Legitimacy and the Right of Revolution: The Role of Tax Protests and Anti-Tax Rhetoric in America

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Do you know what it's called when someone else controls the fruits of your labor. It is tax slavery by the government.\footnote{Professor of Law Tulane Law School. © Marjorie Kornhauser 2002. I would like to thank Adeno Addis, Jeanne Carriere, and John Stick for their many helpful comments.}


The income tax is unconstitutional . . . [T]he Constitution has been so assaulted by the 16th amendment . . . \footnote{2. Fred Stokeld, Alexander Calls for 'Family Friendly' Tax Code, 98 Tax Notes Today 175-7 (1998), LEXIS 98 TNT 175-7 (quoting presidential candidate Lamar Alexander's address at the John F. Kennedy School of Government, Harvard University, September 10, 1998). Further, the current tax system "limits our freedom, stunts our growth, discriminates against women, breeds tyranny, and takes too much of what we earn." Id.}
and other acts of Congress that it barely has a pulse. The last vestige between law and order and total tyranny is the Second Amendment.

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INTRODUCTION

Legitimacy and a steady source of revenue provide the twin foundations of any enduring government. Although groups may gain control of government through illegal seizures of power, they seek legitimization by the populace in order to obtain a stability that mere coercion never can yield. Even legitimate governments, however, lack durability if they have no reliable flow of money to support their functioning. Governments most commonly obtain this

3. Jeff Lonigro, Letter to the Editor, Constitution All But Dead, CHI. DAILY HERALD, February 12, 2001 at 8, available at 2001 WL 13983171. He elaborates on the unconstitutionality of the income tax: "A bill to repeal the First Amendment would be unconstitutional because of the oath [taken by congressmen to uphold and defend the Constitution]. So was the 16th Amendment, which essentially repealed Article 1, Section 2, paragraph 3 of the Constitution." Id.
4. As Alexander Hamilton stated:
   Money is with propriety considered as the vital principle of the body
steady source of revenue through a combination of three methods: ownership of the wealth itself, borrowing, and taxation. In the long run, taxation is the most successful method, but only if the government collects the tax efficiently, that is, with a minimum of effort and expense. A necessary condition of efficiency is that people pay their taxes voluntarily. Thus, the growing unwillingness to pay taxes that occurs in any serious tax revolt, including the current American tax revolt triggered in 1978 by California's Proposition 13, potentially threatens a government's viability by jeopardizing both the legitimacy of its laws and its source of income.

Most people never pay their taxes voluntarily, in the ordinary sense of the word. Rather, they are generally anti-

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political; as that which sustains its life and motion, and enables it to perform its most essential functions. A complete power therefore to procure a regular and adequate supply of it . . . may be regarded as an indispensable ingredient in every constitution. From a deficiency in this particular, one of two evils must ensue; either the people must be subjected to continual plunder as a substitute for a more eligible mode of supplying the public wants, or the government must sink into a fatal atrophy, and in a short course of time perish.

THE FEDERALIST No. 30 (Alexander Hamilton) (citing Turkey as an example of the former situation and the United States under the Articles of Confederation as an example of the latter.)

5. Borrowing must always be repaid. Theoretically, the state could continuously borrow to pay off prior debt, but there are great economic costs to such a deficit budget. Ownership of wealth also has problems, as communism has shown.

Eighteenth century Americans recognized the essential nature of taxation when it replaced the Articles of Confederation, which contained no taxing powers, with the Constitution which granted the federal government considerable taxing powers. Article I grants Congress the "power to lay and collect taxes, duties, imposts and excises." U.S. CONST. art. I, § 8, cl. 1. The only limitations on this power were that direct taxes had to be apportioned among the states according to population and that taxes must be uniform. U.S. CONST. art. I, § 2, cl. 3, § 9, cl. 4, § 8, cl. 1. The 16th amendment authorizing taxing incomes "from whatever source derived" was enacted after the Supreme Court in Pollock v. Farmers' Loan & Trust invalidated the 1894 income tax as a violation of the direct tax clause. 158 U.S. 601 (1895). Pollock was an exception to the Court's general deference to Congress' taxing powers. See, e.g., Nichols v. Ames, 173 U.S. 509 (1898); Veazie Bank v. Fenno, 75 U.S. (8 Wall.) 533, 540 (1869) (tax on state banks upheld as an indirect tax because in light of the weakness of the Articles of Confederation, the framers of the Constitution intended to give Congress the power to tax to "its fullest extent."); United States v. Lee, 455 U.S. 252, 260 (1982) ("[I]nfringement of religious freedom by tax system is not unconstitutional because it is necessary to accomplish an essential government interest—maintenance of a sound tax system . . . ").
tax, in that they usually would prefer to keep any income they receive than pay it to the government in taxes.\(^6\)

6. Some people, of course, do not mind paying taxes because, like Oliver Wendell Holmes, they know that taxes are the price of civilization. See Compania General De Tabacos de Filipinas v. Collector of Internal Revenue, 275 U.S. 87, 100 (1927) ("Taxes are what we pay for civilized society . . . . ").

Although this article is about American tax revolts and the nation's special relation to these revolts, other countries and civilizations are not immune to them either. Perhaps we inherited the tendency from the Mother Country. For example, the 1381 peasant rebellion in England known as Wat Tyler's Rebellion was triggered by a capital tax. See, e.g., David B. Kopel, Courts and Constitutions: It isn't about Duck Hunting: The British Origins of the Right to Arms, 93 Mich. L. Rev. 1333, 1340 (1995). More recently, in the United Kingdom, the poll tax led to much resistance, including a peaceful march that turned into a riot with burning cars, smashed windows, thrown bricks and tear gas. See, e.g., Mobs Riot in West End, Indep. (London) April 1, 1990, at 1; George Gutman, Taxing Chinese Peasants Presents Special Problems, 23 Tax Notes Int'l 631 (July 30, 2001) (tax protests in Jiangxi province of People's Republic of China led to deaths of some peasants); Tax Hike Protests Turn Violent in Guatemala, 2001 Worldwide Tax Daily 152-13 (2001), LEXIS 2001 WTD 152-13 (violent protests about tax increases in Guatemala).

Examples abound in history, as well. Charles Adams describes a series of tax revolts throughout history, including ones in ancient Egypt, Israel, and Rome. Charles Adams, For Good and Evil: The Impact of Taxes on the Course of Civilization (1993). A more scholarly source is Carolynn Webber & Aaron Wildavsky, A History of Taxation and Expenditure in the Western World (1986). In the 1530s, the Holy Roman Emperor Charles V ended tax revolts "by storming the town, revoking its privileges and forcing guildsmen to walk round the city walls wearing nooses round their necks." Clare Thomson, "Star Struck in Flanders," Indep. (London) Sept. 26, 1998 at 22. In parts of Italy, trulli, houses with cone-shaped roofs made of stone, allegedly were built in the Middle Ages so that they could easily be demolished when the tax collector came to impose taxes on buildings and then just as easily rebuilt afterwards. See, I Trulli Di Alberobello, The White Cones of Puglia, at http://www.geocities.com/trullihouses/ (last visited Oct. 7, 2002). Trulli are included in the Italian portion of Mini-Europe in Brussels (along with other buildings such as the cathedrals of Pisa and Siena), but whether their significance lies in their tax motivated origins or their attraction for tourists is unclear.

For other sources about ancient tax revolts, see also Margaret Levi, Of Rule and Revenue (1988). For more recent revolts see Clare Thomson, Star Struck in Flanders, Indep. (London), September 26, 1998, at 22; National Briefs: Over-taxed Peasants Attack Local Leaders, Times-Picayune (New Orleans), Nov. 12, 1996, at A-2 ("Infuriated by heavy taxes, peasants broke into government buildings and destroyed property in south China, killing one village leader and injuring others . . . ."). French chefs recently have been particularly irate over taxes. See Agence-France Presse, French Chefs Protest Restaurant Tax, 2002 Worldwide Tax Daily 53-15 (2002), LEXIS 2002 WTD 53-15 (chefs and owners throw empty coffin in to river protesting unfair taxes); Boiling Over High Tax, French Chefs Protest, Boston Globe, Oct. 12, 1999, at A2 (protesting that 20.6% VAT on restaurant meals as opposed to the 5.5% tax on fast food
Voluntary, in the context of taxation, simply means that people do not have to be compelled to pay their taxes through actual enforcement actions by the state. Although the threat of governmental action certainly influences people's willingness to pay, loyalty to the government also plays a critical role. People voluntarily pay taxes only if they believe that both the tax and the government are legitimate. Taxes, then, are both a price and badge of citizenship. The imposition and collection of taxes are tangible reminders of governmental authority. In addition, a commitment to paying taxes serves as a symbol of loyalty just as other symbols of patriotism do. The duty to pay taxes is a mark of citizenship just as the duty to serve on a jury or the right to vote is. The voluntary payment of taxes, therefore, strengthens the government's legitimacy both symbolically and actually.

Anti-tax rhetoric, in contrast to the act of paying taxes, can threaten legitimacy. Symbolically, it serves as a focal point for anti-government sentiment and general political discontent. It can unify and encourage dissent from, dissatisfaction with, and distrust of government. From a practical standpoint, successful anti-tax rhetoric increases non-compliance with tax laws which in turn can endanger the existence of the state by strangling its means of support.

7. Although many people view citizenship merely through the lens of privileges and rights, others see citizenship as a two-way, not a one-way street. In other words, citizenship entails responsibilities as well as right. Taxation is one of these responsibilities. A discussion of this view of citizenship and a list of sources can be found in Nancy C. Staudt, The Hidden Costs of the Progressivity Debate, 50 VAND. L. REV. 919, 979-90 (1997) (citing such sources as ADRIAN OLDFIELD, CITIZENSHIP AND COMMUNITY: CIVIC REPUBLICANISM AND THE MODERN WORLD 160 (1990) and Michael Walzer, The Civil Society Argument, in DIMENSIONS OF RADICAL DEMOCRACY: PLURALISM, CITIZENSHIP, COMMUNITY 104 (Chantal Mouffe ed., 1992)). See also LINDA K. KERBER, NO CONSTITUTIONAL RIGHT TO BE LADIES: WOMEN AND THE OBLIGATIONS OF CITIZENSHIP 81-121 (1998) (nineteenth century women claiming that they had the obligation of a citizen to pay taxes but not the right of a citizen to vote).

The duty to pay taxes, however, is not confined to citizens. Resident aliens must pay taxes to the same extent as citizens, and even non-resident aliens must pay, albeit to a much more limited degree. See 26 U.S.C. §§ 871, 881 (2000).
Anti-tax rhetoric threatens legitimacy more seriously in the United States than elsewhere because in America anti-tax sentiment goes beyond the natural desire to keep more money for one's own use. In the United States, anti-tax sentiments, along with anti-government sentiments generally, are an intrinsic aspect of American patriotism and national character. From the Revolutionary War's Boston Tea Party to former House Ways & Means Chair Richard Armey (R-TX) and Representative Billy Tauzin's (R-LA) recent re-enactment of that famous event by dumping the Internal Revenue Code into the Boston harbor, Americans celebrate their patriotism and commitment to liberty through resistance—often violent resistance—to taxes. Referring to these intrinsic sentiments, Charles Adams titled his recent book *Those Dirty Rotten taxes: The Tax Revolts That Built America.* This patriotic aversion to taxes helps explain why Americans vociferously complain about over-taxation despite the fact that they are one of the least taxed developed nations.

Given the centrality of tax rebellions in America's history, it is not surprising that tax rhetoric in the United States is frequent—and frequently heated. It is inextricably intertwined with America's conception of democracy, often serving as a "lightening rod" for politics. Even a quick glance at American history reveals that receptive ears hear anti-tax rhetoric and often convert words into action, sometimes violently. In the current tax revolt, actions have

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largely been peaceful, but the language has been replete with revolutionary imagery and appeals to individual liberty, freedom, and the fight against tyrannical government. Much of this strident anti-tax sentiment originates from government officials themselves. Officials spout anti-tax rhetoric, such as calling for the repeal of the Sixteenth Amendment in order to restore freedom. They also engage in flamboyant headline catching actions, such as the previously mentioned tax tea parties and the highly publicized 1997 Senate Hearings on the abuses of the IRS.

12. So far only sporadic isolated violent threats and assaults have occurred. For example, the Treasury Inspector General for Tax Administration (TIGTA) report for the most current period (as of this writing) April 1, 2001 through September 30, 2001 closed 443 threat, assault or harassment investigations in this period. Treasury Inspector General for Tax Administration, SEMI-ANNUAL REPORT TO CONGRESS, Apr. 1, 2001-Sept. 30, 2001 at 27, available at http://www.treas.gov/tigta/text-only-version/semiannual_sept2001. There were 391 investigations of threats, assaults and harassment in the 6 month period October 1, 1999 through March 31, 2000. Treasury Inspector General for Tax Administration, SEMI-ANNUAL REPORT TO CONGRESS, Oct. 1, 1999-Mar. 31, 2000 at 30. It completed 271 investigations of threats and assaults against the IRS from April 1 through September 30, 1999. Treasury Inspector General for Tax Administration, SEMI-ANNUAL REPORT TO CONGRESS, Apr. 1, 1999-Sept. 30, 1999, available at LEXIS 2000 TNT 3-12. These incidents included threats to bomb the World Trade Center, the IRS buildings, as well as actual injury to an IRS employee. Id. at 34-36. See also Amy Hamilton, (Only?) Five Taxpayers Arrested for Threatening to Blow Up IRS, 2000 TAX NOTES TODAY 4-2 (2000), LEXIS 2000 TNT 4-2. Other examples include: Threats Against IRS Bring 2-year Sentence, PLAIN DEALER (Cleveland), Aug. 4, 2000, at 7A; Matthew Ott, Letter Powder Seen as an IRS Threat, Mar. 23, 2001, AP Online, 2000 WL 16862412 (ten people sent to hospital due to a powder that caused rashes that was in an envelope with a tax return and a threatening letter); Eric Gorski, IRS Branch Reopens After Arson Attack, GAZETTE (Colorado Springs) Apr. 13, 1999, LEXIS, News, Arcnws (second arson in two years; article notes that in 1997 there were 872 assaults of threats against the IRS or buildings and 848 in 1998); and Despite Efforts to Better Serve Taxpayers, Many IRS Employees Receive Abuse at Hand of Dissatisfied "Customers", 88 TAX NEWS TODAY 66-H (1988), LEXIS 88 TNT 66-H (noting that two IRS officers were shot in 1983).

13. Representative Sam Johnson (R-Tex), for example, in introducing (and re-introducing) his "Tax Freedom Resolution" has repeatedly stated: "I believe that the Sixteenth Amendment has created a system that is economically destructive, impossibly complex, overly intrusive, unprincipled, dishonest, unfair and inefficient. Now is the time for us to restore freedom to the American taxpayer. .[and] repeal the Sixteenth Amendment." 145 CONG. REC. E643 (April 14, 1999) and 143 CONG. REC. E633 (April 10, 1997), cited in DONALD L. BARLETT & JAMES B. STEELE, THE GREAT AMERICAN TAX DODGE: HOW SPIRALING FRAUD AND AVOIDANCE ARE KILLING FAIRNESS, DESTROYING THE INCOME TAX, AND COSTING YOU 133 (2000). This book is replete with examples of revolutionary anti-tax rhetoric.
These proceedings demonized the agency, often at the expense of accuracy. 14

All this revolutionary anti-tax rhetoric, especially that emanating from officials helps transform the government from "we the people" into "them," the "other." By calling taxation theft and an abridgement of liberty, it weakens the obligation of a citizen to pay taxes and thus it potentially threatens the financial stability of the government. In its

14. Some senators made a point of saying that the IRS in general had good personnel. See e.g., Practices and Procedures of the Internal Revenue Service, S. Hrg. 105-190, 105th Cong., at 1 (Statement of Sen. Wm. Roth), 10 (Statement of Rep. Steny Hoyer), 14 (Statement of Sen. Kent Conrad) and 16 (Statement of Sen. Phil Gramm) (Sept. 23-25, 1997). Nevertheless, the tenor of the hearings and the media attention focuses on IRS abuses and horror stories. The report by the Government Accounting Office in 2000, for example, found that most of the allegations of taxpayer persecutions were unfounded. See e.g., Amy Hamilton, Alleged IRS Harassment: No Misconduct Found in 95 Percent of Cases, 88 Tax Notes 978 (2000) (based on data provided by the IRS and the Treasury Inspector General for Tax Administration); John D. McKinnon, Some IRS Abuse Charges Are Discredited, WALL ST. J., Apr. 25, 2000, at A2. The GAO report found no support for the allegations of many witnesses and concluded, for example, "IRS managers never improperly closed large cases with no adjustment in liability to improve departmental statistics, gain personal awards, or secure employment outside the IRS." Ryan J. Donmoyer, Secret GAO Report Is Latest to Discredit Roth's IRS Hearings, 87 Tax Notes 463 (2000). The redacted version of the GAO report is available at 2000 Tax Notes Today 80-13 (2000), LEXIS 2000 TNT 80-13. The semi-annual reports for the Treasury Inspector General for Tax Administration (TIGTA) also contain information on abuse by IRS employees. For example, Section 1203 of the IRS Restructuring and Reform Act of 1998 requires that the Commissioner of Internal Revenue terminate any IRS employee for violating taxpayer rights. The statistics for these may be found in the semi-annual reports to Congress of the Treasury Inspector General for Tax Administration.

One result of the alleged abuses reported at the Hearings, however, was the enactment of §1203 of the Code, as part of the Internal Revenue Service Restructuring and Reform Act of 1998, which listed ten acts by IRS employees that could result in their being fired. Most of the complaints filed by taxpayers under this section, however, turn out to be unsubstantiated. Lee A. Sheppard, The Sixth Deadly Sin, 92 Tax Notes 1018 (2000).

Even in 1998, the public, according to polls, felt that the IRS was generally courteous and that more taxpayers cheat than are mistreated by the IRS. See Amy Hamilton, Poll Finds Taxpayers Happier with IRS Service than Expected, 98 Tax Notes Today 73-5 (1998), LEXIS 98 TNT 73-5; Humphrey Taylor, Special Harris Poll for Income Tax Day, 98 Tax Notes Today 73-40 (1998), LEXIS 98 TNT 73-40. A recent survey of consumer attitudes found increased satisfaction with the IRS, in part due to growing popularity of electronic tax returns, but also possibly due to a reaction to September 11th. See Patrick Barta, FAA Trumps IRS as Agency Least Loved, WALL ST. J., Dec. 17, 2001, at A2.
most extreme form the rhetoric often appears to attack not just the current income tax or the particular politics of the party in power, but tax and government more generally. Even less inflammatory anti-tax rhetoric may undermine legitimacy by increasing popular discontent with government since the rhetoric constrains the government's ability to raise revenues that would allow it to effectively provide the services people demand.

Is America's anti-tax rhetoric dangerous? Can it lead to violence, as has sometimes occurred in the past, or is it just politics as usual? Is it a challenge to the government's legitimacy or a safety valve through which people can vent their discontent? The answers are unclear. The country's historic, deep-seated anti-tax/anti-government sentiment suggests that the use of revolutionary anti-tax rhetoric, especially by government officials, is tantamount to playing with fire. This is especially true given that many political theorists believe that the past few decades have witnessed a "crisis of legitimacy" among an alienated and cynical citizenry. Conversely, some theorists believe that the rhetoric is either meaningless or even helpful because it acts as a safety valve providing a vehicle for expressing concerns about important government policies.

This Article investigates the connection in the United States between government's legitimacy and anti-tax rhetoric in the context of the federal income tax. The terrorist attacks of September 11, 2001 may cause some to question the relevancy of this investigation since, in its immediate wake, most Americans increased their

15. Commentators have debated for years whether a "crisis in legitimacy" or confidence exists. See, e.g., WHAT IS IT ABOUT GOVERNMENT THAT AMERICANS DISLIKE? 9-46 (John R. Hibbing & Elizabeth Theiss-Morse, eds. 2001) [hereinafter WHAT IS IT ABOUT GOVERNMENT THAT AMERICANS DISLIKE?]; JOHN R. HIBBING & ELIZABETH THEISS-MORSE, CONGRESS AS PUBLIC ENEMY: PUBLIC ATTITUDES TOWARD AMERICAN POLITICAL INSTITUTIONS 1-40 (1995) [hereinafter HIBBINGS & THEISS-MORSE] (discussing whether there is a crisis in confidence in the United States); Jack Citrin and Donald Philip Green, Presidential Leadership and the Resurgence of Trust in Government, 16 BRIT. J. OF POL. SCI. 431, 444 (1986) (most hostility to government reported in surveys is a response to the particular incumbents rather than the government itself.); HERBERT J. GANS, MIDDLE AMERICAN INDIVIDUALISM: POLITICAL PARTICIPATION AND LIBERAL DEMOCRACY 61 (1991) (citing a 1985 New York Times poll showing that only 49% of the respondents trusted the federal government to do what is right only some of the time or never, 87% were very proud to be Americans.). See also infra Part I.B.2 (discussion regarding distrust of government).
awareness and appreciation of the role of government, especially the federal government. Theorists believe, however, that this newly aroused patriotism is temporary. The continued push for tax reduction and the concern about the scope of government seems to support that position. Moreover, there are already indications that distrust is rising, and as time passes, America's inherent anti-government sentiment will increasingly reassert itself.

Part I examines government legitimacy in two sections. The first subpart briefly describes the concept of legitimacy generally and the role of rhetoric in maintaining it. The second section concentrates on legitimacy in United States. It begins with an examination of the relationship of the American conception of sovereignty to both the right of revolution and taxation and it concludes with a discussion of the crisis in legitimacy. Part II's discussion of the current wave of tax protests furthers the analysis of the relationship between tax rhetoric and the production and maintenance of legitimacy in the United States.

This article concludes that anti-tax rhetoric—like the power to tax itself—has both positive and negative aspects. In both aspects it is quintessentially American. On the positive side, it represents core American beliefs in freedom, liberty, the right to participate in government, and the right to freedom of speech, assembly and protest—all of which are captured in the patriotic phrase "no taxation without representation." Anti-tax rhetoric, therefore, can serve to strengthen the government by strengthening these aspects of American democracy. The negative side of the rhetoric, however, reinforces deeply rooted, often violent anti-tax, anti-government sentiments. Thus, anti-tax

16. See e.g., John R. Alford, We're All in This Together: The Decline of Trust in Government, 1958-1996, in What Is It About Government that Americans Dislike? (suggesting that in United States low level of trust in government is the norm and that external threats to the country cause that trust to increase temporarily); John Harwood, Americans Distrust Institutions in Poll, WALL ST. J., June 13, 2002 at A4. See also infra notes 139-40 and accompanying text.

17. This phrase has been used again and again in tax protests, starting of course with the American Revolution, continuing through the suffragettes' tax protests in order to gain the right to vote. Recently, D.C. proposed the slogan for their license plates as a reminder that residents are not represented in Congress. See Stephen Koff, D.C. Wants Tax Revolt Slogan on License Plates, PLAIN DEALER (Cleveland), May 5, 2000 at 13A; Spencer S. Hsu, No Vote, No Taxes, D.C Says: Legislations Pushed to Exempt Residents From Federal Levy, WASH. POST, Mar. 23, 2001, at B5.
rhetoric, especially the more virulent forms, can challenge the legitimacy of the tax itself and the government that imposes it—even when it is used simply as campaign propaganda or as a negotiating tool to achieve a more modest reform of the income tax.

Tax debates have always been a forum in which Americans explore the nature of their government. As such, they are essential to our political system and should be encouraged. However, America's history of tax protests and its strain of anti-government sentiment require that this debate be responsible. For this to occur, politicians must

18. Indeed, some of the people who use the strong anti-tax rhetoric do not actually desire what the rhetoric argues for. Many who rail about IRS abuses and even argue for its abolition, for example, do not really mean it. Rather they see these statements as headline-attention grabbing tactics that can be used as a "launching pad" for major tax reform. See e.g., Ryan J. Donmayer, Flat Tax Strategy: The IRS as Poster Boy for Tax Reform, 77 TAX NOTES 1305 (1997) (Lawrence Kudlow urging Republican congressional staff members to exploit anti-IRS rhetoric not because he wanted to abolish the IRS, but because it was a more effective strategy for tax reform than traditional supply-side economics.). Bob Dole said in his speech accepting the Republican nomination in 1996 that he would "end the IRS as we know it." Bob Dole, GOP Nomination Acceptance Speech, 96 TAX NOTES TODAY 163-24 (1996), LEXIS 96 TNT 163-24. He said this probably knowing, as Professor J. Clifton Fleming Jr. has noted, that most people hear only the first half (ending the IRS) and not the qualifying "as we know it." J. Clifton Fleming Jr., Ending the IRS As We Know It: Thoughts from Outside the Beltway, 96 TAX NOTES TODAY 210-65 (1998), LEXIS 96 TNT 210-65. Yet Dole later criticized the Republican proposals to eliminate the IRS. Fred Stokeld, Dole Criticizes Efforts to Eliminate IRS, 98 TAX NOTES TODAY 44-4 (1998), LEXIS 98 TNT 44-4 (individuals do not favor abolishing the IRS even though he had campaigned on such a platform.).

Morris Dees has noted in the context of the militia phenomenon that preaching distrust of the government by officials such as Newt Gingrich, Jesse Helms, and Strom Thurmond may be seen by "unsophisticated and less tolerant people . . . as a green light to cause serious trouble." January 9, 1995 letter by Morris Dees, in MORRIS DEES, GATHERING STORM AMERICA'S MILITIA THREAT 128 (1996).

See also Sheldon S. Cohen, What's Happened to Bob Dole? 96 TAX NOTES TODAY 167-56 (1996), LEXIS 96 TNT 167-56 ("Candidate Dole now comes out for a variety of measures that he never favored while he was on the Finance Committee, or indeed while he was Chairman of that committee or when he was Majority Leader of the Senate.").

One wonders whether the entire consumption tax campaign by the Republicans is a negotiating device simply to get a much weaker (lower rates and/or a narrower base) income tax since conservatives have traditionally been against a broad based VAT or national retail sales tax because of their "prodigious revenue raising capacity." Michael J. Graetz, Revisiting the Income Tax vs. Consumption Tax Debate, 92 TAX NOTES TODAY 247-96 (1992), LEXIS 92 TNT 247-96.
lead the debate by focusing on issues rather than knee-jerk revolutionary, anti-tax rhetoric. So far they have failed this duty, and in doing so, they fail American democracy.

I. LEGITIMACY

A. The Concept of Legitimacy and the Function of Rhetoric

Legitimacy justifies and transforms the power of government through a moral authority derived from the consent of both the governed and the governing to both the existence and justness of the existing order.\(^{19}\) Legitimacy is,
therefore, an essential aspect of a regime's stability because this moral authority forms the basis of its legal and political authority. Legitimacy persuades the majority of people to accept the status quo: to follow laws enacted by the government, to generally acquiesce to its decisions, and to act on its "behalf" by voting, for example. Consequently, any substantial challenge to a government's legitimacy potentially threatens its capacity to govern.

iii) there is evidence of consent by the subordinate to the particular power relation." BEETHAM, supra at 16.

Thomas Jefferson believed that a regime was legitimate if it was in effective control of its territory (had the requisite power), was willing to comply with its obligations, and rested on the will of the people. Maurice Cranston, From Legitimism to Legitimacy, in LEGITIMACY/LEGITIMITE: PROCEEDINGS OF THE CONFERENCE HELD IN FLORENCE 39-40 (Athanasios Moulakis ed., 1986) (and will of the people was first evidenced by consent and later by "acquiescence, measured by the bare fact of absence of open popular revolt.").

Some theorists focus on citizen actions and attitudes of alienation and political trust while others look at structural aspects of the political system. See, e.g., M. Stephen Weatherford, Measuring Political Legitimacy, 86 AM POL. SCI. REV. 149 (1992); James Willard Hurst, Problems of Legitimacy in the Contemporary Legal Order, 24 OK. L. REV. 224, 225 (1971) (tracing the concerns in western civilization from its beginnings with the Greek city-states through the constitutional tradition today.). Most definitions of legitimacy justify it by appealing to some source of authority beyond the individual—be it an appeal to history/tradition, natural law, a divine source, a "social contract", or a constitution. See e.g., Schaar, supra at 108, and KITTRIE, supra at 4-6. In other words, "[t]he legitimacy of power stems from its origin." Schaar, supra at 111.

20. Tom R. Tyler, Governing Amid Diversity: The Effect of Fair Decision-Making Procedures and the Legitimacy of Government, 28 LAW & SOC'Y REV. 809, 813 (1994). See also e.g., BEETHAM, supra note 19, at 29. As James Willard Hurst has said, "Legitimacy means simply the grounds on which at any given time most of the people accept, or are willing to use, the legal order as they find it." Hurst, supra note 19, at 224.

Other factors also contribute to stability such as effectiveness of the regime, its organizational capacities and its available resources. See e.g., BEETHAM, supra note 19, at 33, and Seymour Martin Lipset, Social Conflict, Legitimacy, and Democracy in LEGITIMACY AND THE STATE 88 (William Connolly ed., 1984). Legitimacy, however, makes a "distinctive" contribution through "the effects it has on the attitudes and behavior of the subordinate as moral agents, not just as self-interested actors." BEETHAM, supra note 19, at 33.

Without legitimacy a government lacks stability; it may stay in power but it requires more and more force to do so. BEETHAM, supra note 19, at 28-29, 33 (giving as examples the collapse of Eastern European Communist governments when it became clear that Gorbachev would not prop them up militarily and the fall of the Shah in Iran in 1979.).

21. See FREEDMAN, supra note 19, at 10 ("substantial, persisting challenges to the legitimacy of governmental institutions must be regarded with concern").
Since legitimacy ultimately rests on the populace's beliefs and attitudes, rhetoric is instrumental in the creation, maintenance, and destruction of legitimacy. Rhetoric, which influences beliefs and attitudes generally, plays an essential role in legitimizing authority for several reasons. First, as Daniel T. Rodgers has explained, words legitimize the outward frame of politics; they create those pictures in our heads which make the structures of authority tolerable and understandable. Thus human beings come to talk of the sacredness of the king's body, the sovereignty of the people, or the destiny of nations—word pictures all, tissues of metaphor. Many of the most powerful words in the lexicon of politics are of this sort.... But of all the functions of political talk, the superimposition of some believable sense and endurable legitimacy on top of the chaotic motions of day-to-day power is the least dispensable. Let the citizens believe that the law is a thing of logic (rather than the whim of men called judges), that their government is a democracy (though only a fraction of the people rule), that human beings were born with rights (though it is plain that they are born to the powerlessness of infancy), and their words have consequences.

Second, rhetoric serves as a unifying mechanism, especially for a diverse population. In contradiction to the widespread negative view of rhetoric as substantively meaningless words whose purpose is more to conceal than to elucidate, some rhetoric is both necessary and good. It

22. Daniel T. Rodgers, Contested Truths: Keywords in American Politics Since Independence 5 (1987). Secular political culture also contributes to and reinforces a nation's legitimacy. See Lipset supra note 20, at 91; accord Herbert J. Gans, Middle American Individualism: Political Participation and Liberal Democracy 62-63 (1991) (national holidays and birthdays of national figures have turned into retail sales events and are "services of the civic religion."). America's symbols of a "secular political culture" which includes national heroes (e.g., the founding Fathers), holidays (e.g., July 4th, Labor Day, Thanksgiving Day), civic symbols (e.g., the flag, the national anthem) and hallowed myths (e.g., George Washington chopping down the cherry tree).

23. See e.g., Thomas E. Farrell, Norms of Rhetorical Culture 2 (1993). Under this view, politicians use rhetoric not because they believe its content or hope to accomplish its goals, but simply to acquire votes. Its function is merely to mask the real intentions of the speakers. Under this view, to paraphrase Marx, political rhetoric—like politics itself—is an opiate of the people designed, as the noted political scientist Murray Edelman says, to mobilize people with vague promises, to create the appearance of change rather than actual change itself. Murray Edelman, The Symbolic Uses of Politics 23-25 (1964) (arguing
fosters legitimacy by helping to build communities and commonalities. It also helps limit people's frustration with government and general feelings of alienation that can erode legitimacy. The rhetoric of elected officials is especially powerful in this respect because citizens believe that officials have more information than they do. Moreover, they view elected officials as the representation of the people's will.  

Rhetoric's appeal to the listener's emotions and beliefs—the very characteristic that gives rhetoric a bad name—is necessary in politics because politics are neither simply a matter of reason, nor of personal taste. 

"Men act not simply in response to some kind of objective reality but to the meaning they give to that reality." Rhetoric is one of

that political rhetoric promises much and delivers little, thus soothing the masses without making many substantive changes). Edelman quotes a statement by Kenneth Burke that political rhetoric is 'secular prayer' whose purpose is "to sharpen up the pointless and blunt the too sharply pointed." KENNETH BURKE, A GRAMMAR OF MOTIVES 33 (1945). But even according to Edelman rhetoric has indirect substance because it ultimately affects people's expectations. See, MURRAY EDELMAN, POLITICS AS SYMBOLIC ACTION 7 (1971).

24. EDELMAN, supra note 23, at 175 says: 
A legitimate government can make its actions potent condensation symbols that bring about such shared mass beliefs and perceptions about matters that evoke anxiety. Government officials present themselves as embodying the people's will; the mystical, nonempirical character of the assertion is not readily apparent to the political actor in everyday life, but only to the person who self-consciously looks for the bases of phenomenological perception. High officials are assumed to have special sources of intelligence not available to the naive observers themselves.

25. See, e.g., Anthony T. Kronman, Rhetoric, 67 U. CIN. L. REV. 677, 682, 692-93 (1999) (rhetoric involves the use of passions as well as logic to persuade because in the political realm truths are not absolute). "Rhetoric is concerned with truths that are variable and obscure, and permanently subject to dispute, and it employs the passions as instruments of persuasion." Id. See also, MURRAY EDELMAN, POLITICAL LANGUAGE: WORDS THAT SUCCEED AND POLITICS THAT FAIL 5 (1977) (rhetoric is image-laden, appealing as much to the emotions as to the intellect); Linda Meyer, Between Reason and Power: Experiencing Legal Truth, 67 U. CIN. L. REV. 727, 732 (1999) (rhetoric "illuminates" a "perspectival" and "controversial" type of truth).

26. Gordon Wood, Rhetoric and Reality in the American Revolution, 23 WILLIAM AND MARY QUARTERLY 3, 19 (1966). Consequently, rhetoric, like other symbols, can be even more important than mere 'objective' fact. People act on beliefs, not facts, and rhetoric, like other symbols can "make reality, and become more useful than the facts." SALMAN RUSHDIE, MIDNIGHT'S CHILDREN 48 (Penguin Ed. 1980)("Sometimes legends made reality, and become more useful than facts").
the ways that people give meaning and shape to that reality. Even rhetoric's tendency to conceal has a positive aspect. By blurring differences, it helps build communities and commonalities that create both a sense of national identity and the ability to act communally even when the diverse groups want contradictory things. Even rhetoric, in this sense, does not manipulate us into cooperation, it embodies cooperation. It is the common ground.  

Even if political rhetoric is viewed negatively as masking governmental inaction rather than positively as the vehicle for persuading acceptance of government action, it is still essential to maintaining a government's legitimacy. Governments succeed and maintain their legitimacy either by giving people what they want or by making people want what the government gives them. Either way, rhetoric fosters legitimacy. It both expresses existent attitudes and helps shape future ones. It helps convince citizens both that the government gives them what

27. Farrell, supra note 23, at 9 (1993) (Rhetoric is necessary for a national identity because "no culture or public life project can survive for long without some form of rhetorical practice, some coherent, symbolic manner of securing collaborative public action."). Farrell also says that rhetoric helps to transform particulars into "a meaningful cultural story, thereby making public character once more a possibility." Id. at 81. Accord Kronman, supra note 25, at 706-707 (describing the role of rhetoric and its appeal to the emotions in creating patriotism, and the "condition of political life.").  

28. Meyer supra note 25, at 758. Anthony Kronman illustrates the necessity of rhetoric this way: 

Patriotism is a condition of political life. A political regime can endure only in case some of its members put the regime's existence ahead of their own—only in case they are willing to die for it. But patriotism is an artificial sentiment that must be cultivated through a process of transference: by causing the natural attachment we feel to ourselves to be transferred to the abstraction of the state. This is accomplished by means of emotional appeals which take advantage of the fact that many of our most primitive feelings of self-regard (anger and pride, for example) have a built-in reference to the beliefs and attitudes of other people and are therefore nascently political, so that the anger a man feels, say, toward his personal enemies can serve as a model and inspiration for the anger an orator wishes to arouse in him toward an enemy of the state. 

Kronman, supra note 25, at 706-07.  

29. "Political arousal and quiescence depend[s] upon how much of what they want from government people get. Political actions chiefly arouse or satisfy people not by granting or withholding their stable substantive demands, but rather by changing the demands and the expectations." Edelman, supra note 23, at 7 (italics in original). "Government affects behavior chiefly by shaping the cognitions of large numbers of people in ambiguous situations." Id.
they want and that they want what the government gives them.

To create this common ground, rhetoric must use words and phrases that have meaning to the listeners. Therefore, speakers do not use words randomly. They choose those words and phrases that both evoke specific feelings and beliefs that tap into the deepest beliefs of their audiences and also articulate a particular idea or fact. Thus, rather than being meaningless, rhetoric is, as Gordon Wood has said, "remarkably revealing of . . . deepest interest and passions." Among the deepest of American passions are a distrust of government and a concomitant anti-tax sentiment.

Rhetoric not only reveals our deepest passions, but it also assists in their creation and maintenance by facilitating people's ability to comprehend the world. People need some efficient way to organize the enormous quantity of information and sensory stimuli they constantly receive. Theorists posit a variety of mechanisms or processes, such as ideologies, schema, or frames, that fulfill this function by creating constellations of both cognitive and affective attitudes and beliefs that allow people to quickly categorize and respond to this barrage. Rhetoric, which uses words to


It is ineffectual to stand outside the currents of values, preferences, and presuppositions and try to bend them to one's will. To be outside is to shout and not be listened to. The effective political rhetoric, in contrast, is to be able to say, 'Listen, my values and preferences are like your values and preferences, and having looked carefully at this thing I have come to a conclusion that I know you would share if you did the same.'

Id.


32. The basic problem is that the human brain—powerful as it is—cannot quickly process the multitude of data that it daily receives and must use. Researchers have posited a variety of cognitive and affective mechanisms that allow an individuals acquire, store, and retrieve knowledge as well as how prior knowledge affects the perception of new information. See e.g., 1 Taxpayer Compliance, An Agenda for Research 149 (Jeffrey A. Roth, et al. eds., 1989). See also Pamela Johnston Conover & Stanley Feldman, How People Organize the Political World: A Schematic Model, 28 Am. J. Poli. Sci. 95 (1984).

Although there is no single definition of schema, each describes a process that organizes an individual's prior knowledge and by this organization influences the perception of new information, affect and values. David O. Sears and Jack Citrin provide a good working definition that is especially apt for this
Article since they used it to develop a tax revolt schema for their work about California's Proposition 13 in 1978. DAVID O. SEARS & JACK CITRIN, TAX REVOLT: SOMETHING FOR NOTHING IN CALIFORNIA 83 (1985). They define a schema as an organized system of both affective and cognitive attitudes toward the various attitude objects composing a limited area of political life. It is less comprehensive, taking in less political territory, than an 'ideology,' which may help to cognitively structure most of political life. A schema has more generality than a 'symbolic predisposition' which refers to a long-standing evaluation of one particular symbol (or narrow set of very similar symbols).

Id. at 75-76. Schematized attitudes, they continue, are those on which "the issue(s) in question, tend to be (1) reasonably well informed, (2) affectively consistent and interdependent, (3) base on some broader, more abstract conceptualization, and (4) stable over time." Id. at 78. See infra Part V.B., for their tax schema.

Schemas thus provide an efficient method for a person to make daily decisions in a complex world. That is, as others have stated, they operate and "develop under a principle of conservation of energy. Simplified schemas develop to minimize information storage and retrieval costs..." 1 JEFFREY A. ROTH, ET AL., TAXPAYER COMPLIANCE 158 (1989) (discussing voting behavior). They thereby serve many functions.

First, they lend organization to an individual's experience in the sense that people order the elements of their environment to reflect the structure of relevant schemas. Second, schemas influence 'what information will be encoded or retrieved from memory'. Third, the structure of a schema constitutes a basis for 'filling in' missing information and thus going beyond the information given. Fourth, schemas provide a means for solving problems by supplying short cuts or heuristics that simplify the problem-solving process. Finally, by generating expectations against which reality is compared, schemas provide a basis for evaluating one's experiences.

Conover & Feldman, supra at 96-97 (citations omitted). A schema, like its cousins—the more narrow symbolic predisposition and the broader ideology—is important because it "operates as a control mechanism that governs the evaluation of incoming information" and "influences the way one processes new information about it and the consistency of his actions toward it." SEARS & CITRIN, supra at 12. Each of these mechanisms has a strong affective facet in addition to any cognitive component. This is important because there is a strong non-rational element to politics. Attitudes and beliefs about such things as race, party identification (Republican/Democrat), and ideology (conservatism/liberalism), often are organized in schemas or ideologies that form early in life are known to play critical roles in politics. Indeed, some theorists believe "that attitudes toward general political symbols are better predictors of policy positions than objective information about the consequences of a policy for the individual in such diverse areas as the economy, civil rights, the Vietnam War, busing, and the energy crisis." ROTH ET AL., supra at 158. In a similar vein, McClosky notes that the role of "[i]deas and intellectual processes in general has been greatly exaggerated and cannot adequately explain many political phenomena." Herbert McClosky, Consensus and Ideology in American Politics, AM. POLI. SCI. REV. 361, 378 (1964).

Some political scientists have found one such mechanism, the concept of
evoke feelings and attitudes, can serve to trigger these constellations and reinforce them. Consequently, rhetoric that triggers positive ideologies about patriotism can bolster the government whereas negative ones can weaken it.

Since words are so vital to legitimizing authority, politicians battle over the right to claim certain words and phrases that, because of their connection to the political culture, carry great affective as well as cognitive weight. By associating these words with themselves, and by claiming these words for their particular stance on an issue, the speakers control the meanings of the words as well as acquire the positive attitudes and the power of legitimacy that people associate with them. Throughout the history of the United States, there have only been a small number of words and phrases that have served as key organizing concepts—words such as individualism, freedom, and equality. They symbolize fundamental elements of the American democratic ideology, such as "consent, accountability, limited or constitutional government, representation, majority rule, minority rights, the principle of political opposition, freedom of thought, speech, press, and assembly, equality of opportunity, religious toleration, equality before the law, the rights of juridical defense, and individual self determination over a broad range of personal affairs." Politicians and political parties therefore

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schema, useful in explaining political phenomenon, especially when affective as well as cognitive processes are included in the concept of schema. See ROTH ET AL., supra at 149; SEARS AND CITRIN, supra at 12. Since people have many schemas, sometimes revolving around related topics, their attitudes and behaviors may appear inconsistent when viewed in the aggregate. Sears and Citrin give the example of schema about race that causes whites to oppose bussing but favor desegregation of schools. Id. at 77. Under this understanding of schema, political symbols represent a cluster of thoughts, values, attitudes and emotions about nationhood, patriotism, and identity.

33. Cf. DAVID GREEN, SHAPING POLITICAL CONSCIOUSNESS: THE LANGUAGE OF POLITICS IN AMERICA FROM MCKINLEY TO REAGAN at ix (1987) ("Whoever shapes public understanding of the labels thereby shapes the nature of political discourse."). See, e.g., id. at 2 ("Political labels are image-laden, appealing as much to the emotions as to the intellect. Although they provide basic categories of rational analysis, they may simultaneously evoke responses that are neither analytical nor rational.").

34. See e.g., id. at ix (1987)(tracing the changing meaning of such words as conservative, progressive, and liberal).

35. McClosky, supra note 32, at 363. The definition of Ideology is also far from clear. McClosky, says: "[i]deologies [are] systems of belief that are
struggle for "ownership" of these words and concepts because whoever owns them controls their meaning and derives legitimacy from them. As James C. Miller III stated in his 1998 testimony before the Joint Economic Committee:

Whoever determines the way a tax proposal is discussed often determines the outcome.... [W]ho can be opposed to a 'fair deal,' to a 'great society,' to 'anti-discrimination law,' to a 'new frontier,' and to a 'progressive tax?' My point is that the side of the argument that determines the language used to describe a proposal and addresses the arguments on their own turf has a substantial advantage.3

It is not unexpected that such a statement would be made in connection with tax because federal taxation and the related issue of the national debt are two areas in which the battle of and for words has been the most intense. Although each is objectively an important area for political concern, the intense debate associated with each derives not solely from their substance but also from their symbolic place in politics. Since the country's founding, debates about taxes or national debt have also been debates about legitimacy, in particular, the role of the federal government in a federal system and the relationship of the individual to elaborate, integrated, and coherent, that justify the exercise of power, explain and judge historical events, identify political right and wrong, set forth the interconnections (causal and moral) between politics and other spheres of activity, and furnish guides for action." Id. at 362. The anthropologist Clifford Geertz sees ideology as a cultural system built up through use of images and symbols of culture. GREEN, supra note 33, at 10 (citing CLIFFORD GEERTZ, THE INTERPRETATION OF CULTURES 211 (1973)). In the context of literary theory, Terry Eagleton describes ideology this way:

The largely concealed structure of values which informs and underlies our factual statements is part of what is meant by 'ideology.' By 'ideology' I mean, roughly, the ways in which what we say and believe connects with the power-structure and power-relations of the society we live in. It follows from such a rough definition of ideology that not all of our underlying judgements and categories can usefully be said to be ideological..... I do not mean by 'ideology' simply the deeply entrenched often unconscious beliefs which people hold; I mean more particularly those modes of feelings, valuing, perceiving and believing which have some kind of relation to the maintenance and reproduction of social power.


36. JEC Hearing, supra note 10, at 153.
that government.\textsuperscript{37} The centrality of both debt and taxes in political debates occurs because each personifies the republican fear of corruption of government by those in power. Both result from acts of the legislature, the branch of a representative democracy that republican theorists viewed as the most likely place of corruption because of its tendency to legislate for its own good rather than that of the public.\textsuperscript{38} Moreover, legislation increasing debt and taxes was seen as particularly dangerous because increases in both created situations which were especially favorable to corrupting officials; the larger the public debt or the amount of revenues the more opportunities there were for corruption.\textsuperscript{39} Fears concerning taxation are particularly strong, given America's particular concept of legitimacy and

\textsuperscript{37} This Article concentrates on the topic of taxes. An excellent discussion of the symbolic role of the debt is contained in \textit{Balanced Budgets \& American Politics}. The author, James D. Savage, stated:

The subject of balanced budgets refers not only to whether the central government's ledger should be balanced, but to broader issues such as the makeup of federal spending, the direction of fiscal policy, the legitimacy and extent of the federal government's intervention in the economy, and to the central question of what role the national government should play in American life. In this fashion, the balanced budget idea serves as an organizing principal that guides public policy and public discourse and acts as a symbol for competing visions of government and society . . . .


\textsuperscript{38} The Federalist No. 48, at 251 (Madison) (Gary Wills ed., 1982).

\textsuperscript{39} Savage \textit{supra} note 37, at 94-95. (Stating that increased revenues allow the number of government officers to increase and exert undue influence on the laws and national debt allows "speculators, bankers, and the money aristocracy [to] benefit from the unearned financial leverage and profits derived by financing the national debt" while the government would spend its borrowed money "promoting an industrialized economy through Hamiltonian policies that resembled those of mercantilist and corrupted England.".). \textit{Cf.} discussion of corruption in notes 123 and 149 and accompanying text.
its historical and theoretical relationship to taxation, as the next section describes.

B. Legitimacy in America

1. Sovereignty, the Right of Revolution, and Taxation. In the United States, sovereignty, the right of revolution, and taxation have always been connected. This linkage obviously exists because of the historic facts about the nation's origins. After all, the country achieved its sovereignty by means of a revolution in which issues of taxation played a defining role. The connection, however, goes deeper than mere historical accident and ultimately lies in the American conception of legitimate governmental power. From this perspective, both the right of revolution and the scope of taxation play critical roles in delineating the limits of rightful government.

United States political theory and popular belief both hold that the government's authority (that is, its legitimacy) rests on the consent of the governed. This consent derives from social contract, but it is not the traditional contract between the governing and the governed. Rather, the consent is amongst the people who agreed to form a government for their mutual benefit. Consequently, when the government no longer acts for the benefit of the people, the people have the right, as the Declaration of Independence states, to alter or even abolish it. The United States' federal constitution, established by

40. See e.g., GORDON S. WOOD, CREATION OF THE AMERICAN REPUBLIC 1776-1787, 601-02 (1969). Professor Stephen Griffin states that although the concept of popular sovereignty is a key element of the United States and American constitutionalism, its meaning has never been clear, in part because the concept—originating in a monarchal setting—has no place in a democracy. STEPHEN M. GRIFFIN, AMERICAN CONSTITUTIONALISM: FROM THEORY TO POLITICS 19-26 (1996). See also notes and accompanying text infra discussing direct democracy.

41. The Declaration of Independence states:

We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the Pursuit of Happiness. That to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed, That whenever any Form of Government becomes destructive of these Ends, it is the Right of the People to alter or
"We, the People," reflects this idea of sovereignty in several places, such as the first amendment rights of petition and assembly and the ninth and tenth amendments, both of which refer to rights reserved to the people. Most state constitutions also formally acknowledge this right of popular sovereignty by containing a provision declaring that because political power inheres in the people and the government is founded for their benefit, the people have the right to alter, to reform, and in some state constitutions, to abolish the government. 42 This provision is sometimes called "the right of revolution" in recognition of its historical roots in the revolutionary struggle and of the belief in the inherent right of the people—retained upon formation of their governments—to revolt. 43 This linkage to the original
revolution highlights how deeply intertwined taxation is with American notions of legitimacy and sovereignty. Participants in that original revolution focused so intently on tax issues that many believed that the only source of conflict was the authority to tax. This entanglement has continued throughout American history up to the present.

One of the immediate challenges for the new nation was to limit the right of revolution. That right, so valuable in the forging of a nation, becomes dangerous once a state is formed because it threatens the state's continued existence, especially the fragile existence of a newly created state. Thus, the new American nation needed to reform the idea of popular sovereignty by limiting the right of armed revolution as a valid method of procuring change. After three centuries and many struggles, including some armed rebellions, this right has been tamed, but not eliminated. The battles to define the right of revolution were part of the larger battle to define the nature of a legitimate American government. Some of these battles were violent and many focused on issues of taxation.

Three rebellions occurred in the important formative years just following the establishment of the new nation: Shays', Whiskey, and Fries rebellions. Each involved tax protests, and each erupted into violence. Thus, they

as more expressly exhibited in the older state constitutions which retain the "slavish" provision in note 42). Interestingly, although some original state constitutions had an explicit right of revolution provision, neither the Articles of Confederation nor the Constitution did. See, e.g., Willi Paul Adams, The First American Constitutions: Republican Ideology and the Making of the State Constitutions in the Revolutionary Era 138 (Rita & Robert Kimber trans., 1980). During the revolutionary period, patriots clearly viewed armed resistance as a justifiable method because it was the means by which the nation was created and acquired its legitimacy. Its roots lie in the English "Glorious Revolution" of 1688. Id. The Englishman John Locke, a source of ideas for many revolutionary thinkers, sanctioned the use of force in limited situations. Akhil Reed Amar, The Bill of Rights as a Constitution, 100 Yale L. J. 1131, 1163 n. 151 (1991) (construing John Locke, The Second Treatise of Government §§ 221-43 (T. Peardon ed. 1952)).

44. In fact, the conflict centered around the broad constitutional question of the legitimacy of Parliament, that is whether Parliament, sitting in Great Britain, had the authority to issue laws binding on the colonies. John Phillip Reid, Constitutional History of the American Revolution 43, 47 (1993). "It is reasonable to suggest that had [taxation] been the only constitutional point in controversy, uncomplicated by the question of parliamentary sovereignty, a solution avoiding armed rebellion could more easily have been devised." Id. at 221 n. 2.
continued the connection established during the American Revolution between taxation and legitimacy, while starkly illustrating the dangers of an unlimited right of revolution.

Shays' Rebellion occurred in 1786, a time of severe economic depression, amidst a policy of tight currency, large debts, and heavy taxes that had been enacted in order to pay down debts from the Revolutionary War. The Rebellion began as peaceful protests at town meetings by poor farmers, including former revolutionary soldiers, to prevent the courts from foreclosing on their property, and escalated into an armed resistance that ended with a failed assault on the federal arsenal at Springfield in late January 1787. 45

Upon hearing of the Shays' Rebellion, Thomas Jefferson wrote, "I hold it that a little rebellion now and then is a good thing, and as necessary in the political world as storms in the physical." 46 Many other people, however, saw it as an example of what an unrestrained right of revolution could do. In fact, many historians believe that Shays' Rebellion was a factor in the adoption of the Constitution because it starkly illustrated the dangers of rebellion, especially in the context of the weak government that then existed under the Articles of Confederation. 47

With the suppression of Shays' Rebellion and the adoption of the Constitution in 1789, many people believed that the Constitutional Convention had shown that peaceful revolution was possible and that violence was no longer a legitimate form of political protest. According to this view, Americans had "legalized revolution, substituting


46. Letter from Thomas Jefferson to James Madison, in *Smith, supra* note 11, at 174, n. 21, available at http://earlyamerica.com. George Washington, on the other hand, was "mortified beyond expression" by the rebellion. *Id.*

ballots for bullets."48 Despite these claims, however, the right of revolution had only been trimmed, not uprooted. The role of violence and the limits of lawful protest remained major issues in the early years of the new republic and continue, to a lesser extent, into the present. As with Shays' Rebellion, taxes were frequently a major precipitating factor of protest that served as the focal point for the larger issue concerning the nature of the government, including proper forms of protest.

The Whiskey Rebellion, following closely on the heels of Shays' Rebellion, stemmed from the excise tax on whiskey enacted in 1791. This tax was enacted to help retire the states' revolutionary debts which the federal government had assumed. Called "the most significant and largest resistance to the laws of the United States of America between the founding of the republic and the Civil War,"49 it was not just a tax revolt but a test of the new constitution.50


50. Ziaukas, supra note 49, at 8. See also, Slaughter, supra note 49 at 25 (Whiskey Rebellion was part of "battle over the nature of representative government, over the appropriate channels for expression of public opinion in a democratic republic."); James Roger Sharp, The Whiskey Rebellion and the Question of Representation, in THE WHISKEY REBELLION, supra note 49, at 119, 124-25. Although the Rebellion occurred primarily in rural, western Pennsylvania where whiskey served as a means of currency, not just as a commodity, there was opposition in other parts of the country such as Kentucky, Virginia, the Carolinas, and even urban Philadelphia which traditional accounts often ignore. See e.g., Mary K. Bonsteel Tachau, A New Look at the Whiskey Rebellion, in THE WHISKEY REBELLION, supra note 49, at 97,
In light of their recent experience with oppressive British excise taxes, such as the infamous stamp and tea taxes, Americans were suspicious of excise taxes and viewed them not only as unfair to the poor but as destructive of liberty.51 The whiskey tax thus served as a focus for other long-standing complaints concerning the national bank, the national debt, the manner in which the wars on the frontier had been conducted, and the continual harassment of militia duty.52 Many influential citizens of the area, including local farmers, resisted the tax.53

Although there was some sporadic violence as early as October 1791 when an excise tax collection agent was tarred and feathered, protests for the next few years were generally calm. Most people paid the tax and Congress responded to complaints by lowering the rates and improving collection procedures. However, in July 1794, before some of these reforms were instituted, seventy-five citizens who had not paid the tax were served with warrants ordering them to appear at the federal court in Philadelphia.54 Outraged by the warrants, rebels fired on

99, 106. (describing the rebellion in Kentucky where jurors refused to convict any of the defendants charged with failing to pay the tax); Roland M. Baumann, Philadelphia’s Manufacturers and the Excise tax of 1794: The Forging of the Jeffersonian Coalition, in THE WHISKEY REBELLION, supra note 49, at 135, 140-41 (manufacturers thought the taxes were more than mere revenue collection and that the regulation of exports was "excessive and expensive" and that "they were being made victims of unconstitutional, discriminatory, and confiscatory taxes." For an account of the rebellion see also United States v. Insurgents 26 F. Cas. 499 (C.C.D. Pa. 1795) (No. 15,443).

51. Id. at 502. "[B]randed with the name of an excise, a term very hateful to the people, as connected with the former oppressions of the British government [the whiskey excise tax] was declared unnecessary and tyrannical." Id. at 499. This case contains an extremely detailed description of the events leading up to the rebellion, including some of the documents.

52. Id. at 501, 509, 518.

53. Id. at 501.

54. In early 1794, Hamilton requested that the law be amended so that taxpayers could be tried in state courts if they lived more than 50 miles from a federal court. In mid-July 1794, before this law could be enacted, however, 75 warrants were served on taxpayers who had not paid the tax ordering them to appear before federal court in Philadelphia. James Kirby Martin, Introduction: The Whiskey Rebellion Redivivus, in THE WHISKEY REBELLION, supra note 49, at 3, 4 (1985). Some of those who received the warrants were active in local Democratic-Republican Society that had criticized Hamilton in particular and federalist policies generally. Id. at 5. Consequently, they believed they were being charged because of their political views. President Washington, however, believed that these societies, active in several states, endangered the national
agents trying to collect the tax. Federal troops were summoned to quell the disturbance. James McFarlane, a local Revolutionary War hero killed while trying to negotiate a peaceful resolution, became "a martyr to the cause of liberty . . . a symbol of the linkage between the Revolutionary and anti-exercise struggles." His death spurred a wave of general violence.

President Washington, worried that the rebellion would spread, ordered all the rebels to disperse and prepared to call up the militia. He believed "the very existence of Government and the fundamental principles of social order are materially involved in the issue[]." When the order failed to stop the protests, Washington called up the militia, and the rebellion quickly fell apart. Approximately twenty rebels were arrested, jailed, and charged with treason. Only two were convicted, but President Washington pardoned them. In 1802 President Jefferson repealed the whiskey tax.

Whereas taxation and Shays' Rebellion had been instrumental in forming the constitution, taxation and the Whiskey Rebellion provided the first exercise of the president's police powers under the new constitution. Consequently, many people, both at the time of the Whiskey Rebellion and in many later interpretations of this much-analyzed event, focus on its role in defining the nature of representative government and the role of protest. Under many of these interpretations, the

interest.

55. Slaughter, quoted by Ziaukas, supra note 49 (estimates vary from 7,000 to 15,000).


57. Id. at 81. [In order] "to check . . . the efforts of misguided or designing men to substitute their misrepresentation in the place of truth and their discontents in the place of stable government[]." Id.


59. Thomas Slaughter, a leading historian of the Whiskey Rebellion, has stated, whatever else the Rebellion was, it was "also a battle over the nature of representative government, over the appropriate channels for expression of public opinion in a democratic republic." Slaughter, supra note 49, at 25. See also Sharp, supra note 50, at 121, 125; Steven R. Boyd, Afterword, in THE
Rebellion was, at least in part, a battle between "liberty" and "order" in which both sides acknowledged the legitimacy of political protest; they just differed as to what type of protest was legitimate. The supporters of Liberty—then and now—link armed rebellion to the principles of the American Revolution and see it, in appropriate circumstances, as a legitimate means of protesting against tyranny and fighting for freedom. Just as the stamp and tea riots were not designed "to break allegiance to the British throne," the Rebellion, according to Reverend James Carnahan, a student in the Pittsburgh area at the time of the Whiskey Rebellion, was merely trying to force the repeal of "odious laws." In contrast, supporters of Order—then and now—generally believe that in a republic citizens must follow all legitimate governmental orders and therefore "abdicate all lawful rights to resist the edicts of government." For them, the Whiskey Rebellion clarified what theretofore had been unclear: citizens had no right to

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**WHISKEY REBELLION, supra** note 49, at 185. People have interpreted the Whiskey Rebellion in various ways: as a result of cultural or economic factors, as a conflict between regions, as a conflict between national and local, as a battle between "liberty" and "order", or as a conflict between two ideologies. See Slaughter, in **THE WHISKEY REBELLION, supra** note 49, at 10. For example, William Findley, a lawyer and congressmen, stated in his 1796 narrative that economic conditions were the primary cause of the violence, especially the fact that whiskey was used for barter. Id. at 12.

60. Early commentators, for example, noted the element of political protest and opposition in the Rebellion. For example, Hugh Brackenridge, a local attorney and then judge, believed that the cause of the insurrection lay in cultural and economic factors, but felt that one of the most important causes was the requirement that delinquent taxpayers be tried in distant Philadelphia the equivalent of "beyond the seas"—a grievance in the Declaration of Independence. Slaughter, **supra** note 49, at 12, 14, 30.

61. Id. at 13 (quoting Reverend James Carnahan, in **The Pennsylvania Insurrection of 1794 Commonly Called the Whiskey Insurrection, Proceeding of the New Jersey Historical Society (1852)**).

62. Id. at 16. However, some supports of Order, even in the midst of the Rebellion, did not discount the appropriateness of force in every situation. After all, to do so would deny the legitimacy of the American Revolution itself. In 1794, for example, the Committee of Fayette County acknowledged that armed resistance was sometimes permissible but only in the narrow circumstance when "no legal and constitutional remedy is within the reach of the people, and when the evils arising from the oppression are excessive, when they far surpass those that must ensue from the resistance." Sharp, **supra** note 50, at 125 (quoting from **Declaration of the Committees of Fayette County, September 1794, in THE WRITINGS OF ALBERT GALLATIN 1, 6** (Henry Adams ed., 1879)). For them the Whiskey rebels' use of violence, however, was illegal because in a republic such as the United States they had other means of redress. Id.
use force to resist unjust laws, but could "resort only to the electoral process to secure a redress of their grievances."63

The Law and Order contingent's conclusion, however, is overstated. America's subsequent use of civil disobedience and even violence to solve national policy issues such as slavery and segregation illustrates the enduring nature of protest in America. As Jefferson's praise of Shays' Rebellion indicated, there was more contemporary evidence that armed force had not been completely abandoned as a legitimate tool of protest.64 This right of revolution was more formally expressed in some state constitutions. New Hampshire's 1797 constitution, for example, contained a "right of revolution" that still exists in its current constitution. The provision states: "whenever the ends of government are perverted, and public liberty manifestly endangered, and all other means of redress are ineffectual, the doctrine of nonresistance against arbitrary power, and oppression, is absurd, slavish, and destructive of the good and happiness of mankind."65

Certainly, the legitimate role of force was hardly clear a few years later, in the fall and winter of 1798-99, when armed resistance to federal law once again occurred in what

63. BOYD, Afterword, in THE WHISKEY REBELLION, supra note 49, at 185.
64. See e.g., Letter from Thomas Jefferson to James Madison in SMITH, supra note 11, at 174, n. 21, at http://earlyamerica.com/review/summer/letter.htm. George Washington, on the other hand, was "mortified beyond expression" by the rebellion. Id.
65. N.H. CONST. art. X, in THE TREE OF LIBERTY, supra note 41, at 85. The New Hampshire constitution still contains the right of revolution:

Government being instituted for the common benefit, protection, and security, of the whole community, and not for the private interest or emolument of any one man, family, or class of men; therefore, whenever the ends of government are perverted, and public liberty manifestly endangered, and all other means of redress are ineffectual, the people may, and of right ought to reform the old, or establish a new government. The doctrine of nonresistance against arbitrary power, and oppression, is absurd, slavish, and destructive of the good and happiness of mankind.

N.H. CONST. pt. 1, art. 10.

Tennessee and other state constitutions also contained such clauses. TENN. CONST. art. I, § 2. Maryland still contains a similar clause, but it is not labeled Right of Revolution. The provision in most state constitutions regarding the sovereignty of the people gives them the right to alter and amend the government; some also specifically mention the right to abolish it. MD. CONST. art. IV. See also the right of revolution discussion, supra note 42 and accompanying text.
is called the Fries Rebellion. Once again, taxation played a central role in the conflict.

The immediate cause of the Fries’ Rebellion was the excise tax enacted to provide the federal government with revenues needed to prepare for an expected war with France. The taxes were criticized as being unjust, unconstitutional, and tyrannical, especially coming so soon after the enactment of the Alien and Sedition Laws which were also viewed as tyrannical and unconstitutional. At first the opposition was only verbal: citizens held public and private meetings to discuss the tax, petitions and resolutions against the tax, and to criticize the President. It escalated, however, to physical harassment of revenue agents.

66. During this time period the French were engaged in war with Europe and were constantly interfering with American trade, especially on the high seas. Consequently, the government believed that war with France was inevitable and that revenues were needed to prepare for the coming war. On July 9, 1798, Congress enacted a law [1 Stat. 580] to value lands, houses and slaves and to appoint assessors as required to do so. The law provided for counting and measuring windows in order to value the house, not to tax the windows, as some believe. A few days later, on July 14th, Congress enacted a direct tax of $2 million ($237,177.72 assessed to Pennsylvania) assessed at progressive rates on houses. The lengthy record of Fries’ trial contains testimony of eyewitnesses. Case of Fries, 9 F. Cas. 826 (C.C.D. Pa. 1799) (No. 51,126). This testimony is heavily quoted in a more readable form in WILLIAM H. DAVIS, FRIES REBELLION: 1798-99 (1899) (reprinted in 1969, Mass Violence in America series). A more abbreviated, traditional, and less nuanced description of the Fries revolt is contained in Jane Shaffer Elsmere, The Trials of John Fries, 103 PENN. MAG. OF HISTORY AND BIOGRAPHY 432 (1979).

67. DAVIS, supra note 66, at 4. But see Elsmere, supra note 66, at 432 (claiming that the taxes were generally met with indifference in urban areas). Yet Davis speaks of the "odious" tax being the subject of heated discussion throughout the country, "discussed in the taverns, stores, at all public gatherings, and at every point where two or more persons came together." DAVIS, supra note 66, at 7, 15-22 (mentioning meetings and petitions about the tax). At trial, Colonel Nichols, the Marshall, testified that he (Fries) could not be punished because the "alien law, the stamp act, and the house-tax law...were unconstitutional." Case of Fries, 9 F. Cas. at 857. Additionally, Fries objected to trying the arrested people in Philadelphia as opposed to closer to home. Id.

68. See, e.g., id. at 857-58. Justice of the peace, Joseph Horsefield, testifying that shortly before the last general election, the spirit of discontent and opposition was sensibly felt in the county of Northampton; there were different meetings... and sundry resolutions were passed, which appeared in public prints; among others, one was that petitions should be formed to obtain a repeal of the alien and sedition laws, and the land-tax act.

Id.
assessors, sometimes forcing them to leave, sometimes capturing them. Some of the protesters were charged with insurrection and arrested. The arrests added insult to injury. Objections arose not only to the tax itself but also to holding the trials of the arrested men in distant Philadelphia (the same complaint of distance from the court occurred in both the Shays and Whiskey rebellions). Approximately eighty to one hundred men armed themselves with the intention of forcing the release of the arrested men.

This armed protest was too similar to the not-so-distant Whiskey Rebellion not to raise government fears of a possible civil war. Indeed, both political parties viewed the protest in a larger context than simply a tax protest. Some Federalists believed that the riot was part of a Republican plot to overthrow the government, although they later learned that some of the arrested men, including Fries, were Federalists. Many Republicans, and perhaps President John Adams himself, believed that the Hamiltonian wing of the Federalist Party was behind the insurrection in order to embarrass Adams before the elections. Consequently, on March 12, 1799 President Adams proclaimed the rebels' actions "illegal and treasonable," called up the militia, and commanded all insurgents "to

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69. This anti-tax campaign was labeled the "hot water war" after one housewife threw hot water on an officer. Elsmere, supra note 66, at 433. Elsmere attributes the resistance to the fact that the populace was unaware of the tax, largely because they spoke German. Id. at 432. Although it is true that many of the individuals in the area did not understand English, it appears that meetings were held to discuss the law, but resistance still remained. See DAVIS, supra note 66, at 14-24, 42-43.

70. The rebellion is named after Fries who had served both in the Revolutionary War and in the militia during the Whiskey Rebellion. DAVIS, supra note 66, at 10-11. Although there is historical evidence that he led the rescue of prisoners in Bethlehem, there is also evidence that some of it was spontaneous and he in fact tried to prevent it. See, e.g., GEORGE CONNOR, A MODEL OF THE POLITICS OF INSURRECTION: A COMPARATIVE ANALYSIS OF THE SHAYS', WHISKEY, AND FRIES REBELLIONS 181-197 (1989). Additionally, evidence presented at the trial showed that Fries said that he would not harm those holding the prisoners. See Case of Fries, 9 F. Cas. at 852, 857, 859, 869 (protesters' concern about the distance of the trial from home). Some of the arrested men were willing to stand trial. Id. at 854. This evidence has led George Connor to conclude that not only did John Fries not lead the rebellion, but that it was not "in fact, led at all." CONNOR, supra at 197.

71. DAVIS, supra note 66, at 139.

72. Elsmore, supra note 66, at 436.
disperse and retire peaceably." Although most of the insurgents complied, Adams nevertheless called up the militia and later federal troops. These actions turned a local rebellion into a national event, with some people fearing—or hoping—for the overthrow of the government.

Eventually Fries and some other protesters were arrested. Most were charged with conspiracy and obstruction of process. Fries and ten others, however, were charged with treason. The most publicized trial was that of Fries who was convicted of treason in a trial that has been called "the most extraordinary judicial proceeding our country ever witnessed." Heated partisan, political discussions continued well after the conclusion of Fries' trial. The Federalists claimed that Fries had committed treason while the Democrats claimed that he was a victim of "tyranny and oppression." Eventually, Adams pardoned Fries over the objections of his cabinet. Specifically, Alexander Hamilton believed that the pardon, coming on the heels of the pardons in the Whiskey Rebellion, would quickly lead to another tax rebellion.

73. Proclamation of President John Adams, Mar. 12, 1799, in THE TREE OF LIBERTY, supra note 41, at 91-92.
74. DAVIS, supra note 66, at 71-73, 75-86.
75. Id. at 73.
76. Id. at 115. Actually, there were two trials. For a discussion of the trials, see Id. at 115-128; Elsmere, supra note 66, at 437-444.
77. DAVIS, supra note 66, at 129. Nevertheless, many on both sides thought Fries should not be executed because they believed that Fries was misled by other, more important men. Id. at 129, 138-39 (Fries stated after the trial that "great men were at the bottom of this business.").
78. THE TREE OF LIBERTY, supra note 41, at 95-97. The cabinet believed "that if the government had not adopted prompt measures, the spirit of insurrection would have rapidly extended." The Heads of the Departments were responding to a list of thirteen questions Adams had posed to them regarding whether to pardon any or all of the three sentenced to execution. Id. at 96. In 1815 John Adams explained in a letter why he had pardoned Fries and the others:

What good, what example would have been exhibited to the nation by the execution of three or four obscure, miserable Germans, as ignorant of our language as they were of our laws, and the nature and definition of treason? Pitiful puppets danced upon the wires of jugglers behind the scene or under ground. Had the mountebanks been in the place of the puppets, mercy would have had a harder struggle to obtain absolution for them . . . . [t]heir crime did not amount to treason. They had been guilty of a high-handed riot and rescue, attended with circumstances hot, rash, violent, and dangerous, but all these did not amount to treason.
Hamilton was correct in that there was another serious tax rebellion. It did not occur, however, until 1832 with a protest against tariffs that led the country to the brink of war. Protests against protective tariffs were common in the pre-Civil War South, because tariffs were intertwined with the ongoing battle about the nature of the federal government and the balance of power between it and state governments. What differentiated the 1832 protest was its extremity and its use of the doctrine of nullification which brought the country to the brink of war. The 1832 Crisis is a stark example of the connection between taxation and legitimacy in a form of government that constitutionally has limited powers.

The crisis originated in South Carolina where many people believed that the protective tariffs that helped other groups such as manufacturers and sugar planters hurt South Carolina by destroying foreign demand for its main exports, rice and cotton. This complaint lent weight to the cause of those who believed that the tariffs were illegal exercises of federal powers in two respects. First, they argued that the purpose of these tariffs was not to raise revenue but to help specific groups. Second, by helping only certain groups, like Northern manufacturers, the tariffs did not promote the general welfare, but rather hurt some segments of the nation, such as Southern cotton growers.

These remarks appear in a letter from John Adams to James Lloyd, March 31, 1815 reprinted in THE TREE OF LIBERTY, supra note 41, at 107-08.

79. Demand would fall either because foreign governments would retaliate by imposing high tariffs against American sellers or simply because foreigners would stop buying American rice and cotton in response to the American tariffs. WILLIAM FREEHLING, PRELUDE TO CIVIL WAR: THE NULLIFICATION CONTROVERSY IN SOUTH CAROLINA 1816-1836 107 (1968).

80. See, e.g., id. at 96. Much of this discussion of the crisis of 1832 relies on FREEHLING and on RICHARD E. ELLIS, THE UNION AT RISK: JACKSONIAN DEMOCRACY, STATES' RIGHTS, AND THE NULLIFICATION CRISIS (1987). In his 1833 Commentaries on the Constitution of the United States, Joseph Story devoted many pages to the issues raised by the tariff in his discussion about Congress' power to tax. For example in section 919, page 382 he says that in the United States the power of taxation must be

for the common defence and general welfare of the United States... It cannot constitutionally transcend them. If the defence proposed by a tax be not the common defence of the United States, if the welfare be not general, but special, or local, as contradistinguished from national, it is not within the scope of the constitution. If the tax be not proposed for the common defence, or general welfare, but for other objects, wholly extraneous, (as for instance, for propagating Mahometanism
These complaints were not new, but they gained urgency in the mid 1820s for several reasons. First, by the summer of 1827 it was clear that rather than reducing the protective tariff of 1824, Congress was going to increase it. This became evident when Westerners agreed to vote for the tariffs in return for Easterners support for internal improvements such as roads. Economic depression and waning concerns about national security as the War of 1812 faded in memory also increased South Carolina's anxiety. The most important factor, however, was increased concerns about the continued existence of slavery. In particular, South Carolinians feared the destruction of the institution of slavery either through slave insurrections (such as the 1822 Vesey insurrection) or through the increasingly active abolition movement.

South Carolinians increasingly believed that issues that were important to them, such as tariffs and slavery, were becoming minority interests in the country as a whole. Consequently, the rest of the country might use a broad construction of congressional powers to consistently vote against Southern interests.

If a simple majority in Congress could exercise any power which it claimed was related to enumerated powers or conducive to the general welfare, the Constitution was at the mercy of popular majorities instead of restraining them. The federal government could seize reserved rights which states had never consented to give up.

Congress, in the view of these South Carolinians, was already acting against Southern interest in regards to tariffs. If congressional powers were broadly construed,
what was to prevent Congress from abolishing slavery, as abolitionist activity increased?

The passage of the tariff of 1828 was the final straw: "Only a minority check on majority tyranny could save the South—and the Union." That check became the doctrine of nullification. First enunciated by John Calhoun in a state legislative report, The South Carolina Exposition and Protest, the doctrine built on the 1798 Resolution of the Kentucky Legislature drafted by Thomas Jefferson and James Madison which declared the Alien and Sedition Acts null and void. According to Calhoun, the Constitution gave only specific defined powers to the national government. If it exceeded those powers, such as by passing a protective tariff, a state, through its retained sovereignty, had the power to declare that congressional act unconstitutional and therefore null and void within that state. The federal government then had a choice either to accept that state's action and not enforce the law, or to obtain a constitutional amendment to grant it the power.

The nullifiers saw the passage of the Tariff of 1832 in June and the agitation for emancipation of slaves as a "single pattern of majority tyranny." If South Carolina yielded on the tariff, more harmful internal improvements such as bridges and roads would be approved, as would abolition. Consequently, in the fall of 1832, a special Convention, convened by the legislature, passed an Ordinance declaring the tariffs of 1828 and 1832 unconst-

83. Id. at 143 (citing both the Charleston Mercury of June 25, 1838 and a speech by James Hamilton).
84. Resolution of the Kentucky Legislature 1798, in THE TREE OF LIBERTY, supra note 41, at 89 (each state party "has an equal right to judge for itself, as well of infraction, as of the mode and measure of redress."). The Resolution was drafted by James Madison and Thomas Jefferson. In retrospect, the actions of North Carolina in respect of the Whiskey Excise Tax were also described in this manner.

The legislatures of Maryland, Pennsylvania, Virginia, and North Carolina united in solemn declarations of rooted dislike, of the whiskey tax and of resistance, in some cases hardly to be reconciled with constitutional opposition; and by the latter state a position was assumed, which in later days would have been called nullification.
85. See, e.g., ELLIS, supra note 80, at 8.
86. FREEHLING, supra note 79, at 255.
87. Id. The Nat Turner Revolt of 1831 increased fears not only of more revolts but that owners would emancipate their slaves. Id. at 251.
stitutional and "null and void" in South Carolina and declared it unlawful to enforce the payment of duties in South Carolina.\textsuperscript{88} Instructing the state legislature to pass "such acts as may be necessary to give full effect to this Ordinance," the Convention proclaimed: "we will consider the passage by Congress of any act authorizing the employment of military or naval force against the State of South Carolina . . . as inconsistent with the longer continuance of South Carolina in the Union."\textsuperscript{89}

On December 10, 1832 President Jackson issued a Nullification Proclamation repudiating nullification and secession and stating that the power to nullify was incompatible with the existence of the Union. Although no state directly supported South Carolina, there was opposition towards Jackson's proclamation and sympathy for South Carolina, especially elsewhere in the South.\textsuperscript{90} The South Carolina legislature responded to the Proclamation by appropriating money to buy weapons, authorizing a military draft, and issuing a call for volunteers to defend the State against Jackson's armies—a call which over 25,000 people answered.\textsuperscript{91} On January 16, 1833 President Jackson, in turn, sent Congress the Force Bill Message in which he asked for military powers. Violence, however, was averted in March 1833 with the passage of the Compromise Tariff of 1833.\textsuperscript{92}

Although the 1832 tariff may be the most acute tax-inspired resistance in the nineteenth century, the longest one was the resistance to federal liquor taxes in the Appalachian south throughout the second half of the century, sometimes called the Second Whiskey Rebellion. Federal governmental powers increased after the Civil War, not just to enforce civil rights for the newly freed slaves, but also to enforce the expanded system of internal taxes

\textsuperscript{88} Id. at 263.
\textsuperscript{89} Id. The Ordinance had an oath which included promises to uphold both the Ordinance and all legislation passed to sustaining it. All officials elected after the Ordinance were to swear to oath or lose office. Id.
\textsuperscript{90} ELLIS, supra note 80. Since nullification was, according to the nullifiers, legal, a president could not call out the militia to repress it unless authorized by Congress. FREEHLING, supra note 79, at 231.
\textsuperscript{91} FREEHLING, supra note 79, at 275.
\textsuperscript{92} Id. at 293. See also DAVID F. ERICSON, THE SHAPING OF AMERICAN LIBERALISM: THE DEBATES OVER RATIFICATION, NULLIFICATION AND SLAVERY 77 (1993); ELLIS, supra note 80, at 165-176.
designed to pay off the national debt incurred during the war, and to fund the government's expanded functions. Whereas Reconstruction efforts to protect the new civil rights failed to permanently enlarge central power, the increased revenue system did so through its creation of a regulatory system—complete with statutes, regulations, an administrative agency, and civil service personnel to run it. One source of the resistance to these excise taxes was concern about the proper nature of the government, specifically government oppression arising from the enactment of illegal laws and their abusive enforcement. Moonshiners believed they had a natural right to do whatever they wanted to do without government interference, so long as they didn't infringe upon their neighbors' rights. These are traditional republican and revolutionary concepts embodied in the idea of negative and inalienable rights. As one Georgia moonshiner said, "he'd like to know what his grandfather 'fit' in the Revolution for if he was not to be allowed to make a little corn whiskey." More formally, newspaper articles spoke of taxation without representation.

93. Wilbur R. Miller, Revenuers and Moonshiners, Enforcing Federal Liquor Law in the Mountain South 1865-1900 1-4 (1991). This discussion relies heavily on Miller which provides a detailed discussion of this era.

94. Id. at 4-5. As Miller states, "Reconstruction's inability to rise above partisanship and the revenue system's usefulness to both parties—helps explain the revenue bureau's ability to function as an agent of national authority." Id. at 10.

95. Some of the resisters were former Confederate soldiers, but some were also Union sympathizers and some were against any government—Union or Confederate. Former Union soldiers in Tennessee felt when they fought for the Union they were not fighting "for the privilege of paying taxes on their mountain dew." Id. at 43. Opposition to the tax occurred in all sectors of society from the illiterate farmers who made the moonshine to influential and wealthier people in positions of power such as the legislators who complained to Congress. A North Carolina federal judge stated:

[Prominent political speakers of both political parties often address the people and for the purpose of winning popular favor, denounce in strong language the injustice, wrong, oppression, and outrage of the Internal Revenue Laws. These laws have but few defenders except the Courts and the officers of the Government.

Id. at 45. (emphasis in the original).]

Although most moonshiners were white men, by the turn of the century about one quarter of the moonshiners in North Carolina were black. Id. at 36.

96. Id. at 41.

97. Id. "In some regions moonshiners did express Democratic resentment of Yankee centralization . . . . In the mountains . . . people voted Republican even
Many of the protests were peaceful. The North Carolina legislature, for example, complained to Congress that the excise tax was "oppressive and inquisitorial, centralizing in its tendencies and inconsistent with the genius of a free people, legalizing unequal, expensive, and iniquitous taxation, and, as enforced in this state, is a fraud upon the sacred rights of our people, and subversive of honest government." Although generally peaceful, the resistance was widespread. When moonshiners were arrested it was difficult to find juries willing to indict or convict them. Some revenue agents were themselves arrested and tried for such offenses as trespassing and even murder. Newspapers denounced the agents who "claimed for themselves and exercised powers and privileges more in harmony with the blind and despotic governments of the East than with the institutions of a free and enlightened republic."

Violence, however, sometimes did occur on both sides: the government tried to enforce the laws by destroying illegal liquor stills and arresting "moonshiners;" local citizens, on the other side, resisted the tax. Although many locals sympathized with the moonshiners, others refused to inform the revenue agents about them out of fear of reprisals such as whippings, arson, shootings and even killings. The moonshiners' resistance was "reactionary" violence—a response to the expansion of federal power that infringed upon their rights and their freedoms.

The right of revolution, evidenced in these nineteenth century tax protests, was also expressed more soberly. In while complaining about the revenue system's violation of their rights." Id. at 42.

98. Id. at 115. See id. at 43-44 and 114 for comments by other legislatures and legislators.

99. Id. at 51. On occasion, moonshiners rescued their fellow moonshiners from jail. See, e.g., id. at 49.

100. Id. at 108.

101. Id. at 113 (quoting a Charleston editorial).

102. Id. at 103 (James M. Davis was killed as he and other revenue officials escorted a moonshiner to court.). Even the women sometimes attacked the revenue agents. Id. at 36.

103. Id. at 51-53. Moonshiners were active in areas that the Ku Klux Klan was, and some of the worst violence against revenue agents occurred in "the name and methods of the Klan". Id. at 53.

104. Id. at 59-60, (citing William F. Holmes, Moonshining and Collective Violence: Georgia, 1889-1895, 67 J. OF AM. HIST. 598, 590-91 (1980)).
mid-nineteenth century, for example, Henry David Thoreau stated "[a]ll men recognize the right of revolution; that is, the right to refuse allegiance to, and to resist, the government, when its tyranny or its inefficiency are great and unendurable." Although the Civil War might be viewed as the ultimate defeat of the right of rebellion, the latter half of the century contained evidence of its continued existence. In 1874, for example, the Pennsylvania Supreme Court interpreted the state's constitutional provision giving the people the "right to alter, reform or abolish their government" as including the right of revolution. Even the great nineteenth century jurist Thomas Cooley believed that "[i]f the contingency ever arise when it would be necessary for the people to make use of the arms in their hands for the protection of constitutional liberty, the proceeding, so far from being revolutionary, would be in strict accord with popular right and duty." On the other hand, the Iowa Supreme Court in 1883 articulated the dominant, tamed version of the right. Although it recognized that the people as sovereigns retain a natural right of revolution, the court concluded, citing Cooley, that the government could only be legitimately altered through those peaceful means previously agreed to in the constitution.

105. Henry D. Thoreau, On the Duty of Civil Disobedience in Political Obligation and Civil Disobedience Readings 177, 179 (Michael P. Smith & Kenneth L. Deutsch eds., 1972) (but he noted that most people did not think the conditions of slavery in America merited the exercise of that right).


106. Wells v. Bain, 75 Pa. 39, 46-47 (1874) (interpreting PA. CONST. art. 1, § 3 to mean that revolution is one of the three "proper" means of changing the form of government). But see Koehler v. Hill, 15 N.W. 609, 615 (Iowa 1883) (denying that a similar provision in the Iowa constitution included a right of revolution).


108. Koehler, 15 N.W. at 615. The court stated:

No heresy has ever been taught in this country so fraught with evil as the doctrine that the people have a constitutional right to disregard the constitution, and that they can set themselves above the instrumentalities appointed by the constitution for the administration
The right of revolution survived the twentieth century and persists in the twenty-first, largely domesticated, but not entirely tame. Certainly, most people reject violence and the right of revolution as legitimate means of protest because the government provides methods for "peaceful and orderly change." Nevertheless, the use of force and disorder as legitimate means of protest and change has retained some viability, and may even have grown. Three states still retain explicit provisions in their constitutions stating that the doctrine of nonresistance against arbitrary power and oppression is absurd, slavish, and destructive of the good and happiness of mankind. Only New Hampshire, however, labels it a "Right of Revolution" in keeping perhaps, with the "Live Free or Die" slogan on its license plates. Justice Douglas, in his 1961 dissent in Scales v. United States, stated that the right of revolution "has been and is a part of the fabric of our institutions."

of law. It tends directly to the encouragement of revolution and anarchy. It is incumbent upon all who influence and mould public opinion to repudiate and discountenance so dangerous a doctrine before it bears fruits destructive of republican institutions. It will be well if the people come to understand the difference between natural and constitutional freedom, before license becomes destructive of liberty.

Id. at 615-16.

109. Dennis v. United States, 341 U.S. 494, 501 (1951) (upholding the Smith Act, which made it illegal to knowingly be a member of an organization that advocates the violent overthrow of the government).

110. MD. CONST. art. 6 (1867); N.H. CONST. pt. I, art. 10 (1783); TENN. CONST. art. I, § 2 (1870). See, e.g., Otis H. Stephens Jr., The Tennessee Constitution and the Dynamics of American Federalism, 61 TENN. L. REV. 707, 710 (1994) (Tennessee's right of revolution, clearly adopted in its first constitution and unchanged since then, "embodied the compact theory of government."). One state, Nevada, specifically has an "anti-revolution" clause forbidding secession or forcible resistance to the execution of federal laws. NEV. CONST. art. 1, § 2 (1864).

111. 367 U.S. 203, 262 (1961) (Douglas, J., dissenting from the decision upholding the Smith Act). To support this position, Douglas quotes the Declaration of Independence, id. at 268-69; Abraham Lincoln's January 12, 1848 address to the United States House of Representatives, id. at 269. "Any people anywhere, being inclined and having the power, have the right to rise up, and shake off the existing government, and form a new one that suits them better. This is a most valuable,—a most sacred right . . . " Thomas Jefferson's December 20, 1787 letter to James Madison, id. at 273.

I own, I am not a friend to a very energetic government. It is always oppressive. . . . The late rebellion in Massachusetts has given more alarm, than I think it should have done. Calculate that one rebellion in thirteen States in the course of eleven years, is but one for each State in a century and a half. No country should be so long without
The right of revolution is also inherent in civil disobedience, an honored tradition in the United States dating back to Colonial times, because it recognizes that even in a democracy, the state's sovereignty is bound by the moral authority of the individual, who is morally obligated to resist immoral laws. This resistance does not necessarily lead to violence, and in fact most people who believe and practice civil disobedience do not advocate violence. Yet it is a potential consequence of civil disobedience, and indeed it occurred during the civil rights movement.

One, and the revolutionary roots of state constitutional provisions reserving the right to the people to "alter, reform or abolish" the existing government.

Id. at 275.


113. See, e.g., William O. Reichert, Toward a New Understanding of Anarchism, in Political Obligation and Civil Disobedience Readings 193, 194, 204-05 (Michael P. Smith & Kenneth L. Deutsch eds., 1972). Anarchists, who do often practice civil disobedience, are against government in general because they believe that ultimate sovereignty rests in the moral sensibility of the individual, not the state, and the individual is morally bound to resist immoral laws. Anarchists are against government because they believe that any organized authority ultimately must rely on force. See id. Thus, anarchists are merely the extreme extension of a general American anti-government sentiment, as expressed by the quintessential American and anarchist, Henry David Thoreau, when he stated that the best government is the one that does not govern at all. Thoreau, supra note 105, at 177. Wills begins his book with this quote. See Garry Wills, A Necessary Evil: A History of American Distrust of Government 15 (1999).

114. The last half of the twentieth century was replete with major acts of civil disobedience, such as Martin Luther King and the civil rights movement, the Vietnam War era protests, and the more recent protests in Seattle at the World Trade Organization meeting in 1999. For a description of the WTO protests, see, e.g., David E. Sanger, Clinton Pleads for Rights of Workers, Chides WTO, Times-Picayune (New Orleans), Dec. 2, 1999, at A-11; Rachel Zimmerman, Clash in Seattle: Police Stumble Despite Months of Preparation, Wall St. J., Dec. 2, 1999, at A-8.

Jury nullification, another type of disobedience, has gained attention in recent years and is supported by the Fully Informed Jury Association (F.I.J.A.). See, e.g., Nancy J. King, Silencing Nullification Advocacy Inside the Jury Room and Outside the Courtroom, 65 U. Chi. L. Rev. 433 (1998). As discussed later, it
Some people believe that disorder, violence, and even chaos can occasionally be valuable. Among them are some anarchists who do not even consider destruction of property to be violence. But supporters of disorder are not limited to anarchists. Even in 1969, the Task Force on Violence stated:

We take the position that the growth of this country has occurred around a series of violent upheavals and that each one has thrust the nation forward. The Boston Tea Party was an attempt by a few to alter an oppressive system of taxation without representation. The validation of these men rested on their attempts to effect needed social change. If the Boston Tea party is viewed historically as a legitimate method of producing such change, then present-day militancy, whether by blacks or students, can claim a similar legitimacy.

is a common theme in many tax protest cases. See, e.g., Skating on Thin Ice: Gary Beacom and the Pitfalls of Tax Protesting, MILITIA WATCHDOG, at http://www.militia-watchdog.org/beacom.htm (last visited Dec. 1, 1999).

The recent common law movement is yet another method of protest that has increased in popularity, although it has not gained legitimacy in the eyes of the majority. This movement, which claims that the government is totally illegitimate, attempts to destroy it through "paper terrorism"—swamping the system with frivolous lawsuits and spurious legal documents, such as liens and U.C.C. filings.

115. Anarchism has become more popular in recent years. See, e.g., Joseph Kahn, Anarchism, the Creed That Won't Stay Dead, N.Y. TIMES, Aug. 5, 2000, at A15. In the United States, for example, a small group of protesters caused the violence at the 1999 World Trade Organization (WTO) conference in Seattle because they believe, as John Zerzan, the group's "intellectual leader", stated, "if the game itself is the problem, you can't play by the rules.[" Peter Waldman, An Anarchist Looks to Provide Logic to Coterie at Core of WTO Vandalism, WALL ST. J., 6 December, 1999, at A17. Indeed, groups called the Black Army Faction and the Black-Clad Messengers have argued that property destruction is not even violence because it is a "legitimate form of self-defense'....

More recently, South Carolina has once more raised the specter of armed defiance of the federal government when the governor declared a state of emergency and ordered state troopers to stop federal shipments of nuclear waste from entering the state. More broadly, many of today's extremist militia fit in with this view in that they see themselves as protecting the constitution, as will be discussed later.

Perhaps the greatest example of the continued viability of the right to revolution is contained in a popular republican interpretation of the Second Amendment. Under this view, the people's right to bear arms incorporated in the Second Amendment is the ultimate bedrock upon which popular sovereignty is grounded. As such, it has been interpreted as supporting the right of revolution as the ultimate defense against governmental tyranny.

maintain a memorial to Confederate president Jefferson Davis because it is a monument "to the rebellious spirit that is quintessentially American, not just Confederate.

For example, in the midst of the agitation of the 1960s and early 1970s, Theodore J. Lowi said: "The disorder that accompanies the failure of institutions is certainly not comfortable. But it is not merely an obstacle between ourselves and some predetermined paradise. There is a positive side to institutional atrophy. The efficiency of good organization makes things too rigid ... ", Theodore J. Lowi, The Politics of Disorder, at x (1971). And again: Chaos is better than a bad program. It is the bad program that gives the sense of a response and then relies on the leadership of agency and clientele groups to make a policy out of the program. No program at all at least provides the opportunity for spontaneous leadership outside the government to propose the more precise and appropriate remedy.

Id. at 180.


119. See generally Joyce Lee Malcolm, To Keep and Bear Arms: The Origins of an Anglo-American Right (1996); Reynolds, supra note 107, at 465-72 (including note 18 which contains a lengthy list of articles on the Second Amendment); Robert J. Cottrol & Raymond Diamond, The Second Amendment; Toward an Afro-Americanist Reconsideration, 80 Geo. L. J. 309 (1991); David C. Williams, Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment, 101 Yale L.J. 551 (1991); Sanford Levinson, The Embarrassing Second Amendment, 99 Yale L.J. 637 (1989). Williams prefers to call it the "right of resistance." Williams, supra at 552 n.3. Wills, however, states that academic supporters of the right to bear arms under the Second Amendment often "confuse the right of insurrection under (within) the Constitution with the right of revolution (which would overthrow the Constitution)." Wills, supra note 113, at 215. At the time of the writing of the Constitution, Americans clearly supported a right of revolution (since the country had just done so), but
To understand the argument, it is necessary to understand the role of corruption in republican theory. It views the republican form of government as the only virtuous form of government because only its citizens will act for the common good and not for their own self-interest. A republic, however, is in constant danger of being "corrupted," that is, acting in the self-interest of either the governors or some of the governed. Although, as James Madison stated, corruption can occur in any part of government, no matter how that branch is chosen, the greatest danger of corruption in a republican government arises in the legislative branch. According to republicanism, both separation of government powers and the existence of competing factions can minimize corruption. The primary means to prevent corruption, however, is the people's retention of the right of revolution, the power to change or overthrow the government when it abuses its authority to act for the common good. The

not a right of insurrection under the Constitution, which states in four places that armed insurrection is forbidden: Article III, Section 3, Clause 1 (regarding treason); Article I, Section 8, Clause 15 (power of Congress to call up the militia to suppress insurrections); Article I, Section 8, Clause 16 (concerning the training of the militia); and Article IV, Section 2, Clause 2 (extradition of people who had committed crimes such as treason). See id. at 207-17.

120. See THE FEDERALIST NO. 48, at 251 (James Madison) (Garry Wills ed., 1982). See also THE FEDERALIST NO. 47 at 245 (James Madison) (Garry Wills ed., 1982) ("The accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many, and whatever hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."); FEDERALIST NO. 48, at 250 (James Madison) (Garry Wills ed., 1982) ("It will not be denied, that power is of an encroaching nature, and that it ought to be effectually restrained from passing the limits assigned to it.").

121. See, e.g., Savage, supra note 37, at 93-94; THE FEDERALIST NO. 10 (James Madison) (existence of many factions will prevent any one from becoming too powerful).

122. Id. For more discussions of corruption, see generally WOOD, supra note 40, at 32-34; LANCE BANNING, THE JEFFERSONIAN PERSUASION: EVOLUTION OF A PARTY IDEOLOGY (1978); J.G.A. POCOCK, THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION (1975). For a discussion of corruption in the context of the role of the deficit in American history, see SAVAGE, supra note 37, 85-120. In 1988, Savage wrote that America's fear of a national deficit and the corruption it represented "dominated American thought and public policy" in the early post-revolutionary period, "and the symbolic meaning of balanced budgets became rooted in the nation's politics until the Republican party's ascendancy during the Civil War." Id. at 86. But as Savage himself makes clear later in the book, concern about the deficit, especially Republican concern continued, as the Reagan years indicate. Id. at 240-41. See also BENAVIE, supra note 37, at 20-21.
Second Amendment, by reserving to the people the right to bear arms, can therefore be seen, as Joseph Story said, "as the palladium of the liberties of a republic; since it offers a strong moral check against the usurpation and arbitrary power of rulers; and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them." In short, revolution under republican theory was the ultimate check on the natural tendency of government towards corruption and tyranny, and, in the words of Thomas Jefferson, "[n]o country should be . . . long without one.

The republican tradition is alive and well in the United States. Indeed, it has recently experienced a revival of interest. Its conception of popular sovereignty and the corruptibility of government help keep alive the possibility of violence as a legitimate means of resistance. Indeed, some commentators worry that the revival of republicanism may encourage more violence. Thus, the powerful concept of the sovereignty of the people, unleashed during the Revolution, retains the power to undermine the stability of the government.

2. Sovereignty and the People's Distrust of Government. The conception of the sovereignty of the people developed in

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123. Levinson, supra note 119, at 649 (citing 3 J. STORY, COMMENTARIES §1890 (1833)). There is a debate as to whether the Second Amendment reserves this power for the people individually or collectively. See id. at 645-46; THE FEDERALIST NO. 46 (Madison) (writing about the ability of the States, via an armed militia, to oppose tyranny of the federal government).


the Revolution and used to create the new federal government threatens that very government in yet another way. The American conception, according to Gordon Wood, differed from previous conceptions of the people because under it, the people were not "organically tied together by their unity of interest but rather [were] an agglomeration of hostile individuals coming together for their mutual benefit to construct a society." This conception ruptured the customary identity between the individual citizen and the society as a whole. Liberty became not just the traditional public and positive liberty or right to participate in the government, but also the personal and negative liberty, the right to freedom from that very government. The role of government was no longer limited to promoting the general welfare of the homogenous "people;" it also included protecting each individual against the government itself and the tyranny of the majority. The government became an enemy to be resisted, and whose power must be curtailed. Under this view, which is a corollary of the republican fear of corruption, government's legitimate function is largely a negative one of protecting the individual from itself as well as from other people.

This conception of sovereignty and the role of government provides the theoretical underpinnings of two prominent characteristics of American political thought. The first is a strong distrust of government, especially the federal government. The second is a profound anti-government sentiment that sees authority, especially federal authority, as inefficient, oppressive, non-responsive to the will of the people, and antithetical to democratic rights.

These anti-government attitudes are ingrained in both popular culture and political thought. For example, a significant component of the Western Frontier—itself a formative myth in American character and history—is the view of western heroes as "noble anarcho-owners no master, free denizens of a limitless wilderness." Mass culture

127. WOOD, supra note 40, at 607. This paragraph owes much to Wood. See id. at 601-616.
128. Many people have less confidence in the federal government than in their local governments. See HERBERT J. GANS, MIDDLE AMERICAN INDIVIDUALISM: THE FUTURE OF LIBERAL DEMOCRACY 34 (1988).
turns the Outsider into a hero who saves the community when the Establishment cannot. The Western genre of films, such as *Shane*, illustrates this phenomenon. In politics, this same sentiment generates support for "outsider" candidates, such as Ross Perot or Jesse Ventura, and for political statements railing against the government. We mythologize the Outlaw in fiction (e.g., *Butch Cassidy and the Sundance Kid*, *Bonnie and Clyde*, and *The Talented Mr. Ripley*) and real life (e.g., D.B. Cooper, the bank robber who hijacked a plane). Even anti-government extremists such as David Koresh in Waco, Texas, and the Unabomber arouse some people's sympathy.

Of course, people in other nations and cultures also distrust government and admire outlaws. Even Jesus is viewed as a rebel. A certain level of distrust of authority and regard for rebels even may be an innate response to the existence of legitimate power—a manifestation of the battle within human nature between the desire for autonomy (freedom) and the need for authority (order). In the
United States, however, this attitude runs deeper. Indeed, distrust has been called the source of American legitimacy and anti-government sentiment "the distinctive aspect of the American Creed." In America, to rebel against authority is to be patriotic and true to this country's revolutionary origins. Taxation is often involved in these expressions of patriotism, just as it was in the original revolt. For example, popular American history extols "moonshiners" who illegally distill liquor because they exemplify the individualistic, even iconoclastic and anarchistic virtues Americans admire. In the twentieth century, the early rebel Daniel Shays was seen as a hero by both sides of the political spectrum: by the left as a champion of the people and enemy of capitalism, and by the right as "the angry taxpayer in revolt against Big Government.

Thomas Paine once proclaimed during the American Revolution that government at best is a "necessary evil" and an "intolerable one" at its worst. Although only a struggle against the Pharaoh in Egypt. See id. at 58. For example, the appeal of many outlaws, such as Robin Hood, may stem from the belief in what has been called the "noble bandit," that is, one who is not really an outlaw but someone fighting for justice in the face of an oppressive—and therefore—illegitimate authority. DUNCAN, supra note 130, at 61 (citing historians, such as E.J. Hobsbawm, for this theory). The negative aspects of rebels and rebellions are also well known. Consider, for example, the excesses of the French Revolution or Stalin, even Lenin in the Russian Revolution.

Finally, the appeal of the rebel, even the criminal outlaw, can be seen as a universal psychological one, deriving, perhaps, from a child's love/hate relationship with parental authority. See id. at 59.

134. GANS, supra note 128, at 34 (quoting SAMUEL P. HUNTINGTON, AMERICAN POLITICS: PROMISE OF DISHARMONY 33 (1981)); Hurst, supra note 19, at 227 ("In our tradition the emphasis on legitimacy begins with distrust of the power of the political state."). Hurst also makes the point that in the United States concentrations of private power must also be justified by being useful (efficient, in his words) and helpful in achieving justice ("socially acceptable and humanly desirable ends."). Id at 225. He notes that this conception of justice as the purpose of law transcends the U.S. Constitution and occurs in many cultures. Id. at 226-27.


136. On the Origin and Design of Government in General, with Concise Remarks on the English Constitution, in THOMAS PAINE, POLITICAL WRITINGS 3 (Bruce Kuklick ed., 1989) ("government even in its best state is but a necessary
small group of people have carried this thought to its logical extreme and espouse anarchy, many Americans are in accord with Thomas Jefferson, who stated: "I own, I am not a friend to a very energetic government. It is always oppressive." They would also agree with Henry David Thoreau, who said: "I heartily accept the motto—'That government is best which governs least'; and I should like to see it acted up to more rapidly and systematically. Carried out, it finally amounts to this, which also I believe—'That government is best which governs not at all[]." As a consequence, although few Americans are anarchists, many believe that the smaller the government the better. Indeed, as Garry Wills pointed out in his book, A Necessary Evil: A History of American Distrust of Government, some people believe that the American government was deliberately designed to be ineffective.

In addition to Americans' anti-government sentiment, other aspects of American history and culture also tend to undermine the government's legitimacy. Many theorists, for example, believe that an essential element of rebellion is the failure of the society to achieve equality. Since equality is one of the fundamental principals of American democracy, evidence of inequality creates great dissonance and leads to the sense of frustration and inability to obtain redress that frequently undermines legitimacy.

Additionally, anti-government rhetoric, especially anti-tax rhetoric, increases frustration with government, a common cause of eroding legitimacy. This occurs because the rhetoric helps create situations in which the populace has contradictory expectations that cannot be satisfied. For example, in recent years Republicans have stridently decried the over-regulation of society by the federal government. This reverberates with and encourages mass America's distrust of government. As a result, the populace has generally approved Republican-led initiatives to de-regulate many industries, limit regulatory powers, reduce funding of federal agencies that supervise them, and

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138. Thoreau, supra note 105, at 177. See also WILLS, supra note 113, at 15 (beginning his book with this quote).
139. See KITTRIE supra note 19, at 69 (tracing this belief back to Aristotle's POLITICS).
generally reduce taxes. At the same time, people still want the government to provide certain services, even though the anti-tax, anti-big government philosophy has impaired the government's capacity to do so. People's frustration with the government increases as they see its effectiveness decline. Thus, for example, when there is an outbreak of salmonella, the public protests the government's ineffectiveness and its inability to prevent such disasters. They want the FDA to conduct more inspections, but at the same time they have created a situation that prohibits the government from doing so because budgets have been curtailed, as has the executive power of the agencies. Although external threats, such as the September 11, 2001 terrorist attacks, may override the normal American distrust of government, any increased trust is only temporary. Similarly, although some Republican politicians, including President Bush, supported increased government activity in areas such as

140. See Alford, supra note 16, at 28, 46 (suggesting that in United States low level of trust in government is the norm and that external threats to the country cause that trust to increase temporarily). Responses to September 11th seem to confirm this. For evidence of post-September 11th distrust, see Harwood, supra note 16. Immediately after the September 11th terrorist attacks, for example, American distrust in government, which had been declining for over 30 years, suddenly reversed. Most people not only wanted the government to do more, but also wanted to give the government more power to carry out national security activities. Trust in government employees from firefighters to Center for Disease Control and Prevention workers increased dramatically, with a CBS/New York Times poll finding that for the first time in decades a majority of the country (fifty-five percent) believed that the government does the right thing most of the time. John Balzar, Public Servants, the Coffee Break is Over, TIMES-PICAYUNE (New Orleans), Nov. 16, 2001, at B-7 (citing CBS/New York Times poll). See also David Wessel, A Pivot Point in American Life, WALL ST. J., Oct. 4, 2001, at A-1 (pre-September 11th questioning of the importance of government has been replaced with an acknowledgement of its "centrality"); David Broder, A Crisis in Public Service, WASH. POST, Oct. 21, 2001, at B7 ("Trust in government is at a 35-year high.").

Yet even in this immediate surge of patriotism and faith in the government there was concern about additional governmental powers and spending, and at least one anti-government individual sold a book describing how to mail anthrax. Greg Hitt & Jeanne Cummings, Terror Attack Reverses a Two-Decade Drive to Shrink Government, WALL ST. J., Sept. 26, 2001, at A1; Timothy Egan, Plan to Expand U.S. Powers Alarming Some in Colorado, N.Y. TIMES, Oct. 3, 2001, at B1 (though some polls find more than sixty percent of people trust government to do the right thing most of the time, many in West, as well as some liberals, worry about increased governmental powers); Paul Ziebauer & William J. Broad, In Utah, a Government Hater Sells a Germ-Warfare Book, N.Y. TIMES, Nov. 21, 2001, at B1.
federalizing airport security, they also continued to press for more traditional Republican solutions, such as tax reduction. Moreover, some Conservatives worried that these activist proposals signaled an unwarranted abandonment of traditional Republican principles of limiting government.\footnote{141} Similarly, the demand for increased government regulation of corporations following the recent revelations of widespread financial misrepresentations by corporations such as Enron and WorldCom will most likely be only temporary and lead only to symbolic or modest government oversight because they were facilitated by a strong deregulation, hands-off philosophy.\footnote{142}

3. Legitimacy as Process. In a widely heterogeneous country such as the United States, legitimacy cannot easily rest solely on agreement about principles. Although Americans express support for broad principles such as liberty, equality and opportunity for all, the diverse populace interprets them differently and supports a disparate array of more particular policies. This difficulty in agreeing on particular substance can undermine the government's legitimacy because it means that there is often dissatisfaction with the results of government action. In this situation, process becomes an important buttress for legitimacy. If people cannot agree on results, they can still accept them if they believe in the legitimacy of the process under which they were reached. Process in American democracy focuses on efficiency, equity, and accountability. Efficiency is concerned with arriving at decision in the quickest and least costly manner; equity focuses on neutrality and access to the process; accountability involves openness (transparency) to the public and responsibility.\footnote{143} Process (means) and policy (ends) are difficult to separate

143. See, e.g., AMY GUTMANN & DENNIS THOMPSON, DEMOCRACY AND DISAGREEMENT 12 (1996) (three principles of the "conception of deliberative democracy" regulate process: "reciprocity, publicity, and accountability"); Seyla Benhabib, Deliberative Rationality and Models of Democratic Legitimacy, 1 CONSTELLATIONS 26 (1994) (deliberation ensures the legitimacy of the outcome, but not its rationality).}
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and indeed may merge. As a consequence, some theoreticians believe that the public's perception of the procedural efficiency and equity in reaching a decision is more important that the policy itself.

Using process as a source of legitimacy has at least two problems. First, just as people interpret the key policy terms such as liberty differently, they also differ in their definitions of the components of process, especially equity or fairness. Second, Americans have, as John R. Hibbing and Elizabeth Theiss-Morse state, an ambivalent relationship to democracy and the democratic process; they want both procedural efficiency and procedural equity, but Americans tend to dislike virtually all of the democratic processes... They dislike compromise and bargaining, they dislike committees and bureaucracy, they dislike political parties and interest groups, they dislike big salaries and big staffs, they dislike slowness and multiple stages, and they dislike debate and publicly hashing things out, referring to such actions as haggling or bickering.

Hibbing and Theiss-Morse describe this situation as causing Americans to want "stealth democracy." More commonly, the American attitude towards democracy is likened to that held about sausages: we like the product but not the process. Regardless of the analogy, the consequence of this ambivalence is an inherent instability to the legitimacy of American institutions. If we cannot, for example, agree on the precise substantive parameters of a "fair" tax, we at least want the tax to be procedurally fair in its enactment and enforcement. Fair enactment, of course, means that the method by which the legislature enacts the

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144. As the 1960s guru, Marshall McLuhan more dramatically said, "The medium is the message." MARSHALL McLuhan, UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN 7 (1964). See also GUTMANN & THOMPSON, supra note 143, at 4 (there is not a big dichotomy between process and policy).

145. See, e.g., HIBBING & THEISS-MORSE, supra note 15, at 15. But see Charles Taylor, Living with Difference, in DEBATING DEMOCRACY'S DISCONTENT: ESSAYS ON AMERICAN POLITICS, LAW, AND PUBLIC PHILOSOPHY 212, 223 (Anita L. Allen & Milton C. Regan, Jr. eds., 1998) ("procedural liberalism is not a very good way of living with difference").

146. HIBBING & THEISS-MORSE, supra note 15, at 18.

147. Id. at 19 (Americans want the opportunity to be involved, but not the actual involvement; they want democratic procedures without the debate; in short they "want democratic procedures without the pain of witnessing what comes along with those procedures.").
tax is equitable and based on policy and principle rather than politics. The more we see Congress in action, however, the less we like its process and the less fair we think that process is. Media and scholarly attention on the tax legislative process highlights how lobbyists obtain special provisions that provide tax benefits to narrow special interests and results in a tax code perceived as unfairly burdening some taxpayers and favoring others.\textsuperscript{148}

The widespread uneasiness about lobbying reflects more than a simple distaste for the messiness of process or sausage making. At bottom, it rests on the traditional Republican concern about corruption of the government by a small group of self-interested people exerting undue influence over legislation. Such corruption erodes the legitimacy of governmental actions. Thus, doubt about the fairness of the process leads to doubt about the outcome, and both undermine the government's legitimacy.

\textsuperscript{148} On the importance of the concept of corruption in United States politics, see supra text accompanying notes 38-39, 125-27. There are numerous articles about the connection between lobbying and tax expenditures. See, e.g., Institute on Taxation & Economic Policy, Citizens for Tax Justice, & Public Campaign, \textit{Buy Now, Save Later: Campaign Contributions & Corporate Taxation} (Nov. 2001), available at http://www.ctj.org/pdf/camptax.pdf (last visited Nov. 9, 2001); Martin A. Sullivan, \textit{Trade Groups Spend Big Bucks Seeking, Getting Tax Changes}, 92 \textit{TAX NOTES}, 1381, 1381-1385 (2001); Martin A. Sullivan, \textit{Money and Ways & Means: Shaw Leads the 'PAC,' Portman Takes None}, \textit{TAX NOTES}, Aug. 13, 2001, at 865. A major impetus for the Tax Reform Act of 1986, which dramatically flattened the rate structure and eliminated many tax expenditures, was the growing perception that the law was no longer fair because of the vast number of tax "loopholes" that allowed wealthy taxpayers to lower their taxes—loopholes achieved through lobbying. Lobbying was instrumental in maintaining the availability of certain tax shelters that played a key role in the collapse of Enron, which filed for bankruptcy in December 2001. See, e.g., John D. McKinnon & Greg Hitt, \textit{How Treasury Lost in Battle to Quash a Dubious Security}, \textit{WALL ST. J.}, Feb. 4, 2002, at A1 (describing how a coalition of interested parties, including investment banks, lawyers, and corporate borrowers, prevented Treasury from clamping down on the use of Monthly Income Preferred Shares (MIPS), which enabled Enron to achieve the double benefit of hiding the amount of its debt but still take tax deductions.).

Of course, the problem of lobbying is not limited to the tax area, as the seemingly endless debates about campaign finance reforms show. See generally Symposium, \textit{Law and the Political Process}, 24 \textit{HARV. J.L. & PUB. POL'Y} 1, 1-188 (2000); Tom Hamburger et al., \textit{Industries that Backed Bush Are Now Seeking Return on Investment}, \textit{WALL ST. J.}, Mar. 6, 2001, at A1. Another indication of the concern, if any is needed, is the amount of coverage in early 2002 that the media devoted to the relationship between Enron officials and officials in the Bush administration after the company collapsed.
Fair collection means that everyone pays the appropriate amount of tax that the law assesses. This entails collection procedures and a collection agency that are seen as objective and easy to comprehend and follow for taxpayers who wish to voluntarily comply, as well as an effective enforcer for those who do not voluntarily comply. The perceived or actual failure of large numbers of taxpayers to pay their taxes "adversely" affects voluntary compliance by the rest of the taxpayers because of their diminished faith in the fairness of the tax. Similarly, taxpayer perception that the collection process, especially the administrative agency (the Internal Revenue Service) is unfair plays into deep-seated American beliefs about the corruptibility of government officials.

4. Crisis in Legitimacy. Although Americans have an innate distrust of government, as described in I.B.2, this distrust has increased over the past thirty-five years among all demographic segments and regardless of economic prosperity. This increased distrust is an acute example of widespread feelings of alienation and distrust of government in democracies around the world. This trend has been so profound that some have called it a crisis in

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150. For a recent excellent analysis of American distrust of government, see generally What Is It About Government That Americans Dislike?, supra note 15, at 28, 46. See also Alford, supra note 16, at 28 (noting that although the amount of distrust has varied somewhat over time since 1958 (when good data begins), the percentage of distrust across demographic groups is remarkably consistent.); Jack Citrin & Samantha Luks, Political Trust Revisited: Déjà vu All Over Again?, in What Is It About Government That Americans Dislike?, supra note 15, at 9. For the temporary nature of the post September 11th increased confidence in the government, see supra note 140.

A recent Harris poll, for example, conducted during a time of great economic prosperity, showed that despite a booming economy Americans were more discontented than previously with government officials, and sixty-two percent of those polled felt alienated. Bloomberg News, Despite Prosperity, Discontent on the Rise, TIMES-PICAYUNE (New Orleans), Dec. 30, 1999, at C-2. The alienation index averaged twenty-nine in the 1960s, fifty-two in the 1970s, fifty-seven in the 1980s and sixty-three in the 1990s. Id. In 1998, it was fifty-six, and it peaked in 1995 to sixty-seven percent. Id. (alienation index is based on responses to questions on wealth distribution, power, government leaders and self-importance). See supra notes 140-42, and accompanying text for a discussion of post-September 11th attitudes.
legitimacy. Whether this crisis, if it exists, matters, is not clear. Theory suggests that the more trust the populace has in its government, the more the populace will voluntarily comply with its laws. There is, however, little empirical evidence that this is true on a day to day level, except in regards to taxation. In this area, studies indicate that a belief in fairness does increase tax compliance. Contempory evidence of widespread tax evasion and aggressive tax avoidance lends anecdotal support to this connection.

151. See, e.g., Robert D. Putnam et al., Introduction, What's Troubling the Trilateral Democracies?, in DISAFFECTED DEMOCRACIES: WHAT'S TROUBLING THE TRILATERAL COUNTRIES? 3, 21-22 (Susan J. Pharr & Robert D. Putnam eds., 2000) (summarizing arguments that the trend is not worrisome, such as, first, a critical citizenry is a sign of health in a democracy, not illness; second, although confidence and participation in traditional forms of democracy such as political parties has waned, new forms have arisen such as referenda; and, third, since the function of government is to give people what they need, not what they want, dissatisfaction with government is not a concern so long as people continue to pay taxes and obey laws).

Russell Hardin argues that people may lose confidence in government because it seems less competent, but the reality may be that problems have gotten harder rather than competence decreasing, or that people are losing confidence in government because they no longer think it is important as the market can take care of most problems. Russell Hardin, The Public Trust, in id. at 31, 33, 42.

Measuring patriotism may be an indicator of the degree of a crisis in legitimacy since patriotism may be a reflection of a populace's trust and belief in its government. If so, the evidence is mixed. For example, in a June, 1998 Roper Poll asking, "Do you think average Americans are more or less patriotic than they were 25 years ago?," sixty-eight percent of respondents replied less, while only eighteen percent replied more. Westlaw, Poll database, Question ID: USO61098 R3 (accessed Aug. 30, 1999) (Poll on file with author). At the same time, a Wall Street Journal article reported that another poll found an increase in patriotism, with seventy percent of the respondents stating that "patriotism was a very important value to them, ranking it well above money and religion." The New Patriotism, WALL ST. J., June 26, 1998, at W1. The article commented that "[t]oday's patriots, like generations before them, say they love the opportunity, the personal freedom, the beauty of America. It is the word 'patriotic'—with its recent connotations of right-wing extremists and militias—that makes them uneasy." Id.


153. For a discussion of tax protesters, see infra Part II.B. The difference between tax avoidance and tax evasion is that the latter is illegal, while the former is just smart tax planning. The boundary between the two is blurry. Certainly law firms have become more aggressive in offering and using tax shelters. See, e.g., John D. McKinnon, IRS Says About 25 Companies Evaded
Consequently, given the evidence of the connection among fairness, trust, tax compliance and the centrality of taxation to government, it seems foolish to ignore any marked decline in confidence.

According to many scholars, this crisis results partly from globalization, which increases alienation and distrust, enlarges wealth and income inequalities, and also makes those inequalities more visible to individuals. The social and political consequences of these phenomena are particularly acute in the United States, especially in connection with taxation. One reason for the heavier impact


154. See, e.g., ROBERT GILPIN, THE CHALLENGE OF GLOBAL CAPITALISM: THE WORLD ECONOMY IN THE 21ST CENTURY 171 (2000) (many critics claim multinational corporations (MNCs) undermine democracy and create a "new form of capitalist imperialism" under which individuals lose control over their own lives and "where the bottom line is the only concern"). Gilpin believes that the alleged economic, social, and political effects of globalization are greatly exaggerated. Id. at 299. But see Andrew Hurrell & Ngaire Woods, Introduction to INEQUALITY, GLOBALIZATION, AND WORLD POLITICS 1 (Andrew Hurrell & Ngaire Woods eds., 1999) ("globalization is exacerbating inequalities of resources, capabilities").

Globalization is a complex phenomenon with no one definition of the term, let alone agreement on its significance and effect. At its most basic level, globalization is defined primarily in economic terms to mean the increased interconnection and competition across and within world markets. These economic changes, in turn, have created other economic changes—such as increased de-regulation. The changes are not limited to economic ones, however; globalization has social and political consequences as well, and many define it to include these aspects. Sociologist Anthony Guiddens has stated, for example, that globalization is a cultural phenomenon which affects "the very texture of everyday life...[and] even intimacies of personal identity." The Relationship between the Enjoyment of Human Rights, in Particular Economic, Social and Cultural Rights, and Income Distribution, 49th Sess., U.N. Doc. E/CN.4/Sub.2/1997/9, at 13 (June 30, 1997) (quoting Guiddens) [hereinafter Bengoa]. Accord Barbara Crossette, Globalization Tops 3-Day U.N. Agenda for World Leaders, N.Y. TIMES, Sept. 3, 2000, at 1 ("globalization...is not simply the greater movement of goods, jobs and capital across borders, but also includes equally important cultural, environmental and political components.").

There are many publications on globalization. Two interesting ones, from differing perspectives, which this part relies on are: GILPIN, supra note 154, at 299-306.

Other causes of this increased distrust of government in the United States include a new emphasis on diversity (and the rise of multiculturalism), particular failures of leaders such as Vietnam and Watergate, the new federalism, and the increased polarization and declining civility of politicians and political debates. Anthony King, Distrust of Government: Explaining American Exceptionalism, in DISAFFECTED DEMOCRACIES 74, 95 (Susan J. Pharr & Robert D. Putnam eds., 2000).
in the United States is that the growth in inequality has been particularly large in this country. Additionally, the increased impact results from the political and philosophical relationship between concentration of wealth and income to American democracy, a democracy that was theoretically built on principles of equality, and a democracy that helped to unify a very heterogeneous population.

Growing economic inequality has greater significance in the United States than in other nations because it places two essential American beliefs in conflict: the belief in progress and the belief in individual freedoms. In the past, advances towards each goal helped bring the other closer. Today, however, they are often in tension in at least two significant ways. First, the increased economic inequality of recent years causes many to question the goal of economic progress. Those whose boats have been left behind by the rising tide of economic growth lose faith in the goal itself. Even those whose boats have risen may lose faith in the goal. They realize that it is not possible to achieve the goal of universal prosperity because they see the evidence of economic disparity, or they recognize its hollowness when material goods do not lead to the good life they expect. In both cases people lose faith in the government. In the first instance, people lose faith because the government cannot fulfill its promise to alleviate poverty; in the latter, the government does fulfill its

155. For the global aspect, see Bengoa supra note 154, at 14-15 and Joseph Kahn, Wealthy Nations Plan a Doubling of Debt Relief, N.Y. TIMES, Sept. 17, 2000, at 1 (action is an attempt to "defuse one of the most potent arguments of the antiglobalization protesters... In times of previously unknown wealth, many of the poorest nations have become increasingly indebted to the rich."). For increased wealth inequality in the U.S., see Bengoa, supra note 154, at 14, (quoting Lester Thurow, The Future of Capitalism 42 (1996) ("No country that has experienced a military defeat or a revolution has probably ever had such a generalized increase in inequality as has occurred in the United States in the last two decades. Never before have Americans seen their real wages reduced when gross per capita product is increasing.").

156. The political scientist William Connolly has called this country's "two fundamental sets of priorities": a concern for progress in the shape of perpetually increasing universal economic prosperity and a concern for freedom and human rights. William Connolly, The Dilemma of Legitimacy, in Legitimacy and the State 222, 227 (William Connolly ed., 1984).

157. Id. at 227-28. Leaving aside religious and moral reasons for this hollowness, increased acquisition of material goods can fail to create satisfaction on even the material level because goods introduced as luxury goods, such as the automobile, eventually become necessities of life. Id. at 228.
promise, but the citizens still are dissatisfied.\textsuperscript{158}

A second reason that tension exists between these two fundamental American goals is that economic growth no longer automatically expands freedom and human rights. The goals may become unlinked for several reasons. First, one cost of economic growth may be the loss of certain freedoms for everyone, such as decreased privacy. The linkage between economic growth and freedom is also severed when economic growth leaves some people mired in poverty. Poverty restricts the freedom and rights of people and leads to their exclusion and alienation from society. This tension is exacerbated by the fact that members of minority groups that are already more susceptible to discrimination are disproportionately poor.\textsuperscript{159}

Disillusion with government performance coupled with alienation and exclusion from other sectors of society on the basis of economic disparity weakens the bonds people have with each other and with the government. Moreover, the economic dislocations of globalization, including the pared down welfare safety nets, increase "cultural disintegration" of the broad concepts that make democratic social life possible, and create alienation and divisiveness that "form seeds of violence, hatred and rancour."\textsuperscript{160} As the bonds weaken, people begin to identify more closely with "people like themselves," often defined by race, religion or ethnicity, and less closely with a government that represents others. People become more strident: the \textit{haves}, who benefit from economic prosperity may exalt its moral, economic and political virtues; the \textit{have-nots} begin to question the

\begin{footnotesize}
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\item[158.] \textit{Id.} at 229 (referring to the unrealizable goal of universal economic prosperity "weaken[ing] the performance of the defining institutions of the civilization").
\item[159.] See Bengoa, \textit{supra} note 154, at 32. "Income distribution at the international and national levels is closely bound up with the processes of exclusion, poverty and discrimination.\ldots\text{.} Within societies there are social groups that find themselves excluded and in which income differentiation implies a gradual disintegration of the ties by which they were bound to the rest of society. There are minority groups\ldots\text{for whom the processes of globalization have led to severely accentuated phenomena of exclusion.} \textit{Id.}
\item[160.] \textit{Id.} at 4. "[T]he application of certain policies, especially policies resulting in high income concentration, high levels of redundancy and poverty, will bring as consequences the social disintegration (atomie) and cultural disintegration (anomie) of society, with serious consequences for the rights of individuals." \textit{Id.} at 22. For decrease in international cooperation, see \textsc{Gilpin, supra} note 154, at 10-14, and Bengoa, \textit{supra} note 154, at 25-28.
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legitimacy of the institutions that are part of a government that supports a goal they believe is unobtainable for them. The dichotomy between "we" and "they" deepens and the have-nots become less willing to pay taxes that support programs for the have-nots.

Deepening the dichotomy between segments of the population and between the population and its government can strain any government's legitimacy, especially a democracy based on the idea of equality and equal representation. The stress, however, may be even greater in the United States for a variety of factors. For example, the dichotomy may seriously deepen alienation since a we/they dichotomy and distrust of government already is intrinsic to the very concept of sovereignty. Secondly, if emphasis on dichotomy can cause alienation and potentially even violence as some believe, then the danger is

161. See generally Amy Gutmann, Introduction, CHARLES TAYLOR, MULTICULTURALISM AND "THE POLITICS OF RECOGNITION" 3 (Amy Gutman ed., 1992); CHARLES TAYLOR, The Politics of Recognition, in MULTICULTURALISM AND "THE POLITICS OF RECOGNITION", supra at 25, 37-39, and Charles Taylor, Living with Difference, in DEBATING DEMOCRACY'S DISCONTENT: ESSAYS ON AMERICAN POLITICS, LAW, AND PUBLIC PHILOSOPHY 212, 221-22 (Anita L. Allen & Milton C. Regan, Jr. eds., 1998) (democracies are vulnerable to alienation). On the one hand, the principle of equality (based on the belief in the equal dignity of each individual) creates a "politics of universalism" with equal citizenship rights such as the right to vote regardless of particular individual traits. On the other hand, it also leads to a modern sense of identity with a concomitant "politics of difference" that takes the particulars, such as race, gender, age and ethnicity, into account and establishes programs based on them such as affirmative action and bilingual education. TAYLOR, supra at 37-39. See also Gutmann, supra at 4.

162. See supra note 128 and accompanying text on the American concept of sovereignty.

163. Nicholas Kittrie, for example, traces the rise in internal conflicts throughout the world (from the disaster in Kosovo to more peaceful demands of the separatists in Quebec) to the increased diversity within nation states that formerly were more homogeneous, and to the increased assertiveness of these heterogeneous groups. KITTRIE, supra note 19, at 3 ("the escalating fragmentation is the result of growing pluralism (simply put, communal diversity) within what used to be more homogeneous and conformist entities"). See also Austin Sarat & Thomas R. Kearns, Responding to the Demands of Difference: An Introduction, in CULTURAL PLURALISM, IDENTITY POLITICS, AND THE LAW 1 (Austin Sarat & Thomas R. Kearns eds., 1999) (discussing how the flexibility of the law accommodates cultural pluralism).

This is true regardless of whether legitimacy is based on the public's belief in governmental policies and decisions or merely on belief in the process by which governmental decisions are made. Tyler, supra note 20, at 810. In the former, a policy or decision is legitimate only if the people agree with it substantively. In the latter, however, if people can agree that the decision-
heightened in a very heterogeneous country. At a minimum, this increased alienation and distrust is implicated in at least two recent important political trends in the United States: federalism and direct democracy. Taxation, in keeping with its traditional role as political lightening rod, has played a prominent role in each.

The increased strength of federalism in the United States may be a function of its diversity, one of the very reasons that led to its creation. In the United States, federalism traditionally has preserved that diversity while unifying the nation by locating much of the political power in smaller, more homogeneous, groups. The exact nature making process itself is fair, they will accept the decision even if they don't agree with it. This just pushes the point of agreement back to an earlier point: from outcome to process. Agreement over process may be easier than agreement over outcomes. Nevertheless, even this common agreement may be threatened because factors such as ethnicity, gender and ideology may influence a person's definition of fairness. Id. at 828-29 (citing a 1994 California Commission report on the future of the California Courts). Others, however, disagree by finding that these factors have little effect on definitions of procedural justice. Id. at 829.

164. Some people believe that the whole purpose of federalism was to deal with diverse, conflicting interests. See, e.g., Peter H. Schuck, Citizenship in a Federal System, Working Paper No. 225, 1, 37 (Jan. 2000), available at http://papers.ssrn.com/paper.taf?abstract_id=191356 ("Only a federal polity can begin to accommodate such disparate values and interests in such perpetual conflict"). Federalism was "designed to contain the centrifugal forces of diverse cultural, linguistic, economic, and political interests by giving those interests recognition and representation, while also gaining the advantages of aggregation." Id. at 27.

Other people believe that federalism has "unrealized possibilities" of allowing people to live together while they lessen their differences and create more uniform values. Mark Tushnet, Federalism as a Cure for Democracy's Discontent?, in DEBATING DEMOCRACY'S DISCONTENT: ESSAYS ON AMERICAN POLITICS, LAW, AND PUBLIC PHILOSOPHY 307, 310 (Anita L. Allen & Milton C. Regan, Jr. eds., 1998). See also Vicki C. Jackson, Federalism and the Uses and Limits of Law: Printz and Principle?, 111 HARV. L. REV. 2180, 2213-14 (1998) (giving additional authorities listing the ability to create or preserve diversity as a strength of federalism. At one level diversity has diminished in America due to factors such as television, movies, telecommunications generally, and mega-corporations such as McDonalds and Gap. Nevertheless, differences do exist in many areas such as population composition, history, and state choices (even the McDonald's in New Orleans can look different than the one in Santa Fe). See Deborah Jones Merritt, Three Faces of Federalism: Finding a Formula for the Future, 47 VAND. L. REV. 1563, 1574 (1994).

Jackson notes that the new federalism that emphasizes the importance of the states may help counteract any divisiveness created by multi-culturalism and promote tolerance since state boundaries do not coincide with "lines of ethnic, racial, or religious identity, which can be more deeply divisive."
of federalism has been an issue in this country since its inception. The distribution of power between the federal and state governments has been fluid throughout history, with the balance shifting towards the federal government since the Civil War. In the past several decades, however, a new states-oriented federalism has risen in the same time period as diversity and alienation have increased.  

Although federalism may be a means by which diverse groups can live together amicably, increased emphasis on states' rights at the expense of the central government may ironically undermine the federation's legitimacy by unduly stressing the part over the whole. People often stress the primacy of the states when they fear that the more diverse nation, through the exercise of federal power, will override their more specific, and allegedly more homogenous, interests. The dilemma of such a position, of course, is that loyalty to the state potentially could weaken the loyalty to the federation. This occurred in the pre-Civil War South when states stressed the principle of state's sovereignty and the right to nullify federal laws.  

Taxation has always been part of the battle to define the scope of federalism as the nullification crisis and other early battles described in Part I.B showed. Similarly, taxation is involved in today's efforts to define the scope of the federal government. In fact, there has even been a suggestion that the country return to the pre-constitution method of financing that the federal government used under the Articles of Confederation: requisitioning the states.

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Jackson, supra at 2221.

165. See id. at 2181 (claiming states' rights and constitutionally based restraints on the federal government have "risen phoenix-like from the ashes of post-New Deal enthusiasm for the exercise of national power"), and JOHN D. DONAHUE, DISUNITED STATES 3 (1997) (stating that the new states' rights have profoundly influenced politics from the Reagan administration to its domination of the 1996 presidential election as symbolized by Bob Dole "regularly brandish[ing]" a copy of the 10th amendment throughout the campaign to President Clinton regularly speaking about the devolution of power to the states).


current debate about federalism.

The rise of direct democracy is also connected to increased alienation and the crisis of legitimacy. Columnist David Broder recently stated that there is a seeming paradox in America in that even though democracy has broadened to include formerly marginalized and disenfranchised groups such as women, blacks, and homosexuals, there has been "a sharp decline in the legitimacy of representative government."168 This decline builds on the already extant distrust of, and alienation from, government that is embedded in the American conception of popular sovereignty, the source of legitimacy. This conception, as previously discussed, holds that authority flows from and ultimately rests with the people. At a fundamental level, if sovereignty rests with the people, it can be argued that the only true form of government is one in which the people directly rule. In fact, many Americans hold this belief. For them, representative government is not the ideal, but only a second-best solution to the technical problems inherent in governing such a large country by direct democracy.169

If representative government is a second-best choice, then it works best when it most closely approximates direct democracy. In other words, it will work best when the population is the most homogeneous, the people most closely identify with the government, and the populace trusts that the representative institutions will reflect its will. Broder's paradox, then, is not really a paradox because as more and more diverse groups are represented in the government, the conditions required for such representative government diminish. Alienation and distrust increase as the identity between the people and the representative government dissolves. Representative government no longer works as a second best solution and more people clamor for direct democracy.

Several recent phenomena reflect the increased desire for direct democracy. First, at the state and local levels of government there is increased use of initiatives and

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which each state government would be required to contribute a set amount to pay for the operation of the federal government).


169. See GRIFFIN, supra note 40, at 25 (stating that most Americans view representative government as a second-best form of democracy).
referenda. Similarly, at all level of government including federal, there is more interest in requiring super-majority votes, rather than a simple majority, to pass legislation. Finally, there has been a rise in the vigor and activity of extremist groups such as the Patriots, who refuse to accept the authority of the institutions of representative government. Taxation is a particularly strong component of all these trends, as described in Part II.B below.

5. Taxes and Legitimacy Revisited. Taxes are directly tied to legitimacy of any government because governments need a cheap, steady source of revenues to survive. This is best achieved through a voluntary tax system. In this sense, taxes are a concrete action by which individuals accept the legitimacy of their government. In the United States, however, there are particularly strong and unique connections between legitimacy and taxes. Taxes are integral to the country's conception of sovereignty, of the nature and limits of its government, and even of its national identity.

There are two ways to view the tax connection between the state and the citizen. Under the first, more common view, the state is the dominant party and taxes are merely a stark expression of the state's sovereignty on the one hand, and the citizenry's obligations on the other. There is another way, however, of viewing the relationship that is more compatible with the American concept of sovereignty as ultimately residing in the people. Under this view, the citizen is the more powerful party in the relationship. Taxation, under this approach, is an expression of the people's will and is granted by them rather than merely being an obligation that citizens owe to the state.\textsuperscript{170} Both views have adherents in the United States. Although tax experts often stress the former,\textsuperscript{171} the latter is deeply

\textsuperscript{170} See, e.g., McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 435 (1819) (Marshall, J.) ("The people of all the states have created the general government, and have conferred upon it the general power of taxation. The people of all the states, and the states themselves, are represented in congress, and, by their representatives, exercise this power").

\textsuperscript{171} This aspect has been emphasized by such tax experts as Thomas M. Cooley in his 1876 TREATISE ON THE LAW OF TAXATION. Edwin R.A. Seligman in his important ESSAYS IN TAXATION at the turn of the nineteenth century advocated an income tax based on this theory. See KERBER, supra note 7, at 114-16 (discussing the connection between sovereignty and taxation).
embedded in American political and popular traditions because it is congruent with the origins and theoretical conception of the nation's government. This sentiment is best exemplified by the revolutionary and still popular slogan: "no taxation without representation."\(^{172}\)

Under the second view, the government, whose purpose is to protect life, liberty, and property, has no inherent right of taxation because that would be a significant infringement upon the right to property. Consequently, taxation is legitimate only when the people themselves, through representation, agree to tax themselves. This reasoning underlies the federal government's lack of taxing power under the original Articles of Confederation. It also explains why revenue bills must start in the House of Representatives, which originally was the only house of Congress popularly elected.\(^{73}\) Shortly after the Civil War, Senator Charles Sumner succinctly expressed this viewpoint:

> [I]n a state of nature no man can take any property from me without my consent. If he does, he deprives me of my liberty and makes me a slave. The very act of taxing, exercised over those who are not represented, appears to me to deprive them of one of their most essential rights as freeman, and if continued seems to be in effect an entire disfranchisement of every civil right.\(^{174}\)

This second view of taxation, under which the people grant the state only limited rights of taxation, emphasizes the split between "we" the people and "they" the government, which is so important to the American conception of sovereignty. Although under a representative government, "we" the people are, in essence, the

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The slogan, however, is somewhat inaccurate. As Joseph Story pointed out in 1833, in actuality that principle does not govern the power to tax since Congress could tax unrepresented people then living in the territories and District of Columbia. Story, supra note 80, at §§ 997-1007. The view that the people rather than the states created the United States further supports this.

173. See Kerber, supra note 7, at 93 (explaining the English origins of the connections between taxation and representation).

174. Id. at 96 (quoting Sen. Sumner).
government, the people must always guard against the government's encroachment upon their liberties, especially through illegitimate taxation. Consequently, this view, coupled with a belief in the limited role of government, forges a philosophical and political connection between taxation and deprivation of freedom and liberty; in other words, "Government taxation takes time, labor, resources, and freedom from people and their families with every tax extraction. It takes from them portions of their lives." In the extreme, this view leads to the libertarian belief, enunciated by Robert Nozick, that mandatory taxation is theft and "[t]axation of earnings from labor is on a par with forced labor." Conservative politicians in particular echo these statements with frequent references to the tyranny of taxation. Taxation, in this view, can be an illegitimate use of power that ultimately can undermine the legitimacy of the state itself by abusing the authority granted to it by the people.

Taxes can be illegitimate not only because of the manner in which they are raised, but also because of the purpose for which they are raised. Since the constitution provides for a limited government, any governmental action that exceeds its enumerated powers is illegitimate. Consequently, the boundaries of congressional power to levy taxes and then to expend the collected revenues have been constantly debated throughout American history. These debates are present in every century: in the eighteenth century Federalist debates; the nineteenth century's extended controversies over tariffs in the 1830s, the income tax at the turn of that century; the twentieth century's struggle over such programs as the New Deal in the 1930s and the 1990s arguments about unfunded mandates; and the 21st century's continued debates about the nature of taxation.

176. See Robert Nozick, Anarchy, State, and Utopia 169 (1968). See also id. at 170-72, 265-68 (issuing statements that follow from his belief that an individual has an absolute moral right to any property he legally acquired), and infra notes 190, 215. See also Keyes, supra note 1, on tax slavery.
177. See infra notes 187-94 and accompanying text.
178. See, e.g., The Federalist Nos. 30-36 (Alexander Hamilton), No. 37
As Part I.A illustrated, taxes are also intimately connected to legitimacy because of their consistent role in defining the boundaries of proper citizen protest against alleged illegitimate actions of democratic government. Are there instances when a super majority is necessary to protect the minority or when a direct, rather than representative, democracy is needed? Can citizens rightfully resort to armed force when the government fails to respond to more peaceful complaints about the governmental actions? These questions were first addressed in the colonial period and set a pattern of anti-tax beliefs and actions that continues today.

II. THE RHETORIC OF TAX AND THE PRODUCTION AND MAINTENANCE OF LEGITIMACY IN THE UNITED STATES TODAY

A. In General

In 1898, the Supreme Court, recognizing the powerful nature of taxation, stated:

The power to tax is the one great power upon which the whole national fabric is based. It is as necessary to the existence and prosperity of a nation as is the air he breathes to the natural man. It is not only the power to destroy, but it is also the power to keep alive.  

This taxing power is necessary even if the only function of the government were to protect negative liberties, such as the right to property, because even this function costs

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(179) Nicol v. Ames, 173 U.S. 509, 515 (1898). Not only are taxes needed to keep government alive, but they are needed to preserve cherished democratic freedoms. As Stephen Holmes and Cass R. Sunstein recently noted, liberty and its associated rights such as the rights to property and to freedom of contract have costs. Taxes pay these costs because they are used to create the structures (judicial, legislative and executive) that create and enforce the laws that protect these rights. STEPHEN HOLMES & CASS. R. SUNSTEIN, THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES 60-61 (1999).
money. The United States government, however, is not so limited. The constitution gives the federal government many broad positive powers such as the power to regulate commerce, provide for defense, and promote the general welfare of the people. These powers have been consistently exercised in a positive manner throughout American history to encourage and/or support many aspects of communal life, including public works, public schools, and the furtherance of science and private industry. In theory, then, the Court's statement and rhetoric more generally could be used to support taxation's role in furthering American liberties. It would thus serve as a positive function in maintaining the state's legitimacy.

In reality, despite the Court's emphasis on the positive aspect of taxation, the statement, like taxation itself, is primarily remembered and quoted for its negative aspect. Conservative politicians have successfully linked national taxes with the historically specific fears of a corrupted or unconstitutionally expanded government, traditional anti-government sentiment, and the innately human desire not to part with money in hand. As a result, for most Americans rhetoric about taxes triggers a cluster of anti-government beliefs and attitudes already deeply embedded in their psyche. Thus, most anti-tax rhetoric is full of references about the evils of taxation. The proponents of this rhetoric do not necessarily believe that all taxes are evil, but they wish to limit government and see limiting national taxes such as the income tax as a way to

180. Id.

181. GARRY WILLS, supra note 113, at 298-320 (discussing why government is also a necessary good). The internet, after all, was originally funded by the U.S. government. See also Louis Kalikow, Letter to the Editor, Let Angry Taxpayers Realize Their Wish, N.Y. TIMES, May 24, 1997, at 18 (suggesting a person should not be required to pay taxes but "[i]n return, he should not be allowed to drive on state-financed roads; ... get police protection; he should drink dirty water; his children should get no schooling, and the Army should put up a big sign on his lawn saying, "This house not protected by the Government").

182. See, e.g., SENATOR WILLIAM V. ROTH, JR. & WILLIAM H. NIXON, THE POWER TO DESTROY: HOW THE IRS BECAME AMERICA'S MOST POWERFUL AGENCY, HOW CONGRESS IS TAKING CONTROL, AND WHAT YOU CAN DO TO PROTECT YOURSELF UNDER THE NEW LAW (1999). For a rare example of rhetoric emphasizing the positive aspect of taxation, see the World War II era cartoon by Walt Disney, The New Spirit (1942) (in which Donald Duck explicitly urges citizens to pay taxes to build the weaponry needed to save democracy).
accomplish this. Lower taxes, the argument goes, would produce lower revenues; lower revenues, in turn, means smaller government because the government has less to spend. As Randolph Paul once said: "You can't have [a] government like this without an income tax, but we [Libertarians] don't want a government like this." Decades later, in March 2001, House Majority leader Richard K. Armey echoed Paul when he urged a larger tax cut than that proposed by President Bush, stating: "I didn't come to Washington to cut taxes, I came to cut government[.]" Despite evidence that reducing taxes does not necessarily reduce government (and evidence that Republicans do not necessarily want to reduce all govern-

183. This ignores the contrary effect that may result from lower taxes: reducing the drag of taxes on the economy can increase economic activity which in turn would produce a larger tax base. This is, in fact, an argument supply-siders make for reducing taxes. Also, although increased government activity has historically been linked to the income tax, government in recent years has increased through other taxes, especially Social Security Taxes, which have increased dramatically. See Gene Steuerle, The New Old Tax Expenditure Debate, 95 TAX NOTES 1671, 1672 (June 10, 2002).

In the context of reducing federal government, it is interesting to note that for the post-war period 1947-1997 the percentage of the gross domestic product (GDP) taken as federal revenues has remained practically constant whereas state and local revenues have risen from approximately five percent to eleven percent. Gene Steuerle, The Extraordinary Growth in State Government Revenues, 81 TAX NOTES 381, 381 (Oct. 19, 1998). Moreover, the percentage of GDP collected through the individual income tax has also remained constant. Id.

Deficits are demonized for similar reasons but, like taxes, are not harmful per se. For example, they have helped stimulate the economy during the New Deal in the depression and even in the Reagan years. See, e.g., Savage, supra note 37, at 47-51; Benaivie, supra note 121, at 7 (claiming that even economists who do not believe in the evil of deficits excoriate them in order to agitate the public against big government). Small government and low taxes are integral to the Republican platform. See The Republicans' Tax Plans, WALL ST. J., Jan. 13, 2000 at A22 ("The job of republicans is to cut taxes and government."). Recently, Republicans have changed their tactics by pursuing tax reductions even at the expense of increased debt. See, e.g., Warren Rojas, Senate Leaders Remain Unfazed by House's Tax-Cut-Permanence Volley, 95 Tax Notes 1535, 1535 (June 10, 2002).


ment), many Republicans consider cutting taxes a (if not the) "defining principle" of their party, one that they consistently link to both liberty and smaller government.\textsuperscript{186}

On January 31, 2000 the Speaker pro tempore, Representative Green of Wisconsin gave a speech entitled "A Republic, If You Can Keep It" that in many ways typifies the rhetorical links traditional conservatives make between the proper nature of American government, liberty, and the role of taxes.\textsuperscript{187} He began with three critical premises: (1) since America is a republic and not a democracy, its government must be one of limited powers "precisely defined and delegated by the people,"\textsuperscript{188} (2) the federal nature of the republic severely limits the power of the central government, and (3) "The American Revolutionaries clearly chose liberty over security."\textsuperscript{189} As a consequence of these premises, he then asserted that liberty declines when the General Welfare clause is interpreted, as it has been in recent decades, to expand the definition of welfare.\textsuperscript{190} He also asserted that taxation is theft because "[s]ince

\begin{itemize}
  \item Republicans acknowledge that "[t]he government does many things that improve economic welfare—protecting the nation's security, identifying and enforcing property rights, establishing and maintaining a reliable currency, and the like." Economic Growth Through Tax Cuts: What's the Best Approach?: Hearing Before the Joint Economic Committee, 106th Cong. (1999), supra note 10, at 149 (quoting testimony of James C. Miller, III). Indeed, it is often the Republicans who want to increase government spending for national defense. Additionally, they can favor governmental action when others don't. Abortion regulation is an example.
  \item 146 CONG. REC. H81 (2000).
  \item Id.
  \item Id.
  \item Id. at H83.
\end{itemize}
government cannot create anything, it can only resort to using force to redistribute the goods that energetic citizens produce.\textsuperscript{191} Consequently, he concluded, high taxes are inimical to liberty, prosperity, and property ownership.\textsuperscript{192} George W. Bush, when campaigning for the presidency, more succinctly, and with less rhetoric, summarized the conservative position on government and taxes when he said that he supported tax cuts because: "[A] government with unlimited funds soon becomes a government of unlimited reach."\textsuperscript{193} The underlying purpose of his 2001 tax cut was to cut back that reach. As the Washington Post observed, "A tax cut that large strips the government of the resources it will need to meet its obligations—shore up Social Security and Medicare, beef up defense, pay for the rest of the services, from highways to Head Start, that the public has rightly come to expect."\textsuperscript{194}

Some of this anti-tax rhetoric, of course, is merely meant to conceal what the politicians are really doing. Many of the same politicians who argue for tax reductions are not against taxes \textit{per se}, just what the taxes are being spent on. They may be willing to levy taxes for national defense, but not for public housing. Also, many politicians who loudly speak against taxes actually also vote for little noticed "revenue enhancements" such as phasing out deductions. President Reagan, himself, less than one year after his great tax cut, signed a tax bill that increased

\textsuperscript{191} 146 CONG REC. No. 5, at H82 (Jan. 31, 2000).

\textsuperscript{192} Id. The speech then continues to discuss the improper role of the federal government in other areas such as education, police powers, and takings. Some of his statements, however, seem to be at the extreme end of the conservative spectrum such as on 1) foreign policy: "A return to the spirit of the republic would mean that a draft would never be used and all able-bodied persons would be willing to volunteer in defense of their liberty"; and 2) the monetary system: "A paper money system is dangerous economically and not constitutionally authorized. It is also immoral for government to counterfeit money which dilutes the value of the currency and steals values from those who hold the currency . . . ." \textit{Id.} at 85-86.

\textsuperscript{193} David Baumann, Taxes, 32 NAT'L J. 1046, 1047 (Apr. 1, 2000) (quoting George W. Bush's speech to Greater Des Moines (Iowa) Chamber of Commerce of December 1, 1999).

\textsuperscript{194} Tax Fraud, WASH. POST, May 26, 2001, Editorial, at A26. \textit{See also} Rep. Charles B. Rangle, Rangle Statement on GOP Tax Rate Cut Bill, 2001 TAX NOTES TODAY 47-34 (opposing tax cut proposal because "it is so large that it will deprive the Federal government of the revenue needed to fund critical social programs and will prevent us from making needed investments in education, health care, and the preservation of Social Security.").
revenues without raising the tax brackets in 1982.\textsuperscript{195} Nevertheless, the recent anti-tax campaigns to decrease taxes have included not just successful decreases in income taxes, but also a successful repeal (at least temporarily) of the estate tax (rhetorically called the death tax), and a concerted but so far unsuccessful attempt to repeal the income tax and replace it with a consumption tax (called a "flat" tax).

This success has been greatly aided by the ability to harness American's anti-government, anti-tax sentiment by using revolutionary rhetoric and patriotic symbols. The negative connection between tax and the evils of government, of course, is easy to make since it has existed since colonial times and has been emphasized ever since. Mere mention of the American Revolution, for example, will have most Americans spouting "no taxation without representation." The mention of patriotism conjures up images of Boston Tea Parties and righteous revolt against a sovereign whose legitimacy withered due to the imposition of tyrannical taxes. Politicians continuously underscore this. For example, President Ronald Reagan often described taxation as tyrannical and a deprivation of liberty.\textsuperscript{196}

More recent attacks on the income tax similarly make

\begin{itemize}
\item 196. On the signing of the Tax Reform Act of 1986, President Reagan stated that the Act's economic benefits were less important than the fact that it returned America to its "first principles." He called the prior code "un-American" stating that "[t]hroughout history, the oppressive hand of government has fallen most heavily on the economic life of the individuals. And, more often than not, it is inflation and taxes that have undermined livelihoods and constrained their freedoms." President Ronald Reagan, Remarks at the Tax Reform Bill Signing Ceremony (Oct. 22, 1986), reprinted in 33 Tax Notes 413 (1986); see also President Ronald Reagan, 1988 Legislative and Administrative Message to Congress (Jan. 25, 1988), excerpts reprinted in 38 Tax Notes 499 (1988) ("If individuals are to possess genuine autonomy, then they must be free to control their own resources, to enjoy the fruits of their labor, and to keep what they earn, free from excessive government taxation and spending.").
\item In addition to using powerful revolutionary images, President Reagan has also used exaggerated figures to show the extensive nature of the tax problem and to promote anti-tax sentiment. For example, in his address to the nation on February 5, 1981, Reagan stated that a person's tax burden had quadrupled since World War II when in fact taxes as a percentage of GNP had merely doubled. C. Eugene Steuerle, The Tax Decade: How Taxes Came to Dominate The Public Agenda 53-54 (1992) (stating that prior to the speech, the Office Of Tax Analysis repeatedly told the White House that its figures were inaccurate).
\end{itemize}
this link. For example, during the 1999 House hearings on the Taxpayer's Defense Act to require congressional approval of administrative agency fees or "taxes," Representative J.D. Hayworth, referring to the Boston Tea Party, said such a law would once again end taxation without representation. Similarly, legislation introduced in the past three Congresses to terminate the income tax has been accompanied by powerful images of freedom and tyranny to describe the problem and the solution. In the 1998 debate, for example, proponents of the bill frequently claimed that abolishing the income tax would "give this government of this country back to the citizens once again," or help "restor[e] freedom to the American taxpayer." Patriotic icons from America's revolutionary
past were invoked as reasons to throw off the yoke of the Code's oppression, even if no particular replacement tax were in place or even in mind.\footnote{201}

During the primary races for the 2000 election, Republicans once again linked taxes and tyranny. Republican presidential candidate Steve Forbes, for example, stated that it was necessary to tear down the Berlin Wall of big government, especially the wall of taxes, "so America may truly experience a new birth of freedom and opportunity."\footnote{202} Similarly, Alan Keyes, an African American candidate for the Republican presidential nomination, called for the income tax to be repealed and stated that the progressive income tax is a form of slavery.\footnote{203}

These recent examples of tax rhetoric are manifestations of taxation's historically central role in defining the nature and ultimate legitimacy of government in the United States. This role is heightened by the interconnection of taxation with two powerful influences in today's society: multiculturalism and federalism. The remainder of this subpart briefly explores these two connections.

The we/they dichotomy stressed in the politics of multiculturalism builds on the American conception of sovereignty, which differentiates between the people and the government. First, the idea of taxes is reduced to a mere "exchange" of money (taxes) for benefits, as in any other contract. This conception of taxes makes it easy to talk about the government as "they" or "them" taking "our"

\footnote{201. \textit{Id.} at H4667 (statement of Rep. Graham referring to the Boston Tea Party and Lexington-Concord); see also \textit{id.} at H4666 (statement of Rep. Fossella invoking the disbelief the Founding Fathers would feel if they could see the tax code).}

\footnote{202. \textit{Forbes: It's Time to Tear Down Taxes}, \textit{TIMES-PICAYUNE} (New Orleans), Nov. 12, 1999, Campaign Briefs Section, at A4.}

\footnote{203. \textit{Keyes To Attend Alabama Straw Poll}, \textit{BULLETIN'S FRONTRUNNER}, Aug. 19, 1999, LEXIS, News Library, Wire Services Story File ("Do you know what it's called when someone else controls the fruits of your labor? It is tax slavery by the government."). \textit{See also}, Steven R. Weisman, \textit{A Debate Over Wealth, Virtue and Justice}, \textit{N.Y. TIMES}, Aug. 22, 1999, § 4, at 12.}
money in taxes while ignoring the fact that "we," through our representatives, are the government and have chosen to collect these taxes.\textsuperscript{204} The government becomes the "greedy hand" unfairly taking our money in excessive taxes, as Amity Shlaes characterizes it in her popular 1999 book, \textit{The Greedy Hand: How Taxes Drive Americans Crazy and What To Do About It}.\textsuperscript{205} Even more ominously, the IRS becomes a dangerous force, "A Law Unto Itself"\textsuperscript{206} with the "Power to Destroy."\textsuperscript{207}

Not only does the rhetoric emphasize a we/they division between the people and the government, but it also emphasizes a we/they split among the people themselves. This polarization of the populace in tax rhetoric has a long history. Most commonly, this aspect of anti-tax rhetoric is phrased in terms of class warfare, especially "soak the rich" slogans. This rhetoric spans several centuries, stretching from the arguments that the doomed Income Tax Act of 1894 was class legislation, to the current claims that George Bush's 2001 proposed tax plan involved class warfare.\textsuperscript{208} The rhetoric sometimes also emphasizes class

\textsuperscript{204} Conservatives have long used the image of "your" or "our" money in the context of taxes and government spending. For example, the American Liberty League, a conservative group active in the 1930s in opposing President Roosevelt and the New Deal, spoke of the government as spending the people's money in furtherance of differentiating between "they' the government and "we" the people. \textit{See}, e.g., Jouett Shouse, \textit{You Owe Thirty-One Billion Dollars} (May 19, 1936) (speech originally on NBC radio station), reprinted in \textit{THE JOUETT SHOUSE PAPERS 1911-1967} (available from the University of Kentucky's William T. Young Library Special Collections Department). Along the same lines but more amusingly, is the new word "intaxification" defined as "Euphoria at getting a tax refund, which lasts only until you realize it was your money to start with." The term was apparently invented by a reader in response to the Washington Post's \textit{Style Invitational} which asks readers to take any word, alter it by one letter, and provide a definition of the new word. \textit{See}, e.g., \textit{How Good is Your Dictionary}, \textit{WEST AUSTL. POST}, May 27, 2000, 2000 WL 1975337 (citing Washington Post); Jo Doolon, \textit{Taxing Times}, \textit{INDEP. BUS. WKLY}, Mar. 14, 2001, 2001 WL 11203268.


\textsuperscript{207} \textit{ROTH & NIXON, supra} note 181. \textit{See also} \textit{ADAMS, supra} note 6, at xix; \textit{ADAMS, supra} note 9, at 206.

\textsuperscript{208} \textit{See, e.g.,} Pollock v. Farmer's Loan & Trust Co., 157 U.S. 429, 596, (1895) (Field, J., concurring) (pitting rich against poor); President George W. Bush, Remarks Announcing the Tax Cut Plan and an Exchange with Reporters,
less directly by categorizing citizens either as those that pay the tax or those that spend (receive) tax revenues, as occurred, for example, in the 1880s and the 1930s.\textsuperscript{209}

Increased diversity also reduces people's willingness to pay taxes by emphasizing a we/they dichotomy. It helps convert both the government and fellow citizens into "others" that "we" are unwilling to support. As the emphasis on diversity increases and more and more formerly marginalized groups gain a voice in government, people become unwilling to support federal programs that are increasingly viewed as helping a portion of the population other than themselves. To the extent that people are willing to sacrifice for others, they certainly are more likely to do so for those with whom they identify; those with whom they identify are more likely to be people like them. Thus, people are less willing to sacrifice "their" money in taxes to help those unlike themselves. They are even less willing to pay federal taxes, because not only is the federal government more distant from a taxpayer than the state government, but the recipients of federal taxes are more likely to be people different from themselves and certainly less familiar.\textsuperscript{210} To the extent that the programs these taxes fund are seen as helping only particular segments of society (e.g., welfare programs) as opposed to everyone (e.g., national defense), the reluctance to pay our taxes to help them is increased.

Similarly, the fear and hostility of "other" citizens resulting from increased diversity shows in tax debates: As Thomas Byrne Edsall and Mary D. Edsall explain in \textit{Chain

\textsuperscript{209} DAVID T. BEITO, TAXPAYERS IN REVOLT: TAX RESISTANCE DURING THE GREAT DEPRESSION, at xiii (1989). Beito quotes John Calhoun's belief that the state's fiscal action created two classes: taxpayers who "bear exclusively the burden of supporting the government" and "tax-consumers" who are the "recipients of their proceeds through disbursements, and who are, in fact, supported by the government." \textit{Id.} at 169 n.5 (citing JOHN C. CALHOUN, A DISQUISITION ON GOVERNMENT AND SELECTIONS FROM THE DISCOURSE, 17-18 (1953)).

\textsuperscript{210} See, e.g., DONAHUE, supra note 165, at 41 (geography is one "systematic" way in which people differ). This diversity is another reason for the tenacity of state rights. \textit{Id.}
Reaction: The Impact of Race, Rights, and Taxes on American Politics, race and taxes have become intertwined over the past few decades. As racial and other marginalized groups, such as women, homosexuals and the disabled, gained rights enforced by the government, the majority focused more on the costs of government (what it takes in the form of taxes to benefit these minorities) rather than on its benefits (what it gives to all the people). Tax became the means by which important issues such as race and welfare were debated in coded terms of taxpayers versus tax recipients. Moreover, to the extent that these issues are discussed in terms of taxpayers versus tax recipients they further alienate one part of the citizenry from another by implying two classes of citizens: those that pay taxes and a lesser class with fewer political rights—those who do not pay taxes.

Many conservatives already believe that these government-supported programs that empowered marginalized groups exceeded the government's constitutional powers and threatened basic American values of freedom and liberty. In this view, taxes are critical because they fund these expanded, allegedly illegitimate programs and "drive home the cost to whites of federal programs that redistribute social and economic benefits to blacks and to other minorities." Taxation to finance welfare is viewed as restricting taxpayers' negative freedom without recognizing that taxation enhances the positive freedom of people who receive the welfare benefits paid by those taxes.

211. THOMAS BYRNE EDSALL & MARY D. EDSALL, CHAIN REACTION: THE IMPACT OF RACE, RIGHTS, AND TAXES ON AMERICAN POLITICS (1992). Hurst points out that race raises great issues of legitimacy in the United States because laws and social conditions do not reflect the values avowed in the Constitution, which is the source of legitimacy. See Hurst, supra note 19, at 232.

212. EDSALL & EDSALL, supra note 211, at 11-13, 129-33, 213-14. This is the theme of their book. See also KENNETH L. KARST, LAW'S PROMISE, LAW'S EXPRESSION 141 (1993) (quoting Marian Wright Edelman's statement that "welfare" is a "fourth-generation code word" for race).


214. EDSALL & EDSALL, supra note 211, at 4.

consequence, conservative political rhetoric has transformed the meaning of 'taxes' from being the mechanism to create salutary federal programs to being a wrongful taking, or theft of citizens' hard earned money. In this light, taxpayers are pitted against tax recipients and "we the people" are pitted against "they the government." The 2002 fiscal budget, for example, hints at this we/they dichotomy in its chapter on tax expenditures. For the first time since tax expenditures have been listed, the budget calls them "so-called" tax expenditures of "questionable analytic value." Although there is debate as to what is and is not a tax expenditure, some people believe that the Bush administration's wording in the budget has an ideological basis reflecting a concern that "the rhetoric

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216. EDSALL & EDSALL, supra note 211, at 214. See also supra note 186, at H82 (statement of Rep. Paul).

217. EDSALL & EDSALL, supra note 211, at 129. Again, this is not a new idea. See supra note 208 and accompanying text.

218. Chapter 5 of the Budget discusses tax expenditures. It may be found in the Analytical Perspectives volume of the Budget of the United States Government, 2001 Tax Notes Today 69-6 (2001), LEXIS 2001 TNT 69-6. The argument is that the "normal" tax base from which the tax expenditure deviates is arbitrary and this makes the whole concept of tax expenditures arbitrary. Assume taxpayer C is in the 20% bracket and earns $70,000 at her job. Additionally, she receives a $1000 gift from her parents and $500 from her local electric company to help pay for her new energy conserving furnace. What is the normal tax base upon which a tax is due and what is a tax expenditure is open to some question. For example, some people might disagree as to whether a gift were income. There is, however, a great deal of agreement on many items. In the above example, everyone would agree that the salary and the money received from the electric company were income. Thus, a provision such as §136 of the Code that excludes the $500 received from the electric company is clearly a tax expenditure enacted to encourage people to install energy efficient furnaces. The taxpayer thus saves $100 of taxes that she would otherwise owe on the $500 of income. The tax expenditure provision would save a lower tax bracket taxpayer less money, however. A 10% taxpayer, for example, who received $500 to purchase a similar furnace would save only $50. If the government had not enacted the provision, it would collect an additional $150 in taxes. It then could use that money for a variety of purposes, including giving cash subsidies to people who purchase furnaces—maybe $100 to X and only $50 to C, or $25 to X and $125 to C. The tax expenditure concept implies that the government, not the taxpayer, is entitled to that $150 under a normal income tax, i.e. one that lacks the special tax expenditure provision that gives the money back to the taxpayer. In this way, the tax expenditure concept emphasizes that under an income tax the government, not the taxpayer is entitled to the money and that tax expenditures, like direct expenditures, are a way in which the government spends money.
[of the tax expenditure concept] suggests it's the government's money and not the people's money.\textsuperscript{219}

Taxation is also connected to the increasingly popular federalist view of limited federal governmental powers. The relationship between federalism, the nature of government and taxation is complex. On the one hand, the scope of government drives the amount of revenue it needs to fulfill its functions. The broader the scope, the more revenue it needs. On the other hand, the mere existence of revenue by itself tends to increase government functions, as the arguments in 2000-2001 over the budget surplus indicated. The larger a government is, the more redistributive a government tends to be, even if a regressive tax is used.\textsuperscript{220} Moreover, the choice of a tax base affects the redistribution of wealth since different types of tax place different burdens on various classes of people. Taxes can also expand governmental functions more directly than simply by providing revenue. Congress can enact a tax whose very purpose is not to raise revenue but to regulate behavior.

Federalism, of course, is a recurrent issue in American history, and taxation has been a crucial part of the battle since the very founding of the nation. For example, the first post-colonial central government failed because the federal government had too little power. It lacked the ability to tax, an ability that was granted the federal government formed under the Constitution. In the late eighteenth and early nineteenth centuries, many of the debates about federalism were played out in the tax context, as Part I's description of Shays' Rebellion, the Whiskey rebellion, and the Nullification Crisis of 1832 described.

Taxes also were a major area of contention during the expansion of the federal government and regulatory state during the first third of the twentieth century. The intense fight over the establishment of the income tax at the turn of that century, for example, reflected both the tax's ability to generate revenues as well as its realignment of burdens of taxation. Tax issues were also part of the Lochner era's struggle to define the powers of the federal government. In

\textsuperscript{219} Heidi Glenn, \textit{Bush Administration Questions Value of Tax Expenditures List}, 91 \textit{Tax Notes} 535 (2001) (quoting Joel Friedman, senior fellow at the Center on Budget and Policy Priorities, a liberal think tank).

1922, for example, the Court invalidated a tax on employers who violated child labor regulations because it interpreted the commerce clause as not granting Congress power to regulate child labor.\textsuperscript{221} Similarly, taxation played a role in the expansion of federal power during the New Deal. In 1936, the Supreme Court invalidated the Agricultural Adjustment Act because, "[t]he tax, the appropriation of the funds raised, and the direction for their disbursement, are but parts of the plan. They are but means to an unconstitutional end."\textsuperscript{222} Taxation has also been a central battleground in the debate over federalism in the late twentieth century, continuing to the present. It is, for example, an intrinsic part of the battle over unfunded mandates.\textsuperscript{223} More directly, proponents of tax reduction often explicitly draw a connection between taxation and federalism. For example, supporters of H.R. 3097, The Tax Code Termination Act of 1998, explained how the abolition of the income tax laws would enhance freedom and "give this government of this country back to the citizens once again" by shifting power away from the federal government.\textsuperscript{224} Stephen Goldsmith,

\textsuperscript{221} Bailey v. Drexel Furniture Co., 259 U.S. 20 (1922) (commonly known as the "Child Labor Tax Case"). See also Richard A. Epstein, \textit{Bargaining with the State} 147-149 (1993) (Child Labor Tax Case raised identical issues of federalism raised by direct congressional acts improperly using commerce clause to interfere with states' internal affairs). Professor Laurence Tribe summarizes the general principles that differentiate between a regulatory and revenue tax as follows:

(1) A tax is a valid revenue measure if it achieves its regulatory effect through its rate structure or if its regulatory provisions bear a 'reasonable relation' to its enforcement as a tax measure. (2) A tax is a regulatory tax—and hence invalid if not otherwise authorized—if its very application presupposes taxpayer violation of a series of specified conditions promulgated along with the tax.


mayor of Indianapolis, clearly articulated this connection at the Joint Economic Committee's 1999 hearings on tax cuts:

Trust people, not government, to make the best decisions for themselves... [Letting government set up programs] undermines individual responsibility and reduces the choices citizens, especially poorer ones, have over their own lives.

Federalism is at the core of our constitutional republic.

Although we usually talk about devolution with regard to welfare reform or other social programs, the principles of federalism hold especially true for taxation. What could be more emblematic of the federalist philosophy than allowing individuals to spend hard-earned wages the way they see fit and letting communities allocate precious local resources. Although we abandoned some of our federalist principles during this century, the 1980s and 1990s have brought a return to federalism in some areas of government responsibility. Today's tax code, however, does not reflect our federalist roots.

Instead of taxing Americans just enough to provide for critical public goods like national defense, the federal government takes much more than it needs from everyday workers and businesses, and then finds creative ways to spend all the extra money. This approach, by definition, usurps authority from states and localities both in matters of taxation and general welfare policy. But most of all, the current tax code says to working Americans that Washington knows how to spend their wages and salaries better than they do.

The federalist argument, like the multicultural phenomenon previously discussed, underscores the gap...
between the people and the government, thereby stressing that tax money is the people's money that "belongs" to them, not the government. Although American popular and political traditions of sovereignty do distinguish between the people and the government, this emphasis distorts reality by presenting only one side of the picture. It exaggerates the dichotomy between the government and the people by ignoring the fundamental principle upon which the United States is founded: "we the people" are the government. Taxation with representation means that the money belongs to the government because the people, through their representatives, have consented to the taxation. Moreover, to the extent that there is a divide between the people and their government, the rhetoric is inaccurate because it is incomplete. As Brookings Institution economist William G. Gale stated,

226. Id. at 108 (testimony of William G. Gale). At the same hearing, James C. Miller put forth the we/them argument:

Within the Washington Beltway and among the commentators, the immediate response to any proposal for a tax cut is, "What will it cost?" This is government-centric language. The predicate embodied in both the Declaration of Independence and the U.S. Constitution are the opposite: "We the People" (and the States) grant the federal government certain limited powers. It's our money, not the federal government's.

Id. at 153 (prepared statement of James C. Miller III) (emphasis in the original).

This approach is also used in the context of the budget surplus which is used as a reason to enact a tax cut. For example, in March 2001, President George Bush in Lafayette, LA, arguing for his tax cut stated: "it makes economic sense to give people their own money back." Glenn, supra note 185 (emphasis added).

Although it is irresponsible for taxpayers and government to ignore these obligations, the current political climate makes it difficult to honor them. Taxes are needed
to fulfil these promises, yet the American public's willingness to pay taxes has been decreased by decades of intense anti-government anti-tax rhetoric as well as by current political trends such as federalism and multiculturalism. As a result, people's confidence in government erodes. In such a situation, people are more likely to protest taxes rather than to vote for them. Indeed, evidence that declining confidence in government was a factor in the successful tax revolts in the late 1970s and early 1980s suggests that current tax protests may also partially be a product of limited trust and belief in the legitimacy of government.\(^{227}\) The next sub-part briefly examines the recent spate of tax revolts as an expression of the lack of confidence in, distrust of, and discontentedness with, the government.

B. Legitimacy, Rhetoric, and Current Tax Revolts

In 1978, California's Proposition 13 inaugurated the current wave of tax revolts. Although the revolt began as a protest against a state property tax, it soon encompassed federal income taxes. Perhaps the most public event of the income tax revolt was the well publicized September 1997 Senate Hearings on the IRS, but rhetorical and political actions against the income tax still persist, albeit at a less flamboyant level. At a more individual and private level, actions that undermine the income tax have increased, as indicated by the rising number of tax scams, evasions, and abuses.

The verbal and political attacks on the income tax, though less inflammatory than at the Senate hearings, continue in both direct and indirect ways. Indirectly, they occur through denigrating words about taxes and by efforts to cut or even eliminate some taxes. Anti-tax rhetoric, for example, was plentiful in the 2000 presidential campaign, continued in the early months of President Bush's administration, and culminated in mid-2001 with both a cut

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227. See, e.g., SEYMOUR MARTIN LIPSET & WM. SCHNEIDER, THE CONFIDENCE GAP: BUSINESS, LABOR, AND GOVERNMENT IN THE PUBLIC MIND 343 (rev. ed. 1987) (stating that "loss of confidence in government contributed to the success of the tax revolt, independently of ideology or partisanship."); id. at 13, where the author quotes President Carter, who announced on television in 1979 that even more serious than inflation or the energy crisis was a "crisis of confidence . . . that strikes at the very heart and soul and spirit of our national will." Id.
in income tax rates and the (temporary) elimination of the estate or, as the Republicans labeled it, the "death tax."\(^\text{228}\)

Even after September 11, Republicans still clamor for more tax cuts to stimulate the economy despite increased spending, growing deficits, and corporate scandals involving tax shelters and lack of strong popular demand for tax cuts.\(^\text{229}\) More direct attacks call for the abolition of the

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The 2000 campaign focus on tax cuts existed despite the public's apparent lack of enthusiasm for tax cuts and despite some economists' belief that a tax cut would actually be harmful at that prosperous point in the economic cycle. For example a 1979 Gallup poll found that 62% of respondents believed that the government "ought to cut taxes even if it means putting off some important things that need to be done" whereas a 1999 poll asking the same question found that only 21% of respondents agreed. See Peter G. Gosselin, *Voters Can't Get Excited About Tax-Cut Plans*, TIMES-PICAYUNE (New Orleans), Aug. 26, 2000, at A7 (also stating that a poll in 2000 showed that voters prefer to use government surpluses for programs such as Medicare and debt reduction, not tax cuts). See also Jacob M. Schlesinger, *Even in the Heartland of Revolt, Tax Cuts Don't Top the Agenda*, WALL ST. J., Mar. 5, 1999, at A1. Perhaps the major reason that the public is no longer excited about tax cuts generally is the strength of the economy. See, e.g., Gosselin, supra (stating that economists believe cutting taxes in a boom economy is unnecessary, and even harmful if the economy is cooling); Gene Steuerle, *Tax Cutting: Why the Limited Enthusiasm?*, 87 TAX NOTES 1275, 1275 (2000) (stating that in a good economy, benefits provided by tax cuts appear minor). Another reason for low public enthusiasm is the fact that most low and middle income taxpayers already have low or no income tax burdens due to previous tax cuts and reforms. See *id*.

When the economic downturn occurred, proponents of a tax cut continued to urge a tax cut; they merely changed their reasons as to why the cut was needed. Taxpayers, on the other hand increasingly feel that tax cuts benefit somebody other than them and prefer congressional candidates that support a balanced budget rather than tax cuts. See Will Lester, *Most Americans think tax cuts help 'someone else,' poll finds*, TIMES-PICAYUNE (New Orleans), Apr. 3, 2002, at A10 (reporting findings of a telephone poll March 22-26, 2002).

229. See cites in note 228. See also Murray, supra note 186, at A4 (quoting House Majority Leader Richard Armey: "There's no greater defining principle of our party than letting taxpayers keep more of what they earn."); Patti Mohr, 'Jeffords Week' Emboldens Calls for Tax Cut Recall, 95 TAX NOTES 1279, 1281 (2002) (presenting clashing opinions of Senate Democrats and Republicans on whether the estate tax repeal should become permanent); Warren Rojas, *Treasury Sidesteps Debt Disaster; House Prepares More Tax Cuts*, 95 TAX NOTES 143, 143 (2002) (reporting that House GOP leaders are considering offering for vote a proposal "to make last year's tax cuts a permanent part of the Code"). Of
income tax, generally on the grounds that it is unfair or economically inefficient. Others go further and claim that the tax must be eliminated because it is illegitimate; some even file suit challenging it on constitutional grounds.

Robert L. Schulz, founder of We The People Foundation for Constitutional Education, Inc., has been trying to hold hearings with government officials on the constitutionality of the income tax and plans a tax protest on April 14th, 2002 on the Washington D.C. Mall, at which time Treasury and Department of Justice flags would be burned. Even the course, the Enron scandal has created some momentum to do "something" about tax shelters, but as of this writing, it is unclear what if anything will be accomplished in this area. See, e.g., John D. McKinnon, Under Pressure, Treasury and IRS Attack Shelters, WALL ST. J., Mar. 21, 2002, at A2; Patti Mohr, Treasury, Taxwriters Unveil Tax Shelter, Corporate Inversion Plans, 94 TAX NOTES 1559 (2002). Further, many economists agree that tax cuts are a poor stimulus. See, e.g., Gesselin, supra note 228.

230. Representative Richard K. Armey’s government homepage, for example, has a link to both a flat tax and a "Tax Season Survival Kit" site. Congressman Dick Armey’s Home Page - 26th District Texas, at http://armey.house.gov/ (last visited June 27, 2002). The Flat tax cite discusses the Armey-Shelby flat tax proposal. See The Doctor is In-Sales Tax: Tax Season Survival Kit, at http://www.freedom.gov/survival/salestax.asp (last visited June 27, 2002). Though billed as an income tax it is really only a tax on wages (thus exempting investment income) but that is not revealed until the reader plows through quite a few pages. See id. The Survival Kit link takes you to the Schaefer-Tauzin proposal for a National Sales Tax which does state flatly that the income tax would be repealed. See The Flat Tax Proposal: Summary, at http://www.flattax.gov/proposal/flat-sum.asp (last visited June 27, 2002).

231. See generally BILL BENSON & M.J. 'RED' BECKMAN, THE LAW THAT NEVER WAS: THE FRAUD OF THE 16TH AMENDMENT AND PERSONAL INCOME TAX (1985) (arguing that for technical reasons, the amendment was not properly ratified). Over the years there have been many lawsuits in both federal and state courts making this claim. See, e.g., Benson v. Hunter, 45 P.3d 444 (Okla. Civ. App. Div. 2, 2002) (dismissing suit claiming that sixteenth amendment was unconstitutional because Oklahoma had not validly ratified it); United States v Stahl, 792 F.2d 1438 (9th Cir. 1986).

U.S. House of Representatives has voted more than once to "terminate" the income tax.\(^{233}\)

Meanwhile, taxpayers themselves undermine the viability of the income tax by increasingly engaging in illegal and questionably legal tax shelters and tax scams. There was a previous wave of such actions in the 1980s, but a new wave occurred in the mid to late 1990s,\(^{234}\) the peak of anti-tax rhetoric. There are probably various reasons for this surge, such as the growing availability of the Internet to spread these schemes. However, another likely cause was that the highly inflammatory rhetoric, especially as evidenced by elected public officials, translated into disdainful actions by the populace. Certainly, the litany of IRS abuses recounted at the 1997 Senate Hearings confirmed traditional American anti-government, anti-tax sentiments. By increasing perceptions of unfairness and even tyranny in the abuses, the very public Hearings could only encourage more taxpayers to disregard the tax laws. Later, much quieter, revelations regarding the inaccuracy of these alleged abuses could not effectively counteract these perceptions.\(^{235}\) Additionally, taxpayer protections enacted in 1998 as a result of the Senate Hearings have been used by promoters of tax evasion schemes to protect themselves from prosecution.\(^{236}\)

Whatever the reasons, taxpayer non-compliance continues to grow. Examples of abusive schemes abound. A district court, for instance, recently enjoined two taxpayers from promoting a shelter called "Good News for Form 1040 Filers: Your Compliance is Strictly Voluntary! Bad News for IRS!"\(^{237}\) Although some of the promoters may believe more...
in the money they make selling their schemes than the schemes themselves, clearly the number of taxpayers following their advice is growing.\textsuperscript{238} Exact details about numbers of taxpayers involved and dollars avoided are unavailable, but in February 2002, the IRS announced that approximately 740,000 individual taxpayers were involved in abusive tax schemes. In addition, it had collected $5 billion of taxes improperly avoided, and that between $20 and $40 billion was uncollected.\textsuperscript{239} Forbes Magazine's March 5, 2001 cover screamed "How to Cheat on Your Taxes" and inside queried whether the honest taxpayer was a "chump" for paying her taxes.\textsuperscript{240} A 2002 survey found that more American taxpayers than ever (twenty-four percent) believe outright cheating on their income taxes is permissible.\textsuperscript{241} The problem is so severe that IRS Commissioner Charles Rossotti testified that "[t]he single biggest problem his successor will face is the IRS's ability to effectively crack down on taxpayers who abuse the system."\textsuperscript{242}
To the extent that the current wave of attacks on the income tax merely attack its fairness, they are a mere continuation of constant criticisms against it as an unfair method of taxation and can be seen as "business as usual." Nevertheless, the sheer number of taxpayers who no longer feel compelled to properly pay their taxes undermines both revenue and respect for the tax laws, by for example, encouraging "chumps" and other taxpayers to avoid their taxes. Moreover, some of the protests also contain an element present in other historic tax protests: a complaint not merely against the current form of the income tax or the income tax itself, but against the justness in Manhattan. See, e.g., Alex Berenson & Carol Vogel, Ex-Tyco Chief Is Indicted in Tax Case, N.Y. Times, June 05, 2002, http://www.nytimes.com/2002/06/05/business/05TYCO.html?ntemail1; Mark Maremont & Jerry Markon, Ex-Tyco Chief Evaded $1 Million In Taxes on Art, Indictment Says, WALL ST. J., June 5, 2002, at A1. Under Kozlowski's reign, Tyco's corporate income taxes also decreased significantly. See Mark Maremont, John Hechinger, Jerry Markon & Gregory Zuckerman, Tainted Chief: Kozlowski Quits Under a Cloud, Worsening Worries About Tyco, WALL ST. J., June 4, 2002, at A1.

243. Post Civil War income taxes in particular have always had a contentious history. (I omit the Civil War income tax due to its limited nature and the defined purpose for which it was imposed.) Some opponents of the first post-Civil War income tax in 1894 and of the early post sixteenth amendment income tax aimed their attacks at the very framework of the tax, claiming that it was "socialism, communism, [and] devilism". 26 CONG. REC. 6695 (1894) (Senator John Sherman speaking of the income tax as trying "to array the rich against the poor or the poor against the rich"). Consequently, some viewed the income tax as an attack on the very system of private property. See, e.g., Pollock v. Farmer's Loan and Trust Co., 157 U.S. 429, 532-33, aff'd on reh'g, 158 U.S. 601 (1895) (Joseph Choate, one of plaintiff's attorneys). Accord 26 CONG. REC. 1645 (1894) (Rep. Franklin Barlett suggesting that the Founding Fathers would be angered by the tax's assault on private property). Mostly, however, criticisms, though pointed, more modestly opposed the tax as "put[ting] tax upon thrift and impos[ing] a penalty on success[.]") 26 CONG. REC., App. at 207 (Jan. 31, 1894) (statement of Rep. Robert Adams, Jr.). See also id. at 1600 (statement of Rep. Ray arguing that the result is "tax[ing] brains, enterprise, and industry," and "[t]his is a warning that men must not be too industrious, too enterprising, or too saving."); see also 26 CONG. REC. 1645, 1650 (1894)(statement of Rep. Joseph Walker (R-MA)).

This pattern of opposition to the income tax has continued through to the present. Based on the idea that the income tax stifles wealth accumulation that is the bastion of civilization, progress, economic growth, liberty and democracy, it occasionally refers to socialism and the Bible but more frequently appeals to supply-side economics to show the benefits of wealth for all of society. For a discussion of the recurrent rhetorical themes in income tax debates, see Marjorie E. Kornhauser, The Morality of Money: American Attitudes Toward Wealth and the Income Tax, 70 IND. L.J. 119 (1994).
of all tax and against the right of the government to impose it. In other words, these protests concern the nature of the government which in some instances rises to the level of questioning the legitimacy of the government itself. Tax is merely one battlefield in the struggle to define the political structure of the government.

In some respects the current revolt echoes an earlier, almost forgotten, twentieth century revolt in the early 1930s. In both situations economic factors may have begun the revolt, but philosophical views about the role of government and the individual bolstered the demands to cut government spending. The 1930s revolt concentrated on state and local property taxes, although there was also protest against federal taxes as a way in which to derail New Deal Programs. The recent wave also began at the state level and focused on property taxes but quickly encompassed federal taxes as well, advocating the elimination of both the federal income and estate taxes. Both waves involve wealthier citizens and populist elements, but current protests tend to be more loosely organized and often individualistically spread through the Internet. Both have used legitimate democratic methods.

244. See DAVID T. BEITO, TAXPAYERS IN REVOLT: TAX RESISTANCE DURING THE GREAT DEPRESSION (1989). There was a flurry of tax limitation action during the Depression. For example, between 1932 and 1934 six states limited property taxes by means of initiatives. Id. at xii (one state limited them via a legislative vote and dozens of similar limitations occurred at the state and local level). For a short history of the property tax limitation movement in the 1930s, see also Mabel Newcomer, The Growth of Tax Limitation Legislation, in PROPERTY TAX LIMITATION LAWS: THE EVIDENCE AND THE ARGUMENTS FOR AND AGAINST THEM BY TWENTY-FOUR AUTHORITIES 38 (Glen Leet & Robert M. Paige eds., Pub. Admin. Serv. 1936). and Rodney L. Mott & W.O. Sutter, The Types and Extent of Existing Tax Limitations, id. at 41. (This compilation has several articles on the limits in particular states.)

One argument in the 1930s favoring property tax limitations was that its purpose was not simply to limit the amount of taxation but to reform the system so that the tax base was broadened beyond simply real estate. See, e.g., Herbert U. Nelson, The Case for Tax Limitation, in id. at 7.

245. See, e.g., BEITO, supra note 243, at xii, 33. Beito concentrates on state and local tax resistance, but there was also a lot of organized resistance to federal taxation as a way to limit the New Deal's spending agenda. This resistance, however, was not focussed on the income tax, however, and when it did look at the income tax, abolition was not the main point. See, e.g., MARK LEFF, THE LIMITS OF SYMBOLIC REFORM: THE NEW DEAL AND TAXATION, 1933-1939 (1984). The author is currently researching income tax resistance in the 1930s.

246. Beito states that "[m]easured in numbers of organizations, the tax
to limit governmental spending powers via the ballot. Both, however, have also used more physical and more extreme protest actions that hark back to the early traditions of tax protest. In the 1930s a local tax strike was the "most serious weapon of resistance," although it was rarely used.\footnote{See id. Beito's book focuses on the 1930-1933 Chicago strike. In early 1930, in response to recent real estate tax increases, a small group of wealthy real estate operators active in the Chicago Loop area formed the Association of Real Estate Taxpayers of Illinois (ARET) in order to "permit united protection for [real estate taxpayers] in matters of taxation and legislation, and to prevent an inequitable distribution of tax burdens on real estate and all incidentals thereto pertaining." \textit{Beito, supra} note 244, at 44 (quoting ARET's registration for non-profit status with the Secretary of State of Illinois). It first tried, unsuccessfully, to promote the passage of a statewide amendment regarding taxation of personal property which would have the effect of lowering tax rates on real estate; when that failed to pass, ARET petitioned the Illinois Tax Commission to rescind the current 1930 assessment. \textit{See id.} at 51-56. When petitioning the Tax Commission failed, ARET went to court and broadened its base to include small taxpayers in order to pay litigation costs. \textit{Id.} at 58 (new members paid a separate legal fee for each piece of property they owned and signed an agreement authorizing ARET to represent them in court). The organization recommended that members not pay any taxes until a court made a final decision. \textit{See id.} at 95.} Today, the extreme methods include actual and threatened acts of violence such as bombings and the ultimate act of resistance: refusal to accept the legitimacy of the government imposing the tax.

Current income tax protests can be divided into two broad categories: the electoral group and the direct action group. The former group generally acknowledges the government's right to tax but believes this right must be narrowly defined and exercised whereas some members of the latter reject not just the tax but the legitimacy of the government itself. Both, however, share a vision of a more limited government and see the current taxing power as facilitating an expanded and illegitimate governmental power that threatens the individual liberty and freedom for which this country was founded. The two factions differ in the means by which they seek to remedy the problem. The electoral group, as its name implies, uses traditional, peaceful methods of trying to enact legislation and
constitutional amendments. The direct action group harkens back to more revolutionary means of protest: civil disobedience that occasionally erupts into violence, and a denial of the government's legitimacy. Even the first group, however, is radical in the sense that it frequently resorts to initiatives and referenda, the tools of direct democracy, rather than to the more traditional representative democracy to achieve its ends.

1. Electoral Group: Proposition 13 and its Progeny. The electoral group’s previously described philosophy of limited government and the priority of individual liberty, coupled with social and economic discontents has expressed itself in a tax revolt not just against the rate of taxation but also against the type of taxation and against the traditional method of enacting taxes. As in past times, these themes have manifested themselves through campaigns to limit taxation at both state and federal levels and particularly through campaigns to abolish the income tax. For some tax protesters, this extreme antipathy to taxation effectively transmutes the revolutionary slogan "no taxation without representation" into "no taxation, even with representation."

Additionally, this revolt contains a procedural aspect that is just as important as its substance. To the extent that it does want taxation with representation, its frequent use of initiatives and referenda stresses direct democracy over the more traditional American representative form of government.

Since California's Proposition 13 (the Jarvis-Gann Amendment) limiting local government’s ability to increase real property taxes began what many characterized as a national tax revolt against both rising taxes and big government, a brief examination of this well studied

248. SMITH, supra note 11, at 18.
249. Specifically, the amendment included the following:
   Set the maximum ad valorem tax on property at 1%,
   Rolled back the assessed value of property to the 1975-76 value,
   Limited annual increase in property value,
   Permitted reassessing property at its full market value when it is sold,
   Prohibited state and local governments from imposing other taxes on
   real property, but allowed specified local entities to impose special
   taxes.

Id. at 54-58. A copy of the abbreviated version of the Ballot Title may be found in SMITH, supra note 11, at 54.
amendment helps illuminate the movement it spawned. Many analysts, politicians, and participants themselves characterized it as a populist, grassroots-driven movement that was, in their view, more democratic than the current representative government.\textsuperscript{250} In reality, however, the tax revolt was not populist in the traditional sense but rather was, in the words of Daniel A. Smith, "faux populist."\textsuperscript{251} Although historians debate the substantive content of real populism, they agree that procedurally it is a "process of a bottom-up, political struggle pitting Us against Them[,]... a mass outcry of a 'common people' aimed at an established elite, their norms, and their practices.\textsuperscript{252} The tax revolt that Proposition 13 began appeared to have many of the characteristics of populism. It had the apparent support of the masses since it was enacted through an initiative voted on directly by the "people" rather than indirectly by their elected representatives. It certainly used the symbolic language of populism, speaking in terms of \textit{we} the people and \textit{they} the government who took, even stole, "our" money through taxation.\textsuperscript{253} Despite these characteristics, the

\begin{itemize}
\item 250. \textit{See} SMITH, supra note 11, at 10.
\item 251. This discussion is drawn from SMITH, supra note 11, at 38-51.
\item 252. \textit{Id.} at 44-45.
\item 253. \textit{See, e.g., id. at} 29 (quoting Proposition 13 leader Howard Jarvis as saying the California tax system was "grand felony theft"); \textit{id. at} 40 (quoting initiative support David Schmidt as saying "Those who oppose direct citizen control of taxes and government spending forget the most important factor in this debate: its \textit{our} money."); SEARS & CITRIN, supra note 32, at 17-18 (stopping 'them' from taking 'our' money helped organize the revolt); and Citrin, \textit{Introduction} to RICHTER, supra note 249, at 7 (quoting Barbara Anderson, executive director of Citizens for Limited taxation which led the Massachusetts drive to limit state taxes, as saying: "Our fight is not mainly about money. It's about control. \textit{They} have to learn once and for all that it's \textit{our} government.").
\end{itemize}
movement was more *faux* than true populist because it had a "populist-sounding message without the political mobilization of the people." Although the message tapped public sentiments, it was initiated and led by a "populist entrepreneur" who had the charisma as well as the financial and organizational backing to successfully drum up more widespread support for the initiatives. In fact, many commentators have noted that although phrased as a revolt of the *people*, the "have-nots," Proposition 13 was, in fact, most strongly supported by the higher income "haves."

Although various factors contributed to the passage of Proposition 13, many analysts believe that a significant factor of this revolt was the state government's unresponsiveness to citizens' complaints. As Jack Citrin, a Proposition 13 expert, noted, the revolt was most successful in states where the government was least responsive.

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254. SMITH, supra note 11, at 48.
255. See id. at 48-51. See also Sherman Clark, Commentary, A Populist Critique of Direct Democracy, 112 HARV. L. REV. 434 (1998) (claiming that representative government more accurately reflects voters opinions and priorities).
256. See SEARS & CITRIN, supra note 32, at 140 ("[T]he characterization 'a revolt of the haves' comes closer. Middle-aged, white, fully employed, affluent male homeowners were the greatest enthusiasts for it."); SMITH, supra note 11; KUTTNER, supra note 249, at 20 ("the distributional consequences of Proposition 13 mark it as a striking bonanza for the haves. The $6.15 billion tax relief allocated under Howard Jarvis' formula rewarded business and corporate property owners first, wealthy individual homeowners second, small householders last, and tenants not at all.") Sears and Citrin found that support among high income taxpayers varied with educational and occupational status. See SEARS & CITRIN, supra note 32, at 100 (higher income—but lower status—taxpayers supported the tax revolt out of self interest, but more highly educated, higher occupational status taxpayers tempered this self interest with a "public-regarding sympathy for government activity in general.") and id. at 110 ("the tax revolt was centered among white, high-to-middle income, middle-aged men residing in Southern California.").
257. KUTTNER, supra note 249, at 96 ("Proposition 13 was the result of shifting taxes, unresponsive politicians, and unusually opportune timing."). See also SMITH, supra note 11, at 61. Other factors include the rising property taxes, discontent with government officials, and frustration with government itself—especially its big spending and regulation. See, e.g., KUTTNER, supra note 249, at 93-94. See also Kirk J. Star, The Right to Vote on Taxes, 96 NW. U. L. REV. 191, 197-201 (2001) (analyzing Proposition 13 not in the context of tax revolt but in the context of fiscal constitutions and the role voting on taxes has in limiting the taxing powers of local governments).
258. Citrin, Introduction to RICHTER, supra note 249, at 19 ("[A] failure on the part of elected officials to meet burgeoning complaints about high taxes at
Citrin and David O. Sears explain California's tax revolt via the concept of a schema, or an organized system of cognitive and affective beliefs previously discussed. They developed a six factor tax revolt schema, consisting of value priorities about the size of government and spending on services, anti-government attitudes about waste and overpaid government workers, personal tax burdens, and a "tax rebel" index that indicated how the person voted on the three California ballots about taxes.

According to their data, a taxpayer's value priority about the role of government had a "stronger effect" on voting behavior than anti-government attitudes about waste and inefficiency. They concluded that the tax revolt schema was linked with two larger political schema: a value priorities schema about the role of government and a malaise schema tied to cynicism, disapproval of incumbents, and general economic complaints to more specific criticisms of government performance. Support for the tax revolt itself was tied much closely to the former than to the latter. That is the central issue in the tax revolt was how much government should be doing, not so much whether it was doing it well or badly. The argument was over the scope of government responsibility, not the competence of its performance or some general malaise.

In other words, just as in earlier centuries, taxation once again became the arena in which political questions about the nature of government were fought. California's successful tax revolt quickly spread to other states and was promptly picked up by national politicians.

least partway was critical to the success of the tax revolt. The rebels won their greatest victories, in California and Massachusetts, where the political system was unresponsive to an obvious problem—in other words, where democratic processes broke down. Citrin cites Oregon's rejection of a version of Proposition 13 as an example of political responsiveness that prevented a successful tax revolt. See id. at 19 and Citrin, Introduction to Richter, supra note 249, at 19 ("[T]he existence of procedures that allowed voters to reject property tax increases and a program of property tax relief funded by the state" was the primary reason Oregon rejected a version of Proposition 13.).

259. See Sears & Citrin, supra note 32, at 74-83. See also Taxpayer Compliance, An Agenda for Research, supra note 32, at 149-150, for a "tax compliance" schema. See, e.g., note 32 and accompanying text for a longer discussion of schemas.

260. See Sears & Citrin, supra note 32, at 83.

261. Id. at 80.

262. Id. at 187 (emphasis added).
as well.\textsuperscript{263} "A Proposition 13 mythology grew up overnight. . . . [that] created its own reality as national politicians scrambled to give the voters what they thought was being demanded."\textsuperscript{264} The consequences were immediate and have been long lasting. As the political scientist Michael Berkman has said, "American tax politics has taken on a noticeably conservative cast, as the commitment to progressive taxation—a mainstay of the federal income tax since its inception—has been slighted, if not nearly abandoned."\textsuperscript{265} Reverberations from Proposition 13 range from then Senator Dole's introduction, shortly after its passage, of four tax cutting measures,\textsuperscript{266} to the 1980 election of Ronald Reagan as president,\textsuperscript{267} to the 2001 income tax cut and elimination of the estate tax. National organizations,

\begin{quote}
\textsuperscript{263} See, \textit{e.g.}, \textsc{Stewart, supra} note 11, at 150. Stewart states that the changes in the tax law in the 1980s were due to two important developments in the 70s: (1) the 'grass-roots' tax revolts in the states starting with Proposition 13 in California in 1987, and (2) a shift in the tax policy debates that "deemphasized macroeconomic policy stability and emphasized microeconomic efficiency." \textit{Id.} at 150. Supply-side economics, in particular, was used to focus on providing incentives for work, capital formation and global competitiveness. There were more than 200 state ballot initiatives in the 2000 elections with more than a dozen dealing with taxes, ranging from repeal of estate and inheritance taxes in S. Dakota and Montana to a cut in income taxes in Massachusetts. \textit{See} Greg Hitt, \textit{State Ballot Initiatives Gauge Support for Tax Cuts, Vouchers, Guns}, \textsc{Wall St. J.}, Oct. 25, 2000, at A8. Many states that only a short while ago cut taxes are currently in a quandry. Under constitutional mandates to balance their budgets, they are now contemplating tax increases in order to compensate for shortfalls caused by the post September 11, 2001 economic recession. \textit{See} Russell Gold, \textit{States' Tax Increases Are Creating a Drag on the Overall Economy}, \textsc{Wall St. J.}, June 3, 2002, at A2. Even in this climate, however, in May 2002 Tennessee—amidst great protesting—voted down an income tax. \textit{Id.}

Although the tax revolt that Proposition 13 began was not unique to America, it was perhaps most virulent in the United States. \textit{See, e.g.}, \textsc{Sears & Citrin, supra} note 32, at 225; \textit{Foreign Digest}, \textsc{Baltimore Sun}, October 28, 1997 at 11A (Ontario's Conservative government "was swept to power in 1995 promising a 'Common Sense Revolution' of tax cuts and leaner government."). There was also a general decrease in tax rates in Europe, but that may be due more to a need to stay competitive in a global economy once the United States lowered its rates in 1986 than a tax revolt.

\textsuperscript{264} \textsc{Kuttner, supra} note 249, at 93.


\textsuperscript{266} \textit{See}, \textsc{Smith supra} note 11, at 28. Representative David Obey (WI-D) stated that Proposition 13 caused "panic in this House." \textit{Id.}

\textsuperscript{267} Jack Citrin calls this the "apogee" of the tax revolt. \textsc{Jack Citrin, Introduction in Richter, supra} note 249, at 4.
with state or grassroots connections, such as the National Taxpayers Union, Americans for Tax Reform and We the People, actively argue for a reduction of taxes and spending. There are even bills to end the income tax, although they sometimes disguise that fact by labeling the proposals as flat "income" taxes that do not tax investment income rather than calling them consumption taxes. One reason sometimes given for eliminating the income tax is related to legitimacy, specifically the claim that the income tax is unconstitutional. This argument is most often made by extremists, but it played a limited role in the 2000 elections. It was a part of the National Platform of the Constitution Party which was on the presidential ballot in many states, and even one of the candidates in the Republican primaries.

Increased "faux" populism in both tax rhetoric and action is another of the most long-lasting consequences of Proposition 13. Much of the tax rhetoric stresses the dichotomy between we the people and they the government. In action, Proposition 13 has encouraged a resort to direct democracy in the form of increased usage of initiatives and


As between taxes and deficits, taxes are often seen as the worse of the two evils. In its National Platform for the election in 2000 the Constitution Party, for example, called for the repeal of all taxes except those on foreign goods and proposed paying for any federal deficit with an apportioned "state-rate tax" under which each state would assume a percentage of the national debt equal to its population. See http://www.constitutionparty.com/ustp-99p1.html, at 24. Even more mainstream politicians sometimes choose deficits as the lesser of evils when compared to taxes. President George W. Bush's 2003 proposed budget, for example, increases the deficit even as it urges new tax cuts—despite polls that show the public preferring to delaying current tax cuts over reducing spending 56% to 32%. Albert R. Hunt, Tax Cuts Coming Home to Roost, WALL ST. J., Jan. 24, 2002 at A19. On Bush's budget, see, for example, Patti Mohr et al., Lawmakers Offer Mixed Reviews of Bush's 2003 Budget Proposal, 2002 TAX NOTES TODAY 24-2 (2002), LEXIS 2002 TNT 24-2. Of course, how to define a deficit is also an issue. For example, in the 2002 budget discussions, Democrats do not include the Social Security surplus in balancing the budget whereas Republicans do. See, e.g., Warren Rojas & Natalia Radziejeweska, Leaders Poised to Follow Different Paths on Budget, Tax Agenda, 94 TAX NOTES 655, 659 (2001).
referenda and of super majority votes. Although the former is not available at the national level, the latter is, resulting in a slew of proposals at the federal level to require super majority votes to increase taxes and even constitutional amendments to limit taxation. At first glance, direct democracy, in the form of initiative and referendum appears to be the most legitimate form of government in America since decisions are made directly by the people, the ultimate source of sovereignty and hence legitimacy. Similarly, supermajorities also might be viewed as more legitimate than regular majorities in that they appear to reflect greater consent of the people. Ironically, however, initiatives and referenda are subject to manipulation and frequently do not reflect people’s priorities. Moreover,


272. See Clark, supra note 255. The referendum process has been seen as "perverting[ the majority rule principle of democratic government because, in most states, a successful petition drive to force a vote also suspends the law in question until the public has voted on it." Jerry W. Calvert, The Popular Referendum Device and Equality of Voting Rights—How Minority Suspension of the Laws Subverts 'One Person-One Vote' in the States, 6 CORNELI J. L. & PUB. POL'Y 383, 384 (1997) (arguing that "we should not allow a minority of 'the People,' through the referendum process, to act as if they were the majority."). See 41 Santa Clara L. Rev., Issue 4 (2001) for a symposium on the initiative process.

Supermajorities, which can create a tyranny of the minority, are one response to a fear of tyranny by the majority. It is not surprising that attempts to require supermajorities should occur in tax related areas because, as James Madison observed long ago in reference to apportionment of taxes, "there is perhaps no legislative act in which greater opportunity and temptation are given to a predominant party, to trample on the rules of justice. Every shilling with which they over-burden the inferior number, is a shilling saved to their own pockets." THE FEDERALIST NO. 10, at 45 (James Madison) (Garry Wills, ed.
some scholars believe that the increased emphasis on direct democracy and supermajorities has undermined the legitimacy of representative government by increasing distrust of it.\textsuperscript{273} The populist language with its emphasis on \textit{we} and \textit{they}\textsuperscript{274} blends with the libertarian suspicion of taxation as "authoriz[ing] the sovereign to commit acts of aggression" against its citizens.\textsuperscript{276}

Tax revolts have deepened both cynicism and traditional anti-government, anti-tax sentiment. Indeed, one commentator has stated that the past decades of tax revolt "indicate... that representative government is often not sufficient when it comes to tax matters. Sometimes the 'people' also want 'no taxation, even with representation.'\textsuperscript{276} Such sentiments, if truly felt by a majority of people, can undermine a government's legitimacy. They can either create the feeling that all taxes are illegitimate or simply lead to minimal taxation so that the state is under-funded. Inadequate state funding can further undermine the state. Without sufficient revenues the government cannot provide the services demanded by the people. As a consequence, their frustration with, and distrust of, the state will increase which in turn help create conditions that can produce a crisis in legitimacy.

2. Direct Action Group: Individual Taxpayer's Refusal to Pay or Acknowledge Duty to Pay Taxes. Direct action protests against taxation differ from the electoral protests in that the protesters go beyond using the traditional democratic process of effecting change via the ballot box and refuse to pay taxes. This type of protest, as I define it, does not include people who are merely avoiding or evading taxes for financial reasons or just because they feel they are 1982). See Edward McCaffery, The Holy Grail of Tax Simplification, 1990 Wis. L. Rev. 1267, 1314 (1990) (This fear of tyranny of the majority in tax legislation can be especially powerful now that the federal government is so involved in non-traditional functions).

\textsuperscript{273} Smith, supra note 11, at 15.

\textsuperscript{274} Citrin, Introduction in Richter supra note 249, at 7 (quoting Barbara Anderson, executive director of Citizens for Limited taxation which led the Massachusetts drive to limit state taxes as saying: "Our fight is not mainly about money. It's about control. They have to learn once and for all that it's our government.").

\textsuperscript{275} Richard A. Epstein, Taxation in a Lockean World, 4 Soc. Phil. & Pol'y, 49, 49 (1986).

\textsuperscript{276} Smith, supra note 11, at 18.
being taxed too much. Nor does it include people who recognize the government's legal right to collect taxes but refuse to pay on grounds such as conscientious objection to war that is financed by taxes. Rather, direct protests, as considered here, have some theoretical or political element that questions the legitimacy of the tax. Physical tax protests, of course, have been an integral part of American history since its formation, as previously described, but they had been largely dormant post World War II. Since the 1970's they have increased dramatically, often recalling earlier tax rebellions with patriotic pride.

The Shays' Rebellion mythology, for example, is so strong that both the Right and the Left have simultaneously claimed it as their emblem. This contradictory

277. It is difficult to determine how much of the everyday type of tax evasion occurs because there are no accurate measures of voluntary compliance since the last IRS measurement of compliance occurred in 1988 under the now suspended Taxpayer Compliance Measurement Program (TCMP). See, e.g., GAO, IRS Audit Rates: Rate for Individual Taxpayers Has Declined But Effect on Compliance is Unknown, 14 (2001), GAO-01-484; GAO REPORT supra note 236; Amy Hamilton, The Tax Gap Game and Inplings of a Focus on Noncompliance, 98 TAX NOTES TODAY 101-3 (2001), LEXIS 98 TNT 101-3 (In the second set of Senate Finance Committee hearings on the IRS, Commissioner Charles Rossotti stated that lost revenues from noncompliance most were almost 200 billion and that if they were collected that would translate into a "tax cut of approximately $1600 for each individual tax return filed."). Most estimates state that individuals fail to pay about 17% of their tax liability, although the tax gap varies depending on the source of revenue. William G. Gale & Janet Holtzblatt, The Role of Administrative Issued in Tax Reform: Simplicity, Compliance, and Administration 16 (2000 draft), February 2, 2001 at http://www.brookingsorg/views/papers/gale/2001201.htm (about 99% of wage income is reported because employers withhold taxes, whereas about 30% of income form farms and small business goes unreported, and over 80% of babysitting income is unreported).

278. For a discussion of these protesters, see Marjorie E. Kornhauser, For God and Country: Taxing Conscience, 1999 WISC. L. REV. 939 (1999).

279. Shays has been claimed by the left as "[a] foe of commercial capitalism, a model for Vietnam veterans, Shays can also aid mythmakers on the right; in that role he becomes the angry taxpayer in revolt against Big Government." White Hats and Hemlocks, supra note 45, at 290. Similarly the Perot movement in the early 1990s, for example, was called "the latest act in a historical pageant of political protest, frequently combining a distrust of politicians and fears of the economic future. Similar protests gave rise to Shays' Rebellion of debt-ridden farmers in the late 18th century...." David Jackson, The Perot Paradox, DALLAS MORNING NEWS, Sept. 12, 1993, (Life Section) at 6, LEXIS, News, Arcnws. Shays has become a major symbol of American tax revolt. See, e.g., Keith Monroe, GOP's New Math: Less (Taxes) Equals More (Entitlements), VIRGINIAN-PILOT (Norfolk) Dec. 4, 1994 at J6. ([h]ostility to taxes is nothing
legacy is clearly evident in the town of Petersham, MA where two plaques mark the rebellion. One reads "true liberty and justice may require resistance to law." The other reads, in part, "obedience to law is true liberty." Both elements of this legacy are still powerful. The dark, negative side links the violence of groups such as modern day militias to Shays. The positive side, emphasizing the necessity of just protest to protect freedom, is frequently expressed in rhetorical tax protests, as exemplified by President Reagan's 1986 radio address linking Shays' protest to our patriotic foundations, the Revolution, and the Constitution.

Although electoral and direct action protests use different means, they share some goals, although the direct action group generally is more extreme. The direct action group protests the encroachment of the federal government on both the state and the individual, but so, we have seen, does the electoral group. The direct action group distrusts majority rule and representative democracy, but so does the...
electoral group, as exemplified to a lesser degree, by its quest for supermajority votes on tax matters and its appeals to direct democracy through initiatives and referenda. Both groups' use of traditional populist language, emphasizing the dichotomy between we and them, increases a sense of alienation from the government and encourages the belief that the government is the "enemy" and not legitimate.

There are a variety of direct tax protests ranging from not paying taxes, to threatening IRS personnel to actual physical violence against IRS property or personnel. Motivation for these protests range from frustration to a sincere belief that the income tax itself is illegal. Some individuals act alone; others are part of semi-organized movements. Many of these tax protesters are members or adherents of radical right wing groups such as the Posse Comitatus, Christian Identity, Sovereign Citizens, the common-law movement, the militia movement, and the Patriot movement. Some of these are violent; others not. All, however, hold similar views about the size and role of government and its potential for corruption, including a commonly held belief that any government beyond the county level is illegitimate and must be resisted. The more extreme groups often form isolated communities complete with their own governments, and feel justified in resisting the illegitimate laws of unconstitutional state and federal governments, using arms if necessary.

These radical protestors believe that it is they who are the true patriots, trying to return the country to its authentic nature. A note found with bombing materials in Timothy McVeigh's car shortly after the Oklahoma bombing captures the essence of this belief: "[o] bey the Constitution of the United States and

283. See infra note 12 (description of violent events).


285. See, e.g., Huhn, supra note 284, at 427-30.
we will not shoot you." Their resistance to "illegitimate" laws includes tax laws. For example, Gordon Kahl, a follower of both Posse Comitatus and the Christian Identity movement, claimed that he would kill anybody trying to arrest him for failure to pay taxes. In 1983, two U.S. Marshals were killed while trying to arrest him. The so-called Patriot Movement in both its violent and non-violent aspects contains a strong anti-tax component and members flood the courts with protests based on the illegitimacy of the income tax as well as more abstruse assertions.

The rationale behind the radical Rights' refusals to pay income taxes is that the income tax laws, frequently, but incorrectly, called "IRS laws," and their administration represent an abuse of power. In the words of Martin A. Larson, an early leader in the movement, the tax laws are "a cancer on our body politic; and until they are eliminated, there will be no peace, freedom, or constitutional government in the United States." The "ultimate purpose of the IRS", he claims, "is not primarily to collect taxes, but to create an authoritarian collectivist and conforming society." His purpose is not just to abolish the income tax but to limit the power of the federal government to those powers specifically enumerated in Art. I, Sec. 8 of the constitution. In keeping with this goal he also favors the abolition of the Federal Reserve system, the elimination of

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286. Quoted in WILLS, A NECESSARY EVIL, supra note 113, at 205.
287. MORRIS DEES, WITH JAMES CORCORAN, supra note 284, at 14. For a fuller description of these events, see, JAMES CORCORAN, BITTER HARVEST: GORDON KAHL AND THE POSSE COMITATUS: MURDER IN THE HEARTLAND (1990).
288. See, e.g., David Lupi-Sher, Anti-tax Promoters: A Close-Knit Group Preying on the Gullible, 1999 TAX NOTES TODAY 229-2 (1999), LEXIS 1999 TNT 229-2 (anti-tax sentiment is a strong component of the militia movement); Sullivan supra note 283, at 800, 811 (Sovereign Citizens' belief that their right to own property and the fruit of their labor is inalienable causes them to assert (often on web pages) that both property taxes and income taxes on wages are unconstitutional). Six associates of the Christian Patriot Association were recently convicted of conspiracy to defraud the IRS. Federal Jury Convicts Seven Tax Protester, 2002 TAX NOTES TODAY 112-28 (2002), LEXIS 2002 TNT 112-28, also discussed in 6 Linked to a Patriot Group Guilty in Banking and Tax Case, N.Y. TIMES, June 10, 2002, at C2. See, also, Sullivan, supra note 284, at 796 (discussing the "dense, complex, and virtually unreadable" nature of a Sovereign Citizen pleadings).
290. Id. at 187.
291. Id. at 188.
the national debt, and most programs now justified under the general welfare clause of the constitution because they go beyond the intentions of the Founding Fathers.

The extreme right wing tax protests, like other taxpayer protesters, commonly claim that they do not owe taxes for a variety of reasons such as: (1) wages are not income, (2) income taxes are voluntary, (3) the sixteenth amendment does not cover income taxes, (4) that since the Internal Revenue Code does not define "U.S. Individual" the taxpayer cannot determine whether he is one and therefore liable for tax, and (5) the taxpayer is not a citizen of the United States, but rather of some state such as Texas or Florida. Although these reasons seem outlandish to the

292. See id. at 193. Today, he states, the government uses the Welfare Clause to give:

[The general government implied powers to expand its sphere of interest into every field of public and privilege endeavor. Our Founding Fathers meant Welfare as those things that would be equally available to all citizens, such as roads, not subsidies that would be taken from producers and given to non-producers. The current interpretation is a complete perversion of the Constitution.]

Id. at 188-89.

293. See United States v. Gerads, 999 F.2d 1255, 1256 (8th Cir. 1993) (claiming appellants are not citizens of the United States but "Free Citizens of the Republic of Minnesota"); United States v. Sloan, 939 F.2d 499, 500 (7th Cir. 1991) (not challenging the tax laws, but claiming they do not apply to him because "he is not a citizen of the United States, but rather, . . . a freeborn, natural individual, a citizen of the State of Indiana, and a 'master'—not 'servant'—of his government."); United States v. Hanson, 2 F.3d 942, 945 (9th Cir. 1993) (claiming that as a natural born citizen of Montana, defendant is a nonresident alien exempt from tax laws); Jacob v. United States, 1994 U.S. App. LEXIS 30528 at *6-7, (10th Cir. 1994) (unpublished table decision) (claiming that defendant "is his own sovereign; he is not subject to the laws of the United States"); Southwell v. Comm'r, 1999 U.S. App. LEXIS 21084, at *4 (6th Cir. 1999) (taxpayer claiming that he had a constitutional right not to pay taxes because the government was "corrupt and unjust" was sanctioned by the appellate court for filing a frivolous appeal). For a description of these common tax protest rationales see Christopher S. Jackson, The Inane Gospel of Tax Protest: Resist Rendering Unto Caesar—Whatever His Demands, 32 GONZ. L. REV. 291, 301-21 (1996-97). For the IRS response to the most common reasons for tax protest, see The Truth About Frivolous Tax Arguments, at http://www.irs.gov/pub/irs-utl/friv_tax.pdf (last visited Oct. 10, 2002). These reasons are not confined to the United States, although the trend is more pronounced here. In Canada, for example, some taxpayers have claimed that the federal income tax is not constitutional. See, e.g., Revenue Canada Warns Taxpayers about Tax-Filing "Myths", in LEXIS; Fedtax-Taxtxt, Doc. 1999-30178; Kennedy v. Canada (Customs & Revenue Agency), [2000] 4 C.T.C. 186 (taxpayer claiming that he does not have to pay tax because natural persons are not subject to it and that the tax is voluntary).
mainstream, they do reflect the Rights' overriding concern with the illegal extension of federal power over individuals and their rights and properties.

The number of taxpayers claiming that they were not liable for income taxes has increased dramatically in the past several decades. In 1982 Congress responded to this increase by enacting provisions such as §6702, imposing a $500 civil penalty on frivolous income tax returns and §6673 permitting courts to sanction taxpayers who file frivolous complaints.\textsuperscript{294} In recent years individuals and groups used lectures and the internet to "educate" taxpayers of their right not to pay taxes. As a result the number of taxpayers believing they do not have to pay taxes has increased in numbers and expanded beyond extreme groups to include some more mainstream individuals such as small business owners. The National Taxpayer Advocate, Nina E. Olson has stated that over half of her mail is "cookie-cutter" anti-tax complaints, including constitutional objections to the income tax.\textsuperscript{295} The IRS recently disclosed that for tax year 2000 a minimum of 152,000 taxpayers claimed they owed no income tax based on a variety of the above listed reasons and that at least 1,500 corporations no longer withheld income tax from their employees' wages.\textsuperscript{296} It further estimated that approximately 740,000 taxpayers used some type of abusive tax scheme that year resulting in the loss of "tens of billions of dollars annually".\textsuperscript{297}

By 2001, the number and visibility of tax protests had increased so much that the IRS felt compelled to take a variety of actions to stop them and it was newsworthy enough that CBS devoted a segment of 60 Minutes II to the

\textsuperscript{294} See I.R.C. §§ 6702, 6673. See also The Truth About Frivolous Tax Arguments, supra note 293 (explaining why these most common arguments against compliance with the tax laws are wrong).

\textsuperscript{295} Warren Rojas, Schulz Hopes to Bury Tax Code at February Hearing, 94 Tax Notes 15 (2001) (quoting Olson that "The biggest shock to me in taking this job is the number of requests for assistance that are raising constitutional challenges to the tax system[]."). See also Commissioner Rossotti's statement, that taxpayer cheating is the biggest problem facing the IRS. Hamilton, supra note 242, at 90.

\textsuperscript{296} See Johnston, supra note 236.

These actions included filing suit against several taxpayers who had not only prepared and signed fraudulent returns but had also actively promoted such schemes via lectures and the internet. More dramatically, the IRS posted a 25 page response to the most common "frivolous" tax arguments on its web site. Additionally, the IRS has increasingly focused on compliance by aggressively cracking down on tax shelters and by proposing several measures such as re-instituting a national taxpayer compliance study that had been abandoned years ago due to congressional concern and Congress has not objected. Similarly, Congress and the Bush administration have begun to recognize the compliance issue by making various proposals about corporate tax shelters and other tax evasion.

Although not all direct action protesters believe that all state and federal laws are illegitimate, they usually do have a similar, less extreme belief that government is too large and is operating beyond its proper scope. In this respect


300. See The Truth About Frivolous Tax Arguments, supra note 293 (explaining why the most common arguments against compliance with the tax laws are wrong). On May 8, 2002, the IRS announced that it created a new Criminal Investigation web page about tax schemes and cons: New Tax Scams Page Debuts on IRS.GOV, May 8, 2002, LEXIS, IR2002-61. The site is located at www.irs.gov, "Tax Scams/Fraud Alerts" link. Id.

301. See George Guttman, IRS Moving Ahead on Taxpayer Compliance Survey, 95 Tax Notes 833 (2002); Jon Almeras, IRS Officials Say Shelter Abuse is Not Just a Corporate Problem, 97 Tax Notes 195 (Oct. 14, 2002); IRS Intent on Stopping Tax Avoidance Schemes, Officials Say, 2002 Tax Notes Today 187-6 (2002), LEXIS 2002 TNT 187-6 (discussing increased use of audits, stopping use of offshore credit cards to evade tax and a new focus on high income taxpayers).

302. The Bush administration, for example, has proposed increasing the penalty for frivolous tax returns to $5000. Amy Hamilton, Bush Wants to Modify IRS Reform Act, 94 Tax Notes 665, 666 (2002). See also Amy Hamilton, Baucus Calls for More Support of IRS Crackdown on Tax Cheats, 96 Tax Notes 1669 (Sept. 23, 2002).
their goal, if not their means, coincides with that of electoral protesters and conservative politicians: reduce the extent of the government by limiting taxes which fund it, especially income taxes that have the greatest potential to both fund expanding government functions and redistribute wealth.

Anti-tax actions and rhetoric not only express traditional American distrust and frustration with government but also fan these sentiments by creating the appearance, if not the reality, of a more contemptuous populace and a more ineffective government. As these feelings increase, more people fail to comply with the tax law. Increased non-compliance, in turn, causes more people to feel the law is unfair which, in turn, breeds more non-compliance. As non-compliance grows, frustration with the government grows because it is seen as more and more ineffective due to its inability to enact and enforce a fair tax law, and even possibly its inability to fulfil (through lack of revenue) all the functions the people expect it to perform. As frustration grows, so does the chance of violence. Many theories about political violence suggest that a critical factor is the existence of frustration (real or perceived) within the populace and the failure of the authorities to provide redress. 303 George Connor has applied this model to

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303. See, e.g., KITTRIE supra note 19, at 68-78 (causes of rebellion); supra notes 257-60 and accompanying text (discussing theories of tax revolts by Sears & Citrin). A particularly volatile situation is when the gratification of expectations, which heretofore were rising, are suddenly blocked so that the gap between expectations and reality increases. See id. at 71 (citing such theorists as James Davies). Frustrations need not be only economic; they can also be about political power, social concerns (such as security or status) or cultural values. See id. at 73-75. See, also, SKOLNICK, supra note 116, at xxvii; CONNOR supra note 70, at 160-66, 174, 179. For a discussion on the ideology of riots, see DAVID O. SEARS & JOHN B. McCONAHAY, THE POLITICS OF VIOLENCE: THE NEW URBAN BLACKS AND THE WATTS RIOT (1973). Sears and McConahay define “ideology” as “a coherent, interrelated set of beliefs held in common by a group of people. Such beliefs interpret an aspect of life (in this case, racial and political aspects) and include an explicit or implicit guide for action.” Id. at 170 n. 1. This is a critical element of a model of riot ideology developed by David Sears and John McConahay to explain the Watts riots in August of 1965. According to them, riot ideology has four components: 1) standard methods of grievance were ineffective, 2) the violence was an alternative of grievance redress and was engaged in as symbolic protest (the “functional-equivalence” hypothesis), 3) riot ideology (belief that revolt is a right and just reaction against aggression in appropriate instances), and 4) absence of leadership. See id. at 196-200.
explain the three violent tax revolts in the United States' formative years: the Shays', Whiskey, and Fries Rebellions. Given this history, tax protests, whether electoral, direct action, or "mere" rhetoric, always bear watching as both reflectors and instigators of a greater frustration with government.

CONCLUSION

For the past several decades, confidence in democratic governments, especially the United States, has declined to very low levels. Many commentators believe that this low level of trust, which they see as only temporarily reversed by the September 11, 2001 terrorist attacks, has created a crisis in legitimacy. Even if there is no crisis, there is certainly a troubling level of distrust, alienation, and frustration with government that challenges its legitimacy. This situation warrants particular concern in the United States because of its history of anti-government sentiment and its first-hand knowledge that governments can be "unmade" as well as "made."

Taxation plays a central role in problems of legitimacy for several reasons. First, a voluntary tax system is the most reliable and efficient source of the revenue that any state needs to survive. Voluntary in the tax context means that there is a very high rate of compliance through self-assessment, and such compliance can best be achieved if the taxpayers believe that the government is legitimate. Second, voluntary payment of taxes strengthens the legitimacy of government because it is an act by which taxpayers consciously express their commitment to the state. Citizens have many rights, especially in a democracy, but their duties are few: military service (hardly universal, especially in a draft-less state), voting (both a duty and a right), and the payment of taxes. Thus, the payment of taxes is a patriotic act that, like any patriotic act, both validates and strengthens the legitimacy of the state by its commission. Empirical evidence suggests that increased trust increases voluntary compliance with tax laws, thereby reinforcing acts of commitment as well as ensuring the state the revenues it needs to survive.

304. Connor, supra note 70.
305. See Rodgers, supra note 22, at 112.
Third, no matter how limited the conception of governmental powers, legitimacy requires some positive actions by the state which in turn requires taxation to fund those actions.\textsuperscript{306} Without the power to ensure steady revenue, as Joseph Story recognized over 150 years ago, "one of two evils must inevitably ensue; either the people must be subjected to continual arbitrary plunder; or the government must sink into a fatal atrophy."\textsuperscript{307} Not only must a government have the power to tax, it also must be able to tax at a level sufficient to perform all those functions the people require of it. President George W. Bush and other proponents of limited government rightly recognize that too much revenue may create waste. They usually fail, however, to recognize the danger of the converse. As another Republican President stated over one hundred years ago, too little revenue produces distrust,\textsuperscript{308} which in turn can undermine legitimacy.

In the United States the link between legitimacy and taxation is particularly strong because the origins of the country and its conception of democracy were forged in a battle about the nature of taxation and government. The American Revolution ensured that in the United States taxation would be viewed primarily as a free expression of the people granting their money to the government rather than as a duty the people owe to their sovereign state.\textsuperscript{309} Taxation therefore embodies for Americans the power of the state to infringe upon individual freedom. Consequently, whenever taxes are imposed without the consent of the people, they are abusive. Since every tax contains the potential to impinge on liberty, every tax is a symbol of potential tyranny. Throughout American history taxation has been central to debates about political issues that are at the heart of the legitimacy of government: the nature and extent of governmental functions and the limits of lawful protest. Tax issues have been crucial elements in

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306. See, e.g., Hurst, supra note 19, at 229. ("It is important in maintaining public confidence in legal order that government be capable of positive response to changes in the social context.").
307. Story, supra note 80, § 929 at 401. The quote continues: "The former is the fate of Turkey under its sovereigns: the latter was the fate of America under the confederation." Id.
309. See supra notes 98-101 and accompanying text.
\end{footnotesize}
fundamental crises of the country, from the very birth of the nation, through the Shays' Whiskey, and Fries' Rebellions of the early years of the republic, the nineteenth century protectionist tariffs and the nullification crisis to the direct democracy and militia movements today.

The essential connection between taxation and legitimacy, especially in the context of America's history of tax protests, means that modern American political rhetoric is replete with anti-tax slogans, often couched in revolutionary terms of liberty and freedom from tyranny. This rhetoric is not meaningless, as many people believe. Words are powerful because of their ability to shape ideas, unify diverse individuals and spur them into action. Tax rhetoric in America is particularly powerful because resistance to (perceived) unfair taxes is inextricably intertwined with American history and the most deep-seated principals of American democracy: individualism, freedom, and liberty from a coercive state.

Although the rhetoric is not meaningless, its meaning is unclear. Anti-tax rhetoric is at the same time both reassuring and alarming. It can be either a safety valve or a tinderbox. On the one hand, it is reassuring in that despite the relative frequency of tax protests, the legitimacy of the federal government has not yet been seriously undermined. The rhetoric in part may be a way to blow off steam, as it were, and to focus attention on political matters. After all, political rhetoric is usually more extreme than the reality of what is accomplished. On the other hand, rhetoric in the tax context may be more alarming since American history reveals how easily tax unrest can and has translated into violence. Moreover, the rhetoric can further polarize beliefs and encourage extreme behavior. As Gertrude Himmelfarb has stated, "In their eagerness to do away with the nanny

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310. See RODGERS, supra note 22, at 4:
Political words do more than mystify; they inspire, persuade, enrage, mobilize. With words minds are changed, votes acquired, enemies labeled, alliances secured, unpopular programs made palatable, the status quo suddenly unveiled as unjust and intolerable. Through words, coalitions are made out of voters who, stripped of their common rallying cries and slogans, would quickly dissolve into jarring fragments. Words make mass actions possible. With words ringing in their head, masses of men have made revolutions and crusades. . . . Through words some of the most potent forces of modern politics are wheeled into motion.

Id. at 4.
state... some conservatives risk belittling, even de-legitimating the state itself.\textsuperscript{311} The ability of rhetoric to spur action is especially potent in the tax area, where tax rhetoric has in the past incited the populace to armed revolt. Ironically, the use of force in the past has often resulted not so much from a sense that the existent government was illegitimate but more from a belief that the protesters were exercising their democratic rights to help preserve the legitimacy of the government. Similarly, many of today's tax protesters, including extremists such as the militiamen, also protest in the name of preserving the legitimacy of American government.

Politicians, especially elected ones, who use anti-tax rhetoric, are playing with fire. Although they may not really mean to abolish taxes or undermine the existence of government, they should remember that the American reality is shaped by a patriotic anti-tax sentiment that can easily express itself in ways more forceful than exercising the right to vote. This does not mean they should not discuss taxation. On the contrary, in a democracy, debate is always healthy, especially about critical matters such as taxation. However, a healthy and meaningful debate must not be one-sided, especially in the tax area given the dual nature of tax protests in the United States.

The dissent in \textit{U.S. v Amon}, a case that upheld the conviction of a tax protester for willfully providing false information, articulated this duality. On the one hand, it recognized the positive aspect of tax protest as the quintessential political protest in America\textsuperscript{312} At the same time, it acknowledged the darker side of tax protest, stating that "the history of the American Revolution [arguably] supports a finding that tax protests present a clear and present danger to the Republic."\textsuperscript{313}

\textsuperscript{311} \textit{Gertrude Himmelfarb, One Nation, Two Cultures} 78 (1999).
\textsuperscript{312} 669 F.2d. 1351, 1364 (10th Cir. 1981). According to dissenting Judge McKay:

\begin{quote}
It is hard to imagine a kind of political protest more consistent with the most cherished traditions of this nation than protest focusing on the laws of taxation. Certainly no form of protest is more American (footnote omitted). It was, after all, protest against the Stamp Act which helped set in motion the chain of events which won for this nation its independence from a repressive King George and led to the enshrining in the first amendment of the right to protest.
\end{quote}

\textit{Id.} at 1364.

\textsuperscript{313} \textit{Id.} at 1363. Although he did not believe that the Amon case presented
The challenge for this country is to maintain the delicate balance between healthy and self-destructive tax protest. The current debate has shown no such balance or moderation. In 1996 then Treasury Assistant Secretary for Tax Policy Leslie B. Samuels recognized the importance of discussing the tax system, but warned that the current debate was destructive because it was "dominated by denigration of government and public service [and described] ... voices of violence—voices from some in militias and elsewhere—who are actually threatening federal employees way beyond what the public sees."\footnote{314} Tax protests rarely turn into full blown tax revolts, let alone violent ones. Nevertheless, over two hundred years of American history show that taxation is one of the most "incendiary" issues in American politics and that tax revolts are "[h]ighly combustible" and "[l]ike forest fires, which can instantaneously char the landscape, altering the ecosystem forever, tax revolts can engender permanent damage."\footnote{315}

Leaders have an obligation to lead. As Justice Frankfurter once said "the responsibility of those who exercise power in a democratic government is not to reflect inflamed public feeling but to help form its understanding."\footnote{316} In the tax area, many officials and candidates for office have sorely neglected this responsibility. Indeed, they have not only reflected inflamed public feeling, they have consciously sought to ignite the public's constantly simmering anti-tax sentiment. It is time for them to shoulder their responsibility by rationally discussing tax policy. They should help preserve the balance between the positive and negative aspects of tax

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\item such a danger, he did understand that "there is a danger that illegal tax practices will become more widespread if the government fails to strike swiftly and decisively in gagging or at least intimidating the most outspoken tax protester." \textit{Id.} at 1364.
\item 316. Cooper v. Power, 358 U.S. 1, 26 (1958) (Frankfurter J., concurring). These words are engraved on the federal court building in Boston, Massachusetts.
\end{itemize}
protest, not destroy it in their efforts to achieve or maintain office. It is time for them to lead.