THE LANGUAGE OF TAX PROTESTS

Language and the Law
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Table of Contents

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I. INTRODUCTION

Protests are conducted to put an audience on notice of the protesters' dissatisfaction with the status quo. To be effective, protesters must communicate their opinions in a comprehensible manner. Whether violent or peaceful, offensive or genial, language is used to inform and persuade others of a cause. When protests move into a courtroom, formalities imposed by the venue will constrain the language used, but will not diminish the importance of its proper application. Those who misuse the linguistic tools at their disposal will be penalized with unfavorable verdicts.

A. The Purpose of Protest

The purpose of protest can be as varied as its form. Lodged as formal disapproval of or objections to public policies and private opinions, protests range from the trivial to the significant. Some protesters merely seek satisfaction that their dissent has been publicized, while others hope to effectuate pervasive change. Some wish to benefit only themselves, while others espouse noble causes such as peace and liberty for all. Accordingly, petty protests are those conducted by self-centered individuals who wish to

become nothing more than thorns in the side of society, whereas substantive protests are waged for the perceived betterment of mankind.

B. The Philosophy of Protests

Whether the protests are of trivial or crucial consequence, dissidents share common goals: All want to be heard; all want a moment of glory. All believe in the righteousness of their causes; all believe that contradictory opinions are wrong. And all hope to persuade others of their beliefs.

The tax protester is no different from any other protester. He, too, seeks to effect change; albeit a change of financial importance only. He hopes to eliminate his own tax liability as well as the liability of like-situated individuals. He demands vindication of his theories, but consciously fails to acknowledge the costs and consequences of his actions upon social welfare and societal equity: Every tax dollar that the protester does not pay into the public coffer, is a dollar that cannot be spent in support of governmental programs. While the tax protester imbibes freely of the nation's infrastructure, he does not want to help foot the bill.

The tax protester frequently stems from one of several fringe groups which harbor strong antigovernment sentiments and engage in literal interpretations of the Bible, the Constitution, the Internal Revenue Code (the "Code" or "IRC"), as well as other legal and religious documents.[1] Selectively quoting from these sources and couching his arguments in "pseudo-scholarly terms," the protester defiantly claims that he represents "sovereign citizens, not subject to [a] court."[2] Judge Barz dubbed these

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[1] Peter M. Tiersma, *Legal Language* 212 (U. Chi. Press 1999).

[2] Tom Lackey, *Judges at Wits End: "They're Contaminating Our 'Good' Criminals...,"* The Los Angeles Times (November 16, 1997), *http://www.Worldfreeinternet.Net/News/Nws55.Htm* (last accessed Dec. 2, 2004).

rants as "claptrap" and "Freemanspeak" while presiding over the trials of the Montana Freemen who zealously rejected the validity of federal and local governments by militantly resisting arrest.

Although he is not usually an avowed member of this particular Montana faction, the tax protester often engages in tirades and courtroom antics similar to the Freemen who submitted "legal briefs full of gibberish and generally [made] life miserable for defenders and prosecutors alike."[3] Yet, even when the protester does not resort to extreme behavior, the results remain the same since he protests governmental policies based upon untenable positions for purely self-serving reasons.

The generic protester's motivations are varied and could include reaching large numbers of people, creating solidarity, building coalitions, emphasizing another's vulnerability, instigating systemic change, showing strength, exposing crimes, motivating the undecided, combating a sense of helplessness, exploiting the news media, rattling the complacent, or having fun.[4] The tax protester, on the other hand, does not embrace all of these motives but, like his generic counterpart, he wants to shake up the system.

C. Syllabus

The American income tax system relies upon voluntary reporting. Most citizens comply grudgingly. The tax protester, however, seeks to evade his obligations by either not filing a tax return or not reporting his taxable income properly. Inevitably the IRS will correspond with the individual in an effort to encourage compliance. Failing in that endeavor, the IRS will summon the protester for an audit which he will, of course, lose

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[3] *Id.*

[4] *Why Should You Protest?*, http://home.earthlink.net/~jamiranda/whyprotest.html (last accessed Dec. 2, 2004).

since his position is indefensible. Procedural policy next allows the protester to state his case in court, a forum which grants him and the tax authority an opportunity to convince an impartial judge of their opposing positions.

The parties will employ their most persuasive skills, relying upon language to convey their arguments and using quotations from prior court cases, citations to statutes and tax regulations, and interpretations of the Constitution. Each party will present only passages from those references which effectively support his viewpoint, often excerpting and extracting so much that the resource is abused and the process becomes hopelessly obfuscated. In this fashion language will be used, as well as misused.

Part II of this paper identifies the tax protester as an individual whose legal arguments are invalid. Granted his constitutional right to due process, the tax protester may bring his case to trial, but because his arguments are fallacious (and often ludicrous), he will never be allowed to prevail.

The process by which this failure is ensured is examined next. All participants, including the protester, the tax authority, and judge will use the language of the Constitution, various tax statutes, and judicial opinions to support their contentions. In Part III, the tax protester dissects the Code, claiming that he is not subject to the regulations because pertinent terms remain statutorily undefined. But the Internal Revenue Service (the "IRS") counters with common usage definitions of the disputed terms, while the court relies upon trade usage to undermine the protester's assertions.

Additional tactics employed by the fervent protester who attempts to impress the court with his knowledge of precedential rulings are also identified. Still the protester fails when he cites inapplicable case law or decisions that have long been overturned. He is equally unsuccessful when

he uses quotes taken out of context or attempts to shift the burden of disproving his legal theories onto others.

Innumerable protests have been lodged, fueled by the greed and creativity of individuals determined to disrupt society. The Criminal Investigations Division of the IRS and the Department of Justice (the "DOJ") have identified those tax schemes currently most detrimental or most propagated. Part IV examines those that hinge upon linguistic interpretations of the Code.

Part V delineates the judicial response to tax protests. Beginning with an historical analysis, legal opinions rely upon previous rulings and constitutional construction, often finding support within generally accepted canons.

Accusations of judicial prejudice lodged by disgruntled protesters who have yet again tilted at windmills are rebutted in Part VI. Judges neither dodge cases nor fear reprisals and instead guarantee a forum in which the protester and his governmental nemesis may present claims. Nonetheless, criminal and civil convictions ensue, whether upon retrial or negotiated settlement. While the occasional ruling may appear to favor the protester, his singular victory is always short-lived and illusory.

In conclusion, the tax protester's cause is one that is doomed from the outset and one that can never be given hope of success. Any triumph—no matter how minor or limited in scope—would sound the death knell of a meticulously-crafted system designed to raise revenue for the support of government. Since taxation is necessary within our complex society, the social order demands that all tax protests be unequivocally repelled.

II. THE PRE-DETERMINED OUTCOME

A. Tax Protesters Defined

Although generic protesters may champion valid causes, the IRS defines "tax protesters" as those who engage in "any scheme, without basis in law or fact, designed to express dissatisfaction"[5] with tax laws by illegally avoiding or reducing tax liabilities. Unlike common taxpayers who honestly believe that their positions in opposition to federal regulations are based upon merit or precedent, tax protesters are disingenuous. "It is well established that [a] good faith defense encompasses a misunderstanding of the law, not disagreement with the law."[6]

The tax protester generally espouses a frivolous argument that he knows, or should know, is based on discredited legal theory. While some contentions are novel, most are mere repetitions of previously litigated assertions that are rejected again and again without much commentary from the bench. "Petitioner's arguments are no more than stale tax protester contentions long dismissed summarily by this Court and all other courts which have heard such contentions."[7] In all cases the outcome is the same: The protester is destined to lose.

Whether he claims that the income tax is unconstitutional, that the IRS lacks enforcement jurisdiction, or that he is not an American citizen subject

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[5] Jennifer E. Ihlo, *The Gold Fringed Flag: Prosecution of the Illegal Tax Protester*, U.S. Attorneys' Bulletin, 15 (April 1998).

[6] U.S. v. Schiff, 801 F.2d 108, 112 (2nd Cir. 1986). Schiff described himself as a "professional tax resister" who taught others how to stop paying income taxes. He was convicted of tax evasion and willful failure to file. The conviction was upheld despite Schiff's argument that improper jury instructions had been given; but because he had concealed his income and his own writings verified his extensive knowledge of the tax code, the "conscious avoidance" instruction was deemed to have been proper.

[7] Nieman v. Commr., 66 T.C.M. (CCH) 1340 at 5 (1993). Taxpayer attempted preposterously to argue that he was not required to file and pay income taxes because he was a citizen of Illinois which Congress had excluded from the definition of "United States" for the purposes of 26 U.S.C., Subtitle A.

to federal income tax laws, the court must necessarily rule against him. If not, "any taxpayer could evade tax obligations simply by"[8] adhering to an untenable position and setting a precedent for other taxpayers to follow. The demise of the American income tax system would inevitably ensue.

B. Judicial Response

Determined to protect the system, judges are predisposed toward a negative outcome of all tax protest cases. Conspiracists theorize that judges have a vested interest in upholding the income tax or that they fear retribution from the IRS, which may audit their personal tax returns. Yet judges routinely[9] rule against the IRS in many cases where the taxpayer's position is deemed meritorious, indicating that they are not afraid of administrative reprisals. Furthermore, they are appointed for life and need not worry that their tenure or livelihood would be threatened by an enraged governmental agency.

Instead judges seek to protect and promote the inviolability of a system designed to raise revenue for the support of government. Like all citizens, those robed in black rely upon the infrastructure, educational system, and military protection provided by federal tax funding. As a result, judges have the same vested interest in protecting the national system of taxation from errant tax protestors as do all citizens.

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[8] *Id.*

[9] Daniel M. Schneider, *Assessing and Predicting Who Wins Federal Tax Trial Decisions* (Oct. 22, 2002), http://www.law.wfu.edu/prebuilt/LR_v37n2_3-schneider.pdf (last accessed Dec. 2, 2004). Based upon his empirical research, Professor Schneider of the Northern Illinois University College of Law analyzed the connection between who wins federal tax trial decisions and the social backgrounds of the presiding judges. In his sampling of cases, the taxpayer won 29% of the time, prevailing more frequently in Tax Court than in District Court.

III. THE LANGUAGE OF PROTEST

Many of the ill-fated arguments presented by protesters are based upon misinterpretation of the legislative word, forcing judges to divine the intent of legislators and parse the meaning of statutory language. Examples abound.

Although not a protest case, *Wilkinson-Beane, Inc. v. Commr.* illustrates the lengths to which a judge will go to select an appropriate and intended meaning for a specific word in the Code. Here, the dispute hinged upon the definition of "merchandise," which—if not merely incidental to the taxpayer's business—must be inventoried using the accrual method of accounting.[10] Wilkinson-Beane, however, was a cash-basis taxpayer and therefore impudently sought to prove that his coffins were not an income-producing factor in his undertaking business.

Unable to find a pertinent definition of "merchandise" in any relevant tax source, the court canvassed various authorities in the accounting field which provided numerous conflicting definitions. When it still could not discern the quintessential connotation, the court chose to gather the meaning "from the context and the subject"[11] of the Treasury Regulation. Since the taxpayer's caskets were considered to be "goods awaiting sale,"[12] the court held that they must be inventoried as merchandise.

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[10] Treas. Regulation § 1.471-1 (1958).

[11] Wilkinson-Beane, Inc. v. Commr., 420 F2d 352, 354 (1st Circ. 1970). The taxpayer operated an undertaking establishment which offered a complete funeral service, including caskets that could not be purchased separately. Since the taxpayer used the cash method of accounting, he failed to include receivables and account for his inventories. The court held that the taxpayer was required to change his method of accounting because his caskets were a substantial source of income, not merely incidental to his business, and had to be inventoried using the accrual method.

[12] *Id.*

Had the taxpayer's caskets been sold separately from the burial service, neither the taxpayer nor the court would have disagreed that they were indeed distinct commodities that readily fit within the definition of "merchandise." Wilkinson-Beane, however, included the cost of its caskets in his flat funereal fee and so it became critical to establish whether the caskets were awaiting sale or were merely accompaniments to a service which was eligible for cash-basis accounting.

All tax cases, especially protest cases, hinge upon similar pedantic distinctions.

B. Parsing the Code

1. "Individuals" Defined

The Internal Revenue Code begins with "Tax on Individuals."[13] Some protesters look only to this chapter heading and immediately claim that the word "individual" is not defined anywhere in the Code.

Declaring herself to be an "absolute, freeborn and natural individual,"[14] Ruth Studley hoped to argue that because she was a person (a natural, human being as opposed to a legal entity), she was not an "individual" as defined in the Code. The court disagreed and held that an "individual is a 'person' under the Internal Revenue Code and thus subject

[13] I.R.C., Chapter I, Part I (as amended 1954).

[14] U.S. v. Studley, 783 F.2d 934, 937 (9th Circ. 1986). Convicted of willful failure to file tax returns, Studley appealed on the grounds that her arrest had been illegal because the warrant had been defective; that her detention had been illegal because she had been incarcerated overnight before being brought before a magistrate; that she had been denied access to jury lists; that the district court had erred when it denied yet another continuance motion made on the opening day of trial after Studley had been repeatedly represented by unlicensed attorneys; that the presiding judge should have recused himself; and that she had been illegally subjected to criminal prosecution for a violation she contended was covered by the civil statute.

to tax,"[15] referring to the precedential definition in *United States v. Romero*[16] that a "person" included legal entities as well as natural-born individuals.

a. Statutory Definition

Like Studley, other protesters ignore judicial precedent and instead rely upon a selective interpretation of IRC Section 7701 which states that "person" includes an individual, a trust, estate, partnership, association, company, or corporation. Arguing that the word "individual" is grouped with non-natural entities, these protesters contend that legislators had not meant to include a human being in the list. Of course, they purposefully disregard Revenue Regulation 301.7701-6(a) which expands the definition of "person" to include "guardian, committee, trustee, executor, [and] administrator"[17] and leaves no doubt that a "person" may be either a natural or a legal being. Thus, a "person" is indeed an "individual" who would be subject to a "tax on individuals."[18]

Furthermore, the list mentioned in the Code appears to be illustrative rather than exclusive in that the named entities are followed by a comma and the phrase "or other." This allows the definition to be expanded to include beings not otherwise mentioned. Determining which entities, if any, should be included within the legal definition of the disputed term falls upon the court.

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[15] *Id*.

[16] U.S. v. Romero, 640 F.2d 1014, 1016 (9th Circ. 1981). Although the taxpayer stipulated to the fact that he had earnings during years for which he did not file tax returns, he appealed his conviction on five counts of knowingly and willfully failing to file. At trial, Romero demanded that he be allowed to represent himself, despite being advised that this would be unwise. In doing so, Romero deliberately sought to insert built-in errors into the proceedings. He hoped to use a tactic employed by other tax protestors who discharge their court-appointed attorneys and later contend unknowing waiver of counsel.

[17] Treas. Reg. § 301.7701-6(a) (1997).

[18] I.R.C., Chapter I, Part I (as amended 1954).

b. Common Usage

Upon which authority should the court rely to establish the proper meaning of the disputed term? Protesters reference the Code to their advantage, while the tax authority prefers to rely upon the common usage of the term "individual." Ordinarily, everyone would agree that an "individual" is a single human being, like the protester before the bench.

To verify this definition, the court may refer to a dictionary. Webster's[19] merely defines "individual" as a "particular being," "distinguished from the group'" and "an indivisible entity." As a sub-classification of this definition, Webster refers to "a particular person," thereby confirming that an individual is indeed singular and subject to tax.

c. Trade Usage

Creative tax protesters, unwilling to concede defeat, may attempt to distinguish between prescriptive and descriptive definitions. Applying the former, they might try to persuade the court that "individual" should be used to describe only legal entities; but the IRS would apply the latter and argue that usage determines meaning and thus, "individual" would once again describe that which the public would commonly presume to be a person. The court, on the other hand, might refer to a legal dictionary that has memorialized trade usage and would ascertain that an "individual" is a "single person or thing, as opposed to a group."[20]

While this definition stems from a technical dictionary, it is not authoritative in and of itself; whereas statutory definitions—those embodied within the law—are fixed. However, the Code did not explicitly define the

[19] *Webster's Seventh New Collegiate Dictionary*, 428 (20th ed., G. & C. Merriam Co., 1972).
[20] *Black's Law Dictionary*, 344 (Bryan A. Garner ed., 2d pocket ed., West 2001).

term and so the loophole was left open for tax protesters to argue the point until unfavorable rulings forced them to move on to other linguistic battles…

2. "Income" Defined

a. The Protester's Misconstrued Precedent

Unable to argue that individuals are not subject to tax, protesters next attack the definition of "income," citing Part II of the Code: "Items Specifically Included in Gross Income."[21] They claim that wages and salaries are not income, reasoning:

> At law, labor is property. In fact, the Supreme Court has identified labor as man's most precious property. Therefore, the exchange of one's labor for wages or salary (which are also property) is considered by law to be an exchange of properties of equal value in which there is NO gain or profit. Such a property exchange of equal value cannot be taxed because there is no profit or gain.[22]

Adopting this oft-litigated fallacy, Jon Luman seeks to inform the would-be tax protester "How to become a person that is not taxable by Congress."[23] To make his point, Luman selectively quotes from the Code and from judicial decisions in a seemingly logical and coherent manner. His eager followers readily succumb to arguments that appear rational, simultaneously overlooking the many previously litigated cases that discredit each of Luman's positions.

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[21] I.R.C. §§ 71-90 (as amended 1954).

[22] Jon Luman, *Deceptive IRS Code words -- including 'Income', 'Person', 'Taxpayer', 'Shall', and 'Must': Deciphering the Internal Revenue Code and IRS Publications*, http://www.futuregate.com/tax_buster/definitions.html (last accessed Dec. 6, 2004).

[23] Jon Luman, *The Tax Buster Guide: How to become a person that is not taxable by Congress*, http://www.futuregate.com/tax%5Fbuster/ (last accessed Dec. 2, 2004).

Although he does not provide a citation, Luman is likely referencing a decision of the Virginia, not the U.S. Supreme Court, which established that compensation for labor was not "regarded as profit within the meaning of the law."[24] Tax protesters have often selectively quoted from *Oliver v. Halstead*, wherein the court determined whether the amounts paid to a corporate director represented an allocated portion of the company's profit in violation of state law or an allowable amount paid for services rendered. The disputed statute was intended to prevent officers from receiving preferential profit-sharing treatment over other members of a cooperative marketing association and so the key issue concerned the word "profit."

Interestingly, the court relied upon Black's Law Dictionary and determined that "profit" was the "gain made on sale, …after deducting the value of labor…"[25] The court did indeed distinguish "profit" from "compensation for labor," but only to establish that a profit could not be shared whereas compensation for labor (i.e. wages) could be legally distributed. Tax protesters who maintain that profits are not distributable and thereby taxable, are obviously misconstruing a case that is irrelevant to their contention that wages are not taxable.

b. Quotes Taken out of Context

Selective use of excerpted material from previously litigated cases is often used to lend credence to the protesters' arguments. Citing *Brushaber*

[24] Oliver v. Halstead, 86 S.E. 2d 858, 859 (Va. 1955). Members of the Norfolk Cooperative Milk Producers Association sued to enjoin Halstead from receiving a salary for his services as manager. The court held that a contract under which a director is also employed as a business manager does not constitute a "contract for profit." Thus, Halstead was entitled to receive fair remuneration for his time spent.

[25] *Id.*

v. Union Pacific Railroad,[26] protesters maintain that the income tax cannot be imposed as a direct tax because the Constitution requires that all direct taxes be apportioned amongst the States. Protesters conveniently ignore that the court's opinion was devoted exclusively, eloquently, and at great length to *dis*proving precisely this contention. In fact, Justice White held that "an income tax although direct should not be subject to the regulation of apportionment applicable to all other direct taxes."[27]

Similarly, tax protesters quote *Pollock v. Farmers' Loan and Trust Company*[28] that "a tax upon rents or income issuing out of lands is intrinsically [no] different from a tax on the land itself" and that "a tax on real estate is a[n unconstitutional] direct tax."[29] On appeal, a narrow majority of justices held that "taxes on personal property, or on the income of personal property, are likewise direct taxes."[30] Gleeful to have found a direct quote that would seem to support the argument that a tax imposed upon income is a direct tax prohibited by Article I, Section 9, Clause 4 of the Constitution,[31] protesters not only misappropriate a quote by equating a real property tax to an income tax, but also misapply a case that has since been overruled. *South Carolina v. Baker* held that "the owners of state bonds [defined as personal property] have no constitutional entitlement not to pay

[26] Brushaber v. Union Pacific Railroad Co., 240 U.S. 1 (1916). A stockholder sought to restrain the corporation from voluntarily paying the income tax imposed by the Tariff Act of 1913, contending that the tax was unconstitutional and repugnant to the 16th Amendment.

[27] *Id* at 11.

[28] Pollock v. Farmers' Loan and Trust Company, 157 U.S. 429 (1895). In a class action suit against an insurance company, stockholders alleged that a tax on rental and investment income earned by the company was not subject to taxation. The court held that this tax was a direct tax upon the real estate owned by the company and was therefore in violation of art. 1, § 2 of the Constitution.

[29] *Id* at 580.

[30] Pollock v. Farmers' Loan and Trust Company, *158 U.S. 601, 637* (1895).

[31] U.S. Const. art. 1, § 9, cl. 4: "No Capitation, Or Other Direct, Tax Shall Be Laid, Unless In Proportion To The Census Or Enumeration Herein Before Directed To Be Taken."

taxes on income they earn,"[32] thereby distinguishing between a tax on revenues generated by property and a tax on the underlying property itself.

c. The Burden Of Proof Is Improperly Shifted

It becomes apparent that protesters unscrupulously pick and choose amongst and from within cases to support their claims. They do not care whether the quotes are taken out context or that the cases they cite have no precedential merit. Instead, they adhere steadfastly to incorrect arguments and challenge others to rebut them.

Believing that "it would be the duty of various federal officials to set [him] straight, if [he] were incorrect,"[33] Jon Luman demanded that Presidents Bill Clinton and George W. Bush, Vice Presidents Al Gore and Dick Cheney, U.S. Attorneys General Janet Reno and John Ashcroft, U.S. Supreme Court Justice William Rehnquist, IRS Commissioners Margaret Richardson and Charles Rosotti, and others refute his claims. Luman was genuinely surprised that he did not receive any response and concluded that there is no "applicable law that would place [him] under the jurisdiction of title 26 taxation."[34] He foolishly took the silence of these individuals as "an affirmation that our Declaration of Independence and Constitution are still

[32] South Carolina v. Baker, 485 U.S. 505, 525 (1988). The State contended that § 310(b)(1) of TEFRA violated principles of federalism and intergovernmental tax immunity by taxing interest earned on state bonds. The court held that because the State was not deprived of its right to participate in the national political process by which the legislation was passed, it had not been left unconstitutionally powerless. However, § 310(b)(1) was inconsistent with case law that held that a state bond was immune from federal taxation and so that precedent was overruled. As a result, state bonds are now subject to non-discriminatory federal taxation.

[33] Jon Luman, http://www.futuregate.com/tax%5Fbuster/list.htm (last accessed Dec. 4, 2004). Luman claims that he has been tax-free since 1996 and teaches others "everything [they] need to Lawfully Opt-Out of the Federal Income Tax System. For Only $69.95!" (2002).

[34] *Id.*

sound."[35] However, the DOJ obviously disagreed and on September 9, 2004 sued to enjoin Luman from selling his tax scam via the internet.[36]

B. Common Defects

Tax protester arguments frequently share the following illogical and legal flaws:

- **Improper understanding of the word "includes":** Normally used to compile a list that is incomplete, the word when used is not intended to identify every possible component. Instead, "includes" is used to expand the scope of an illustrated phrase. For example, "body parts *include* arms, legs, and fingers." Needless to say, this list is far from complete and intimates that the three mentioned items certainly qualify for inclusion, but that there are many other anatomical parts that could be listed as well.

  To eliminate potential confusion, language is often added to clarify that enumerated items are included, but not limited to the items mentioned, thereby proving that the list is merely illustrative. However, in the absence of this type of clarifying phrase, "tension between precision and flexibility [becomes] an inherent problem."[37] Legislators seeking to preclude potential misunderstandings could strive to include every possible example

[35] *Id.*

[36] News Release # 04-605 (Sept. 9, 2004), http://www.usdoj.gov/opa/pr/2004/September/04_tax_605.htm (last accessed Dec. 4, 2004). The DOJ asked a federal court in Atlanta to bar Jonathan D. Luman, of Lovejoy, Georgia, from selling an alleged tax scam via the Internet. According to the civil injunction complaint, Luman operates websites that sell bogus documents, including a manual known as the "Tax Buster Guide," containing forms which customers are told to submit to the IRS in lieu of tax returns. Luman allegedly tells customers that the documents would allow them to reclaim their "sovereign citizen" status and eliminate their federal tax liabilities.

[37] Peter M. Tiersma, *Legal Language* 85 (U. Chi. Press 1999).

in a list. Unfortunately, this effort would not only make an already immense code unmanageable, but would also not make the statute any more precise. Inevitably, an item would be missing from the list, leaving others to question whether it was merely forgotten or intentionally omitted.

Presciently, Congress hoped to prevent such linguistic confusion when drafting the tax statutes. IRC Section 7701(c) specifically states that the term "includes" when used "shall not be deemed to exclude other things otherwise within the meaning of the term defined."[38] Nevertheless, protesters continue to argue to the contrary. Although he resided in Indiana and was in fact employed by the U.S. Postal Service, Loran Roop professed to be a non-resident alien because the United States (the "U.S.") allegedly only consisted of the District of Columbia and various territories, but did not include individual states.[39] However, IRC Section 7701(a)(9) defines the U.S. to include "the States and the District of Columbia."

- **Assuming the truth of the converse:** If X implies Y, then Y must also imply X. Unfortunately these phrases are not commutative. Returning to the previous analogy, "all legs are body parts" does not allow the conclusion that "all body parts are legs."

[38] I.R.C. § 7701(c) (as amended 1954).

[39] Roop v. U.S., 1992 U.S. Dist. Lexis 6652 (S.D. Ind. 1992). The protester argued that, although, he lived in Indiana, he was a non-resident alien because the U.S. allegedly only consisted of the District of Columbia and various territories. Thus, the protester contended that he owed no federal income taxes. The court ruled that the protester's argument as to his alleged non-resident alien status was patently absurd.

Applying such reasoning, tax protesters have argued that because "corporate profit is income," all income must be corporate profit. Employing this faulty logic and extrapolating further, protesters wrongly conclude that income tax can only be assessed against corporate profits.[40]

- **"A rose by any other name…"**[41] Simply labeling something by another name does not in and of itself change its characteristics. Abraham Lincoln proved that when he asked how many legs a dog would have if you called his tail a leg. The answer was still four since conferring a new name upon a tail did not convert it to a leg. Nor do tax protesters' avowals that they are not a "taxpayers" make them anything else and exempt them from rules that apply to all other taxpayers.[42]

As erroneous as these arguments may seem, hoards of protesters are lured to adopt them in an attempt to evade their financial obligations. "Like moths to a flame, some people find themselves irresistibly drawn to the tax protestor movement's illusory claim that there is no legal requirement to pay federal income tax."[43] Judge Kanne observed further that protesters, like moths, also get burned.

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[40] Daniel B. Evans, *The Tax Protester FAQ* 152 (last updated Feb. 3, 2004), http://evans-legal.com/dan/tpfaq.html.

[41] William Shakespeare, *Romeo and Juliet*, Act II Sc. 2 (1591?).

[42] Daniel B. Evans, *The Tax Protester FAQ* 159 (last updated Feb. 3, 2004), http://evans-legal.com/dan/tpfaq.html.

[43] U.S. v. Sloan, 939 F. 2d 499 (7th Cir. 1991). Sloan did not pay taxes on his wages for the years 1981-1983, and filed false W-4 forms to ensure his "exemption" from the income tax, asserting that he was not subject to the jurisdiction of the laws of the U.S. He was convicted on three counts of federal tax evasion.

IV. TAX SCAMS

Determined to ferret out would-be tax evaders, the IRS has publicized its list of "Dirty Dozen"[44] tax schemes and is actively pursuing both the promoters of these scams as well as the taxpayers who employ the unsound advice. The list, while not comprehensive, is intended to alert taxpayers to those schemes which are most closely monitored by the tax authority. The IRS has also published guidance that debunks these schemes and provides legal assistance to taxpayers. IRS Commissioner Everson warns taxpayers, "Don't be fooled by these outrageous claims. There is no secret way to escape paying taxes."[45]

Although all scams involve misinterpretation of the Code to some extent, certain schemes provide examples of the protesters' misuse of language. These include:

- **"Claim of Right" Doctrine:** Scam promoters advise taxpayers to report their wages in full and then to claim a deduction of an equal amount, thereby reducing taxable income to zero. Taxpayers are told to label the deduction as "a necessary expense for the production of income" or "compensation for personal services actually rendered."

[44]Department of Treasury IR-2004-26 (Mar. 1, 2004), http://www.irs.gov/newsroom/article/0,,id=120803,00.html. The IRS has updated its list for 2004 to include the following schemes: Misuse of Trusts, "Claim of Right" Doctrine, Corporation Sole, Offshore Transactions, Employment Tax Evasion, Return Preparer Fraud, Americans with Disabilities Act, African-Americans Get a Special Tax Refund, Improper Home-Based Business, Frivolous Arguments, Identity Theft, and Share/Borrow EITC Dependents.

[45]Dept. of Treasury-IRS: *IRS Updates the 'Dirty Dozen' for 2004: Agency Warns of New Scams* (IR-2004-26, March 1, 2004) http://www.irs.gov/newsroom/article/0,,id=120803,00.html (last accessed Dec. 4, 2004).

However, the recently published Revenue Ruling 2004-29 explains that the deduction is based upon misuse of IRC Section 1341 which applies only when income is properly included in one year, but returned to the original payor by the taxpayer in a later year. Promoters quote the Code that "a deduction is allowable for the taxable year," but fail to apply the remainder of the rule which explains that the deduction is only allowed where the "taxpayer did not have an unrestricted right"[46] to the income. Naturally, a taxpayer who has received wage income in exchange for services rendered has an inalienable right to that income. Since he will not be required to repay or refund any portion of his wages to his employer, he is not entitled to claim the suggested tax deduction.

- **Employment Tax Evasion:** Employers are instructed to discontinue withholding federal income and other employment taxes from the wages paid to their employees. This scheme, which claims that U.S.-source income is not subject to taxation, is based on a slipshod interpretation of IRC Section 861.[47] Claiming that taxes are only imposed on income derived from certain foreign-based activities, scam promoters fail to acknowledge that the income sourcing mentioned in the statute is relevant solely to determine whether U.S. citizens or residents may claim a credit for foreign taxes paid. Thus, apart from any credit claims, all income paid to U.S. citizens remains taxable to and reportable by all wage earners. Again, the IRS has issued guidance directly on point and

[46] I.R.C. § 1341(a)(2): Computation of tax where taxpayer restores substantial amount held under claim of right.
[47] I.R.C. § 861: Income from Sources within the United States.

warns taxpayers that the Section 861 "argument has no merit and is frivolous."[48]

Current information regarding the government's efforts to combat these and other ploys can be found on the DOJ's regularly updated website.[49] The Criminal Investigation Division of the IRS has published the following statistics:[50]

	Abusive Tax Schemes 2001	**Abusive Tax Schemes 2002**	**Abusive Tax Schemes 2003**	**Abusive Tax Schemes 2004**
Investigations Initiated	79	108	79	131
Indictments	32	44	73	82
Sentenced	26	34	43	45
Avg. Months Incarcerated	52	28	47	36

This table shows that the IRS has become increasingly aggressive in its pursuit of taxpayers believed to participate in tax evasion and protest schemes. The data further indicates that a significant percentage of those indicted are also convicted and sentenced.

V. JUDICIAL REASONING

Judicial opinions regarding tax litigations range from the concise to the expansive. Burdened by taxpayers who are entitled to their day in court only to espouse meaningless theories and champion lost causes, judges often

[48] Rev. Rul. 2004-30, 2004-12 I.R.B.
[49] Dept. of Justice-Tax Division, Http://Www.Usdoj.Gov/Tax/Taxpress2004.Htm (last accessed Dec. 4, 2004).
[50] Dept. of Treasury-I.R.S., *Statistical Data - Abusive Tax Schemes*, http://www.irs.gov/compliance/enforcement/article/0,,id=106462,00.html (last accessed Dec. 4, 2004).

impatiently dismiss cases with patronizing comments: "The real tragedy of this case is the unconscionable waste of Mr. Sloan's time, resources, and emotion in continuing to pursue these wholly defective and unsuccessful arguments about the validity of the income tax laws of the United States."[51] An irreverent judge may dub the tax protester's argument as nothing but "legalistic gibberish," and find that there is "no need to catalog petitioner's contentions and painstakingly address them."[52] Other times, courts feel compelled to support their rulings in excruciating detail to justify their opinions and preclude similar protests in the future.

A. Historic Development

Justice White gave one such opinion in *Brushaber*[53] when he traced the historic development of the income tax law from its constitutional origins to its explicit enactment with the 16th Amendment. Article I, Section 8, Clause 1 grants Congress the "Power To lay and collect Taxes, Duties, Imposts and Excises." White held that this power had been authoritatively declared to be "exhaustive and [embrace] every conceivable power of taxation."[54] He cited Justice Fuller's holding in *Pollock*[55] that this constitutional power was limited only by Article 1, Section 8, Clause 3 which established that "direct Taxes shall be apportioned among the several

[51] U.S. v. Sloan, 939 F.2d 499, 502 (7th Circ. 1991).

[52] Pabon v. Commr., 68 T.C.M. (CCH) 813, 7 (1994). Pabon presented innumerable unintelligible arguments, such as "I demand to see the foundational instrument bearing my bona fide signature whereby I knowingly, purposefully and with intent, volunteered into participating in federal bankrupt State activity, program, and agency whereby the federal States have a claim to all of my God given unalienable rights, and substituted therefore the privileges and legal status of a bankruptcy chattel to the federal international banker creditors of the bankrupt 51 federal States created by Congress to quietly and without notice overthrow our American de jure states." The court found that the taxpayer was not interested in disputing the merits of the tax deficiency, but simply wanted to protest the tax laws of this country and espouse her own misguided views.

[53] Brushaber v. Union Pacific Railroad Co., 240 U.S. 1 (1916).

[54] *Id* at 12.

[55] Pollock v. Farmers' Loan and Trust Company, 157 U.S. 429, 557 (1895).

States" and Article 1, Section 9, Clause 4 that "no Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration hereinbefore directed to be taken."

Thus, White reasoned that the Constitution recognized two types of tax: (1) direct taxes which were subject to the Rule of Apportionment and (2) duties, imposts and excises which were subject to the Rule of Uniformity. While these constitutional rules established the mode by which Congress could exert its authority, they did not in any way infringe upon its plenary power to tax.

Unfortunately, it has not always been clear into which category a particular tax falls. The carriage tax, for instance, was held to be a duty,[56] whereas a tax levied upon real estate or slaves (which were deemed to be property) was a direct tax subject to apportionment. In 1894, "an act was passed laying a tax on incomes from all classes of property."[57] But because a tax that burdened income from property was deemed to be a tax upon the property from which the income derived, the 1894 income tax required apportionment[58] and was therefore held to be unconstitutional. However, the section of the statute that declared income from "professions, trades, employments, or vocations"[59] to be taxable, was held to be valid. This enabled the tax burden to be shifted from real estate and invested property to occupations and labor. Since this reallocation was not Congress' intent, the entire act was struck down and declared to be unconstitutional.

[56] Hylton v. U.S., 3 U.S. 171, 175 (1796). Aware of the federal regulation requiring that he pay a duty on carriages maintained for personal use, the taxpayer refused to pay and alleged that the law was unconstitutional. The court held that the tax was within Congress' power to lay duties and that an annual tax could be imposed because a carriage was a consumable commodity.
[57] Brushaber v. Union Pacific Railroad Co., 240 U.S. 1, 15 (1916).
[58] Pollock V. Farmers' Loan And Trust Company, 157 U.S. 581 (1895)
[59] Pollock V. Farmers' Loan and Trust Company, 158 U.S. 601, 637 (1895).

The 16th Amendment, enacted in 1913 in response to the *Pollock* ruling, granted Congress the "power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States." The Amendment did not confer the power to tax upon Congress since that authority had already been granted under Article I, but merely clarified that income taxes when imposed would no longer be subject to apportionment.

B. Pre-empting Future Protests

In *Brushaber*, White pedagogically concluded that the 16th Amendment had been ratified "not to change the existing interpretation [of the Constitution] except to the extent necessary to accomplish the result intended."[60] The Amendment was intended "take an income tax out of the class of excises, duties and imposts and place it in the class of direct taxes,"[61] ensuring that it would no longer be subject to apportionment. This clear explanation, supported by historical fact and stare decisis, is frequently cited and continues to serve notice to all would-be protesters by definitively laying to rest the contention that the federal income tax is an unconstitutional direct tax. Protesters, who adhere to this argument anyway, ignore "both the plain language of the 16th Amendment and the fact that Congress could tax wages and other income from employment even before the adoption of the 16th Amendment."[62]

1. Finding Support in Constitutional Construction

[60] Brushaber v. Union Pacific Railroad Co., 240 U.S. 1, 19 (1916).
[61] *Id.*
[62] Daniel B. Evans, *The Tax Protester FAQ* 11 (last updated Feb. 3, 2004), http://evans-legal.com/dan/tpfaq.html.

White's expansive holding was soundly reasoned and appears incontrovertible even today. Yet his theory was based entirely upon the premise that the 16th Amendment was intended merely as an interpretive clarification of a precept already held to be inviolate under Article I which granted Congress the enumerated power to tax. Although an amendment, by definition, is a revision to the main body of text, it is not clear whether an amendment will supersede or merely supplement the original.[63] For example, the 21st Amendment ratified in 1933 follows chronologically upon the heels of the 18th Amendment ratified fourteen years earlier to prohibit "the manufacture, sale, or transportation of intoxicating liquors." The later amendment explicitly repealed its predecessor, leaving no doubt that it was intended to supplant rather than complement it.[64]

Given that our amendments are appended to the end of the main text of the Constitution rather than incorporated within, the question arises whether all such amendments should be applied in the order in which they were chronologically ratified. If, for instance, the 16th Amendment was not an interpretive clause designed to rectify the ambiguity created when the Constitutional drafters failed to categorize each type of tax as subject to either the Rule of Apportionment or the Rule of Uniformity, then the Amendment must necessarily take on a life of its own. Thus, the 16th Amendment would grant Congress the specific power to "lay and collect taxes on *incomes* [emphasis added]," but would fail to imbue Congress with the power to assess taxes of any other kind. As a result, taxes, duties, imposts, and excises previously held to be constitutional would be invalid.

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[63]*Wikipedia: The Free Encyclopedia*, Http://En.Wikipedia.Org/Wiki/Constitutional_Amendment (last modified by Wikipedia Foundation, Inc. on Nov. 4, 2004).

[64]U.S. Const. amend. XXI, § 1. "The eighteenth article of amendment to the Constitution of the United States is hereby repealed."

Yet, White was not compelled to even consider this possibility and operated under the assumption that any change to the Constitution would always be adopted incrementally and in chronological fashion, as a mere supplement to the original text. Indeed, he had no precedent by which to consider any alternative.

2. Applying the Plain Meaning Rule

Establishing the parameters of possible interpretations, judicial rulings have repeatedly found when language of a statute provides for unambiguous interpretation, "courts have the duty to enforce the enactment according to its obvious terms and there is no need for construction."[65] In fact, in *Sturges v. Crowninshield*, Justice Marshall declared constitutional language to be sacred and free from the control of legislative bodies and other extrinsic circumstances.[66] But "where words conflict with each other, [or] where the different clauses of an instrument bear upon each other, and would be inconsistent,"[67] Marshall held that judicial interpretation would be necessary.

Since it remains unclear whether the 16th Amendment was added to the Constitution in support of, in addition to, or in lieu of Article I, time-honored interpretive guidelines may be used to resolve the issue. Although the guiding principles cannot and have not always been adhered to rigidly, courts routinely look to these rules to ensure that a modicum of uniformity is employed when interpreting constitutional language.

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[65]Kalakowski v. John A. Russell Corp., 137 Vt. 219, 223 (Vt. 1979). The corporation contended that its wholesale warehouse was permitted as per local zoning ordinances, but the court held that the allowable use was limited to retail sales. The zoning measure was construed to give its words their ordinary meaning and significance.

[66]Sturges v. Crowninshield, 17 U.S. 122 (1819). The court held that New York had authority to pass a bankruptcy law, provided that the law did not impair the obligation of contracts within the meaning of the U.S. Constitution and that there was no act of Congress in force to establish a uniform system of bankruptcy conflicting with the state law.

[67]*Id* at 202.

3. Applicable Canons

Of the nearly fifty canons of constitutional construction cataloged by Professor Antieau in his book,[68] the following are applicable to the discussion at hand:

- **Provisions in pari materia are to be construed together:** In other words, different clauses throughout the Constitution which relate to the same subject should be construed jointly and in light of each other.[69] Thus, the 16th Amendment should not be viewed independently, but rather in conjunction with the original phrasing and intent of Article I.

- **The provision's purpose should be considered:** "A constitutional provision should not be construed so as to defeat its evident purpose, but rather so as to give it effective operation and suppress the mischief at which it was aimed."[70] Given that the 16th Amendment was enacted in direct response to the *Pollock* ruling which had declared the 1894 income tax unconstitutional, it is only logical that the Amendment was designed to remedy a specific problem and eliminate the ambiguity created by Article I.

- **Conflicting clauses should be harmonized, where possible:** No provision of the Constitution should be nullified or impaired by

[68] Chester James Antieau, *Constitutional Construction* (Oceana Publications, Inc. 1982).
[69] *Id* at 21.
[70] Jarrolt v. Moberly, 103 U.S. 580, 586 (1881). A citizen of Illinois sought to recover unpaid interest income from bonds issued by the city of Moberly in Missouri.

any other. If "any one provision of the Constitution would, if adopted, neutralize a positive prohibition of another provision of that instrument, then it results that such asserted construction is erroneous."[71] Application of this canon would mean that the 16th Amendment was enacted in support, not in lieu of Article I.

- **Later provisions prevail over earlier conflicting ones:** If provisions cannot be reconciled with one another, courts have generally held that the newer clause will supersede the earlier. A protester would eagerly adopt this argument in support of his claim that the 16th Amendment invalidated Congress's power to assess anything but income taxes. However, since it is possible to harmonize the Amendment with Article I, this canon need not be employed. Congress' power to collect an income tax as per the Amendment is easily reconciled with its power to lay and collect taxes as originally enumerated in Article I.

- **Grants of power to the federal government are to be liberally construed:** Adhering to *McCulloch v. Maryland*,[72] courts have traditionally imbued Congress with liberal powers so long as "the objects for which [they were] given, especially when those objects

[71]South Dakota v. North Carolina, 192 U.S. 286, 324 (1904). North Carolina issued bonds for the construction of a railway, defaulted on the debt, and issued new bonds that were unsecured. An investor later transferred these bonds to the State of South Dakota when his petition for payment was denied by North Carolina. The court held that the bonds were valid, that South Dakota had title to the bonds, and that the court had jurisdiction because it was an action by one state against another to enforce delivery of personal property.

[72]McCulloch v. Maryland, 17 U.S. 316 (1819). Maryland's legislature passed an act to impose a tax on all unchartered banks within the state. When a cashier at the Bank of the United States issued notes on unstamped paper in contravention of the state act, Maryland sued. The court held that it was unconstitutional to impose a tax on a federal bank because the states had no power to burden the operations of the constitutional laws enacted by Congress.

are expressed in the instrument itself,"[73] are consistent with constitutional intent. The intent is to grant the Legislature ample opportunity to effectuate its mandate. Applying this canon, the 16th Amendment merely clarifies that Congress has the power to impose an income tax in addition to all other taxes previously allowed under Article I.

- **Various constitutional grants of power can be read together:** Since "it is allowable to group together any number [of powers] and infer from them all that the power claimed has been conferred,"[74] powers granted by the Constitution are cumulative, not deductive.

Given the many canons that lead to the conclusion that the 16th Amendment was enacted to repair a linguistic defect and the resulting ambiguity of Article I, Justice White's interpretation and ruling appear solid. Nonetheless, protesters often argue that judicial construction allows judges to use the law to their advantage for the sole purpose of discrediting all future protest arguments.

[73]Gibbons v. Ogden, 22 U.S. 1, 189 (1824). In 1808, the New York legislature gave an exclusive right to certain individuals to use steam navigation in all state waters for 30 years, but the law prohibiting other vessels from navigating the waters of the state was repugnant to the Constitution and found to be void.
[74]Chester James Antieau, *Constitutional Construction* 40 (Oceana Publications, Inc. 1982).

VI. JUDICIAL PREJUDICE

A. Are Judges Passing the Buck?

It is unlikely that judges intentionally manipulate the Constitution and the Tax Code to the detriment of the tax protester merely to thwart that individual's efforts to evade liability and payment. Nonetheless, an argument can be sustained that judges often seek constitutional grounds to avoid ruling on topics they deem to be judicially unpleasant. The Supreme Court's recent remand to the lower court is one such example. Asked to rule upon the constitutionality of the word "God" in the *Pledge of Allegiance,*[75] the court cleverly dodged that bullet and the inevitable political fallout when it ruled that the appellant did not have standing to sue because he was a non-custodial parent who could not speak on behalf of his minor daughter.[76]

While the ruling may indeed have judicial merit, the outcome of the case proved unsatisfactory and simply served to postpone an issue that will surely have to be adjudicated in the future. Similarly, presidential powers under the War Powers Resolution[77] will have to be re-tested since the court found that Representative Tom Campbell (who claimed that the American bombing of Yugoslavia was carried out in violation of the Executive

[75] "I Pledge Allegiance to the flag of the United States of America and to the Republic for which it stands, one Nation under *God* [italics added] indivisible, with liberty and justice for all." (1892, as amended in 1954).

[76] Elk Grove Unified School Dist. v. Newdow, 2004 U.S. Lexis 4178 (2004). An atheist father contended that the word "God" in the Pledge violated the Establishment and Free Exercise Clauses of the 1st Amendment and that the school district's recitation policy was unconstitutional. Pursuant to a divorce decree, the child's parents shared custody, but the mother endorsed the religious ideas and possessed what amounted to a tie-breaking vote. The court held that the non-custodial father lacked prudential standing to bring the suit in federal court.

[77] 50 USCS § 1541 (2004). Title 50: War and National Defense; Chapter 33—The War Powers Resolution authorizes the President to use the armed forces of the U.S. as he determines to be necessary and proper in order to (1) defend the national security of the U.S. against the continuing threat posed by Iraq, and (2) enforce all relevant United Nation Security Council resolutions regarding Iraq. The resolution requires the President to notify Congress within 48 hours of any military action against Iraq and submit, at least every 60 days, a report to Congress on the military campaign.

branch's enumerated powers) did not have standing.[78] By dismissing the case on justiciability grounds, the court avoided ruling upon this overt challenge to presidential power.

Federal judges have ruled inconsistently regarding diversity jurisdiction in cases that might otherwise be comparable. When a stock seller who claimed to reside in Massachusetts sued a New Hampshire citizen to recover on a promissory note, the court found that he was actually domiciled in New Hampshire and therefore diversity did not apply.[79] On the other hand, the court held that diversity did exist where a Louisiana landlord was being sued by his tenants (a French national residing in Louisiana with his wife from Mississippi) for installing a two-way mirror in the rental unit. Although a husband's alien status is traditionally assigned to the wife, the court apparently did not feel compelled to do so in this case.[80] These rulings suggest that the diversity statute[81] may be selectively interpreted. On the one hand, the judge may have sought to dispose of an uninteresting case about a complicated financial arrangement by denying the federal forum and

[78] Campbell v. Clinton, 52 F. Supp 2d 34 (D.D.C. 1999). Although plaintiffs alleged that the congressional votes defeating the measures declaring war and providing the President with authorization to conduct air strikes were nullified, the court dismissed the case because plaintiffs had not suffered a particularized and personal injury sufficient to establish their interest in the litigation. Plaintiffs would have had to demonstrate that there had been a true constitutional impasse or an actual confrontation between the legislative and executive branches. The court found the standing inquiry to be especially rigorous because reaching the merits of the dispute would force the court to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional.

[79] Lundquist v. Precision Valley Aviation, Inc., 946 F. 2d 8 (1st Cir. 1991). The plaintiff, who filed suit to recover on a promissory note, alleged diversity of citizenship by claiming that he was domiciled in Massachusetts and a resident of Florida. The defendant, on the other hand, alleged that both he and the plaintiff were New Hampshire citizens. Although the plaintiff lived in Florida at times, he voted and filed corporate papers in New Hampshire. The court, therefore, found that the plaintiff was a New Hampshire resident and that there was no diversity of citizenship.

[80] Mas v. Perry, 489 F.2d 1396 (5th Cir. 1974). Where the plaintiffs alleged that their landlord had installed two-way mirrors in their apartment, the court concluded that for diversity purposes a woman did not have her state citizenship changed solely by reason of her marriage to an alien. The case was dismissed.

[81] Fed. R. Civ. P. 1332 (a). "The district courts shall have original jurisdiction of all civil actions where the matter in controversy… is between (1) citizens of different States"

requiring that the case be heard in state court; while in the other case, the judge may have been intrigued by the claims of privacy violations.

Given these instances, it is debatable whether judges are predisposed to the outcome of all tax protest cases simply because the cases have been labeled as protest cases and are therefore onerous. Unable to dismiss these cases on procedural grounds, judges must hear each one and rule upon the merits (or lack thereof) presented. Thus, the protester does get his day in court, but his eventual defeat may be a forgone conclusion.

B. Are Judges Afraid?

Judges are often accused by disgruntled protesters of succumbing to political pressures for fear of governmental reprisals, but no anecdotal evidence can be found to support this claim. In fact, innumerable cases have been won by taxpayers who have championed their cases in good faith, supported by legitimate and persuasive declarations. Never has a judge hesitated to rule in a taxpayer's favor if his arguments had merit, even though the losing party was necessarily the IRS. It seems doubtful that these judges, who seem willing to taunt the IRS in this manner, would suddenly fear reprisal if they sided with the occasional protester.

The judicial bias may actually be the reverse. Daniel Evans tells of Justice Douglas who voted against the IRS at almost every opportunity, often dissenting from otherwise unanimous decisions because he was "angry at having been audited once."[82] It appears that the IRS had more to fear from the angry judge than vice versa.

[82]Daniel B. Evans, *The Tax Protester FAQ* 148 (last updated Feb. 3, 2004), http://evans-legal.com/dan/tpfaq.html.

C. Protester Victories?

1. Retrials

Protesters often attempt to propagate the myth that they have prevailed against the IRS, insinuating that there is hope for all others. Yet, this is untrue. Although some protesters have "won," all appellate cases have been remanded and the protesters were later convicted at retrial, including an American Airlines pilot who appealed his conviction for willfully failing to file tax returns for five years.[83] Ruling that he could not argue that the income tax was unconstitutional or otherwise invalid, he was granted a new trial at which he could present evidence of his lack of willfulness. Unable to do so, he was convicted again.

2. Settlements

By coincidence, another pilot—this time with FedEx—was charged with criminal tax evasion when she falsely directed her employer not to withhold any income taxes from the $920,000 she had earned between 1996 and 2001.[84] The taxpayer claimed that she had sent numerous inquiries to the tax authority and stopped filing her returns when she did not receive a response. Acquitted in 2003 because the pilot's correspondence evinced her lack of criminal intent, she later settled with the IRS for $532,000 plus penalties and interest.[85]

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[83]U.S. v. Cheek, 3 F 3d 1057 (7th Cir. 1993). Juries twice convicted Cheek for willfully failing to file federal income tax returns for the years 1980, 1981, and 1983 through 1986. On appeal, the court held that the lower court did not err by refusing to instruct the jury on a reliance of counsel defense since there was evidence that the defendant had sought advice and then proceeded despite having been counseled that his conduct was illegal.

[84]Kuglin v. Commr., 83 T.C.M. (CCH) 1265 (2002).

[85]Frank Keiser, *Whatever Happened to Vernice Kuglin*, (Internet blog dated Sept. 10, 2004), Http://Www.Chatabouttaxes.Com/Whatever_Happened_To_Vernice_Kuglin-5543595-1076-A.Html.

Protest organizations were eager to herald the so-called victory, and claimed that the ensuing lack of news coverage about the trial's outcome was proof that the "mainstream media [is] controlled by the federal government."[86] Protesters, however, conveniently ignored the fact that the pilot was merely cleared of criminal charges but still faced civil proceedings and was ultimately forced to pay the tax assessed.

3. Criminal Convictions

Although pilots as a professional group are mentioned here merely by chance, one tax protest organization chose to specifically target airline employees. The Pilot Connection Society ("TPCS") marketed an "Untax Package"[87] that included the U.S. Constitution, Psalm 91, a photograph of the organization's founder suitable for framing, as well as a form letter that could be signed and sent to the IRS. In the letter, which TPCS advised should be hand-written because it "takes 3 to 5 times as long to read," the protester was advised to state that the IRS was "attempting to extort money"[88] without justifying its jurisdiction and that the TPCS client was not subject to this jurisdiction in any case. The protester was further advised to revoke his signature on all previously filed tax returns to ensure that the IRS could not use earlier returns to prove that he had been aware of his obligation to file and pay. In 1993, the promoters of this scheme were

[86] Carl F. Worden, *IRS vs. Kuglin*, as quoted in The Sierra Times (Aug. 16, 2003), *http://www.freerepublic.com/focus/f-news/965381/posts* (last accessed Dec. 4, 2004).

[87] IRS-Tax Info: *The Pilot Connection-U.S. v. Marsh 9610287* (posted Aug. 12, 2003), http://www.apfn.org/apfn/irstax.htm (last accessed Dec. 5, 2004). The verb "untax" entered the language in political conflict in England over a formidable tariff on foreign grain and denoted political action by the government ("Who will untax our bread?" E. Elliott, Corn-Law Rhymes, 1833). "Untax," as used in the present context, means freeing oneself from any legal obligation to pay any income tax, federal or state.

[88] *Id.*

indicted for conspiracy to defraud the U.S. and eventually convicted to extensive jail terms.[89]

D. Victories are not always what they seem

Obviously tax protesters cannot and do not win. Those who claim to have prevailed against the IRS delusionally believe that they have set precedents for others to follow. They brag about their triumphs up until the facts turn against them and then they become conspicuously silent. With their story only half-told, they proudly beat their chests and shout "Eureka!" But much like front page headlines in bold print and fine print follow-ups on the back page, these protesters slink silently into the night when their causes prove futile.

Epic "victories" are often only the result of the government's expeditious decision not to prosecute when there are "doubts about the evidence, not doubts about the law."[90] Although the case remains unpublished, it appears as though the IRS dropped the proceedings against Gail Sanocki[91] but continued to pursue her husband after the tax authority could not successfully refute her claims that she was an "innocent spouse" and therefore not liable for her husband's misdeeds.

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[89] U.S. v. Marsh, 144 F.3d 1229 (9th Cir. 1998). Marsh promised his customers that they could untax themselves. His wife Marlene helped to market the plan; her daughter Jill served as office manager; and Jill's husband Darrell served as General Manager. The family operation was aided by Joseph Coltrane, who put together trusts enabling clients to hide their assets from the IRS. Marsh claimed that he was not a tax protester, but only taught others that the IRS was "a private corporation" engaged in lawless efforts to extract money. The Marshes were convicted of tax evasion and for failure to file tax returns.

[90] Daniel B. Evans, *The Tax Protester FAQ* 142 (last updated Feb. 3, 2004), http://evans-legal.com/dan/tpfaq.html.

[91] Michael Lane, *Triumph of the Past*-December *1997: A Defense Against Arbitrary Taxation*, http://www.alor.org/Triumph%20of%20The%20Past/A%20Defense%20Against%20Arbitrary%20Taxation.htm (last accessed Dec. 5, 2004). A grand jury dismissed Sanocki's case in 1981 when she successfully alleged that the indictment failed to state the government's contention that she willfully attempted to evade taxation.

Losses, on the other hand, are often summarily dismissed by protesters as rulings rendered by ignorant or corrupt judges. Not satisfied to accuse only judges of incompetence, protesters also illogically claim that the IRS chooses to litigate solely against uneducated and ill-prepared defendants. If both contentions are to be believed, parties on both sides of every protest case would be hopelessly inept!

CONCLUSION

In an adversarial system, it is incumbent upon each party to persuade the court of its position. To that end, each party must employ language to his best advantage, present arguments with conviction, dexterously make rational points, and evoke sympathy. The courtroom, therefore, becomes a forum for a war of words. He who argues most persuasively wins.

Tax protest cases are no different from all other cases in this respect, except that protesters lack meritorious positions. Although they present seemingly compelling claims, they are labeled as "protesters" when they advocate futile arguments intended only to frustrate the government's lawful ability to impose and collect tax. Protesters' assertions are always based upon inadequate interpretation of constitutional and statutory language and selective application of previously litigated cases. By definition, the tax protesters' arguments are always frivolous.

Courts also rely upon precedential decisions and quote liberally from the Constitution and the Tax Code, often utilizing the same sources used by protesters in support of diametrically opposed positions. Whether by design or happenstance, the courts' use of the material proves more fruitful. The

rulings ultimately favor the government by discrediting the protesters' positions.

The failure to prevail may in part be justified by the language of the Code, which like so many other legal documents is written in a form barely understandable by the common man. Whether used to protect the public from its own ignorance, elevate the stature of congressmen responsible for tax legislation, preserve a professional monopoly of expert tax advisers, subtly embed pro-governmental policies within every statute, or pre-empt imprecision and ambiguity, the language remains hopelessly convoluted and subject to (mis)interpretation. Better trained and with the power of the gavel to sustain their beliefs, judges become the ultimate arbiters of the law. While courts frequently do rule in favor of taxpayers who bring positions to the bench in good faith, they routinely rule against protesters.

Courts cannot allow those identified as protesters to prevail for they do not merely misunderstand the law; they disagree with and seek to overturn it. They intentionally evade their obligations to comply with tax regulations by creatively, furtively, and artfully (albeit unsuccessfully) manipulating tax provisions in their favor. This cannot be tolerated since the "ability of the Government to function could be impaired if persons could refuse to pay taxes."[92] All tax protests, regardless of the linguistic gymnastics used, must and will fail.

[92]Packard v. U.S., 7 F. Supp 2d 143, 145 (D. Conn., 1998). The taxpayer had been a tax protester for 16 years. Although she had filed tax returns, she failed to pay the tax due on the grounds that it was contrary to her religious beliefs to pay for wars. The court held that the taxpayer could engage in acts of civil disobedience, but had to pay society's price if she did so. Payment of taxes was compulsory, even if it violated religious beliefs and interfered with the free exercise of religion.