) In addition, the presence of instrumental sanctions might reinforce other norms that taxpayers hold that encourage them to comply.\(^{58}\) Further, audits and penalties reassure compliant taxpayers that the government is monitoring the system and endeavoring to catch and punish cheaters. However, the government must walk a fine line when reassuring the public that cheaters are being punished. If the public perceives that tax evasion is rampant, then compliant taxpayers may well believe that they are fools to report their taxes accurately. There is evidence that “the publicity about taxpayer evasion and government efforts to stop evasion seem less likely to have pernicious effects on society when the government publicizes specific examples of noncompliance as compared to general stories about rampant tax cheating.”\(^{59}\)

Most importantly, the cost benefit model does not fully explain the level of voluntary compliance in the United States because most people do not base every decision on pure economics or the potential for wealth maximizing. Rather, people want and need to satisfy myriad values and goals. Further, a tax system cannot be based solely on threats and coercion – at least not in a country of this size and with a democratic form of government; the government needs for taxpayers to fulfill their obligations in a spirit of cooperation if tax administration is to be effective. One way for the government to do so is to create a tax morale that favors compliance. Tax morale represents a conglomeration of factors that have an impact, either positive or negative depending on the circumstances, on taxpaying attitudes. Societies with high tax morale will have high voluntary compliance; and societies with low tax morale will have widespread evasion and cheating. High tax morale fills in the gap, so to speak, as to what explains taxpayer compliance to the extent that the penalties and audits do not.

\(^{56}\) See e.g., James Andreoni, Brian Erard & Jonathan Feinstein, *Tax Compliance*, 36 J. ECON. LIT. 818, 846 (1998) (noting that misperceptions of audit rate cannot explain observed compliance rate); Benno Torgler, TAX COMPLIANCE AND TAX MORALE: A THEORETICAL AND EMPIRICAL ANALYSIS 4 (2007) (noting that estimated level of risk aversion in the United States would need to be much higher to explain the compliance rate).

\(^{57}\) Lavoie, supra note 52, at 647.

\(^{58}\) See Leandra Lederman, *The Interplay Between Norms and Enforcement in Tax Compliance*, 64 OH. ST. L.J. 1453 (2003) (demonstrating that enforcement sanctions such as auditing and penalties can buttress norms-based appeals for compliance.)

\(^{59}\) Leslie Book, *The Poor and Tax Compliance: One Size Does Not Fit All*, 51 U. KAN. L. REV. 1145, fn.18, citing SM Sheffrin & RK Triest, Can Brute Deterrence Backfire, in Perceptions and Attitudes, in 2 TAXPAYER COMPLIANCE at 193, 210, 212013 (suggesting that general stories about the tax gap likely lowers morale and leads people to believe others are cheating, but that particularized stories are not likely to have a similar effect).
Society can create high tax morale through the use of expressive sanctions. Expressive sanctions seek to change the target’s behavior by changing or altering norms. The goal of the expressive form of sanctions is to encourage the target to internalize a new norm, thereby causing the target to change its behavior. Robert McAdams’s esteem-based theory of norm development theorizes that the enactment of expressive legislation publicizes to the relevant community that a consensus on certain behavior exists. After individuals become aware of this consensus, they are more likely to experience a gain in esteem by complying with the norm (or lose esteem by failing to comply.) For purposes of expressive sanctions, “the term ‘social norms’ means informal social regularities that individuals feel obligated to follow because of an internalized sense of duty, because of a fear of external non-legal sanctions, or both.” Simply put, if a sufficient number of people in a social group or community adopt a norm, those who comply gain esteem and those who violate the norm garner disapproval.

Lavoie uses the term “tax ethos” to describe this social norm. Tax ethos connotes a widely held society belief (an internalized norm) that one should not cheat on his or her taxes. “A taxpaying ethos represents a pervasive cultural norm that is internalized by members of society and therefore strongly influences their behavior in favor of faithfully complying with the tax laws.” Stated another way, taxpaying ethos is a descriptive phrase identifying a cultural dynamic that values adhering to (and disfavors disobeying) the tax laws, while tax morale refers to the various factors that may contribute to creating such a taxpaying ethos within a particular society. As Lavoie notes, tax ethos can be one of the factors that affects tax morale in that if there is a strong tax ethos, tax morale should be higher. We need a tax ethos because we cannot rely only on threats and fear of punishment to compel compliance. Not only would we need a much larger IRS, but this creates an atmosphere that is negative for tax morale.

Two perceptions or beliefs can create a foundation for a taxpaying ethos among the general public if the beliefs are widely-held: a social contract, and quid pro quo. A social contract exists in a society when taxpayers not only perceive a tax as legitimate or fair and fairly collected (a type of trust in their government), but also that others are also honestly reporting and paying

60 Kirsch, supra note 44, at 913.


63 Kirsch, supra note 44, at 917-18.

64 Lavoie, supra note 52, 642-43.

65 Id. at 643.

66 Id.
their fair share of taxes (a type of trust in other members of society). Quid pro quo exists when taxpayers believe that their taxes are being used to provide benefits to the taxpayer or to society in general – benefits that the taxpayer believes have value or are worthy (again, a type of trust in government). As noted by Lavoie, “Taxpayers’ willingness to pay taxes increases if they understand the implicit quid pro quo received in exchange for their taxes and they if perceive that others are reciprocating by paying their share of the tax burden as well.”\(^{67}\) Lavoie also states with regard to the quid pro quo aspect of tax ethos that:

This relationship continues to hold true even when the quid pro quo takes the form of “public goods,” which the government would provide to all citizens even if a particular taxpayer did not contribute toward them. Thus, individuals perceive benefits and are willing to pay for government activities even if the benefits are amorphous with no direct link to the individuals, like government grants for pure scientific research.\(^{68}\)

As discussed below, there is a deliberate campaign to destroy tax ethos with the purpose of destroying the progressive federal income tax. The social contract basis for taxpaying ethos can be eroded if taxpayers believe that others are not paying their fair share or if the nontaxpaying norm of a subgroup gains widespread acceptance. As shall be discussed below in Part IV, there has been a deliberate campaign by a segment of society to destroy taxpayers’ belief in the social contract by both of those methods. This same small segment also seeks to create doubt in taxpayers’ that the government uses tax revenues responsibly.

B. Creation of a Taxpaying Ethos in the United States

1. Early Attempts to Create a Federal Income Tax

Prior to enactment of the modern federal income tax in 1913,\(^{69}\) the federal government derived most of its revenues primarily from tariffs and customs duties on imports, and from some internal excises taxes (for example on the sale of alcohol and tobacco) and from the sale of public lands. However, during times of crisis, such as war, the federal government had to find other sources of funds in order to meet the expanded demands on the federal government. For example, during the War of 1812, revenues from tariffs dropped during the pre-war embargo against Great Britain and the War itself.\(^{70}\) Secretary of the Treasury Alexander J. Dallis suggested enactment of an inheritance tax and an income tax which he thought could “be easily made to produce $3 million.”\(^{71}\) However, the war ended before the proposal could be enacted.

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\(^{67}\) Lavoie, supra note 51, at 46.

\(^{68}\) Id.

\(^{69}\) Act of October 3, 1913, ch. 16, 38 Stat. 114.

\(^{70}\) JOHNSON & KWAK, supra 10, at 6.

Later, from 1861 to 1865,\textsuperscript{72} the country was embroiled in a Civil War, and the federal government’s expenditures rose from $67 million in 1861 to $1.3 billion by 1865.\textsuperscript{73} The federal government could not raise such large sums from tariffs and excise taxes alone. Therefore, the Civil War saw the country’s enactment of the first income tax (at least in the North)\textsuperscript{74} the rates of which were steadily raised during the war as the need for funds increased.\textsuperscript{75} The general public tolerated the tax because it was perceived as a temporary measure required by the exigencies of war and because most of the burden was shouldered by the more affluent. This first federal income tax was not a significant source of government revenues; in 1866, at the tax’s height, it raised $73 million out of total federal revenues of $559 million.\textsuperscript{76} Further, within a few years of the War’s end the country had returned to a budget surplus, and, under pressure from banking and commercial interests in the Northeast, the income tax was repealed, effective 1872.\textsuperscript{77} The short-lived nature of the Civil War era income tax and its limited scope (both in terms of amount of revenue generated and the number of taxpayers subject to it) were factors that were not conducive to creating a social contract or quid pro quo basis for compliance in the general public.\textsuperscript{78}

\textsuperscript{72} Actual hostilities commenced when Confederate forces attached Fort Sumter in South Carolina on April 12, 1861. Robert E. Lee surrendered at Appomattox on April 9, 1865 and President Andrew Johnson issued a Proclamation on May 9, 1865 proclaiming an end to hostilities.

\textsuperscript{73} DUBROFF, \textit{supra} note 71, at 2.

\textsuperscript{74} Act of August 5, 1861, ch. 45, §49, 12 Stat. 309.

\textsuperscript{75} Initially, incomes below $600 were exempt from the tax; incomes between $600 and $10,000 were taxed at a rate of 3%; incomes above $10,000 were taxed at a rate of 5%. Act of July 1, 1862, ch. 119, §90, 12 Stat. 473. As the war progressed and the federal government needed more funds, the rates were increased so that by 1865, incomes between $600 and $5,000 were taxed at a rate of 5% and incomes above $5,000 were taxed at a rate of 10%. Act of March 3, 1865, ch. 78, 13 Stat. 479.

\textsuperscript{76} DUBROFF \textit{supra} note 71, at 3. By 1872, when the tax was repealed, it raised $14 million out of total federal revenues of $374 million. \textit{Id.}

\textsuperscript{77} Act of July 14, 1870, ch. 255, §6, 16 Stat. 257. Prior to its repeal, the amount of income exempt from tax was steadily increased and the tax rates were reduced. \textit{See} Act of March 2, 1867, ch. 169, §13, 14 Stat. 478, and Act of July 14, 1870, ch. 255, §§6, 8, 16 Stat. 257, 258.

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

Almost immediately after the repeal of the Civil War’s income tax, the country experienced a severe recession and financial panic in 1873 which hit farmers in the south and Midwest particularly hard because while prices for their crops dropped, the cost of feed, fuel, and other supplies did not. No sooner had the country begun to recover when it was caught in the grip of a depression in 1893, which again hurt farmers and small businesses in particular. The first attempt at a permanent income tax arose from a populist and agrarian movement in rebellion against the government’s reliance on tariffs and internal excise taxes to fund its activities, and the regular appearance of economic recessions and depressions. Tariffs favored the merchant class because it made domestic goods more attractive over imported goods. However, tariffs tax consumption, and, therefore, fall more heavily on lower-income people who must use a greater percent of their income to purchase goods (the same is true for internal excise taxes.) In addition, economic power was increasingly concentrated in the hands of the banks, railroads, and other industrial and financial interests. The populist movement wanted cheap money, the regulation or break-up of the monopolies, and the imposition of an income tax.

Out of this economic turmoil arose a coalition of populists, southern and western Democrats and some moderate Republicans who joined together in 1894 to enact what was hoped to be the first permanent federal income tax. This income tax was supposed to reduce tariffs and make up the shortfall by taxing the wealthy (although it only taxed the wealthiest 2% of the population and at a rate of 2%, with an exemption of $4,000). This first permanent income tax was unusual in that it arose because the public (at least, the less affluent members of the public) demanded that the government impose the tax (a bottom-up demand, so to speak) Heretofore, taxes usually were proposed by the government and then imposed on the public (a top-down demand, so to speak) True, even from the days in Great Britain dating back to 1100 with the Charter of Liberties and from our countries’ early history, the masses of citizens had demanded a say in the government’s imposition of a tax. However, this demand found expression in the citizenry wanting a voice or representation in the government which then devised and imposed the tax. Here, the public itself generated the demand for the tax. It was the public, not the government, which was behind the demand for this tax. Unsurprisingly, the wealthy denounced the tax as “socialism, communism.

79 DUBROFF, supra note 71, at 4.
80 Id.
81 Id. at 5.
82 Act of August 27, 1894, ch. 349,§27, 29 Stat. 553. President Grover Cleveland, who favored reducing tariffs but opposed an income tax let it become law without his signature.
83 DUBROFF, supra note 71, at 5-6.
84 The English aristocracy began to demand that King could not levy taxes without consulting them. See Cockfield, supra note 8, at 21-22.
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and devilism” devised by “the professors with their books, the socialists with their schemes,” and “the anarchists with their bombs.”

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

2. The Sixteenth Amendment and the modern income tax.

For the poor, especially immigrants, economic conditions in the Untied States at the beginning of the twentieth century only worsened, so that most workers lived in extreme poverty while wealth became increasingly concentrated in the hands of the monopolies. In addition, in 1907, the

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85 DUBROFF, supra note 71, at 5.
87 U.S. CONST., art. I, §9
88 U.S. CONST. ART. I, §8, cl. 1
89 U.S. CONST., AMEND X.
90 Hylton v. United States, 3 U.S. (3 Dall.) 171, 174 (1796)

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

Id. at 673-74.
country experienced another financial crisis with a run on the banks. Only the efforts of J.P. Morgan, who provided loans to threatened banks, prevented the financial system from collapsing. Although Republicans controlled the White House, the Senate, and the House of Representatives, several Midwestern Republican senators again forged an alliance with Democrats who were in favor of a progressive federal income tax. In order to save the Payne-Aldrich-Tariff Bill, the conservative Republicans had to compromise with the coalition and agree to: (1) amend the United States Constitution to permit an income tax without apportionment, and (2) enact a corporate income tax. By 1913, two-thirds of the states necessary for its enactment had approved the Sixteenth Amendment to the United States Constitution, which provided that, “The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.” In 1913, Congress enacted the Internal Revenue Act of 1913— the predecessor to today’s federal income tax as now codified in Title 26 of the United States Code – and which President Woodrow Wilson signed into law. The 1913 Act was relatively modest in its scope with low rates and a generous exemption so that out of a population of 97 million, only 358,000 individual income tax returns were filed for the 1913 tax year. Again, it is significant that the demands from the general public for the enactment of the

See also, Laurie Serafino, *Life Cycles of American Legal History Through Bob Dylan’s Eyes*, 38 FORDHAM URBAN LAW JOURNAL (October 2011)1453-54:

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

*Id.* at 1453.


95 Act of August 5, 1909, ch. 6, §38, 36 Stat. 112.

96 It was believed that the corporate income tax would not run afoul of the U.S. Supreme Court’s decision in *Pollack* because it was described as an excise tax on the right to do business in the corporate form and was measured by the corporation’s income. The U.S. Supreme Court blessed the corporate income tax in *Flint v. Stone Tracy Co.*, 220 U.S. 109 (1911).

97 U.S. CONST., AMEND. XVI. See also supra fn. 2.

98 Act of October 3, 1913, ch. 16, 38 Stat. 114. *See also supra* fn. 3. President Theodore Roosevelt had spoken up in favor of a progressive income tax during his administration, but he took no action on that score. His successor, William Howard Taft, also made statements in support of a progressive income tax but also took no action personally to further its enactment. DUBROFF, * supra* note 71, at 5-6.

modern income tax were not based on social contract or quid pro quo theories that “we are all in this together,” but rather, were based on a sense that a small segment of society was benefiting the most and, therefore, should contribute something to the federal fisc.

A government agency was needed to administer this new tax system. In 1861 and 1862, when Congress had enacted legislation temporarily creating an income tax to finance the Civil War\textsuperscript{100} Congress also created the Bureau of Internal Revenue (“the Bureau”) to administer the income tax.\textsuperscript{101} Although the income tax was repealed after the Civil War, the Bureau remained in existence to administer what few internal revenue taxes remained – such as on alcohol and tobacco – and to perform certain other miscellaneous duties such as administering the bounty for United States sugar producers, certifying Chinese laborers, and collecting the tax on opium and oleomargarine.\textsuperscript{102}

In 1914, World War I (“WWI”) began in Europe, and, although the United States would not officially enter the conflict until the spring of 1917, the United States immediately experienced financial repercussions from the war as a result of (1) reduced revenues from customs receipts due to trade reduction with Europe, and (2) increased government expenditures as the United States made preparations to enter the conflict.\textsuperscript{103} As a result, the federal government had a deficit of $400,000 in 1914 which deficit increased to $13 billion by 1919.\textsuperscript{104} In response, Congress enacted the Revenue Acts of 1916,\textsuperscript{105} 1917,\textsuperscript{106} and 1918\textsuperscript{107} (collectively, “the WWI Revenue Acts”).\textsuperscript{108} Each one of these revenue measures increased the number of taxpayers who were required to file returns so that by 1917, 3.5 million individuals filed income tax returns and by 1920, the number had increased to 7 million, or 11.4 percent of the population.\textsuperscript{109} Nevertheless, the tax remained a “class tax” and was paid only by taxpayers in the upper economic strata. Perhaps there was a rough justice to this given that the rich became richer from the war.\textsuperscript{110} Again, as with the Civil War income tax, the federal government did not attempt to

\textsuperscript{100} Act of August 5, 1861, ch. 45, §49, 12 Stat 309; Act of July 1, 1862, ch. 119, §89, 12 Stat. 473.

\textsuperscript{101} DUBROFF, supra note 71, at 13-14. See also Camp, supra note 78.

\textsuperscript{102} DUBROFF, supra note 71, at 14.

\textsuperscript{103} Id. at 8-9.

\textsuperscript{104} Id. at 9.

\textsuperscript{105} Revenue Act of 1916, ch. 463, 39 Stat. 756.

\textsuperscript{106} Revenue Act of 1917, ch. 63, 40 Stat. 300.

\textsuperscript{107} Revenue Act of 1918, ch. 18, 40 stat. 1057.

\textsuperscript{108} DUBROFF, supra note 71, at 9-10.

\textsuperscript{109} Id. at 10-12. See also L. Seltzer, THE PERSONAL EXEMPTIONS IN THE INCOME TAX 62 (1968).

\textsuperscript{110} LIAQUAT AHAMED, LORDS OF FINANCE 90-91 (2009).
expand the tax to the general public with appeals to their sense of social contract or quid pro quo. However, in contrast to the Civil War, the federal individual income tax, the corporate income tax, and the excess profits tax were significant sources of federal revenues. For example, in 1920, federal revenues were $6.7 billion of which $3.9 billion, or 55%, were derived from the income and excise taxes.\footnote{DUBROFF, supra note 71, at 12.}

After WWI ended and the federal government once again had revenue surpluses, Congress was under pressure to reduce the income tax, and the Revenue Act of 1921 reduced the individual and corporate tax rates.\footnote{Revenue Act of 1921, ch. 136, §216(c), 42 Stat. 233, 242.} However, the income tax was too firmly entrenched to be completely repealed. From 1918 to at least 1979, income and profits taxes have rarely yielded less than half of the annual government receipts; in some years they have yielded considerably more than half. Therefore, reducing significantly or eliminating the income tax would greatly reduce federal tax revenues and would incapacitate the federal government.

The Sixteenth Amendment and the subsequent income tax were approved because the less wealthy believed it would shift some of the tax burden onto the wealthy. There was an evolving perception among the less affluent that the income tax would increase fairness in the tax system. Therefore, the idea of a federal income tax was not only accepted by the general public, but was embraced and demanded. However, the purpose of this early income tax (and who should pay it) was radically different from its purpose during World War II and thereafter. Initially, the purpose of the tax was to provide some relief for the less wealthy because the government would then rely less on tariffs and excise taxes for revenue. Further, much of the public perceived that the wealthy and the large corporations derived most of the economic benefit from this country and, therefore, should pay something. As described below, the purpose, and therefore, the nature of the income tax, needed to change during World War II in order for the tax to change from a class tax to a mass tax, and this change has persisted to this day, but is under increasing assault by segments of the wealthy once again.

3. Transition from a Class Tax to a Mass Tax.
   a. Educating the American Public about the Income Tax

The federal income tax changed within a relatively short period of time from a tax begrudgingly paid by the wealthy to a tax also paid by cooperative middle and lower income classes. This transition took place because World War II enabled the government to create a taxpaying ethos in the majority of the citizenry – a tax ethos that remained in place for decades after the war ended. During World War II, the government used such tools as the media, popular public figures, and appeals to American values such as patriotism to educate the public about this greatly expanded tax system and to persuade the public to accept their taxpaying obligations. These tools helped create the perception among the general public that everyone had a part to play in the war effort – a social contract basis for compliance – and the awareness that the tax revenues were providing the men on the front lines with guns, ammunition, planes etc. – a quid
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pro quo basis for compliance. As demonstrated below, within a relatively short period of time, the general public’s perception of and compliance with the federal income tax underwent dramatic changes.

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

By 1938, the public still supported the idea of taxing the wealthy but still did not support the idea of imposing the tax on low-income wage earners. However, by the fall of 1939, it was clear to Treasury Secretary Henry Morgenthau, Jr. that the United States would become involved in the wars in Europe and Asia and that involvement would require the United States to change its income tax structure. For one thing, the war itself would need to be funded and current

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114 Id. at 689, citing L. Seltzer supra at note 109, at 2.
115 Jones, supra note 113, at 689.
116 Id., referring to violence in Mississippi and Kentucky where sales tax protestors tried to force their way into the governors’ offices, and threats of violence over taxes in New York and Louisiana.
118 In 1937, Congress held hearings detailing the tactics used by sixty-seven wealthy families to evade taxation. Foreign and domestic personal holding companies, hobby losses, incorporated yachts and country estates, and personal service corporations were among the devices used by the well-to-do to avoid taxation. Revenue Act of 1937: Hearings Before the House Committee on Ways and Means, 75th Cong., 1st Sess. (1937)
119 PUBLIC OPINION, 1935-1946 317, item 22, (H. Cantril ed. 1951), at 316, item 16, at 316, item 12, at 317, item 20. cited in Jones, supra at 693. If inflation occurred, lower-income taxpayers would be at a disadvantage at being able to afford goods at a time that they would be asked to contribute some of their income towards taxes.
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government revenues were not sufficient for the task. Second, the war would create both shortages of goods and increased consumer spending power so that there was a real risk of inflation as consumers competed for scarce goods and drove up prices. The income tax could be both a source of funding for federal expenditures and also as a way of tamping down consumer purchasing power. However, the government faced the dilemma of how to get the public to accept the idea of an income tax on all economic classes when up to this time, the federal income tax was viewed as a something only the very wealthy paid. The government needed to find a way to justify the federal income tax to make it acceptable to the public. The problem the Roosevelt administration faced was changing the public perception of the income tax as a measure designed to curb the economic and political power of the wealthy, to a perception that everyone should sacrifice for the common good. As explained by Professor Jones:

Because income taxpayers had been portrayed as members of a despised class during the years before World War II, there was little in the rationale for the income tax during the 1930’s that justified income taxation of average Americans. Further, efforts to redistribute wealth by tapping the resources of middle income taxpayers had proved unsuccessful during the 1930’s and did not provide a promising justification for a mass income tax.

The wealthy paid the federal income tax because they had to and not because of either (1) a recognition that their lives were enhanced by the benefits the government provides (a quid pro quo basis for compliance) or (2) respect for the social contract that “we are in this together” and need to pay our fair share because others are doing so. Because the idea of an income tax was tied to being an economic measure against the “economic royalists,” the administration needed to find a way to make the tax “legitimate” so as to be able to impose the tax on a mass scale on everyone else. The administration was going to have to find a philosophical basis or rationale that the general public would accept as a good reason for paying this newly imposed tax. In other words, Roosevelt was going to have to create a taxpaying ethos among the general population. Professor Jones posits that the administration was able to do this because of the messages and structures that were created during the war. The administration obtained citizen cooperation (1)

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121 James R. Brackett to Fred Smith (Aug 4, 1943), Treasury/Correspondence; General Records of Assistant Directors James Rogers and William Lewis, January to July 1943; Records of the Office of War Information, Record Group 208; (available in national Records Center, Suitland, Md.). cited in Jones, supra at 724-25.

122 Jones, supra note 113, at 733. In 1938, only 10 percent of families had incomes of $3,200 and over. A subsistence income for a family of four was variously set at $800 and $2,000. Approximately seventy four percent of American families earned less than $2,000. Congress at that time increases surtaxes on those with incomes over $50,000 making a top bracket of seventy nine percent for income over $5 million. For three years after that, only John D. Rockefeller qualified for this top bracket. See MARK LEFF, THE LIMITS OF SYMBOLIC REFORM 11-17 (1984), at 94, 142, 144-45.
through an intense education campaign as to why and how the tax should be paid which changed the perception as to the nature of the income tax, and (2) by imposing withholding on wages at the source which meant that taxpayers were current on their payments as opposed to having to save up to pay the tax bill later.

As a result of the Revenue Acts of 1940 and 1941, the number of taxable returns increased from 7.4 million to 27.5 million.\textsuperscript{123} For the less wealthy, the income tax became a fact of life so that Professors Surrey and Warren stated that the income tax had “changed its morning coat for overalls” and had “spread from the country club group district down the railroad tracks and then over to the other side of the tracks.”\textsuperscript{124} The Roosevelt administration was able to achieve this change mainly by tying the tax to the war effort and shared sacrifice (and not to the New Deal economic programs).\textsuperscript{125} One can understand how this appeal would be effective for the duration of the war, but many expected the tax to disappear for most Americans once the war ended.

One tool the administration employed during the war to create a taxpaying ethos was the media to disseminate information to the public as to how the funds were being used in the war effort and how to comply with their tax paying obligations. The administration made frequent use of media to “get the message out” that Uncle Sam needs your help.\textsuperscript{126} During World War II, Americans owned 57 million radio sets that reached over 90 percent of the population.\textsuperscript{127} The Treasury Department and the Office of War Information would broadcast their own programs, sometimes featuring Treasury Secretary Morgenthau or other administration officials, who would explain and encourage tax compliance. Also effective were short advertisements and spot announcements during entertainment programming which would contain war messages such as, “Join the WAC,” or “Pay Your Taxes.”\textsuperscript{128} Other times, popular radio shows such as the Roy Rogers Show and the Great Gildersleeves, and popular personalities such as the Andrews Sisters and Burns and Gracie would urge the public to support the war by paying their taxes.\textsuperscript{129}

\textsuperscript{123} BUREAU OF THE CENSUS, U.S. DEPARTMENT OF COMMERCE, SER. Y 402-411, HISTORICAL STATISTICS OF AMERICA 1110 (1975). The 1942 Act also included a “Victory Tax” which was a 5 percent gross income tax on all income over $624. Taking the Victory Tax into account, the income tax rolls increased from 13 million to 50 million in one year. Jones, supra at 695.

\textsuperscript{124} RANDOLPH PAUL, TAXATION IN THE UNITED STATES 262, 319 (1940).

\textsuperscript{125} Jones, supra note 113, at 733.

\textsuperscript{126} Lavoie, supra note 51, at 53-54.


\textsuperscript{128} Allocation Schedule for War Information Messages, Week Beginning February 21, 1944 (final), Radio Bureau Allocations: Records of the Deputy Director; Records of the Office of War Information, Record Group 208; available in National Records Center, Suitland, Md.). Jones at 712.

\textsuperscript{129} Jones supra note 113, at 711-725. See Burns and Allen (radio), no title, aired February 5, 1945 in which the announcer announces early in the show that:
Encouraging the public to support the war contributed to Americans’ feeling that they all had a part to play in the war effort and they were “in this together” – a social contract basis for compliance.

The administration also used movies to encourage Americans to pay their taxes. Given that each week, 80 million Americans – two-thirds of the population – saw at least one movie, it made sense to use such a popular media. The Treasury Department commissioned Disney to make an animated short, “The New Spirit, which starred Donald Duck. In “The New Spirit,” Donald Duck fills out his tax forms after hearing a radio announcement that it is “your privilege, not just your duty, but your privilege to help your government by paying your tax and paying it promptly.” Donald then races from Hollywood to Washington to file his return and the film shows how tax revenues are transmuted into guns, planes, and ships while a narrator exhorts that, “Taxes will keep democracy on the march.” Through popular movies and radio programs, taxpayers were shown how the government used tax revenues to create benefits such as the public defense (a quid pro quo basis for compliance).

The administration also made extensive use of written materials such as pamphlets that were distributed to governors, mayors, town clerk, heads of education, and larger employers, posters that were sent for display to banks, department stores, libraries, post offices, and office buildings, newspaper cartoons and editorials, and magazines such as the Magazine War Guide. These materials all emphasized the important role the average citizen could play in the war effort and that role included “Taxes to fight the Axis.” All this messaging and information helped create the impression that the tax was not coercive but was a citizen’s choice or voluntary assumption of service to the country. It also helped to assuage the guilt of those who were not serving in the armed services by giving them a way to participate in the war effort. A taxpayer who complied with his or her taxpaying obligations felt as if he or she played an important part in the war effort and felt as if he or she was carrying a part of the load. In other words, as if we are “all

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


131 The New Spirit (Disney, 1942), U.S. Government Film Collection, Motion Picture Collection FAA 188 (available in Library of Congress, Washington D.C.). Treasury Secretary Morgenthau was heard to exclaim that, “If we can get people to pay taxes with that God-awful Mickey Mouse, we will have arrived socially.” Group Meeting, (9:45am Dec. 15, 1941): Mickey Mouse was eventually replaced by Donald Duck in the film.

132 Jones, supra note 113, at 705-709.

133 Id. at 734.

134 Id. at fn. 265. She notes that there were very few public announcements that mentioned penalties for failing to file or pay.
in this together” or a part of the social contract. Some Americans served overseas; others contributed at home through economic support by means of war bonds and taxes. Although appeals to patriotism during peacetime have not been demonstrated to be particularly effective, appeals during wartime are. This makes sense because one would expect people to react to threats to their safety and lives, as occurs during wartime. Although Americans on the mainland of the United States might not have felt physically threatened, they could identify with loved ones and friends who were serving in the European and Pacific theaters and who were risking their lives.

The administration also saw the income tax as a tool for fighting inflation. With the increased employment because of the war and shortages of consumer goods, the country faced a serious risk of inflation as Americans competed for consumer goods, thereby driving up prices. The administration attempted to explain the problem to the public in a second Walt Disney movie with Donald Duck: “The Spirit of ’43” in which Donald struggles with his conscience between being a spendthrift or a scrooge. Donald Duck is reminded that “every dollar you spend for something you don’t need is a dollar – to help the Axis.” However, the government’s appeals to the public to exercise restraint were not particularly effective. Despite the fact that inflation affects the every day lives of taxpayers, it is difficult to get the public to see the connection between such an abstract concept as inflation and behavior. This also explains why appeals to patriotism, at least for a period of time, can be effective. People understand the concept of physical danger and threats to safety when the threat is imminent.

b. Changing the taxpayer’s payment method

The Roosevelt administration also had to change the payment structure that had been in place for the income tax and then educate the mass of new taxpayers regarding the new payment system and the tax forms. Prior to 1943, federal income taxes were not collected at the source (e.g., by the employer withholding the tax from the employee’s wages), and they were not paid in the current year when incurred, but rather, were paid in quarterly installments in the following year. Thus, the 1941 tax obligations based on salary income were paid in quarterly installments in 1942. Lower-income taxpayers in particular struggled to make the quarterly payments because they oftentimes had not set aside funds for that purpose. Therefore, the lack of withholding at the source and the delay in payment until the year after the tax accrued made it impractical, if not impossible, for the federal government to impose and collect the tax.

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136 The Spirit of ’43 (Disney, 1943), U.S. Government Film Collection; Motion Picture Collection FAA 256 (Library of Congress, Washington D.C.).


138 RANDOLPH PAUL, supra at 328-29, 332.
The solution was to have employers withhold the estimated tax due from employees’ pay so that the tax was collected currently. However, this created a new problem as to how to make the transition to this system because the first year the system was imposed, it would create a “bunching” problem. “Under the existing tax system, Year 1’s tax liability was paid in Year 2. If, in Year 2, the tax payments were made current, a taxpayer would be required to pay Year 1’s and Year 2’s taxes in Year 2.” 139 In the Current Tax Payment Act of 1943, Congress solved the problem by a partial forgiveness of the lower of the 1942 or 1943 tax liability and unforgiven tax liabilities could be paid over the next two years. 140 If it had not been for the exigencies of war, the government might not have been able to obtain the public’s willingness to struggle through the chaotic first year or two of the transition to this new tax and the new system of payment.

The Roosevelt administration again made use of the media to explain to the new taxpayers how to file and pay their taxes, assuring the public that the obligation was not unduly confusing or burdensome. Taxpayers were reminded frequently in public service announcements over the radio as to the deadlines for filing taxes. These public service announcements sometimes used actors playing “ordinary” people such as factory workers or housewives who enthused about how easy they found it to be to fill out the new forms and how withholding relieved the worrying about payment. The Treasury Department also recognized that the tax forms had to be simplified and explained if the public’s cooperation in complying with their new tax obligations was going to be obtained. The services of Judge Opper and Judge Marion J. Harron of the Tax Court were enlisted in creating and endorsing the new tax forms. 141

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

Not only does withholding tax at the source solve the problem of taxpayers having to find the funds to pay a tax bill at the end of the year, but the tax payment is less noticeable to taxpayers. Taxpayers are paying the tax with money they have never seen in their paychecks because it has been withheld from their gross income. It is less emotionally intrusive to have the money withheld that to have to write a check and send the money in to the Treasury Department.

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139 Jones, supra note 113, at 698.

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

141 See Jones, supra note 113, at 730-732. In September of 1943, some taxpayers were required to file an estimated tax declaration form as part of the transition to a current payment of the tax. The September 15, 1943 declaration form proved to be particularly challenging. After it took Treasury Secretary one and one-half hours and the assistance of two aides to complete the fifty-five computations the form required, Morgenthau recognized that the form had to be simplified or the public would be outraged. Id. at 731-32.
Withholding becomes a routine, unobtrusive way of paying one’s tax obligation, thereby increasing compliance.

The creation of these two foundations for tax compliance (social contract and quid pro quo) is one reason why the public did not demand that the federal income tax be repealed after World War II ended. Despite the end of World War II, Americans did not necessarily feel safe from outside threats – in particular from the Soviet Union and, to a lesser extent, China. During the Truman, Eisenhower, and Kennedy administrations Americans worried that the Soviet Union would take over the United States either through a direct attack or from the inside by communist infiltration. The Cold War posed a common threat to all Americans and bound the country together in a continued sense that we are all in this together – or, at least, we are facing annihilation together. A strong federal government could protect the country from attack. Despite the fact that in 1953 the Bureau of Internal Revenue was rocked with a corruption scandal by top administration officials, support for the income tax and overall faith in the tax system remained strong.\(^\text{142}\) At the same time, the post-World War II era continued to be a time during which Americans could see the connection between their taxes and government benefits. For example, veterans attended college with assistance from the GI Bill\(^\text{143}\) The government also poured money into the Space Program and national defense which generated jobs.\(^\text{144}\)

IV. The Campaign to Destroy Tax Ethos and the Income Tax

A. The Cabal

Not everyone was in favor of Roosevelt’s New Deal, the increased power and size of the federal government, and the enactment of the federal income tax. The initially small but very determined cabal of men who wanted to eviscerate, if not outright repeal, the federal income tax and render the federal government impotent were businessmen and not politicians, although these businessmen would later recruit politicians, and academics and religious leaders, to further the movement’s goals.\(^\text{145}\)

\(^{142}\) Camp, supra note 78, at 87. In 1953, the House Ways and Means Committee spent two years investigating allegations of misconduct and corruption at what was then called the Bureau of Internal Revenue. A number of top officials were charged with crimes and the Bureau of Internal Revenue was reorganized into the Internal Revenue Service.

\(^{143}\) Cite.

\(^{144}\) See e.g., Robert B. Reich, Supercapitalism, Vintage Books, 2007, p. 56-60. For example, in the 1970’s, the federal government provided half of the research and development funding of the nation’s telecommunications industry and 70% of the nation’s aircraft industry. Id. at 59.

\(^{145}\) KIM PHILLIPS-FEIN, INVISIBLE HANDS: THE MAKING OF THE CONSERVATIVE MOVEMENT FROM THE NEW DEAL TO REAGAN 6 (2009). The anti-New Deal, anti-income tax movement began during Roosevelt’s administration and continued after World War II, despite the fact that business and labor had worked together during WWII to defeat the Axis.

But at the same time, despite all these changes, it remained difficult for the men who had fought the New Deal in the 1930s to let go of their battle. All they could see in the postwar order was a landscape of defeat.
Some of the names of the men and some of the corporations they ran are familiar; other men are less well-known but no less important to the movement. The early members included Lemuel Ricketts Boulware, the head of General Electric who became famous for his union breaking tactics, \(^{146}\) the three DuPont brothers (Irenee, Lammot, and Pierre) who made fortunes during the two World Wars from their plastics which were used extensively by the military, \(^{147}\) Howard Pew, president of Sun Oil, \(^{148}\) Sterling Morton, head of the Morton Salt Company, \(^{149}\) Leonard Read, who with Jasper Crane \(^{150}\) in 1946 founded the still highly influential Foundation for Economic Education (“FEE”), \(^{151}\) and William J. Baroody, who helped found the American Enterprise Institute (“AEI”), another leading political right think tank, and the Hoover Institute at Stanford University and the Center for Strategic Study at Georgetown University, both of which are influential conservative intellectual organizations. Somewhat later on board was Joseph Coors, who, together with Paul Weyrich \(^{152}\) formed the Heritage Foundation, probably the most influential think tank for the political right. \(^{153}\) Paul Weyrich also helped found the Manhattan

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After all, from their perspective, the war had created a newly gargantuan federal government. In the late 1940s, top marginal income tax rates were about 90 percent, and corporate tax rates remained high as well. The government had steady revenue sources that it had never possessed before. Nor were they comforted by the new ideology of Keynesian consumerism, for it implied that the disposable income of workers, not the patient saving and canny investment of entrepreneurs and owners, mattered most for economic health.

\(^{146}\) Boulware became so effective at destroying labor unions that some of his tactics were later labeled as being “boulwared.” *Id.* at 99-101

\(^{147}\) *Id.* at 10. In 1934, the DuPont brothers founded the American Liberty Union, one of the first groups organized to overthrow the New Deal. The name was carefully chosen to create the impression that the group’s concern was defending the U.S. Constitution and not protecting the members’ wealth. *Id.*

\(^{148}\) Despite the rise of the fundamentalist religious movement in the country beginning in the 1930s, Pew despaired of its efficacy in the conservative cause. (“We can never hope to stop this Country’s plunge toward totalitarianism until we have gotten the ministers’ thinking straight.”) *Id.* at 70.

\(^{149}\) In 1956, Sterling Morton sent a $500 check to the conservative Foundation for Economic Education with a note expressing his support for the repeal of the Sixteenth Amendment which had allowed the creation of the federal income tax. *Id.* at 85.

\(^{150}\) Leonard Read served as the general manager for the Los Angeles Chamber of Commerce; Jasper Crane was a retired DuPont Chemical vice president. *Id.* at 16-19, 27.

\(^{151}\) Jasper Crane, who was one of the first trustees for FEE believed that it was essential that the movement clarify its goals and articulate its theoretical underpinnings. Crane believed that appeals to emotion would be important later, but that initially those who wished to undo the New Deal and return to laissez faire unfettered capitalism should be able to explain their principles. FEE, which is located in Irvington, New York, is still an important think tank today. *Id.* at 27, 19, 265, 54.

\(^{152}\) Paul Weyrich was a staff member for Senator Gordon Allott of Colorado at the time. *Id.* at 171.

\(^{153}\) In addition to its research mission, the Heritage Foundation “runs a full-service media relations shop, ready to assist reporters, editors and producers 365 days of the year.” In addition, the Heritage Foundation also provides analysts who “help members of Congress and their staff prepare for congressional hearings by providing valuable
Institute and the Cato Institute, also conservative, influential think tanks. He also helped found the Federalist Society, an organization of conservative law students and professors, and the American Legislative Exchange Council (“ALEC”) which promotes conservative ideas at the state level. These organizations are funded and supported by a small group of ultra-rich sponsors. As explained by David C. Johnson in his article on supposed tort reform (another pet project of the conservative movement):

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

The movement faced an uphill battle, especially after World War II because “the flexible hybrid of capitalism and the welfare state pioneered in the United States had proved capable of military triumph over Germany, Italy, and Japan.” Further, the bitterness and violence between rich and poor, labor and capitalists, that had marked the early twentieth century in this country had largely disappeared. It is beyond the purview of this article to delve in great detail into the reasons for the changing economic and political climate during the 1950’s and 1960’s; however, by the 1970s, the country experienced chronic economic problems in the form of “stagflation”


154 The Federalist Society is an association of conservative law students which was founded by a conference of law students and professors in 1981 and was partly underwritten by the Olin Foundation. Ari Berman, Big $$ for Progressive Politics, The Nation September 28, 2006 and can be found at http://www.thenation.com/print/article/big-progressive-politics.

155 Cite


157 Id. See also “Buying a Movement,” People for the American Way Foundation, at 32. The report is viewable online at http://www.pfaw.org/pfaw/general/default.aspx?oid=2052. Lynde Bradley, Joseph Coors, and Fred Koch all helped create or fund the John Birch Society. The Allegheny Foundation is also a Scaife-funded Foundation.

158 Phillips-Fein, supra note 145, at 31.

159 Stagflation is an unusual economic phenomenon in which the country experienced both high unemployment and high prices. Ordinarily, you would expect high prices when there is high employment and people have money to spend and compete for goods.
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and an oil embargo by OPEC. The economic downturn provided conservative economic ideas with an opportunity to take root because these ideas were not longer competing against “good times.”

B. Philosophical Foundation for Reducing Income Tax Rates

1. Supply Side Economics: Let’s Kill Santa

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

Taxes should be cut and government spending maintained through deficit financing only when a special condition exists, a condition which Mundell and Laffer say exists now. “There are always two tax rates that produce the same dollar revenues,” says Laffer.

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160 Organization of Petroleum Exporting Countries.

161 Robert Mundell, a Canadian, was a professor of economics at Columbia University.


163 Jude Wanniski, The Mundell-Laffer Hypothesis – A New World View, PUBLIC INTEREST (Spring 1975). Arthur Laffer at the time was a professor at the University of Chicago’s graduate school of business. In this article, Wanniski notes that there was no joint Mundell-Laffer paper, but rather, Mundell wrote the economic theory and Laffer provided data support. Id. at Fn 1.

164 Jude Wanniski, The Mundell-Laffer Hypothesis, Part III, reprinted in Polyeconomics, coversheet to email Wanniski sent to his SSU students explaining the last part of his commentary that originally appeared in Public Interest in 1975. In the email, Wanniski explained that Mundell visited Wanniski at his home and drafted the footnote.
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“For example, when taxes are zero, revenues are zero. When taxes are 100 per cent, there is no production, and revenues are also zero. In between these extremes there is one tax rate that maximizes government revenues.” Any higher tax rate reduces total output and the tax base, and becomes counterproductive even for producing revenues. U.S. marginal tax rates are now, they argue, in this unproductive range and the economy is being “choked, asphyxiated by taxes, says Mundell. Tax rates have been put up inadvertently by the impact of inflation on the progressivity of the tax structure. If the tax rate were below the rate that maximizes revenues, tax cuts would reduce tax revenues at full employment. But a multiplier effect operates if the economy is at less than full employment, and the tax cut then raises output and the tax base, besides making the economy more efficient. Even if a bigger deficit emerges, sufficient tax revenues will be recovered to pay the interest on the government bonds issued to finance the deficit. Thus, future taxes would not have to be raised and there would be no subtraction from future output. Tax cuts, therefore, actually can provide a means for servicing the public debt.\footnote{165}

In 1976, Wanniski made his most important contribution to supply-side economics by writing \textit{Taxes and a Two-Santa Theory}.\footnote{166} As shall be explained below, Wanniski argued that Democrats are the spending Santa Clause and Republicans should be the tax-cut Santa Clause.\footnote{167} Wanniski attributes the success of the Democrats in winning elections to knowing “the first rule of successful politics is Never Shoot Santa Clause.”\footnote{168} Reagan agreed and in 1980, he ran on a platform that advocated tax cuts, with little emphasis on deficit reduction. Despite the fact that the deficit increased markedly during his first term, he won reelection in 1984, which convinced his fellow Republicans that tax cuts were a winning position.\footnote{169} Grover Norquist, the Republican enforcer of no tax increases, has claimed that his tax pledge owes much to Wanniski’s Two-Santas theory.\footnote{170}

\begin{footnotes}
\footnote{165}{\textit{Id.} at fn. 4.}
\footnote{166}{The Two-Santas article was published on March 6, 1976, in \textit{The National Observer}, a weekly published by the Dow Jones. \textit{The National Observer} was no longer published after 1977 and, therefore, it is impossible to obtain a copy from its archives. However, Congressman Jack Kemp, discussed \textit{infra}, kept the article alive by handing out copies. The article has been reproduced by Bruce Bartlett, in \textit{Economic}, \textit{supra} note 162, fn. 178.}
\footnote{167}{\textit{Id.} As Bruce Bartlett observes in his introduction to the Two-Santas article, Irving Kristol immediately recognized the political possibilities in Wanniski’s proposal to turn the Republicans to the party of tax-cuts rather than the party of balanced budgets.}
\footnote{168}{\textit{Id.}}
\footnote{169}{\textit{Id.} During Reagan’s first term, the budget deficit rose from 2.7\% of gross domestic product in 1980 to 6\% by 1983.}
\footnote{170}{\textit{Id.} Interestingly, in a 2005 email to Ben Bernanke, then the chairman of the president’s Council of Economic Advisors, Wanniski wrote that “[t]he Grover Norquist idea of opposing all tax increases is dumb, and Grover knows I believe that.”}
\end{footnotes}
Wanniski initially states that we need both Santas, and that the Democrats are suited to be the spending Santa just as the Republicans are meant to be the Santa of tax cuts. However, as the article progresses, it becomes increasingly clear that tax-cut Santa can and should destroy spending Santa. In his rather short Two-Santas Theory article, Wanniski reviews the economic history of the United States from the Coolidge administration beginning in the 1920’s to the Ford Administration in 1976 and claims to prove that every time the government cut tax rates, prosperity ensued but when the government raised tax rates, either because of economic hard times or to balance the budget, the country suffered economic calamity. The only factor that Wanniski considers is tax rates, ignoring any other possible explanations or factors to account for economic conditions. He singles out for particular praise and emulation presidents Warren Harding and Calvin Coolidge and their Secretary of the Treasury, Andrew Mellon.

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

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

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171 Arthur Laffer continues to adhere to Wanniski’s point of view regarding our country’s economic history, as evidenced by his recent comments on the radio in which he repeated portions of Wanniski’s historical account and continued the narrative through the George W. Bush administration’s tax cuts. NPR, Intelligence Squared, Proposition: The Rich are Taxed Enough, March 3, 2013. Intelligence Squared hosted a panel of four economists divided into two teams who debated the proposition that the rich are taxed enough: Robert Reich and Mark Sandy who opposed the proposition, and Arthur Laffer and Glenn Hubbard who supported it.

172 Id.

173 Id.

174 Id.

175 Id.

176 Id. Wanniski is correct that Eisenhower was a firm believer in balanced budgets, and, although he did balance the budget, unemployment rose from 2.6% to 6.9% during his time in office.
Wanniski acknowledges that Democrats at times play both Santas, but, by temperament, are suited to be spending Santa, only reluctantly cutting taxes when politically expedient. To his great relief, Wanniski believes that Ford and Reagan understand the potency of tax cuts. Therefore, rather than kill spending Santa quickly by shooting him, Ford and Reagan will kill him more slowly by expanding the private sector through tax cuts, eliminating the need for spending Santa.

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

All the United States needs now to prosper is a Coolidge in the White House, a Mellon at Treasury, and GOP tax-cutting St. Nick.177

During WWII, Americans understand that they were now paying the income tax because “Uncle Sam needs your help,” and “Taxes to fight the Axis.” These short, pithy, slogans enabled Americans to understand why paying taxes is patriotic. The anti-tax movement has been able to articulate a philosophy that appears to say that not paying taxes would be good for and would help America.178 The right has been very effective in creating and promoting a philosophy that is very understandable to voters. With regard to taxes, voters understand the message, “Cut taxes, get government out of the way, and the economy will take off.” The anti-tax conservatives recognized that this is a much more attractive philosophy and message than, “We need to balance the budget and to do so we must cut services.” For the last thirty years, the anti-tax conservatives have trumpeted the Wanniski-Laffer-Reagan tax cut philosophy embodied in the first message to great effect. It is difficult to think of a similar message on the left since the Reagan administration with regard to taxes. During WWII and the first few decades after, Americans might not have had a sophisticated grasp of the theory behind the progressive income tax, but they could see and understood the connection between taxes and benefits, and they could

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

178 During the 2008 presidential campaign, then vice-president candidate Joe Biden defended the Democratic Party’s proposal to raise taxes on individuals earning more than $250,000 by stating, “It’s time to be patriotic …. Time to jump in. Time to be part of the deal. Time to help get America out of the rut.” Republican vice-president candidate Sarah Palin rebuked Biden by saying, “…to the rest of America that’s not patriotism….. Raising taxes is about killing jobs and hurting small businesses and making things worse. Michael Falcone, On Tax Policy and Patriotism, The N.Y. Times, September 19, 2008 at A14.
understand that the argument that everyone needs to chip in. Between 1972 and 1999, conservatives created at least sixty new organizations with mission statements modeled after the Heritage Foundation’s, which emphasizes free enterprise, limited government, individual freedom, traditional American values, and a strong national defense.\(^{179}\) In 2004, Pollster Celinda Lake asked a group of white Midwestern swing voters what conservatives stood for and most of the voters repeated the above catchphrases. However, when the voters were asked what liberals stood for, half of them answered that they didn’t know.\(^{180}\)

C. Ronald Reagan, Massive Tax Cuts: Massive Deficits

Reagan became a firm believer in the efficacy of tax cuts and in 1981 pushed through the biggest tax cut in United States history.\(^{181}\) However, the economic boom did not materialize; the federal budget deficit ballooned and unemployment increased to 10 percent.\(^{182}\) In fact, the tax cuts contributed to record peacetime deficits.\(^{183}\) In 1982 the federal deficit was more than double than in 1981 and in 1983 it grew to $343 billion, almost triple the level from when Reagan took office. As a result, the government was borrowing almost one dollar out of every three it spent.\(^{184}\)

Republicans are fond of saying that tax revenues increased during these years. They did, but not because of increased productivity by business. As the government hemorrhaged red ink because of the tax cuts, the administration and its allies in Congress searched for new sources of funding to pay for the everyday expenses of running the federal government. First, they raised excise taxes such as the nickel-a-gallon tax on gasoline (which Reagan referred to as revenue enhancers

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\(^{179}\) Ari Berman, *Big $$ for Progressive Politics*, The Nation, September 28, 2006; the Heritage Foundation, About Heritage.

\(^{180}\) *Id.*

\(^{181}\) JOHNSON & KWAK, *supra* note 10, at 88, fn. 118. The second or third largest tax cut (depending on how you measure it) was the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA), pushed through by George W. Bush, and discussed more fully infra.

The largest as a share of GDP was the 1981 Reagan tax cut; the second largest was the 1964 Kennedy-Johnson tax cut. In 2010, when fully phased in, EGTRRA was projected to reduce tax revenues by $176 billion, or 1.1 percent of GDP (as then projected by the CBO), making it larger than the Revenue Act of 1978. In real dollar terms, EGTRRA was the second-largest tax cut in modern history. We exclude the major tax cuts enacted as a result of the end of World War II. CBO, “Pay-as-you-go Estimate, H.R. 1836: Economic Growth and Tax Relief Reconciliation Act of 2001,” June 4, 2001.

\(^{182}\) DAVID CAY JOHNSTON, *PERFEKTLY LEGAL: THE COVERT CAMPAIGN TO RIG OUR TAX SYSTEM TO BENEFIT THE SUPER RICH – AND CHEAT EVERYBODY ELSE 121 2003.*

\(^{183}\) JOHNSON & KWAK, *supra* note 10, at 68. Government revenues fell from 19.6% of GDP in 1981 to 17.3% in 1984. They grew later on in the decade but never exceeded 18.4% of GDP. OMB, *Fiscal Year 2012 Budget of the U.S. Government: Historical Tables*, Table 1.2.

\(^{184}\) JOHNSON & KWAK, *supra* note 10, at 68.
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rather than call them tax increases); then they increased the Social Security tax. The tax burden of both of these increases is felt more keenly by low and middle income tax payers.

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

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

The rise in the maximum Social Security tax has been sharp. In 1970 the maximum tax was $327. Three decades later the maximum was $4,724 or more than 14 times as much. In 2003 it was almost $5,400, an amount matched by the employer. For a married couple both earning the $87,000 maximum subject to the total tax, it comes to $21,576 or more than $400 paid to the government each week.

185 Id.

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

187 JOHNSTON, supra note 182, at 121-22.

188 Id. at 122.


190 JOHNSTON, supra note 182, at 123.
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Rather than tell the American people the truth, their leaders in Congress assured the public that the extra money being paid into Social Security would go into a trust fund and would earn interest. Of course, no such thing occurred. Instead, the money was used to make up the shortfall in federal revenues caused by the Reagan tax cuts for the wealthy. From 1983 to 2003, the government spent almost $5.4 trillion more than it took in from income, estate, gift, and excise taxes. However, the government debt grew only by $3.6 trillion because of the extra Social Security taxes that were paid in and used for the every day operations of the federal government.191 “In effect the government took dollars from Joe Lunchpail so that the rich could stuff even more into their silk pockets.”192

However, tax cuts are now the centerpiece of Republican economic policy, no matter how the economy is fairing. When economic times are good (an increasing rarity), then taxes should be reduced to return the money to its rightful owners. When the economy is bad, cutting taxes will create economic stimulation. Most taxpayers don’t have the time or ability to study in depth how the federal budget or the income tax system operates; therefore, taxpayers don’t see how fallacious or circular the tax cut arguments are. The mantra is “cut tax.” As the government incurs massive debt, taxpayers develop the impression that the federal government is irresponsible and out of control; therefore, it is throwing good money after bad to continue to fund the federal government with taxpayers’ hard-earned money. As the government then continues to lose funding, the government is forced to cut services or borrow money to meet expenses. This service reduction and mounting debt then further reinforces the belief that government is incompetent and cannot manage its affairs, leading to the argument that taxes should be cut even more.

David Stockman who was the budget director for Ronald Reagan has expressed disgust with the tax cuts at all times philosophy, despite the detriment to the country:

Well, it’s become in a sense an absolute. Something that can’t be questioned, something that’s gospel, something that’s sort of embedded into the catechism and so scratch the average Republican today and he’ll say “Tax cuts, tax cuts, tax cuts,” he explained.

It’s rank demagoguery, he added. We should call it for what it is. If these people were all put into a room on penalty of death to come up with how much they should cut, they couldn’t come up with $50 billion, when the problem is $1.3 trillion. So, to stand before the public and rub raw this anti-tax sentiment, the Republican Party, as much as it pains me to say this, should be ashamed of themselves.193

191 Id. at 123.

192 Id. at 124. Computed by Jarrett Murphy from National Income and Product Accounts, Bureau of Economic Analysis, Commerce Department. Further, from 1983 to 1986, taxes other than Social Security and Medicare totaled less than half of federal spending.

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

D. More Tax Cuts and More Debt

On August 10, 1993, President Bill Clinton signed legislation raising taxes, mostly on higher income taxpayers. Clinton was able to get his tax increase legislation passed by arguing fiscal responsibility and balanced budgets and not based on any ideological or policy arguments or explanations that the progressive income tax is fair. The tax increase passed without a single Republican vote. As a result, the federal government’s annual budget operated in the black and the deficit began to shrink. As a result, in January of 2001, when George Bush entered the

194 JOHNSON & KWAY, supra note 10, at 73.

195 Id. at 73-78. See also, DANIEL J. BALZ AND RONALD BROWNSTEIN, STORMING THE GATES: PROTEST POLITICS AND THE REPUBLICAN REVIVAL (Little, Brown, 1996).

196 BALZ &BROWNSTEIN, supra note 195, at 154.

197 In 2011, when Congress was debating whether or not to raise the debt ceiling, Norquist stated, “Anyone who says we have a deficit problem is either a Democrat who wants to raise taxes or a Republican who’s dimwitted and doesn’t understand what he is talking about.”

198 U.S. Senate Roll Call Votes 103rd Congress – 1st Session. The Roll Call states that the 50 Democratic senators voted for the tax increase and the 50 Republican senators voted against it. Vice-president Al Gore voted in favor of the tax increase, breaking the tie vote, available at http://www.senate.gov/legislative/LIS/roll_call_vote_vote. In the House of Representatives, all of the 175 Republican representatives voted against the tax increase, available at http://www.house.gov/evs/1993/roll406.xml.

199 Interestingly, Bruce Bartlett, a Treasury official in the Reagan administration acknowledged that Clinton’s economic policies were praiseworthy, noting that Clinton returned the federal budget to surpluses. Bruce Bartlett, Those were the days, The N.Y. Times, Jul. 1, 2004 (Bringing the federal budget into surplus is obviously an achievement. After inheriting a deficit of 4.7 percent of gross domestic product in 1992, Mr. Clinton turned this into a surplus of 2.4 percent of G.D.P. in 2000 ….”).
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White House, the Congressional Budget Office was projecting budget surpluses for the next decade, including a $796 surplus of $796 billion.\(^{201}\)

However, in 2010 the budget actually ran a deficit of $1.3 trillion – a difference of over $2 trillion. How did the federal government go from surpluses to deficits during the George W. Bush administration? On June 7, 2001, Bush signed his tax cut package into law and lowered rates on the rich, eliminated the estate tax for one year and gave more than half of the $1.3 trillion tax cut (to be spread over ten years) to the richest 1 percent.\(^{202}\) The Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA) was the second or third largest tax cut in modern history.\(^{203}\) EGTRRA lowered tax rates for almost all taxpayers, increased deductions and exemptions for high-income households, and made it easier to shield retirement funds from taxation.\(^{204}\)

By 2003, the budget surpluses from the Clinton administration were gone, but Bush argued that additional tax cuts would act as an economic stimulus and, with waver Republicans under extreme pressure from organizations such as Grover Norquist’s Americans For Tax Reform, discussed below, Congress passed the Jobs and Growth Tax Relief Reconciliation Act of 2003 (JGTRRA).\(^{205}\) This tax cut bill lowered the tax rate on capital gains and dividends and also accelerated some of the 2001 tax cuts that originally had been scheduled to in later years.\(^{206}\) This tax cut primarily benefited the wealthy whose investments generate capital gains and dividends. (Middle class taxpayers also have investments but mostly in the form of the equity in their homes, and retirement savings, and these investments are largely shielded from taxation.) These tax cuts were then extended through 2010 by the Tax Increase Prevention and Reconciliation Act of 2005.\(^{207}\) In 2010, with the support of President Barack Obama, the tax cuts were extended

\(^{201}\) CBO, The Budget and Economic Outlook: Fiscal Years 2002-2011, January 2001, Table 1-1, p. 2.


\(^{203}\) JOHNSON & KWAK, supra note 10, at 193.


\(^{206}\) Id.

\(^{207}\) The reason that these tax cuts were scheduled to expire in 2010, rather than being made permanent, was because of the manner in which Congress enacted the legislation. In the Senate, most measures require sixty votes in order to end debate and move to a vote; a filibuster allows forty-one Senators to prevent a vote. However, the budget reconciliation process provides an exception to the filibuster rules for bills that change revenue and mandatory spending laws. The budget reconciliation process was created by the Congressional Budget and Impoundment Control Act of 1974 and was intended to expedite budgetary legislation. However, bills passed through this process sunset after ten years. However, when the tax cuts are due to expire, the antitax group argues that allowing the cuts to expire is the same thing as a tax increase.
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again until 2012. When fully phased in, 67 percent of the tax cuts went to the richest 20 percent of households. Households making between $40,000 and $50,000 saw an average 2010 tax reduction of $962, but households making more than $1 million received an average reduction of $168,052.

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

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

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

E. Grover Norquist: Tax Cut Enforcer

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211 JOHNSTON, supra note 182, at 127.


213 Johnston, supra note 182, fn. 115.
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In 2012, George H.W. Bush snapped, “Who the hell is Grover Norquist, anyway?” Of course the former President knew who Norquist is, but his point was that Norquist is not an elected official, yet he wields enormous power. The former President was referring to Norquist’s threats to punish any Republican member of Congress who votes for a tax increase. Norquist is president of Americans for Tax Reform (ATR), an advocacy group which campaigns for lower taxes at the federal and state level. But ATR is not just any advocacy group; it is the central clearing house for all far right conservative causes, and it is well funded.

Norquist has also built a solid working alliance with the Fortune 500 corporate elite and its K Street lobbyists. “What he’s managed to do is to chain the ideological conservatives together with the business guys, who have the money, and to put that money to work in the service of the conservative movement,” says Roger Hickey of the Campaign for America’s Future, who’s repeatedly clashed with Norquist. “And he picks big issues.” Besides taxes, Norquist is also the go-to buy on virtually all of the right’s favorite agenda items, from privatization of Social Security and Medicare to school vouchers and deregulation.


215 Norquist claims credit for the former President’s defeat when he ran for a second term in office as president in 1992. During his first successful campaign in 1988, Bush had promised, “No new taxes.” However, when faced with a looming large deficit, he realized that income taxes would have to go up. An infuriated Norquist claims that he punished the Bush to send a message to other Republican leaders not to stray from the commandment not to raise taxes. As observed by Alan Brinkley, a Columbia University historian, “I don’t know of anyone outside of government who has had this kind of influence on politics before, …. He is sui generis, I think, not a politician, not visible very often in the media, but remarkably powerful.” Id.

216 For example, White house logs indicate that Norquist visited the White House 74 times over a 5 year period when George W. Bush was president. Alison Fitzgerald, No-Tax ‘Zealot’ Norquist Emerges as Biggest Barrier to U.S. Deficit Deal, Bloomberg, May 24, 2011.

217 Norquist has also compared the arguments for imposing the estate tax on the wealthiest Americans to the morality of the Holocaust. (“…[T]he morality that says it’s OK to do something to a group because they’re a small percentage of the population is the morality that says that the Holocaust is OK because they didn’t target everybody, just a small percentage.”) Terry Gross, National Public Radio. Fresh Air, October 2003.

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

Norquist is able to boast that, as of June 1, 2011, 236 U.S. Representatives and 41 Senators from the 112th Congress have signed his Tax Pledge in which they promise never to raise taxes. He also, as of June 17, 2011 has acquired the signatures of 1263 state legislators, in addition to 13 Governors, 5 Lieutenant Governors, 4 Attorney Generals, 3 Secretaries of State, 3 Treasurers, 1 Auditor, and 1 Board of Equalization member. The Tax Pledge is not just a piece of paper; it is a weapon. Woe to the politician who reneges on this promise or even shows signs of weakening. During the primary race for the Republican presidential nomination, then-front-runner Bob Dole refused to sign the pledge and lost the Republican nomination to George H.W. Bush, who had signed the pledge. However, in 1990, faced with the large Reagan-era budget
deficits and debt, George H. W. Bush raised taxes. After George H.W. Bush did so, Norquist targeted Bush for defeat when he ran for reelection in 1992. In 1994, after Republicans had gained control of the House, some Republicans protested the size of the tax cut proposed by the House leadership. Norquist launched a direct mail attack against the group’s leader, forcing the group to back down. Norquist’s revenge is not confined to politicians at the federal level. He has sought to defeat in primary elections Republican legislators who have voted to raise taxes in violation of the pledge. When Abel Maldonado, a state senator from California, voted for a tax increase proposed by then Republican governor Arnold Schwarzenegger, Norquist successfully targeted Maldonado for defeat when he ran for lieutenant governor.

Norquist has spent the last thirty years building a powerful network/coalition of hard core far right conservatives who are opposed to tax increases for any reason. Norquist’s ultimate goal

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229 Id.

230 JOHNSON & KWAK, supra note 10, at 80. Bennett, supra note 225.

231 Cassidy, supra note 223.

In the past few years, a lot of states and cities have been facing budget deficits, which they are legally obligated to close. You might think this justifies higher taxes, but Norquist doesn’t. He’s just brutal to Republican tax raisers. In Virginia, for example, he’s getting involved in this year’s Republican primaries and trying to unseat a number of legislators who voted for higher taxes. It’s a similar story in other states.


233 He has also compared bipartisanship to “date rape.” Cassidy, supra note 223.

is to reduce the government to the size it can be drowned in a bathtub. He hasn’t succeeded yet; however, he was instrumental in damaging the credit rating of the United States government. The debt-ceiling standoff in Congress in the summer of 2011 was due in large part to members of Congress being unwilling to violate the tax pledge they had signed, bringing the nation to the verge of a default. “Congress was willing to cause severe economic damage to the entire population, marvels Paul O’Neill, Bush’s former Treasury Secretary, simply because they were slaves to an idiot’s idea of how the world works.”

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

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

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

The Law and Economics Center mission is to educate judges in how to apply principles of economic analysis to the law. By 1991, the Center had provided such training – with seminars held at resort locations to enhance their attractiveness – to over 40% of the federal judiciary. The Law and Economics Center mission is to educate judges in how to apply principles of economic analysis to the law. By 1991, the Center had provided such training – with seminars held at resort locations to enhance their attractiveness – to over 40% of the federal judiciary.

In the meantime, he has other goals as well. For example, he wants to dismantle and privatize state pension plans and their trillions of dollars of public funds held as investments for retirees. “Just 115 control $1 trillion in these funds,” he says. “We want to take that power and destroy it.” Dreyfuss, supra note 225. In addition, destroying the Democratic party appeals to him. “Also, Democrats used to anger him, Norquist said. He’s past angry now. ‘Do you get mad at cancer? We’ll defeat and crush their institutions, and the trial lawyers will go sell pizza.’ ” Bloomenfeld, supra note 223.


Like the Center for the Study of Market Processes, the LEC is run independently of George Mason, with corporate and foundation sponsors covering “all travel, lodging, and meal expenses for the most powerful players in the legal system – judges.”

F. Think Tanks and Media

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

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

These organizations, through the media, put out the same message, creating a “multiplier” effect and give the impression that there is a consensus or wide-spread support for their opinions and policies, that “everyone thinks so.”

The Right’s organizations use sophisticated market methods to “translate” – packaging ideas to appeal to people’s deeper feelings and values – and disseminate messages

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237 Johnson, supra note 157, at 140. The Law and Economics Centers Founded by Henry G. Manne at not only George Mason but at Emory University and the University of Miami, receive funding from the Sarah Scaife Foundation. George Mason University Foundation, Inc. the George Mason University, and George Mason School of Law also receives funding from the Charles G. Koch Charitable Foundation, John M. Olin Foundation, and The Lynde and Harry Bradley Foundation (according to records from 1989 to 2002.)


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

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

_id._
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designed to alter underlying public opinions to be supportive of their shared ideology. Even single words or phrases, selected for their effectiveness, are shared by multiple voices to reinforce the right wing message.

This in turn leads to public support for their organizations and ideology, puts public pressure on legislators to support their issues, and elects public officials who support their agenda and appoint judges and agency officials who carry out their policies.\textsuperscript{239}

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

\begin{quote}
Layer upon layer of seminars, studies, conferences, and interviews [can] do much to push along, if not create, the issues, which then become the national agenda of debate …. By multiplying the authorities to whom the media are prepared to give a friendly hearing, [conservative donations] have helped to create an illusion of diversity where none exists. The result can be an increasing number of one-sided debates in which the challengers are far outnumbered, if indeed they are heard at all.\textsuperscript{240}
\end{quote}

Talk show radio and cable news, in particular, have played an important role in broadcasting the anti-tax, anti-government message. Rush Limbaugh has been the top-rated radio host for the last twenty years,\textsuperscript{241} and Fox News has been the dominant cable news channel since 2002.\textsuperscript{242} Rush Limbaugh is not alone, however. As of spring 2011, the top eight talk radio shows featured conservative hosts. The top eight were: (1) Rush Limbaugh, (2) Sean Hannity, (3) Michael Savage, (4) Glenn Beck, (5) Mark Levin, (6) Dave Ramsey, (7) Neal Boortz, and (8) Laura Ingraham.\textsuperscript{243} Talkers Magazine updated spring 2011. Admittedly, there probably is a great deal of overlap in the listening audiences. Every weekday, and sometimes on weekends, these conservative talk show hosts preach the anti-government, anti-tax message to their audience.

A more recent tactic by the anti-tax movement has been to use a fake grassroots organization to create the impression that, average Americans, fed up with taxes, have spontaneously organized

\begin{itemize}
\item \textsuperscript{239}Johnson at 10.
\item \textsuperscript{241}Zev Chafets, \textit{Late-Period Limbaugh}, The N.Y. Times, July 6, 2008.
\item \textsuperscript{243}Talkers Magazine, Spring 2011, available at \url{http://talkers.com/top-talk-radio-audiences/}. Glenn Beck and Neal Boortz are no longer hosting programs. Boortz recently retired and Glenn Beck became so controversial that he was switched to cable television.
\end{itemize}
and banded together to fight back: the Tea Party. Historically objections to taxes tended to be against specific taxes or the purpose for which they were used (e.g., war) but this new objection, as voiced by the Tea Party movement is against tax in general.\textsuperscript{244} However, the Tea Party is organized and funded by FreedomWorks, an organization that, until recently, was run by Dick Armey, the former House majority leader for the Republicans. FreedomWorks is funded by the same right-wing group of billionaires as the other organizations, such as Heritage Foundation and the Manhattan Institute.\textsuperscript{245}

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

Beginning in the 1940’s, radio and television sitcoms began to air episodes (especially around March which was the month in which the return date formerly fell, or April) in which taxpayers had to file their annual tax returns.\textsuperscript{246} One notable change over the years is in the number of episodes: fifteen in 1940, twenty-seven in the 1950s, ten in the 1960s, eight in the 1970s, seven in the 1980s, fourteen in the 1990s, and three from 2000 to 2006.\textsuperscript{247} The high number of episodes in the 1940s and 1950s reflects the fact that for many of the taxpayers, the federal income tax was a new experience.\textsuperscript{248} The spike in the 1990s might well reflect the fact that Congress was holding highly publicized hearings attacking the Internal Revenue Service, discussed below.\textsuperscript{249}

\begin{itemize}
  \item \textsuperscript{244} Lavoie, \textit{supra} note 151.
  \item \textsuperscript{245} Paul Krugman, \textit{Tea Parties Forever}, The N.Y. Times, Apr. 13, 2009, at A21.
  \item \textsuperscript{246} Lawrence Zelenak, \textit{From the Great Gildersleeves to Homer Simpson: Six Decades of the Federal Income Tax in Situation Comedies},
  \item \textsuperscript{247} \textit{Id.} at 3.
  \item \textsuperscript{248} Burns and Allen (radio) “Income Tax Problems,” aired March 1, 1950 in which George explains to Gracie why the government needs the money:

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

  \item \textsuperscript{249} See \textit{e.g.}, Camp, \textit{supra} note 78; Diane L. Fahey, \textit{The Tax Court’s Jurisdiction over Due Process Collection Appeals: Is it Constitutional?} 55 BAYLOR L. REV. 453, 457-58 (2003); (discussing the Senate Finance Committee hearings that led to the enactment of the IRS Restructuring and Reform Act).
\end{itemize}
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Many of the episodes had plots in which a taxpayer would have to decide whether or not to be truthful on his or her tax return. Especially in the earlier episodes, the taxpayer is anguished over either an honest mistake or a deliberate omission of some items of income (and usually in relatively small amounts). Although many of the taxpayer express fear that they will face prison, the Internal Revenue Service agents are not portrayed unsympathetically and will thank the taxpayer for his or her honesty when he or she confesses to the understatement and corrects the return. Many of the taxpayers express pride that “they did the right thing” and paid their fair share of tax because of all the benefits they receive from living in this country. However, in some of the later episodes in the 1990s and 2000s, there is some evidence of decreasing respect for the income tax system.

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

The earlier storylines reflected the taxpayer’s (1) recognition that our lives are enhanced by the benefits the government provides (a quid pro quo basis for compliance), and (2) respect for the social contract that “we are in this together” and need to pay our fair share because others are doing so. As discussed above, threats are not sufficient to obtain taxpayer compliance with their taxpaying obligations. As noted by Lavoie, “Taxpayers’ willingness to pay taxes increases if

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250 Lawrence Zelenak, Justice Holmes, Ralph Kramden, an the Civic Virtues of a Tax Return Filing Requirement, 61 Tax Law Rev. 62-63 (2007) The Honeymooners, “Income Tax,” Episode 17, aired March 7, 1953. Ralph Kramden finds that he owes $15 which he could pay by using the money he had saved for a new bowling ball. Instead, he gives the money to a priest who stops by to ask for a donation for the poor. Ralph decides he will work an extra shift to earn the money for the tax and tells his wife, Alice:

I didn’t mean what I said before about income taxes. Boy, we should give everything to the government. We’re living in a great country. This is the great country in the world. We’ve got parks for the kids. Everybody’s free to say what they think and do and please. It’s a great place.

251 Roseanne, “April Fool’s Day” episode aired April 10, 1990 on ABC, in which the taxpayers cheat on their taxes and bitterly denounce the IRS and the Internal Revenue Code to IRS employees who are rude and sarcastic. Roseanne and Dan Connor must determine whether they need to include on their income tax return $400 that Roseanne earned selling magazine subscriptions. When one of the children asks whether the parents cheat on their taxes, Roseanne says no, but winks and nods at the same time, indicating that she and her husband do cheat. Roseanne and Dan then go visit an IRS office for assistance, but the IRS employee is sarcastic and rude. The employee explains that Roseanne did not receive a Form 1099 for the $400 because a Form 1099 is not required for amounts less than $600. “The answer is there in writing. Sorry there are no pictures.” Roseanne responds angrily that “No human being can really understand these things, you know that. That's why you've got to go get some $200 an hour lawyer to explain the crap to you, you know. And I can't afford $200 an hour.” Another IRS employee then retorts, “We don't write the stinking laws. You got a complaint, talk to the idiots in Congress.” Roseanne bitterly erupts that, “The poor people and us regular people, we're paying more taxes than the rich people, 'cause they've got all the lawyers to figure out all the loopholes.” The Connors return home and complete their tax return, with the implication that they did not include the $400 in their income.

Id. at 67-69.
they understand the implicit quid pro quo received in exchange for their taxes and they if perceive that others are reciprocating by paying their share of the tax burden as well.”

G. The Internal Revenue Service Under Attack

1. 1998 Senate and House Hearings into Alleged Abuses

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

> The tax determination process ultimately rests on taxpayers disclosing their financial affairs and paying what they owe through withholding or otherwise without overt government compulsion. … It is each citizen’s self-enforcement of the legal duty that keeps … the tax … system running smoothly. With over 130 million individual tax returns and over 80 million other returns (not including information returns) filed in calendar year 2001, the system depends on the veracity, if not the kindness, of taxpayers.

The IRS obtains information about taxpayers through tax and information returns and audits; however, the IRS employs these tools solely for the purpose of encouraging compliance. It is by obtaining information that the IRS is able to monitor, verify, and enforce the law, that is to say, to require taxpayers to determine their correct tax liability and pay it.

However, particularly beginning with Ronald Reagan, the anti-tax, anti-federal government cabal, bitterly denounced the federal government in general and the IRS in particular. Many Americans are familiar with Ronald Reagan’s words when he took the oath of office to serve as president of this country, “Government is not the solution to the problem; government is the problem.” On other occasions, he had stated that the most dreaded words in the English language were, “I’m from the government and I’m here to help you.” He also famously denounced the federal income tax as “theft.”

Reagan was not alone in his denunciations of our government and tax system. Congressmen Jack Kemp also called for the abolishment of the income tax and the IRS.

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

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252 Lavoie, supra note 51, at 46.
253 Camp, supra note 78, at 1, 6

254 I.R.M. 1.2.4.10 (1974) (“The primary objective in selecting returns for examination is to promote the highest degree of voluntary compliance on the part of the taxpayers.”) The I.R.M. – the Internal Revenue Manual – is the penultimate guide for IRS personnel.

255 Cite
knowing, by definition, the fundamental rights of privacy and fairness must be violated.\textsuperscript{256}

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

Beginning in September of 1997, the Senate Finance Committee held hearings in which former and current IRS agents and taxpayers recounted horror stories of alleged agency abuse of innocent taxpayers. Senate William Roth of Delaware was the force behind most of the hearings which he arranged to be held in a Senate committee room specially designed for intelligence briefings with walls that are supposed to block electronic eavesdropping and with posted guards who searched those who wished to enter the room. At one point, six IRS agents testified from behind a black curtain, with their voices electronically distorted and their identities concealed, the way turncoat mobsters who feared their godfathers would have them whacked were allowed to testify. At a time when some members of Congress were describing government law enforcement agents as “jack-booted thugs,” the impression that the IRS was a government Mafia that could have you killed for breaking its code of silence was unmistakable.\textsuperscript{257}

These anonymous agents and taxpayers recounted dramatic stories of armed IRS agents bursting into the homes and businesses of innocent taxpayers while making threats, and, in one instance, alleging ordering a teenage girl to change her clothes while a male agent watched, and of agents issuing subpoenas solely to harass enemies.\textsuperscript{258}

In April 1998, Senator Roth and the Senate Finance Committee held additional, equally sensational hearings, which led to Senators Trent Lott of Mississippi and Frank Murkowski of


\textsuperscript{257} JOHNSTON, supra note 182, at 145-46.

\textsuperscript{258} Id. at 146.
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Alaska to denounce the IRS’s “Gestapo-like tactics.”

Representative Bill Archer, Chair of the House Ways and Means Committee, also thundered that “Criminals have more rights in this country than taxpayers do. It shouldn’t be that way. That’s wrong and we’re going to fix it.”

In addition to denouncing the IRS as an out-of-control rogue agency, members of Congress denounced the Internal Revenue Code as a monstrosity that no honest taxpayer could understand in order to determine honestly and accurately one’s correct tax liability. Representative Bill Archer claimed that “…income is a subjective term. No two people agree on precisely what is income for tax purposes.”

Senator Roth belittled the tax code as “a mine field for most Americans, and even too complex to be efficiently and consistently administered by the Internal Revenue Service.” Implicit in these statements is the belief that a taxpayer’s true liability cannot be determined with any degree of accuracy; therefore, any action on the part of the IRS to collect the tax is unreasonable and an arbitrary exercise of government power. If Americans believe these congressional leaders as to what is the problem with government, Americans are going to believe in the proposed solutions.

However, virtually every accusation leveled against the IRS was repudiated after thorough investigations by the General Accounting Office, Justice William Webster (a former FBI Director who the Senate Finance Committee appointed to investigate the accusations), the New York Times, Tax Notes, and the Wall Street Journal.

For example, David Cay Johnston, at the time an investigative reporter for the New York Times found that “[m]ost of the crucial testimony in the 1997-98 hearings that preceded the new law, contending abuses by I.R.S. agents has proved to be unfounded, based on false or misleading testimony or disproved in subsequent court actions.” Judge Weber also found the accusations leveled against the IRS to be unfounded.

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259 Id. at 147. See also David Cay Johnston, I.R.S. Commissioner Promises Full Inquiry, The N.Y. Times, May 2, 1998:

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

260 Camp, supra note 78, at 82, citing Representative Bill Archer, News Conference (Oct. 21, 1997) (transcript available on LEXIS in FDCH Political Transcripts.)

261 Camp, supra note 78, at 83, referring to Representative Bill Archer, News Conference (Sept. 30, 1997) (transcript available on LEXIS in FDCH Political Transcript.) As noted by Professor Camp, “Archer was trying to segue into his favorite reform: consumption tax. Camp, supra note 78, at fn. 435.


263 Kirsch, supra note 78, at 915, citing McAdams, supra note 62, at 400-07.

264 JOHNSTON, supra note 182, at 155-56.

“No evidence was found of systematic abuses by agents,” Judge Webster reported, although his investigators did find “isolated and individual” examples of misconduct. Judge Webster concluded that there was “no evidence in the use-of-force incidents to suggest that …agents are overly aggressive, use force unnecessarily, or are improperly trained.”

Even more significantly, the General Accounting Office’s investigation failed to find abuse of power by the IRS.

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

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

2. Congressional Restrictions on IRS Enforcement Powers

Nevertheless, after the second round of hearings, the Senate voted 97 to 0 to pass The Internal Revenue Service Restructuring and Reform Act of 1998 (“RRA 98”). The House followed suit and Clinton signed the bill into law on July 22, 1998. RRA 98 made a number of significant changes in the structure of the IRS, most of which are beyond the scope of this article; however, one provision in particular had the effect of handcuffing IRS employees and made
them fearful that they could lose their jobs as a result of complaints by disgruntled or vindictive taxpayers. The provision is commonly referred to as the Ten Deadly Sins. RRA 98 mandated that IRS employees would be fired if found to have engaged in any of ten acts, which included violating a taxpayer’s constitutional or civil rights, threatening an audit for personal gain, making a false statement under oath or falsifying or destroying documents to conceal mistakes.\(^{271}\) Certainly, committing any of these acts would be egregious behavior on the part of an IRS employee. However, IRS employees feared being accused, even unjustly, and subjected to investigations by the Department of the Treasury’s inspector general for tax administration.\(^{272}\) Well known tax protestors such as Irwin Schiff who had served time for tax fraud, began to hold seminars teaching people how to use the new law to evade taxes.\(^{273}\)

Collection efforts by IRS personnel immediately plummeted because of (1) concerns of being falsely accused under the ten deadly sins, and (2) the shift of IRS personnel from enforcement to service.\(^{274}\) Levies on and seizures of taxpayer assets dropped from 3,669,090 in 1997 to 2,505,259 in 1998.\(^{275}\) Even more dramatically, levies and seizures dropped to 504,151 in 1999.

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\(^{271}\) The ten deadly sins contained in RRA 98 are:

1. Willful failure to obtain the required approval signatures on documents authorizing the seizure of a taxpayer’s home, personal belongings, or business assets;
2. Providing a false statement under oath with respect to a material matter involving a taxpayer or taxpayer representative;
3. With respect to a taxpayer, taxpayer representative, or other employee of the Internal Revenue Service, the violation of (i) any right under the Constitution the United States; or (ii) any civil right established under (i) title VI or VII of the Civil Rights Act of 1964; (ii) title IX of the Education Amendments of 1972; (iii) the Age Discrimination Act Employment Act of 1967; (iv) the Age Discrimination Act of 1975; (v) Section 501 or 504 of the Rehabilitation Act of 1973; or (vi) title I of the Americans with Disability Act of 1990;
4. Falsifying or destroying documents to conceal mistakes made by any employee with respect to a matter involving a taxpayer or taxpayer representative;
5. Assault or battery on a taxpayer, taxpayer representative, or other employee of the Internal Revenue Service, but only if there is a criminal conviction, or a final judgment by a court in a civil case, with respect to the assault or battery;
6. Violations of the Internal Revenue Code of 1986, Department of Treasury regulations, or policies of the Internal Revenue Service (including the Internal Revenue Manual) for the purpose of retaliating against, or harassing, a taxpayer, taxpayer representative, or other employee of the Internal Revenue Service;
7. Willful misuse of the provisions of section 6103 of the Internal Revenue Code of 1986 for the purpose of concealing information from a congressional inquiry;
8. Willful failure to file any return of tax required under the Internal Revenue Code of 1986 on or before the date prescribed therefore (including any extensions), unless such failure is due to reasonable cause and not to willful neglect;
9. Willful understatement of Federal tax liability, unless such understatement is due to reasonable cause and not to willful neglect; and
10. Threatening to audit a taxpayer for the purpose of extracting personal gain or benefit.

RRA 98, §1203(b).


\(^{273}\) JOHNSTON, *supra* note 182, at 150.


\(^{275}\) *Id.* at 984.
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and to 220,174 in 2000. Taxpayers with influence with their Congressperson were able to use that influence to resolve cases in the taxpayers favor:

In Nashville, a revenue agent said anyone there could get a tax case resolved favorably if the taxpayer had enough influence to get a senator or congressperson to complain to the IRS. “We just collapse,” the 14-year veteran said.

“Please don’t call us tax collectors in the newspaper, one longtime revenue officer in New York said. “We don’t collect taxes anymore. We aren’t allowed to.”

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

Donald Alexander, the Nixon administration tax commissioner, was astonished at what his party, the party of law and order, had done to breed disrespect for tax law enforcement. Alexander, who had gone on to become a prominent Washington tax lawyer, said he would have none of the fashionable Republican view that law enforcement was good, audits were bad. And he believed that weakening the IRS was an unprincipled way to restrain the growth of government because the benefits went to the sharpers at the expense of the honest.

“It’s a dumb law,” Alexander said of the reform act and its Ten Deadly Sins. “When someone can fail to meet his or her tax obligations without a worry about having enforcement actions taken, then other creditors are going to come in first and get paid, and the deadbeat taxpayer wins.”

[The decline in tax rates paid by the largest companies and the increased willingness of rich Americans to hide income and to undervalue gifts were the predictable results of slashing the number of auditors and then handcuffing those that remained. … “The fewer traffic policemen you have, the more chances people are going to take,” he said. “And as people find that their neighbors are not paying their fair share, they are encouraged to not pay their share, either.”]

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276 Id.

277 JOHNSTON, supra note 182, at 152. Johnston also uncovered evidence suggesting that IRS supervisors refused to support the conclusions of IRS agents who were auditing big oil companies like Unocal and Chevron. Id. at 252-53. Similar accusations arose in 2004 relating to the IRS’s audit of Micrel, Inc., See Warren Rojas, Agent says IRS Used Disclosure, Circular Referrals to Block Audit TAX NOTES 687 (2004) (IRS agent accused of wrongdoing after making public allegations of collusion between corporation under examination and senior IRS executives).

278 JOHNSTON, supra note 182, at 153, 166. See also Donald L. Bartlett & James B. Steele, THE GREAT AMERICAN TAX DODGE: HOW SPIRALING FRAUD AND AVOIDANCE ARE KILLING FAIRNESS,
Nevertheless, the IRS, under the new Commissioner, Charles Rossotti, did exactly that and cut the number of audits for all income levels except for poor taxpayers who received the Earned Income Tax Credit.\textsuperscript{279} Other than being audited in 1997, Commissioner Rossotti had no background in tax although he was a successful entrepreneur who had founded American Management Systems, which contracted with government agencies to integrate technology and management.\textsuperscript{280} In fiscal year 2000, assigning IRS personnel to customer service instead of examination of returns reduced examination programs by 605 staff year, and in fiscal year 2001, the number of professional staff in audit and field collection was approximately 21\% lower than before 1987.\textsuperscript{281} Under his watch, the audit rate for taxpayers making more than $100,000 fell so that the odds of being audited were one in 145.\textsuperscript{282} The risk for S Corporations, favored by doctors, lawyers, and other wealthy professionals fell to one in 233. In addition, audits of gift and estate tax returns also sharply dropped. In 1997, for gifts of $1 million or more, IRS auditors had recommended more taxes in four out of five audited returns, with the average return understating the value of the gift by $303,000, a relatively large amount.\textsuperscript{283} However, a provision in the 1997 Taxpayer Relief Act required the IRS to audit gift tax returns within three years or accept them as filed. Prior to the change in the law, gift tax returns oftentimes were not audited until the donor died and the estate tax return was filed. When the number of IRS auditors was reduced to 78 agents, audits of these complicated gift tax returns were reduced to thirty-one minutes, creating an incentive for wealthy taxpayers to understate the value of gifts and avoid paying the proper amount of tax.\textsuperscript{284} The one group of taxpayers who saw their risk of being audited increased, were recipients of the EITC. In fact, in 2000, the odds of being audited were one in 47, making them approximately three times more likely to be audited than the affluent. They were even somewhat more likely to

\textsuperscript{279} The earned income tax credit (“EITC”) is a welfare system for the working poor administered through the tax system. The EITC is a way of giving poor but working taxpayers money by means of a refundable tax credit, meaning that the taxpayer receives back more in taxes than the taxpayer paid. The amount of the refund rises as the taxpayer earns more up to a point and then begins to fall until it is phased out when income reaches a certain level. The amount of the credit is also dependent on whether the taxpayer has one or two (and at times, three) children, although a small credit is provided for very poor working taxpayers with no children.

\textsuperscript{280} JOHNSTON, supra note 182, at 157,161.

\textsuperscript{281} Lederman, supra at 982-83.

\textsuperscript{282} JOHNSTON, supra note 182, at 164.

\textsuperscript{283} Id. at 165.

\textsuperscript{284} Id. at 165.
be audited than businesses with assets between $1 million and $5 million whose audit rate was only one in 49.\footnote{Id. at 166. Congress was willing to provide the IRS with $100 million in funds specially earmarked for audits of EITC recipients. \textit{Id.} at 132. However, to reduce taxpayer complaints about long waits or unanswered phone calls, Commissioner Rossotti ordered auditors and tax collectors to staff the phones, contributing to the reduction in the number of audits of other taxpayers. \textit{Id.} at 164.}

In more recent years, the situation has not improved. The net tax gap was $385 billion in 2006 (the most recent year the IRS has been able to estimate).\footnote{Taxpayer Advocate Service – 2012 Annual Report to Congress – Volume One, p. 7. The net tax gap reflects the amount by which tax liabilities exceed tax collection after accounting for late payments and enforced collections. The gross tax gap – the amount of tax due but not paid timely and before enforced collections – was estimated to be $450 billion.} Given that there are 116 million households in the United States, this means that each household is paying a “surtax” of approximately $3,300 to subsidize noncompliance by others.\footnote{Id. at 35, referencing the Government Accountability Office (GAO), GAO-13-120, Financial Audit: IRS’s Fiscal Years 2012 and 2011 Financial Statements 65 (Nov. 2012), at \url{http://www.gao.gov/assets/650/649881.pdf}, and the Department of the Treasury, \textit{FY 2013 Budget in Brief}, at \url{http://www.treasuary.gov/about/budget-performance/budget-in-brief/Documents/11.20IRS_508%20-%20%20passed.pdf}.} One would expect Congress to take action and fund the IRS so that it could effectively pursue noncompliant taxpayers. However, Congress has reduced the IRS’s budget in the last several years,\footnote{\textit{Id.} at 35, referencing Letter from Douglas H. Shulman, Commissioner of Internal Revenue, to the chairman and ranking members of the House Committee on Ways and Means (and its Subcommittee on Oversight) and the Senate Committee on Finance (October 17, 2011), at \url{http://Democrats.waysandmeans.house.gov/sites/Democrats.waysandmeans.house.gov/files/media/pdf/112/Rep_Le wis_IRS-Letter.pdf}. Former Commissioner Charles O. Rossotti, in his book, \textit{Many Unhappy Returns: One Man’s Quest to Turn Around the Most Unpopular Organization in America} 278 (2005) stated that the most difficult part of his job was dealing with the IRS’s budget, to the astonishment of his business associates. (“When I talked to business friends about my job at the IRS, they were always surprised when I said that the most intractable part of the program integrity cap adjustment” mechanism where new funding is appropriated for IRS enforcement programs, but in a way that causes the Taxpayer Advocate concern that this mechanism will actually have a deleterious effect on voluntary compliance, \textit{infra}. The IRS’s budget was reduced from fiscal year 2010 to fiscal year 2011, and from fiscal year 2011 to fiscal year 2012, and is facing the possibility of future cuts. \textit{Id.} at 35. \textit{See also} Alan Fram, \textit{Watchdog: Growing IRS workload causing problems}, Yahoo! Finance, January 11, 2012 (“Congress cut the IRS budget to $11.8 billion this year. That is $300 million less than last year and $1.5 billion below the request by President Barack Obama, who argued that boosting the agency’s spending would fatten tax collections and provide better service for taxpayers.”).} despite the fact that that in 2012, the IRS collected approximately $2.52 trillion on a budget of approximately $11.8 billion, which is a return on investment of approximately 214:1.\footnote{\textit{Id.} at 35, referencing the Government Accountability Office (GAO), GAO-13-120, Financial Audit: IRS’s Fiscal Years 2012 and 2011 Financial Statements 65 (Nov. 2012), at \url{http://www.gao.gov/assets/650/649881.pdf}, and the Department of the Treasury, \textit{FY 2013 Budget in Brief}, at \url{http://www.treasuary.gov/about/budget-performance/budget-in-brief/Documents/11.20IRS_508%20-%20%20passed.pdf}.} In a letter to Congress last year, former Commissioner Douglas H. Shulman informed Congress that the then proposed cuts to the IRS budget would result in reduced revenue collection of seven times as much as the cuts.\footnote{\textit{Id.} referencing Letter from Douglas H. Shulman, Commissioner of Internal Revenue, to the chairman and ranking members of the House Committee on Ways and Means (and its Subcommittee on Oversight) and the Senate Committee on Finance (October 17, 2011), at \url{http://Democrats.waysandmeans.house.gov/sites/Democrats.waysandmeans.house.gov/files/media/pdf/112/Rep_Lewis_IRS-Letter.pdf}. Former Commissioner Charles O. Rossotti, in his book, \textit{Many Unhappy Returns: One Man’s Quest to Turn Around the Most Unpopular Organization in America} 278 (2005) stated that the most difficult part of his job was dealing with the IRS’s budget, to the astonishment of his business associates. (“When I talked to business friends about my job at the IRS, they were always surprised when I said that the most intractable part of the }}
The IRS’s budget problems do not only affect the agency’s ability to pursue collection of delinquent amounts. The IRS is unable to respond effectively to taxpayers’ requests for assistance and information, which is going to lead to a further erosion in taxpayers’ willingness to comply voluntarily with their taxpaying obligations. Despite the fact that of the 140 million individual taxpayers who filed tax returns for fiscal year 2011, 59% paid preparers to prepare and file the returns and another 30% used tax software programs to assist them in preparing the returns themselves, the IRS has been inundated with phone calls and correspondence from taxpayers requesting information and assistance. In each of the last two fiscal years, the IRS has received more than 115 million phone calls and has become increasingly unable to answer them. Further, the IRS’s ability to process taxpayer correspondence in a timely manner has also declined from fiscal year 2004 to fiscal year 2012. The IRS receives more than 10 million letters from taxpayers each year in response to IRS adjustment notices.

Given its funding constraints and the other demands on its time, the IRS now only audits 1% of individual taxpayers, and most of these audits are conducted by automated correspondence because face-to-face audits are expensive. Almost three out of four audits of individual taxpayers are now limited issue examinations conducted by mail. As a result, the IRS in fiscal year 2011 only conducted traditional face-to-face audits of just one out of every 360 taxpayers.

3. Erosion in Taxpaying Ethos

Prior to the RRA 98, the IRS’s avowed mission was to collect the “true” tax liability owed by the taxpayer. Prior to RRA 98, the IRS mission statement stated as follows:

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

job, by far, was dealing with the IRS budget. The reaction was usually ‘Why should that be a problem? If you need a little money to bring in a lot of money, why wouldn’t you be able to get it?’ “).
Underlying this mission statement was the belief that a taxpayer’s true tax liability could be determined and should be collected. However, certain members of Congress used the RRA 98 hearings to convince the public that a true tax liability could not be determined, hence making the tax system arbitrary, and therefore not to be trusted. Subsequent to RRA 98, the IRS’s mission statement was changed to the following:

Provide America’s taxpayers with top quality service by helping them understand and meet their tax responsibilities and by applying the tax law with integrity and fairness to all.

The new mission statement makes no reference to determining the taxpayer’s correct liability or to collection. However, to ensure continued taxpayer compliance, taxpayer’s must be convinced that others are paying their taxes and in the proper amounts. There is an alarming decrease in taxpayer’s attitudes towards their responsibilities, an erosion that became quite marked immediately after the RRA 98 hearings.

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

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

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297 Infra.


300 INTERNAL REVENUE SERVICE, THE IRS OVERSIGHT BOARD; See also IRS OVERSIGHT BD., 2004 ANNUAL REPORT 11 (2004) at http://www.treas.gov/irsob/documents/2004_annual_report.pdf (reporting a continuing decrease in the percentage of Americans who feel that it is not at all acceptable to cheat on their income taxes).
Even more alarmingly, in her 2012 Annual Report to Congress, Taxpayer Advocate Nina Olson reported that in a statistically representative national survey by the Taxpayer Advocate Service (“TAS”) of over 3,300 taxpayers who operate businesses as sole proprietors, only 16% said that they believed the tax laws are fair. Further, only 12% believe that taxpayers pay their fair share of taxes. In addition, 73% of the surveyed taxpayers said that the “wealthy have ways of minimizing their Federal taxes that are not available to the average taxpayer,” and only 12% said that “everyone pays their fair share of taxes.” This survey reveals an alarming erosion in taxpayer belief that (1) the income tax itself is fair, and (2) it is administered in a way that is fair. In addition, in a Gallup poll in 1999 (shortly after the Senate Finance Committee hearings on the IRS, 49% of Americans surveyed thought that there taxes were unfair, while 45% called them fair. In comparison, during World War II, Gallup polls found that eight out of 10 Americans believed their taxes were fair.

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

The Taxpayer Advocate believes that increasing funding for collection and enforcement but not assistance will erode voluntary compliance in two ways. The first way – on the taxpayer end of compliance – will occur because taxpayer services are significant driver of tax compliance. In order to promote voluntary compliance, the IRS needs to be able to publish tax forms and instructions, and educate taxpayers, tax return preparers, and tax software manufacturers. The

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301 2012 Annual Report to Congress – Volume One, p. 3. The Taxpayer Advocate went on to state that she “finds this extraordinary lack of public trust in the method by which our government is funded to be profoundly disturbing.” Id.

302 Id.

303 Robert Borosage & Celinda Lake, supra note 1. Talking Taxes, The American Prospect, May 22, 2005, at http://prospect.org/cs/articles?article=talking_taxes. Interestingly, a Gallup poll taken after the attacks on September 11, 2001 found that 61% of Americans thought their taxes were fair compared to 34% who said they were unfair. Id. This lends further proof to the belief that Americans rally round their government when the country faces a threat.

304 Id. at 38-39.

305 Id. at 39.
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second way – on the IRS’s end of compliance – will occur because an enforcement only cap adjustment will force the IRS to become more a hard-core enforcement agency. However, for fiscal year 2011, 98% of IRS tax collections resulted from front-end voluntary compliance. Two percent of total IRS tax collections were the result of enforcement activity at the back-end of compliance.\textsuperscript{306} As noted by the Taxpayer Advocate, “In our effort to enforce the laws against noncompliant taxpayers, we must take care to avoid steps that may alienate compliant taxpayers and thereby jeopardize the existing tax base.”\textsuperscript{307} (Although only 2% of tax collections are the result of enforcement activity, that activity is vital to ensure that other taxpayers voluntarily comply. If taxpayers believe that the IRS is taking action against noncompliance taxpayers, other taxpayers don’t feel like “chumps” for voluntarily filing and paying.)

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

One model of tax compliance … suggests that a norm of compliance can gradually erode as enforcement decreases until the norm “tips” to one of noncompliance. Once there is a norm of noncompliance, the psychic costs of evasion are lower, so authorities likely will have to increase enforcement above the previous level to restore the previous level of compliance. In other words, the model suggests that it is difficult for the government to disturb an existing equilibrium reflecting a norm of noncompliance but that it can be done with increased enforcement.\textsuperscript{308}

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

potential norm entrepreneurs … alerting the public to the existence of a shared complaint and suggesting a collective solution. Under certain circumstances, the enactment of legislation may lower the cost to individuals of expressing the new norms, resulting in a norm bandwagon that encourages an ever-increasing number of people to reject a previously popular norm. Eventually, a tipping point is reached, where the new norm becomes generally accepted and adherence to the old norm produces social disapproval.\textsuperscript{309}

\textsuperscript{306} Id. at 39.

\textsuperscript{307} Id. at 39.

\textsuperscript{308} Lederman, \textit{supra} note 58, at 1509-10.

V. Conclusion

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

There is a deliberate campaign to destroy this trust and a new norm of noncompliance is beginning to take root. The anti-tax financial elites have an easily understood philosophy: cut taxes and we will all prosper. The evidence is to the contrary, but relatively few people have the resources to ferret out the truth. Further, supporters of the income tax cannot point to a cogent, easily understood argument they have been offering in support of tax. Americans do not see the connection between the tax cuts and the federal deficit because neither congressional leaders nor the media explains it to them. Further, the IRS is so under funded and understaffed that it cannot provide the education and assistance taxpayers need in order to comply with their taxpaying obligations. The financial elites have not only been successful in starting to convince Americans that their taxes are too high, but have succeeded in developing strategies, networks, and funding to achieve their goals. The tax paying ethos was created in a relatively short period of time during WWII; once a tipping point is reached, a nontaxpaying ethos quickly can become the norm.