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Volume 45  
Number 1 *Fall 2011*

Article 2

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9-1-2011

## Patriotism and Taxation: The Tax Compliance Implications of the Tea Party Movement

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## **PATRIOTISM AND TAXATION: THE TAX COMPLIANCE IMPLICATIONS OF THE TEA PARTY MOVEMENT**

*Richard Lavoie\**

*Given the rise of the tea party movement, which draws strength from the historical linkage between patriotism and tax protests in the United States, the role of patriotism as a general tax compliance factor is examined in light of the extant empirical evidence. The existing research suggests that patriotism may be a weaker tax compliance factor in the United States than it is elsewhere. In light of this possibility, the tea party movement has the potential to weaken this compliance factor even more. Further, when considered in light of the broader tax morale factors that contribute to tax compliance, the tea party movement also poses a risk of destabilizing the social contract framework that underlies our established taxpaying ethos. In order to strengthen the impact of patriotism on tax compliance and lessen any adverse impact of the tea party movement on the country's taxpaying ethos, the government should take steps to disentangle American patriotism from its anti-tax roots. Important first steps in this regard are outlined in this Article, including the creation of a voluntary "Patriotic Remittance Tax." Making such changes will strengthen the bond between taxpayers and the government and help promote a vision of American patriotism that is positively associated with taxation rather than antithetical to it.*

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## I. INTRODUCTION

America is one of the most patriotic countries in the world.<sup>1</sup> Yet, while we take great pride in our country's accomplishments, Americans hate paying the taxes necessary to support their government.<sup>2</sup> Our aversion to taxes has become part of our national psyche,<sup>3</sup> along with the unfounded belief that we are overtaxed.<sup>4</sup>

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1. See *infra* note 77 and accompanying text.

2. See CHARLES ADAMS, *THOSE DIRTY ROTTEN TAXES: THE TAX REVOLTS THAT BUILT AMERICA*, at xiii (1998); Geoffrey Christopher Rapp, *Monopoly's Hidden Justice: How Lax Antitrust Enforcement May Stimulate Charitable Giving and Overcome the Political Economy Barriers to Redistributive Taxation*, 70 UMKC L. REV. 303, 313 (2001); Joshua D. Rosenberg, *The Psychology of Taxes: Why They Drive Us Crazy, and How We Can Make Them Sane*, 16 VA. TAX REV. 155, 158 (1996); see also KARLYN BOWMAN & ANDREW RUGG, AM. ENTER. INST. FOR PUB. POLICY RESEARCH, *AEI STUDIES IN PUBLIC OPINION: PUBLIC OPINION ON TAXES* (2010) [hereinafter *AEI PUBLIC OPINION ON TAXES STUDY*], available at <http://www.aei.org/docLib/AEIPublicOpinionTaxes2010April.pdf> (compiling seventy years of public survey data regarding taxation).

3. Rosenberg, *supra* note 2, at 157–61.

4. See *AEI PUBLIC OPINION ON TAXES STUDY*, *supra* note 2, at 3–5 (demonstrating that public opinion surveys have consistently shown a majority or substantial plurality of Americans believe their tax burden is too high); Kevin G. Hall, *Politics and Public Opinion Aside, Americans Are Under-Taxed*, MCCLATCHY, May 5, 2011, available at [http://www.mcclatchydc.com/2011/05/05/113759/this-fact-may-not-sit-well-americans.html#storylink=misearch;66%\\_Say\\_America\\_is\\_Overtaxed](http://www.mcclatchydc.com/2011/05/05/113759/this-fact-may-not-sit-well-americans.html#storylink=misearch;66%_Say_America_is_Overtaxed), RASMUSSEN REPORTS (Apr. 11, 2010), [http://www.rasmussenreports.com/public\\_content/business/taxes/april\\_2010/66\\_say\\_america\\_is\\_overtaxed](http://www.rasmussenreports.com/public_content/business/taxes/april_2010/66_say_america_is_overtaxed); *Duh! Americans Say They're Overtaxed*, UPI (Apr. 6, 2011), [http://www.upi.com/Top\\_News/US/2011/04/06/Duh-Americans-say-theyre-overtaxed/UPI-79261302112250/](http://www.upi.com/Top_News/US/2011/04/06/Duh-Americans-say-theyre-overtaxed/UPI-79261302112250/) (reporting a 2011 Rasmussen poll finding 64 percent of Americans believe they are overtaxed). The belief in being overtaxed is strong within the tea party movement as well, with many members believing that the nation's tax burden is substantially higher than it truly is. See, e.g., Bruce Bartlett, *The Misinformed Tea Party Movement*, FORBES.COM (Mar. 19, 2010), [http://www.forbes.com/2010/03/18/tea-party-ignorant-taxes-opinions-columnists-bruce-bartlett\\_print.html](http://www.forbes.com/2010/03/18/tea-party-ignorant-taxes-opinions-columnists-bruce-bartlett_print.html); Brian Montopoli, *Tea Party Supporters: Who They Are and What They Believe*, CBS NEWS (Apr. 14, 2010), [http://www.cbsnews.com/8301-503544\\_162-20002529-503544.html](http://www.cbsnews.com/8301-503544_162-20002529-503544.html) [hereinafter *CBS Poll*] (reporting poll finding that “[s]ixty-four percent [of tea party supporters] believe that the president has increased taxes for most Americans, despite the fact that the vast majority of Americans got a tax cut under the Obama administration”). Indeed, some in the tea party movement have twisted the historical reference to “TEA” into an acronym standing for “Taxed Enough Already.” See Clarence Page, *Tea Partiers Taking Pages from New Left*, CHI. TRIB., May 19, 2010, at 19. In fact, the effective tax burden in the United States is lower than that in most other developed nations. Organisation for Economic Co-operation and Development (OECD) figures demonstrate that the effective tax burden in the United States is consistently well below the OECD average when aggregate tax receipts are measured as a percentage of the gross domestic product. *OECD Tax Database: Tax Revenue Statistics*, OECD, <http://www.oecd.org/ctp/taxdatabase> (last visited July 10, 2011) (see Table A: Tax Revenue as Percentage of GDP). Indeed, provisional figures for 2009 (the most recent year available) indicate that only Mexico and Chile had lower tax burdens than the United States had. *Id.* Further, the current tax burden in the United States is at an all-time low when judged by historical levels of taxation for the country.

American tax law itself is overflowing with statements that the determination of one's taxes is a purely legal matter in which patriotism is irrelevant.<sup>5</sup> In the current environment, it has become almost sacrilegious to assert patriotism as a reason for paying taxes. Vice President Biden found this out when he made just such a claim during the 2008 presidential campaign. In explaining the Democratic proposal to raise taxes on individuals earning more than \$250,000 a year, Biden stated that "[i]t's time to be patriotic . . . . Time to jump in. Time to be part of the deal. Time to help get America out of the rut."<sup>6</sup> His counterpart on the Republican ticket, Sarah Palin, was quick to counter by stating that "[t]o the rest of America that's not patriotism . . . . Raising taxes is about killing jobs and hurting small businesses and making things worse."<sup>7</sup> The Republican presidential nominee, John McCain, went so far as to characterize Biden's position as "just plain dumb."<sup>8</sup> Is it? Does patriotism have a role in fostering tax compliance? If it does, can we afford to ignore it given the more than \$345 billion<sup>9</sup> "tax gap" between the federal income taxes actually paid each year and the true amount owed?<sup>10</sup>

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Dennis Cauchon, *Tax Bills in 2009 at Lowest Level Since 1950*, USA TODAY, May 11, 2010, at 1A ("Federal, state and local income taxes . . . consumed 9.2% of all personal income in 2009, the lowest rate since 1950, the Bureau of Economic Analysis (BEA) reports. That rate is far below the historic average of 12% for the past half-century.").

5. See *infra* note 92.

6. Michael Falcone, *On Tax Policy and Patriotism*, N.Y. TIMES, Sept. 19, 2008, at A14. Biden's view appears to be shared by President Obama as well. For instance, in a 2011 speech the president advocated reducing the federal budget deficit by increasing tax revenues as well as by making substantial spending cuts, and then noted: "And here's the thing: I believe that most wealthy Americans would agree with me. They want to give back to their country, a country that's done so much for them. It's just Washington hasn't asked them to." President Barack Obama, Remarks by the President on Fiscal Policy (Apr. 13, 2011) (transcript available at <http://www.whitehouse.gov/the-press-office/2011/04/13/remarks-president-fiscal-policy>).

7. Falcone, *supra* note 6.

8. *Id.*

9. This figure represents the IRS's most recent estimate (from 2006) of the gross tax gap for 2001, the most recent year for which the relevant data is available. *IRS Updates Tax Gap Estimates*, INTERNAL REVENUE SERV. (Feb. 14, 2006), <http://www.irs.gov/newsroom/article/0,,id=154496,00.html> (estimating the tax gap for 2001 at \$345 billion).

10. In recent years, numerous scholarly articles (including at least one law review symposium issue) have been published on the tax gap and how to most effectively address it. See, e.g., Michael Doran, *Tax Penalties and Tax Compliance*, 46 HARV. J. ON LEGIS. 111 (2009); Marjorie E. Kornhauser, *A Tax Morale Approach to Compliance: Recommendations for the IRS*, 8 FLA. TAX REV. 599 (2007); Leandra Lederman, *Reducing Information Gaps to Reduce the Tax Gap: When Is Information Reporting Warranted?*, 78 FORDHAM L. REV. 1733 (2010); Leandra Lederman, *Statutory Speed Bumps: The Roles Third Parties Play in Tax Compliance*, 60 STAN. L. REV. 695 (2007); Edward A. Morse, *Whistleblowers and Tax Enforcement: Using Inside*

Understanding why some taxpayers comply with their taxpaying obligations and others do not has been the subject of intensive study in recent years.<sup>11</sup> The focus of this inquiry has been on identifying the hodgepodge of noncoercive forces and behavioral traits that influence tax evasion. Collectively, such traits contribute to a society's "tax morale,"<sup>12</sup> and once a stable equilibrium of such factors has been established, a society can be said to have a self-sustaining "taxpaying ethos."<sup>13</sup> Although the empirical work on the

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*Information to Close the "Tax Gap,"* 24 AKRON TAX J. 1 (2009); Dave Rifkin, *A Primer on the "Tax Gap" and Methodologies for Reducing It*, 27 QUINNIPIAC L. REV. 375 (2009); Joshua D. Rosenberg, *Narrowing the Tax Gap: Behavioral Options*, 117 TAX NOTES 517 (2007); Symposium, *Closing the Tax Gap*, 20 STAN. L. & POL'Y REV. 1 (2009); Elizabeth Branham, Note, *Closing the Tax Gap: Encouraging Voluntary Compliance Through Mass-Media Publication of High-Profile Tax Issues*, 60 HASTINGS L.J. 1507 (2009).

11. See, e.g., John T. Scholz, *Contractual Compliance: Tax Institutions and Tax Morale in the U.S.*, in TAX EVASION, TRUST AND STATE CAPACITIES 51 (Nicolas Hayoz & Simon Hug eds., 2007) [hereinafter Scholz, *Contractual Compliance*]; John T. Scholz, *Trust, Taxes, and Compliance*, in TRUST AND GOVERNANCE 135 (Valerie Braithwaite & Margaret Levi eds., 1998); BENNO TORGLER, TAX COMPLIANCE AND TAX MORALE: A THEORETICAL AND EMPIRICAL ANALYSIS (2007) [hereinafter TORGLER, TAX MORALE]; 2 TAXPAYER COMPLIANCE (Jeffrey A. Roth & John T. Scholz eds., 1989); WHY PEOPLE PAY TAXES (Joel Slemrod ed., 1992); James Alm et al., *Changing the Social Norm of Tax Compliance by Voting*, 52 KYKLOS 141 (1999) [hereinafter Alm et al., *Changing the Social Norm*]; James Alm et al., *Estimating the Determinants of Taxpayer Compliance with Experimental Data*, 45 NAT'L TAX J. 107 (1992) [hereinafter Alm et al., *Taxpayer Compliance*]; James Alm et al., *Fiscal Exchange, Collective Decision Institutions, and Tax Compliance*, 22 J. ECON. BEHAV. & ORG. 285 (1993) [hereinafter Alm et al., *Fiscal Exchange*]; James Alm et al., *Institutional Uncertainty and Taxpayer Compliance*, 82 AM. ECON. REV. 1018 (1992) [hereinafter Alm et al., *Institutional Uncertainty*]; James Alm et al., *Why Do People Pay Taxes?*, 48 J. PUB. ECON. 21 (1992) [hereinafter Alm et al., *Why Do People Pay Taxes?*]; Jeff T. Casey & John T. Scholz, *Beyond Deterrence: Behavioral Decision Theory and Tax Compliance*, 25 LAW & SOC'Y REV. 821 (1991); Lars P. Feld & Bruno S. Frey, *Tax Compliance as the Result of a Psychological Tax Contract: The Role of Incentives and Responsive Regulation*, 29 LAW & POL'Y 102 (2007); Lars P. Feld & Jean-Robert Tyran, *Tax Evasion and Voting: An Experimental Analysis*, 55 KYKLOS 197 (2002); Bruno S. Frey & Benno Torgler, *Tax Morale and Conditional Cooperation*, 35 J. COMP. ECON. 136 (2007); Harold G. Grasmick et al., "Render Unto Caesar What Is Caesar's": *Religiosity and Taxpayers' Inclinations to Cheat*, 32 SOC. Q. 251 (1991); Li-Chen Hsu, *Experimental Evidence on Tax Compliance and Voluntary Public Good Provision*, 61 NAT'L TAX J. 205 (2008); Kornhauser, *supra* note 10; Leandra Lederman, *The Interplay Between Norms and Enforcement in Tax Compliance*, 64 OHIO ST. L.J. 1453 (2003); Werner W. Pommerehne et al., *Tax Morale, Tax Evasion and the Choice of Policy Instruments in Different Political Systems*, 49 PUB. FIN. 52 (Supp. 1994); Benno Torgler & Christoph A. Schaltegger, *Tax Amnesties and Political Participation*, 33 PUB. FIN. REV. 403 (2005); Benno Torgler, *Tax Morale and Direct Democracy*, 21 EUR. J. POL. ECON. 525 (2005) [hereinafter Torgler, *Direct Democracy*]; Benno Torgler, *What Do We Know About Tax Morale and Tax Compliance?*, 48 INT'L REV. ECON. & BUS. 395 (2001) [hereinafter Torgler, *Tax Compliance*].

12. See TORGLER, TAX MORALE, *supra* note 11 (exhaustively reviewing the empirical studies exploring the nature of tax morale).

13. Richard Lavoie, *Flying Above the Law and Below the Radar: Instilling a Taxpaying Ethos in Those Playing by Their Own Rules*, 29 PACE L. REV. 637, 638 (2009).

components that factor into a society's tax morale is still developing, a number of statistically significant factors have been empirically identified.<sup>14</sup> For instance, a taxpayer's perceived legitimacy of both the government's imposition of a tax and the means by which it adopted the tax strongly correlates with taxpayer compliance.<sup>15</sup>

This Article considers the evidence for patriotism as a significant tax morale factor. It also considers the challenges that the tea party movement poses to maintaining a stable taxpaying ethos in the United States and how the use of patriotism as a tax morale factor could address those challenges. More specifically, Part II of this Article briefly reviews the concept of a taxpaying ethos and the factors that keep a society in a taxpaying equilibrium. The Article uses a social contract framework to explain each factor's relevance. Part III considers the role patriotism plays in tax compliance by examining the empirical work done on this question. There is solid evidence indicating that patriotism plays a significant role in promoting tax compliance. Interestingly, while tax compliance and patriotism are both high in the United States, some of this research indicates that the relative impact of patriotism as a tax compliance factor in the United States is *less* than it is in the other countries examined. As a possible explanation for this incongruity, Part IV reviews the historical linkage of patriotism with anti-tax sentiment in the United States. Part V then examines the recent tea party movement in the United States and the challenges it poses to maintaining a stable taxpaying ethos. Part VI presents some possible structural changes that could be made in the tax law to strengthen American patriotism as an important element in maintaining the taxpaying ethos in the United States and to mitigate the potential negative impact of the tea party movement. Part VII concludes that the government should adopt the suggested tax law changes as a means of separating American patriotism from its anti-tax roots, thereby making patriotism a more potent factor in promoting tax compliance in the United States.

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14. Kornhauser, *supra* note 10, at 601.

15. Alm et al., *Changing the Social Norm*, *supra* note 11, at 163; Alm et al., *Fiscal Exchange*, *supra* note 11; Feld & Tyran, *supra* note 11, at 218; see Torgler, *Direct Democracy*, *supra* note 11.

## II. MAINTAINING A TAXPAYING ETHOS

Identifying the factors that motivate taxpayers to obey tax laws is a complex inquiry.<sup>16</sup> However, some elements of the puzzle are quite clear. Traditional deterrence models, which try to explain tax compliance based solely on audit rates and penalties for noncompliance, completely fail to explain the observed level of tax compliance in industrialized nations.<sup>17</sup> A primary flaw of the deterrence model is that it presupposes that taxpayers act rationally to maximize their economic wealth by minimizing their tax burden. In fact, they do not.<sup>18</sup> Individuals exhibit many perceptual biases that can, and do, distort their understanding of relevant factual information.<sup>19</sup> Further, the manner in which individuals utilize these “facts” to make decisions about future actions is often anything but logical. For instance, individuals exhibit a tendency to give greater significance to facts confirming their preexisting beliefs and to downplay the relevance of contrary factual information.<sup>20</sup> Consequently, individuals can easily misinterpret the true significance of new factual information. Similarly, an individual’s course of action in a particular situation is often based on analogies to similar situations that the individual has previously encountered, rather than based on a cool and impartial weighing of the current situation.<sup>21</sup> Consequently, any model that relies predominantly on

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16. See Kornhauser, *supra* note 10, at 601–02.

17. Lavoie, *supra* note 13, at 639–42; Lederman, *supra* note 11, at 1457; Eric A. Posner, *Law and Social Norms: The Case of Tax Compliance*, 86 VA. L. REV. 1781, 1782 (2000).

18. John S. Carroll, *A Cognitive-Process Analysis of Taxpayer Compliance*, in 2 TAXPAYER COMPLIANCE: SOCIAL SCIENCE PERSPECTIVES 228, 234–36 (Jeffrey A. Roth & John T. Scholz eds., 1989) (describing some of the behavioral studies indicating that human actions often diverge from rational economic utility predictions); see, e.g., Casey & Scholz, *supra* note 11, at 833–34.

19. Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CALIF. L. REV. 1051, 1127–34 (2000) (providing a systemic discussion of a variety of heuristics and their influence on human decision-making); Rosenberg, *supra* note 10, at 517 (noting the existence of heuristics and biases in tax context); Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCI. 1124 (1974).

20. This tendency is typically referred to as the “confirmation bias.” Clifford R. Mynatt et al., *Confirmation Bias in a Simulated Research Environment: An Experimental Study of Scientific Inference*, 29 Q.J. EXPERIMENTAL PSYCHOL. 85 (1977).

21. ICEK AJZEN, ATTITUDES, PERSONALITY, AND BEHAVIOR 99–101 (Anthony S. Manstead ed., 1988).

humans making “rational” choices is at a distinct disadvantage in predicting actual behavior.<sup>22</sup>

Even placing individual perceptual biases and decisional heuristics aside, the underlying premise of the deterrence model (i.e., that taxpayers will engage in tax evasion whenever it maximizes their wealth) is too simplistic. In particular, empirical evidence supports the hypothesis that individuals consider more than a simple economic calculus when making decisions.<sup>23</sup> In particular, when weighing whether to comply with a tax, individuals will comprehend that there are direct and indirect benefits they receive from the government in exchange for their tax dollars. Taxpayers’ willingness to pay taxes increases if they understand the implicit quid pro quo received in exchange for their taxes and they if perceive that others are reciprocating by paying their share of the tax burden as well.<sup>24</sup> This relationship continues to hold true even when the quid pro quo takes the form of “public goods,” which the government would provide to all citizens even if a particular taxpayer did not contribute toward them.<sup>25</sup> Thus, individuals perceive benefits and are still willing to pay for government activities even if the benefits are amorphous with no direct link to the individuals, like government grants for pure scientific research.<sup>26</sup>

This is essentially a social contract approach to understanding why people pay their taxes.<sup>27</sup> That is, paying taxes is justifiable since

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22. This is not to say that people act “irrationally.” Indeed, the species would not have survived long if that was the case. Rather, it is to say that the actual mental processes that ultimately result in a person making a particular behavioral choice do not necessarily follow, or perhaps even consider, the purely logical approach that could have been followed. Consequently, an individual may very well make an appropriate choice in a situation, despite basing it on an illogical mode of analysis regarding the situation.

23. See, e.g., Colin F. Camerer & Ernst Fehr, *Measuring Social Norms and Preferences Using Experimental Games: A Guide for Social Scientists*, in FOUNDATIONS OF HUMAN SOCIALITY 55 (Joseph Henrich et al. eds., 2004).

24. See Dan M. Kahan, *Trust, Collective Action, and Law*, 81 B.U. L. REV. 333, 333–35 (2001).

25. See John O. Ledyard, *Public Goods: A Survey of Experimental Research*, in THE HANDBOOK OF EXPERIMENTAL ECONOMICS 111, 112–13 (John H. Kagel & Alvin E. Roth eds., 1995); Kahan, *supra* note 24, at 335–37; Elinor Ostrom, *Collective Action and the Evolution of Social Norms*, 14 J. ECON. PERSP., Summer 2000, at 137, 140.

26. Alm et al., *Fiscal Exchange*, *supra* note 11. For a general overview of the literature regarding public goods in the tax arena, see TORGLER, *TAX MORALE*, *supra* note 11, at 97–100.

27. This type of social contract framework (sometimes referred to as a fiscal exchange framework) for understanding tax compliance has been utilized by a number of commentators. See, e.g., Scholz, *Contractual Compliance*, *supra* note 11, at 105; Alm et al., *Changing the Social*

you are receiving equal benefits in return. Or as Oliver Wendell Holmes once noted, “Taxes are what we pay for civilized society.”<sup>28</sup> Of course, in the real world there is never a direct one-to-one correlation between the amount of taxes paid and the value of benefits received by any particular taxpayer. Further, most industrialized countries, including the United States, tax income using a progressive rate structure that levies more tax from each dollar earned as a person’s income rises.<sup>29</sup> Consequently, unless wealthier individuals receive a greater share of government benefits than their less well-off brethren receive, such a system represents a form of wealth redistribution in which those taxed at the higher rate are overpaying for the benefits they actually enjoy in order to subsidize increased benefits to less fortunate members of the society.<sup>30</sup> As a result, one would expect those with higher incomes to view the disproportionately heavy taxes on them as inequitable.<sup>31</sup> While some studies do suggest such a correlation, the data is not as clear as might be expected.<sup>32</sup> In particular, it appears that the negative

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*Norm*, *supra* note 11; Alm et al., *Taxpayer Compliance*, *supra* note 11; Alm et al., *Fiscal Exchange*, *supra* note 11; Alm et al., *Institutional Uncertainty*, *supra* note 11; Feld & Frey, *supra* note 11; Pommerehne et al., *supra* note 11; Thomas M. Porcano, *Correlates of Tax Evasion*, 9 J. ECON. PSYCHOL. 47 (1988); M.W. Spicer & S.B. Lundstedt, *Understanding Tax Evasion*, 31 PUB. FIN. 295 (1976).

28. *Compañía General de Tabacos de Filipinas v. Collector of Internal Revenue*, 275 U.S. 87, 100 (1927).

29. Fabio Padovano & Emma Galli, *Comparing the Growth Effects of Marginal vs. Average Tax Rates and Progressivity*, 18 EUR. J. OF POL. ECON. 529, 530 (2002).

30. It is possible to reach the opposite conclusion, however, and conclude that the wealthy really *do* get greater benefits from the government when intangible benefits are taken into account. For instance, if an entrepreneur makes a fortune from developing and marketing a new invention, a large part of his success is attributable to the existence of a stable free-market economy, which only exists because the government provides the security and financial regulation needed to permit such an economy to thrive. Thus, the capitalist system itself is an indirect governmental benefit and those who exploit that system more effectively should pay more in taxes since they derive greater benefit from the system than others do.

31. Indeed, a plethora of such complaints were prompted by a recent finding of the Joint Committee on Taxation that in 2009, 51 percent of American households paid no income taxes whatsoever (although such households typically did pay Social Security and Medicare taxes). Chuck Marr & Brian Highsmith, *Misconceptions and Realities About Who Pays Taxes*, CTR. ON BUDGET & POLICY PRIORITIES (May 31, 2011), <http://www.cbpp.org/cms/index.cfm?fa=view&id=3505> (noting these arguments and disputing the interpretation being given to the cited fact).

32. For instance, the following studies have generally found a positive correlation between higher levels of income and/or tax rates and increased tax evasion: Charles T. Clotfelter, *Tax Evasion and Tax Rates: An Analysis of Individual Returns*, 65 REV. ECON. & STAT. 363 (1983); Karyl A. Kinsey & Howard G. Grasmick, *Did the Tax Reform Act of 1986 Improve Compliance? Three Studies of Pre- and Post-TRA Compliance Attitudes*, 15 LAW & POL’Y 293 (1993);

impact of a progressive tax rate system is at least partially mitigated by participation in the political process that decided on the rate structure.<sup>33</sup> So, when a group was allowed to vote on a progressive rate structure, the resulting law was respected even by individuals who voted against it. Further, the compliance by these opponents exceeded that of a control group where a similar rate structure was imposed without a group vote.<sup>34</sup> Effectively, achieving a societal consensus on the appropriate sharing of the financial burden of civilization seems to ameliorate the negative impact on wealthy individuals from not having a direct quid pro quo of benefits received to taxes actually paid.

Another area where the social contract can break down is where the goods provided by the government are not in line with the preferences of society. Here, empirical studies bear out the supposition that the more the benefits provided by the government are in line with societal priorities, the greater the level of tax compliance.<sup>35</sup> Again, taxpayer participation in the process by which government expenditures are made acts to ameliorate the fact that any particular taxpayer may well believe government funds would be best directed with a different focus.<sup>36</sup> However, even if most

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Michael L. Roberts & Peggy A. Hite, *Progressive Taxation, Fairness, and Compliance*, 16 LAW & POL'Y 27 (1994). However, other studies have found the opposite. For instance, a study based on Jamaican data found that evasion declined with increasing marginal tax rates. James Alm et al., *Audit Selection and Income Tax Underreporting in the Tax Compliance Game*, 42 J. DEV. ECON. 1 (1993); see also Jonathan S. Feinstein, *An Econometric Analysis of Income Tax Evasion and Its Detection*, 22 RAND J. ECON. 14 (1991) (finding a significant negative correlation between marginal tax rates and evasion); David Joulfaian & Mark Rider, *Tax Evasion in the Presence of Negative Income Tax Rates*, 49 NAT'L TAX J. 553 (1996) (finding income misreporting rates to be invariant to high tax rates among low-income taxpayers). The difficulty in obtaining data on evasion may contribute to these mixed results. To control for this problem, several studies have used laboratory experiments where subjects were asked hypothetical questions about their behavior. See, e.g., PAUL WEBLEY ET AL., *TAX EVASION: AN EXPERIMENTAL APPROACH* (1991); Alm et al., *Taxpayer Compliance*, *supra* note 11. Typically, these results also find a positive association between higher tax rates and evasion.

33. See TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (1990) (arguing that people generally comply with the law if they perceive the process that leads to the law as fair); see, e.g., Alm et al., *Changing the Social Norm*, *supra* note 11, at 163; Alm et al., *Fiscal Exchange*, *supra* note 11; Feld & Tyran, *supra* note 11, at 218; Torgler & Schaltegger, *supra* note 11; Torgler, *Tax Compliance*, *supra* note 11 (surveying literature on political participation and compliance).

34. Feld & Tyran, *supra* note 11, at 218.

35. See, e.g., Alm et al., *Taxpayer Compliance*, *supra* note 11; Alm et al., *Fiscal Exchange*, *supra* note 11; Alm et al., *Institutional Uncertainty*, *supra* note 11; Alm et al., *Why Do People Pay Taxes?*, *supra* note 11; Pommerehne et al., *supra* note 11; Porcano, *supra* note 27; Spicer & Lundstedt, *supra* note 27.

36. Alm et al., *Fiscal Exchange*, *supra* note 11.

taxpayers accept the legitimacy of the consensus budgetary decisions of their elected representatives, situations can arise where a taxpayer's personal belief system is so at odds with the government's priorities that he still refuses to pay any taxes. Since a government cannot ignore such flagrant disobedience without undermining the perceived fairness of the tax system and the allegiance of other taxpayers, it must either pursue such tax protestors diligently or develop some means of securing their compliance by assuaging their concerns.

A good example of this situation involves pacifist tax protestors. Just as a portion of society will claim conscientious objector status when called to military service during wartime due to their strongly held belief that war is immoral, a committed pacifist might take the position that paying taxes used to fund a war is equally abhorrent.<sup>37</sup> However, while conscientious objector status is respected by many governments with regard to service in actual combat situations,<sup>38</sup> it is generally not accepted as a valid excuse for refusing to pay one's taxes.<sup>39</sup> Thus, a taxpayer who refuses to pay taxes based on his pacifist views is pursued by the government in the same manner that the government pursues any other willful tax evader, and the taxpayer faces seizure of property and criminal prosecution even if he has received no individual economic benefit from his tax evasion.<sup>40</sup> Since the 1970s, a movement has existed to try to

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37. ED HEDEMANN, WAR TAX RESISTANCE: A GUIDE TO WITHHOLDING YOUR SUPPORT FROM THE MILITARY 92 (Ruth Benn & Ed Hedemann eds., 5th ed. 2003).

38. Recognition of conscientious objector status has a long history in the United States and indeed extends back into colonial times. JOHN WHITECLAY CHAMBERS II, *Conscientious Objectors and the American State from Colonial Times to the Present*, in THE NEW CONSCIENTIOUS OBJECTION: FROM SACRED TO SECULAR RESISTANCE 23 (Charles C. Moskos & John Whiteclay Chambers II eds., 1993); Major Joseph B. Mackey, *Reclaiming the In-Service Conscientious Objection Program: Proposals for Creating a Meaningful Limitation to the Claim of Conscientious Objection*, ARMY L., Aug. 2008, at 31, 31–32. While the draft has not been activated since 1973, currently all males from ages eighteen through twenty-five (only men are currently eligible for military conscription) must register with the Selective Service System. If the draft is activated, an otherwise eligible man could apply for conscientious objector status based on religious, moral, or ethical grounds. 50 U.S.C. app. § 456(j) (2006). If granted, the conscientious objector is assigned either a noncombat role in the military or to some form of nonmilitary alternative service. *Id.*

39. Marjorie E. Kornhauser, *For God and Country: Taxing Conscience*, 1999 WIS. L. REV. 939, 941–42 (1999).

40. For instance, a pacifist tax protestor would inure no pecuniary benefit if he contributes the full amount of his annual tax liability to a charity and notes that fact on an otherwise accurate and timely filed tax return. *Id.*

ameliorate this result through congressional action to permit pacifist tax protestors in the United States to pay their taxes into a special “peace tax fund,” which the government could only use to fund nonmilitary appropriations.<sup>41</sup> However, while a bill to establish such a fund is introduced each year, the movement has not garnered sufficient interest for passage.<sup>42</sup> Additionally, the Treasury Department has resisted the idea on grounds of administrative complexity and concerns about permitting taxpayers to earmark their tax payments.<sup>43</sup> The viability of allowing taxpayers to earmark their tax payments is discussed in detail in Part VI below.

A final crucial aspect of the social contract approach to understanding tax compliance is that taxpayers must have faith that they are not alone in complying with the tax laws. The belief that others are shirking their taxpaying responsibilities encourages taxpayers to question their own compliance.<sup>44</sup> No one wants to be a chump who pays taxes when everyone else is taking a free ride.<sup>45</sup> Consequently, the existence of an acknowledged and accepted societal norm of taxpaying, or a taxpaying ethos, is key to obtaining

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41. *Id.* at 986; see also *Welcome to the National Campaign for a Peace Tax Fund*, NAT'L CAMPAIGN FOR A PEACE TAX FUND, <http://www.peacetaxfund.org> (last updated Oct. 24, 2011) (discussing the organization that advocates for the passage of the Religious Freedom Peace Tax Fund Act).

42. See *History of the Campaign for a Peace Tax Fund*, NAT'L CAMPAIGN FOR A PEACE TAX FUND, <http://www.peacetaxfund.org/aboutus/history.htm> (last updated Jan. 20, 2011).

43. *Miscellaneous Tax Bills and the Peace Tax Fund: Hearing on H.R. 65, H.R. 1733, and H.R. 1870 Before the Subcomm. on Select Revenue Measures of the H. Comm. on Ways & Means*, 102d Cong. 70 (1992) [hereinafter *Peace Tax Hearing*].

44. See, e.g., James Alm & Jorge Martinez-Vazquez, *Institutions, Paradigms, and Tax Evasion in Developing and Transition Countries*, in PUBLIC FINANCE IN DEVELOPING AND TRANSITIONAL COUNTRIES 146, 151 (James Alm & Jorge Martinez-Vazquez eds., 2003) (“If the perception becomes widespread that the government is not willing to detect and penalize evaders, then such a perception legitimizes tax evasion. The rejection of sanctions sends a signal to each individual that others do not wish to enforce the tax laws and that tax evasion is in some sense socially acceptable, and the social norm of compliance disappears.”); Steven M. Sheffrin & Robert K. Triest, *Can Brute Deterrence Backfire? Perceptions and Attitudes in Taxpayer Compliance*, in WHY PEOPLE PAY TAXES 193 (Joel Slemrod ed., 1992) (showing that perceiving other taxpayers as dishonest significantly increases the likelihood a person will avoid taxes); Frey & Torgler, *supra* note 11 (demonstrating that, in Western and Eastern Europe, tax morale decreases when tax evasion is perceived as common); Michael P. Vandenbergh, *Beyond Elegance: A Testable Typology of Social Norms in Corporate Environmental Compliance*, 22 STAN. ENVTL. L.J. 55, 112–13 (2003) (“The effect of perceptions of widespread [tax] noncompliance on intentions to comply in the future may result from the norm of conformity, or may simply be the product of a perceived reduction in the risk of formal or informal sanctions.”).

45. Janet Novack, *Are You a Chump*, FORBES, Mar. 5, 2001, at 122.

widespread tax compliance.<sup>46</sup> Once established, such a norm of tax compliance reinforces itself through the use of public and private shaming, peer pressure, guilt from noncompliance, and self-esteem gains from compliance.<sup>47</sup> Conversely, a societal belief in the existence of a taxpaying norm can be undermined either by publicity regarding widespread tax cheating or by the non-taxpaying norm of a subgroup gaining wider acceptance.<sup>48</sup> As a result, while a taxpaying ethos is generally self-sustaining once established, it is vulnerable to paradigm shifts occurring in the society as a whole.

### III. PATRIOTISM AS A SIGNIFICANT TAX MORALE FACTOR

The preceding section discussed the concept of tax morale and the relevance of an overarching social contract framework for contextualizing the relevance of various tax morale factors. This section focuses more specifically on the role of patriotism as a factor that influences tax compliance.<sup>49</sup> As a general matter, the social

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46. Lavoie, *supra* note 13, at 638.

47. *Id.* at 668–71.

48. *See, e.g., id.* at 678–79 (“The greater opportunities to evade taxes in the small-business setting, coupled with competitive pressures to exploit those opportunities, lead to the widely held perception that most similarly situated small-business owners engage in tax evasion. The result is a noncompliance norm.”).

49. *The Oxford English Dictionary* defines patriotism as the “love of or zealous devotion to one’s country.” 11 OXFORD ENGLISH DICTIONARY 349 (2d ed. 1989). As such, patriotism is typically expressed as pride in one’s country and its accomplishments. The term patriotism is used herein in this straightforward sense. Further, this “pride in one’s country” understanding of the term also forms the predicate for the empirical studies on patriotism and taxation that are discussed below. *See infra* notes 70–82 and accompanying text. That said, it is acknowledged that, at least when used in scholarly circles, the term patriotism is often a loaded one that implicates a myriad of hotly debated issues. To philosophers, it highlights thorny questions concerning the universality of morality. For instance, when faced with two equally ill persons and limited resources, is it ever moral to favor a compatriot over one who is not? Or is morality essentially a relative notion, rather than a universal one, such that patriotism reflects the embodiment of a particular culture and hence is justifiable as the very bedrock of a society’s moral beliefs? Igor Primoratz & Aleksandar Parković, *Introduction to PATRIOTISM: PHILOSOPHICAL AND POLITICAL PERSPECTIVES* 1, 1–2 (Igor Primoratz & Aleksandar Pavković eds., 2007). To political scientists, the term engenders questions concerning the role of patriotism in maintaining a stable political system. *Id.* In this regard, whether there is any real distinction between patriotism and nationalism is a key question. *Id.* For some, patriotism is a more moderate concept reflecting loyalty to the “patria,” (i.e., the country and homeland) without any need to denigrate the “patria” of others or elevate one over another. Igor Primoratz, *Patriotism and Morality: Mapping the Terrain*, in *PATRIOTISM: PHILOSOPHICAL AND POLITICAL PERSPECTIVES* 17, 18 (Igor Primoratz & Aleksandar Pavković eds., 2007). In its purest sense, patriotism, so conceived, is central to republican political theory by representing a love of the institutions and laws of one’s country and derivatively the rights and liberties arising as a result. Primoratz &

contract framework would suggest that the more patriotic an individual is, the more likely he is to share the values of his nation and support its announced goals by willingly complying with the tax laws. Consequently, one would expect patriotic appeals for greater tax compliance to have a demonstrable impact in societies with high levels of patriotism. One would also expect nations with high levels of patriotism to have higher levels of individual tax compliance than less patriotic societies have. Regarding the first expectation, the empirical evidence considering the impact of pro-tax patriotic appeals is mixed. While a positive impact during wartime has been documented, studies regarding analogous social contract-based appeals during peacetime have generally not shown any statistically significant correlation between the appeals and tax compliance. However, these studies did not specifically focus on the role of patriotism, and, therefore, the failure of these studies to show a positive correlation is not dispositive concerning the impact of patriotic appeals. Conversely, regarding the second expectation, the extant empirical evidence strongly supports the proposition that countries with higher levels of patriotism exhibit higher levels of tax compliance.<sup>50</sup>

As early as the late 1800s, scholars noted this intuitive correlation between patriotism and tax compliance suggested under

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Parković, *supra* at 2. Conversely, nationalism emanates from a common “nation,” (i.e., birth and ancestry) and therefore carries overtones of a shared ethnicity and cultural antecedents. Primoratz, *supra* at 18. Thus, the hallmark of nationalism is a love of and loyalty to the “people” as a “nation” and only derivatively to the “nation-state” as a political entity. Nationalism’s focus is on the superiority of one group of individuals to another with inevitable consequences for “outsiders” whether physically located within the nation-state or outside it. Ross Poole, *Patriotism and Nationalism*, in PATRIOTISM: PHILOSOPHICAL AND POLITICAL PERSPECTIVES 129–30 (Igor Primoratz & Aleksandar Pavković eds., 2007). On the other hand, others argue there is little practical difference attributable to such semantic distinctions. For an anthology of the early seminal published writings on these topics, see *id.* For a cogently argued defense of the republican form of patriotism discussed above and its potential use in combating nationalism, see MAURIZIO VIROLI, FOR LOVE OF COUNTRY: AN ESSAY ON PATRIOTISM AND NATIONALISM (1995). So, to be absolutely clear, the purpose of this Article is *not* to take a position in any of these scholarly debates regarding the nature of patriotism, its moral justifications, or whether it should be viewed as a virtue or an inherent evil leading inevitably to conflicts, wars, and exterminations. The point of this Article is merely to acknowledge that, for good or ill, individuals *do* exhibit pride in their country to greater or lesser degrees, and this patriotic feeling has a positive correlation with tax compliance. While this Article ultimately suggests channeling patriotic feeling away from anti-tax rhetoric as a means of strengthening this tax compliance correlation, it should not be taken as an intellectual endorsement of patriotism as an unabashedly positive force in all contexts.

50. See *infra* notes 70–82 and accompanying text.

the social contract approach in connection with the income tax imposed during the Civil War.<sup>51</sup> Most wars result in the warring nations making patriotic appeals to their citizens to support the wars, including through increased taxation, that are quite successful.<sup>52</sup> Indeed, it has been compellingly documented that most of the major wars in which the United States has participated have created conditions conducive to successful tax reform initiatives, as the unity created by the armed conflict has overcome prior resistance.<sup>53</sup> Thus, there is little dispute that patriotic appeals during wartime can positively affect tax compliance.<sup>54</sup>

However, the empirical work on patriotism outside of wartime is fairly limited.<sup>55</sup> While not focusing on patriotism per se, several studies have focused on the analogous question of whether social contract-based moral appeals have an impact on taxpayer compliance.<sup>56</sup> These studies have failed to find any statistically

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51. Joseph A. Hill, *The Civil War Income Tax*, 8 Q. J. ECON. 416, 451 (1894).

52. For instance, in World War II the United States went so far as to have Walt Disney produce a cartoon featuring Donald Duck as a reluctant taxpayer who is ultimately swayed to pay his taxes in order to help defeat the Axis powers. Carolyn C. Jones, *Class Tax to Mass Tax: The Role of Propaganda in the Expansion of the Income Tax During World War II*, 37 BUFF. L. REV. 685, 716 (1989). Similarly, the Great Depression, and tax protests in the early 1930s, prompted national and local “pay your taxes” campaigns initiated by various interested parties to boost compliance at a time of great budgetary and national strain. See DAVID T. BEITO, TAXPAYERS IN REVOLT: TAX RESISTANCE DURING THE GREAT DEPRESSION 101–29 (1989).

53. STEVEN A. BANK ET AL., WAR AND TAXES (Kathleen Courrier et al. eds., 2008).

54. Joel Slemrod, *Cheating Ourselves: The Economics of Tax Evasion*, J. ECON. PERSP., Winter 2007, at 25, 40 (reviewing the existing evidence for the link between patriotism and tax compliance in times of war).

55. TORGLER, TAX MORALE, *supra* note 11, at 41 (“[T]o the author’s knowledge, [national pride] has been completely neglected in the tax compliance literature.”); Slemrod, *supra* note 54, at 40 (noting that whether “[patriotic] campaigns are successful during ordinary (nonwar) times in swaying taxpayers from their otherwise optimal compliance strategy has not been compellingly demonstrated”). The extant studies that do examine patriotism (sometimes referred to as national pride or nationalism) only do so as part of a larger analysis of tax morale factors; nevertheless, the limited studies that exist consistently find a positive correlation between patriotism and tax compliance. See, e.g., James Alm et al., *Russian Attitudes Toward Paying Taxes—Before, During, and After the Transition*, 33 INT’L J. SOC. ECON. 832, 850 (2006); Jorge Martinez-Vazquez & Benno Torgler, *The Evolution of Tax Morale in Modern Spain*, 43 J. ECON. ISSUES 1, 15 (2009); Benno Torgler, *Tax Morale in Latin America*, 122 PUB. CHOICE 133, 151 (2005); Benno Torgler, *Tax Morale in Transition Countries*, 15 POST-COMMUNIST ECON. 357, 374 (2003); Benno Torgler, *To Evade Taxes or Not to Evade: That Is the Question*, 32 J. SOCIO-ECON. 283, 294 (2003); Benno Torgler & Friedrich Schneider, *What Shapes Attitudes Toward Paying Taxes? Evidence from Multicultural European Countries*, 88 SOC. SCI. Q. 443, 456 (2007).

56. See TORGLER, TAX MORALE, *supra* note 11, at 239–63; Marsha Blumenthal et al., *Do Normative Appeals Affect Tax Compliance? Evidence from a Controlled Experiment in Minnesota*, 54 NAT’L TAX J. 125 (2001); Kathleen M. McGraw & John T. Scholz, *Appeals to*

significant correlation between the appeals and increased tax compliance.<sup>57</sup> For instance, in a study done in Minnesota, two groups of taxpayers were sent form letters containing different normative appeals encouraging tax compliance.<sup>58</sup> One letter contained a paragraph describing the proportion of tax dollars spent on various government services, including education, social welfare, highways, and transfers to support local community services (e.g., police and snow removal).<sup>59</sup> The paragraph concluded with: “So when taxpayers do not pay what they owe, the entire community suffers.”<sup>60</sup> The intent of the letter was to promote tax compliance by highlighting the services taxpayers receive in exchange for their tax dollars (a social contract approach) and by invoking a sense of shared obligation regarding the continued provision of these valued services (a moral- or conscience-based appeal).<sup>61</sup> While the study showed a successful persuasion of 0.8 percent for taxpayers receiving the letter (i.e., on average those receiving the letter increased the taxes they paid by a small amount), the effect was not statistically significant.<sup>62</sup> Similar results were obtained in a field study involving actual taxpayers in a particular Swiss village who were sent letters containing a paragraph (in varying degrees of strength) about the moral duty to pay taxes to provide for the needs of their local community.<sup>63</sup>

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*Civic Virtue Versus Attention to Self-Interest: Effects on Tax Compliance*, 25 LAW & SOC’Y REV. 471 (1991).

57. See sources cited *supra* note 56. This conclusion accords with the experimental evidence in nontax situations, which typically find moral appeals operate best when emergency situations exist (e.g., please donate to a charity following a natural disaster) and have limited utility otherwise. See, e.g., TORGLER, TAX MORALE, *supra* note 11, at 241–42 (reviewing the relevant literature).

58. Blumenthal et al., *supra* note 56, at 128.

59. *Id.* at 137. The other letter noted that most taxpayers “file their returns accurately and on time,” and implicitly encouraged the reader to be part of this honest majority rather than one that “deliberately cheat[s].” *Id.* at 138. As a separate study, the authors also conducted an experiment using a form letter informing taxpayers of an increased chance of audit. Joel Slemrod et al., *Taxpayer Response to an Increased Probability of Audit: Evidence from a Controlled Experiment in Minnesota*, 79 J. PUB. ECON. 455 (2001).

60. Blumenthal et al., *supra* note 56, at 137.

61. *Id.* at 129.

62. *Id.* at 131.

63. TORGLER, TAX MORALE, *supra* note 11, at 258 (“Our results are in line with those of previous findings, indicating that moral suasion has hardly any effect on taxpayers’ compliance behaviour.”). The Swiss study was focused at the municipal level on the theory that taxpayers would feel more connected with the services they receive from their particular municipality, and, therefore, moral persuasion would be more likely to be effective. *Id.* at 243, 258.

While neither the Minnesota study nor the Swiss experiment showed a statistically significant relationship between social contract-based moral appeals and increased tax compliance, the relevance of their findings to patriotic-based appeals can be questioned. First, the content of the letters was not specifically patriotic. Rather, the appeal was a form of moral persuasion based on an assumption that taxpayers, in fact, believed that the government's utilization of their tax dollars was appropriate and valuable. That is, the appeal was to pay taxes since valued societal benefits would not occur without voluntary compliance, and, hence, a moral duty existed to contribute toward the provision of such goods.<sup>64</sup> While it may well be true that most taxpayers did support the government's allocation of resources, that is by no means a given. In any event, it is not clear that believing government expenditures are socially useful and valuable in their own right is necessarily correlated to the concept of patriotism. An individual could still place a high value on road maintenance, garbage collection, and other government services without having any patriotic feelings whatsoever. Conversely, even citizens feeling a high level of patriotism toward their country generally might not actually value or support specific government programs. They might well disagree with the particular allocation of resources while nevertheless still feel bound by a strong patriotic duty to fund their government. Further, even if taxpayers are patriotic and in fact agree with and value government services, a generalized social contract-based appeal may simply be too amorphous for

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64. In the Minnesota study, the relevant persuasive paragraph reads as follows:

Your income tax dollars are spent on services that we Minnesotans depend on. Over 30 percent of state taxes go to support education. Another 18 percent is spent on health care and support for the elderly and the needy. Local governments get about 12 percent of the state tax money, supporting services in your community such as law enforcement, parks, libraries and snow removal. Other tax dollars pay for highways and for cleaning up the environment. So when taxpayers do not pay what they owe, the entire community suffers.

Blumenthal et al., *supra* note 56, at 137. In the Swiss study, the relevant persuasive appeal stated:

The taxes you pay are vital for maintaining the municipal tasks in [the municipality of] Trimbach. If the taxpayers did not contribute their share, our commune with its 6,226 inhabitants would suffer greatly. With your taxes, you help keep Trimbach attractive for its inhabitants. . . . [The] Swiss system [of active participation in the legislative process and self-declaration by taxpayers] presupposes that citizens have a sense of responsibility and are ready to maintain the functioning of municipalities, cantons and the state. With your conscientious tax declaration, you contribute to preserving this democratic and liberal structure.

TORGLER, TAX MORALE, *supra* note 11, at 261.

people to equate it with patriotism. For instance, a conscience-based appeal that you should pay your taxes so that society can care for the old and infirm may lack the resonance of an appeal stating that you are being unpatriotic or disloyal to the state by cheating on your taxes. It is unclear whether taxpayers hearing this type of conscience-based appeal will readily interpret it as also implying the patriotic appeal. So, while patriotism may imply shared values regarding the social contract, it is not clear that the impact of social contract-based appeals would be the same as specific patriotic-based appeals.

Second, both studies involved subnational level taxation (i.e., a particular state within the United States or a particular village within Switzerland), rather than a tax imposed at the national level.<sup>65</sup> Patriotism is essentially a national level affinity, and, therefore, the strength of patriotic appeals at a state or local level would be much weaker.<sup>66</sup> Further, given the mobility of modern society, it is also quite possible that the state (or municipality) to which one has a “patriotic” affinity is not the place where he currently lives and pays taxes. Consequently, studying the impact of patriotism on tax compliance at the state or municipal level seems inappropriate.

Finally, it may be significant that both studies were done in the context of a single written appeal to actual taxpayers. As the studies themselves note, receipt of a form letter may be insufficient contact to alter an individual’s historic beliefs and behaviors.<sup>67</sup> Thus, the studies do not illuminate whether a more sustained persuasive campaign would have had an impact. This is particularly true in the

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65. Indeed, the focus on the subnational level was intentional in at least the Swiss study as the researchers felt there was more likely to be a significant impact when individuals studied have a closer tie to the government services provided. TORGLER, TAX MORALE, *supra* note 11, at 243, 258.

66. Of course, the strength of the “patriotic” affinity to a particular state or municipality may depend on the particular state involved and the length of an individual’s residence there. One can imagine a native Texan having a bit more loyalty and pride in his state than does a recent New Jerseyan who is just figuring out which exit number he lives at off the New Jersey Turnpike. Then again, while most New Jerseyans dislike the old “So, you’re from New Jersey? What exit?” joke, the New Jersey Historical Society chose it as the name for its highly interesting online exhibit commemorating the fiftieth anniversary of the Turnpike and its formative impact on the state and its citizens. *NJHS / What Exit?*, THE N.J. HISTORICAL SOC’Y, [http://www.jerseyhistory.org/what\\_exit/index.html](http://www.jerseyhistory.org/what_exit/index.html) (last visited Sept. 1, 2011). The Author, having been born in Pennsylvania and having resided in an additional ten states—including both the aforementioned Texas and New Jersey—must perforce imagine here, as he personally will always be a Mainer at heart.

67. TORGLER, TAX MORALE, *supra* note 11, at 259; Blumenthal et al., *supra* note 56, at 134–35.

context of examining the role of patriotism in tax morale. Whether a particular individual is more or less tax compliant is primarily based on his intrinsic patriotism as it has developed (or atrophied) over his lifetime. Consequently, a single letter, or even a series of related letters, making a patriotic appeal may have little impact on observed compliance since the individual's intrinsic level of patriotism is already figured into his compliance profile. Similarly, while overall patriotism levels may differ from society to society, within a particular society any random sampling of taxpayers is likely to mimic the range of intrinsic patriotism levels evidenced by the society as a whole and mask the effect of patriotism when comparisons are made solely based on different groups within that particular society. For all of these reasons, the lack of any statistically significant correlation between social contract-based moral appeals and tax compliance in the extant studies should not be viewed as indicating there would be no correlation associated with patriotic-based appeals. On the other hand, there is no evidence supporting such a correlation outside of wartime either.<sup>68</sup>

Beyond these moral suasion type studies, the literature focusing specifically on patriotism as a factor is quite limited.<sup>69</sup> As noted above, one difficulty in determining the impact of patriotism on tax morale is that the impact of patriotism may be masked somewhat when examining one society in isolation. Thus, the extant studies discussing the role of patriotism are all based on multicountry survey data.<sup>70</sup> Such survey-based studies demonstrate that higher levels of

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68. Slemrod, *supra* note 54, at 40. Ultimately, finding a limited impact for patriotic appeals outside of wartime would be in accord with the relevant studies regarding morality-based persuasive appeals in non-tax contexts that indicate that the impact of such appeals is likely to be short lived and limited to periods of crisis. TORGLER, TAX MORALE, *supra* note 11, at 241 (discussing relevant authorities and noting that “[i]n general, economists are rather cautious regarding the effects of moral suasion . . . [but some] are more optimistic about the effects of moral suasion in a state of emergency . . .”).

69. See *supra* notes 54–55.

70. In such multicountry surveys, a group of individuals from each country are asked the same survey questions. Such surveys provide researchers with a large amount of demographic and attitudinal data about the respondents that can be manipulated using sophisticated statistical techniques to unearth relevant correlations. However, a risk in relying on such surveys is that a surveyed group might not truly be representative of their country. As a result, such surveys are typically repeated at regular intervals and special care is taken to achieve a representative data set. For a detailed discussion of the use of such survey data in the tax morale context (including the pros and cons of such usage), see TORGLER, TAX MORALE, *supra* note 11, at 6–10.

patriotism positively correlate with better tax morale.<sup>71</sup> Additionally, the impact of patriotism on tax compliance emerging from these studies appears fairly dramatic. For instance, in one study of the role of national pride in Latin American countries, the researchers concluded that “[w]e find a positive correlation between pride and tax morale. An increase in pride by one unit [measured on a one-to-four scale] raises the share of persons arguing that tax [cheating] is never justifiable by 9.2 percentage points.”<sup>72</sup>

The most recent study focusing on patriotism as a tax morale factor used survey data from the International Social Survey Programme collected from eight industrialized countries.<sup>73</sup> The patriotism level utilized in the study was derived from participant responses to a series of questions asking about the participants’ pride in their country’s accomplishments in various areas.<sup>74</sup> The level of tax compliance was determined based on the participants’ responses to a question asking how important it is (on a scale of one to seven) to never attempt to evade taxes.<sup>75</sup> Based on this data, the study analyzed the results in terms of (1) comparing countries based on their average patriotism and tax evasion levels; (2) comparing individuals from all countries as a group in terms of their relative individual patriotism/compliance profiles; and (3) breaking out the individual results for each of the eight countries to ensure that one country was not skewing the aggregate results.<sup>76</sup>

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71. *Id.* at 41, 44–47 (see Tables 1.7, 1.8, and 1.9, presenting the effects of national pride on tax morale in Europe, North and South America, and Asian countries, respectively, and noting that “[i]n almost all estimations, a higher level of [national] pride leads to significantly better tax morale. Thus, independent of the cultural setting, this variable has a strong effect on tax morale”).

72. *Id.* at 208; see also KAI A. KONRAD & SALMAI QARI, *THE LAST REFUGE OF A SCOUNDREL? PATRIOTISM AND TAX COMPLIANCE* 8, 10 (2011), available at [http://www.tax.mpg.de/files/pdf/2011\\_03\\_21\\_patriotism\\_compliance\\_paper\\_final.pdf](http://www.tax.mpg.de/files/pdf/2011_03_21_patriotism_compliance_paper_final.pdf) (finding that an increase of one standard deviation in the level of patriotism increases the probability of the highest category of tax compliance by 8 percent and is roughly equivalent to the 9 percent decrease in the highest compliance level associated with being self-employed).

73. KONRAD & QARI, *supra* note 72, at 2–3. The eight countries were the United States, Austria, Ireland, Poland, Canada, Portugal, Uruguay, and the Netherlands. *Id.* at 20 n.10.

74. *Id.* at 5. Participants were asked to rate their pride in the way the country’s democracy works; its economic achievements; its scientific and technological achievements; its fair and equal treatment of all groups; its achievements in the arts and literature; its history; its political influence in the world; its achievements in sports; and its armed forces. *Id.* at 5 tbl.1.

75. *Id.* at 5.

76. *Id.* at 4.

The study found that higher average patriotism levels were positively correlated with lower aggregate levels of tax evasion. In this regard, the United States was both the most patriotic country and the one exhibiting the least aggregate tax avoidance.<sup>77</sup> On an aggregate cross-country individual basis, the study found a strong correlation between the level of patriotism and tax compliance. Additionally, the study found that marginal increases in the patriotism level appear to correlate with significantly higher compliance,<sup>78</sup> suggesting that even a small increase in an individual's patriotism level could have significant tax compliance benefits. Finally, breaking out the individual participants by country confirmed the aggregate result in that each country showed that individuals having a higher patriotism level have higher probabilities of high tax compliance.<sup>79</sup>

Interestingly, the United States showed the smallest such correlation of all the countries. That is, while higher levels of patriotism were still positively correlated with greater probabilities of high tax compliance, the relative effect was less than that in the other countries. The authors of the study hypothesized that this might be primarily due to the high levels of compliance in the United States, masking the impact of patriotism.<sup>80</sup> That is, given the high levels of tax compliance in the United States, there is a smaller pool of noncompliant taxpayers on which patriotism could act as a compliance trigger, so the impact appears lessened. While this is a plausible explanation, the study's results still leave open the possibility that patriotism is, in fact, a weaker factor in fostering tax compliance in the United States than it is elsewhere.<sup>81</sup> Such a conjecture finds support from the strong historical links in the United

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77. While the published version of this study merely summarizes the country specific data, a more fulsome overview of the country specific data (which identifies the first-place position of the United States on these measures) was contained in the working draft of the article. Kai A. Konrad & Salmay Qari, *The Last Refuge of a Scoundrel? Patriotism and Tax Compliance* 12, 14 (IZA, Discussion Paper No. 4121, 2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1391793](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1391793) (using the size of the shadow economy in each nation as a surrogate measure for the level of tax evasion occurring within the nation).

78. *Id.* at 18.

79. *Id.* at 15.

80. KONRAD & QARI, *supra* note 72, at 16.

81. This is not to say that patriotism is not still a strong factor. As the study demonstrates in terms of their country to country comparison, the United States is clearly the most patriotic and the most tax compliant. *See supra* note 77.

States between patriotism and anti-tax sentiments.<sup>82</sup> Could it be that America's peculiar brand of anti-tax flavored patriotism actually decreases the intrinsic impact of patriotism as a tax compliance factor in the United States?

#### IV. THE UNIQUE NATURE OF U.S. PATRIOTISM

From the very founding of the United States, American patriotism has been associated with anti-tax sentiment. Indeed, the rallying cry of “no taxation without representation” forms the bedrock of many Americans' understanding of why the colonies rose up in revolt.<sup>83</sup> Additionally, the pioneer values of independence and individual self-reliance have contributed to a strong undercurrent distrustful of centralized government.<sup>84</sup> Since the nation itself was founded as part of a tax rebellion, it is, perhaps, understandable that American patriotism has an almost schizophrenic nature embodying both loyalty to the nation as well as distrust of its government, and a concomitant reluctance to fund the operation of potentially intrusive government activities.

Beyond the Revolutionary period, anti-tax sentiment and armed tax revolts have continued to reinforce a patriotic linkage. From Shay's Rebellion (which gave impetus to reforming the Articles of Confederation) to reenactments of the Boston Tea Party protesting modern day tax burdens, challenging the appropriateness of taxes has been seen as an act of patriotism, or conversely, as the patriotic defense of citizen rights against the tyranny of taxation.<sup>85</sup> As a result

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82. See *infra* Part IV.

83. Grant Dorfman, *The Founders' Legal Case: "No Taxation Without Representation" Versus Taxation No Tyranny*, 44 HOUS. L. REV. 1377, 1378 (2008) (“That ‘no taxation without representation’ was the rallying cry of colonists seeking their independence in 1776 is the ‘mother’s milk’ of American history education. Generations of schoolchildren have been weaned on it.”). Of course, the validity of the proposition that the American Revolution was in fact prompted primarily by ideological opposition to oppressive taxation (as opposed to taxation merely being a convenient pretext for the Founding Fathers' fixed intention to rebel) has been the subject of substantial scholarly dispute. *Id.* at 1381–86 (succinctly reviewing the scholarly debate regarding the real motives underlying the American Revolution). Nevertheless, the popular belief that excessive taxation was the key factor is well established. *Id.* at 1378–79.

84. 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? 28, 30–33 (John R. Hibbing & Elizabeth Theiss-Morse eds., 2001) (suggesting that in the United States a low level of trust in government is the prevailing norm).

85. See ADAMS, *supra* note 2.

of this rich history, “[i]n the United States, anti-tax sentiments, along with anti-government sentiments generally, are an intrinsic aspect of American patriotism and national character. . . . Americans celebrate their patriotism and commitment to liberty through resistance—often violent resistance—to taxes.”<sup>86</sup> Indeed, a well-known tax protestor manifesto proudly notes that “[i]t was tax protesters, not any political party, or judge or prosecutor who gave us our great Constitutional Republican form of government. The tax protest is more American than baseball, hot dogs, apple pie or Chevrolet!!”<sup>87</sup>

This popular linkage of patriotism with anti-tax sentiment has also given rise, in the modern era, to an accepted belief that patriotism has no proper role in determining a citizen’s taxpaying obligations. While in the early 1900s a prevailing strain of thought branded tax evaders as unpatriotic, faithless, and detestable cowards,<sup>88</sup> beginning in the 1920s, views on taxation began to shift.<sup>89</sup> This body of thought began to draw a legalistic (and hence morally indifferent) distinction between tax avoidance and tax evasion.<sup>90</sup> As long as a tax minimization scheme arguably was not prohibited by the letter of the law, then it was permissible, since there was no moral or patriotic duty to fund the state.<sup>91</sup> Only explicitly illegal means of tax avoidance were prohibited. This amoral conception of the nature of taxation was ultimately adopted by the courts, which, even when they ruled against various taxpayer avoidance schemes, made sure to emphasize that citizens’ tax obligations were legal, not

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

87. *Miller v. United States*, 868 F.2d 236, 240 (7th Cir. 1989) (quoting BILL BENSON & M.J. “RED” BECKMAN, *THE LAW THAT NEVER WAS*, at xvii (1985)).

88. JOHN S. WISE, *A TREATISE ON AMERICAN CITIZENSHIP* 74 (1906).

89. See Assaf Likhovski, *The Duke and the Lady: Helvering v. Gregory and the History of Tax Avoidance Adjudication*, 25 CARDOZO L. REV. 953, 997–1000 (2004) (discussing the changing judicial, legal, economic, and political views on taxation and tax avoidance that began to emerge in the 1920s, and the shift from moral to “amoral discourse on tax avoidance”).

90. This concept can be seen in law review articles in this period. See, e.g., John H. Sears, *Effective and Lawful Avoidance of Taxes*, 8 VA. L. REV. 77, 77–79 (1921).

91. See, e.g., Paul Marcuse, *Six Years of National-Socialistic Practice in Taxation*, 13 TUL. L. REV. 534, 556–57 (1939) (justifying the distinction by noting that “[t]he old spirit of the pilgrims and the pioneers [holds that government intervention is odious, and] as long as this spirit prevails, it can neither be unpatriotic nor immoral to reduce taxation by means which are not strictly illegal”).

patriotic, duties.<sup>92</sup> Thus, the duty to pay taxes evolved into a purely legal question divorced of all moral or patriotic flavor.<sup>93</sup>

V. THE TEA PARTY MOVEMENT  
AND ITS POTENTIAL TO UNBALANCE  
THE U.S. TAXPAYING ETHOS

The level of voluntary tax compliance in the United States is a relatively high 84 percent overall.<sup>94</sup> This compliance level has remained stable for an extended period of time and demonstrates the existence of a stable taxpaying ethos. The social contract framework set forth in Part II would predict such a high voluntary compliance rate. The United States enjoys a long history of well-established representative democratic institutions entrusted with lawmaking and

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92. The seminal statements in this regard, which continue to be cited with approval to this day, include: *Gregory v. Helvering*, 293 U.S. 465, 469 (1935) (“The legal right of a taxpayer to decrease the amount of what otherwise would be his taxes, or altogether avoid them, by means which the law permits, cannot be doubted.”); *Superior Oil Co. v. Mississippi*, 280 U.S. 390, 395–96 (1930) (“The only purpose of the vendor here was to escape taxation . . . . The fact that it desired to evade the law, as it is called, is immaterial, because the very meaning of a line in the law is that you intentionally may go as close to it as you can if you do not pass it.”); *Bullen v. Wisconsin*, 240 U.S. 625, 630–31 (1916) (“[W]hen the law draws a line, a case is on one side of it or the other, and if on the safe side is none the worse legally that a party has availed himself to the full of what the law permits. When an act is condemned as an evasion what is meant is that it is on the wrong side of the line indicated by the policy if not by the mere letter of the law.”); *Commissioner v. Newman*, 159 F.2d 848, 850–51 (2d Cir. 1947) (Hand, J., dissenting) (“Over and over again courts have said that there is nothing sinister in so arranging one’s affairs as to keep taxes as low as possible. Everybody does so, rich or poor; and all do right, for nobody owes any public duty to pay more than the law demands: taxes are enforced exactions, not voluntary contributions. To demand more in the name of morals is mere cant.”); *Helvering v. Gregory*, 69 F.2d 809, 810 (2d Cir. 1934), *aff’d*, 293 U.S. 465 (1935) (“[A] transaction, otherwise within an exception of the tax law, does not lose its immunity, because it is actuated by a desire to avoid, or, if one choose, to evade, taxation. Any one may so arrange his affairs that his taxes shall be as low as possible; he is not bound to choose that pattern which will best pay the Treasury; there is not even a patriotic duty to increase one’s taxes.”). *But see* David A. Weisbach, *Ten Truths about Tax Shelters*, 55 TAX L. REV. 215, 215–17 (2002) (advocating that all tax planning should be made illegal).

93. Indeed, the present state of the law in this regard has become what J.P. Morgan argued for in the 1930s. *See Legal Tax-Dodging Upheld by Morgan*, N.Y. TIMES, June 8, 1937, at 27 (noting Morgan’s statements that “taxation is a legal question . . . not a moral one” and that “Congress should know how to levy taxes and if it doesn’t know how to collect them, then a man is a fool to pay the taxes”).

94. The Internal Revenue Service (the “Service”) estimates of taxpayer compliance since the mid-1980s have remained fairly stable at about 82 to 84 percent. *See, e.g.*, George Guttman, *IRS Updates Estimates on Individual Tax Gap*, TAX NOTES TODAY, May 10, 1996, available at LEXIS 96 TNT 93-5 (reporting an 81.5 percent rate for 1985 and 83 percent rate for both 1988 and 1992); Dustin Stamper, *Everson Pledges to Narrow Growing Tax Gap*, TAX NOTES, Feb. 20, 2006, at 807, available at LEXIS 110 Tax Notes 807 (reporting an 83.5 percent rate for 2001, the most recent data year available).

enforcement. Since citizens play a role in electing those who set the tax laws, and since citizens can also vote out those who go against the popular will, citizens are more likely to accept the tax laws as legitimate and voluntarily comply. Similarly, in terms of other citizens' compliance, the popular belief is that the government vigilantly enforces the tax laws and that most people do in fact pay their taxes, albeit grudgingly in many cases, on April 15 of each year.<sup>95</sup> While this belief may have been weakened in recent years by publicity surrounding the size of the tax gap in the United States<sup>96</sup> and surrounding various high profile tax prosecutions,<sup>97</sup> there is little evidence that the prevailing taxpaying ethos has yet been altered.<sup>98</sup>

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95. Indeed, a recent article has documented that the Tax Division of the Department of Justice initiates and publicizes more high profile criminal prosecutions around tax-filing time than it does during the rest of the year. Joshua D. Blank & Daniel Z. Levin, *When Is Tax Enforcement Publicized?*, 30 VA. TAX REV. 1 (2010). Presumably, this is the result of either an explicit or implicit decision to give all taxpayers the signal that the tax laws are being enforced. Of course, there is a fine line between signaling vigilant enforcement and signaling that there is a high level of noncompliance throughout society, since a lot of people, including some high profile personalities we might generally aspire to emulate, are in fact cheating.

96. As noted earlier, the tax gap has been the subject of significant scholarly attention in recent years. *See supra* note 10. Similar attention has been paid in the popular press as well, usually highlighting the large dollar amount of the uncollected taxes. Roberta Mann, *Beyond Enforcement: Top 10 Strategies for Encouraging Tax Compliance*, TAX NOTES, May 22, 2006, at 919, available at LEXIS 111 Tax Notes 919; *see also* Richard B. Malamud & Richard O. Parry, *It's Time to Do Something About the Tax Gap*, 9 HOUS. BUS. & TAX L.J. 1, 2–3 (2008) (noting that the term “tax gap” is now ubiquitous in American society).

97. For a brief compilation of some recent high profile tax cheaters in politics and the entertainment industry, see Lavoie, *supra* note 13, at 637–38 nn.3–4; Branham, *supra* note 10, at 1507.

98. The relevant empirical work in this area indicates that if individuals believe others are cheating on their taxes, they are more likely to cheat themselves. Sheffrin & Triest, *supra* note 44, at 214 (showing that perceiving other taxpayers as dishonest significantly increases permissive attitudes toward tax evasion and increases the likelihood a person will avoid taxes); Michael R. Welch et al., “*But Everybody Does It . . .*”: *The Effects of Perceptions, Moral Pressures, and Informal Sanctions on Tax Cheating*, 25 SOC. SPECTRUM 21, 22 (2005) (“[T]he more prevalent an individual perceives tax evasion to be within the community, the less likely the individual will be to judge the act harshly, the less likely he or she will be to fear informal sanctions directed against it, and the more inclined the individual will be to commit tax evasion in the future.”); *see also* FRANK A. COWELL, CHEATING THE GOVERNMENT: THE ECONOMICS OF EVASION 102 (1990) (“[W]hether or not a taxpayer is compliant with tax demands is significantly affected by the social grouping in which the taxpayer finds himself.”); Marco R. Steenbergen et al., *Taxpayer Adaptation to the 1986 Tax Reform Act: Do New Tax Laws Affect the Way Taxpayers Think about Taxes?*, in WHY PEOPLE PAY TAXES 9, 29–30 (Joel Slemrod ed., 1992) (indicating that taxpayer commitment to tax compliance was impacted by the attitudes of other taxpayers they communicated with in the months leading to a major tax reform); Frey & Torgler, *supra* note 11, at 153 (demonstrating that, in Western and Eastern Europe, tax morale decreases when tax evasion is perceived as common); Richard D. Schwartz & Sonya Orleans, *On Legal Sanctions*, 34 U. CHI. L. REV. 274, 276–77 (1967) (noting, based on anecdotal information, that publicized cases of tax evasion sometimes trigger additional tax cheating by those who believe they will not

While a strong taxpaying ethos exists in the United States, extreme anti-tax rhetoric and a strong tax protestor movement could upset the delicate balance that maintains the existing ethos. Further, although anti-tax rhetoric has been a factor in American politics since before the Revolutionary War, the strength and stridency of the rhetoric have ebbed and flowed over the years.<sup>99</sup> Typically, the worst eruptions of such sentiments have been focused on specific taxes, and when those taxes were modified, the sentiment has died down.<sup>100</sup> Similarly, while tax protestors have asserted for years that the tax law does not apply to them,<sup>101</sup> such protestors represent a true fringe

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be pursued by the government, since the government seems to only go after very egregious cheaters). As a corollary to this finding, it would seem that publicizing the level of tax cheating would highlight the level of tax evasion in society and thereby weaken individual tax compliance. See, e.g., Sheffrin & Triest, *supra* note 44, at 213–14 (“Publicizing the ‘tax gap’ increases the degree to which others are viewed as dishonest. Estimates . . . suggest that this shift in perceived honesty will result in an increase in noncompliance.”); Mann, *supra* note 96, at 921 (noting that public accounts regarding the tax gap fail to note the generally high level of tax compliance and could therefore lead taxpayers to erroneously believe cheating is rampant, which could then undermine voluntary compliance). However, as noted earlier, tax compliance rates in the United States have remained quite stable over the years, despite the tax gap being publicly discussed since at least the mid-1980s. Malamud & Parry, *supra* note 96, at 2–3. One explanation may be that while faith in the tax compliance of others has lessened, the damage done to this one tax-morale factor has not been sufficient to cause the equilibrium of our stable taxpaying ethos to “flip” into one of noncompliance. See Lavoie, *supra* note 13, at 674–75 (indicating that societies exhibiting a stable taxpaying ethos do not gradually sink into noncompliance, but instead flip into a noncompliance norm once a tipping point is reached); Lederman, *supra* note 11, at 1509–10 (same). Alternatively, some have suggested that the impact of publicizing enforcement is predominately interpreted by the public as the government doing its job and catching wrongdoers, rather than highlighting the prevalence of cheating, and, as such, is still a net positive in terms of promoting tax compliance. See, e.g., Branham, *supra* note 10, at 1508 (taking the position that high profile tax enforcement actions should be affirmatively embraced as a means of encouraging tax compliance); Lederman, *supra* note 11, at 1485–99 (reviewing the conflicting studies regarding the impact of publicized tax enforcement and tax compliance and concluding that “the speculation that sanctions for tax evasion will tend to undermine compliance does not seem to be supported by the evidence”).

99. ADAMS, *supra* note 2, at xiii (reviewing the periods of serious tax revolt in the United States).

100. *Id.*

101. While some refuse to pay taxes based on moral or religious grounds, the tax protestors focused on here are the ones who make patently frivolous claims that the tax laws do not apply to them, especially those who proselytize their tax protest ideology to others. There are a wide variety of such claims, but most assert that the Constitution forbids income taxation, that the Sixteenth Amendment was improperly adopted, or that the scope of the Sixteenth Amendment and relevant taxing statutes properly interpreted in fact make paying taxes voluntary. Danshera Cords, *Tax Protestors and Penalties: Ensuring Perceived Fairness and Mitigating Systemic Costs*, 2005 BYU L. REV. 1515, 1515–16 (2005); Christopher S. Jackson, *The Inane Gospel of Tax Protest: Resist Rendering Unto Caesar—Whatever His Demands*, 32 GONZ. L. REV. 291, 300–21 (1996); Ray Walden, Comment, *Render Unto Uncle Sam That Which Is Uncle Sam's: The IRS and Tax Protest Evangelism*, 61 NEB. L. REV. 681, 697–98 (1982). Indeed, the IRS has created an eighty-page document identifying and refuting numerous frivolous tax protestor

element, asserting patently frivolous arguments with no chance of exerting any real sway on the beliefs of the broader society.<sup>102</sup> The real threat from these forces would be that they become a more pervasive phenomenon so that people begin to question the very legitimacy of our democratic institutions and view the government not as an outgrowth of themselves but as an oppressive Leviathan aimed at stealing their freedom.<sup>103</sup>

More than any other anti-tax group in recent history, the tea party movement has the potential to unsettle the taxpaying ethos in the United States. While the movement encompasses a number of groups that have traditionally held extreme views, the movement's appeal is clearly more widespread than the appeal of these fringe elements.<sup>104</sup> As even President Obama has acknowledged, the tea

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claims. *The Truth about Frivolous Tax Arguments*, INTERNAL REVENUE SERV., (Jan. 1, 2011), <http://www.irs.gov/taxpros/article/0,,id=159853,00.html>.

102. Calculating the actual size of the frivolous tax protestor movement is a difficult endeavor. As a minimum estimate, one can point to the fact that on June 30, 1981, the IRS was investigating 13,600 illegal tax-protestor returns. *Miller v. United States*, 868 F.2d 236, 239 (7th Cir. 1989). However, the IRS ceased classifying individual returns as those of "illegal tax protesters" after Congress affirmatively banned the IRS from "designating taxpayers as illegal tax protesters (or any similar designation)" as part of the IRS Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 3707, 112 Stat. 778 (1998). Today, the IRS addresses tax protesters on a year-by-year only basis through independent programs dealing with (1) frivolous return positions; (2) non-filers; and (3) potentially dangerous taxpayers (those who have threatened or harmed IRS personnel). Treasury Inspector Gen. for Tax Admin., *TIGTA Reviews Compliance with Guidelines Barring Use of Illegal Tax Protester Label*, TAX NOTES TODAY, June 2, 2009, available at LEXIS 2009 TNT 103-34. At the other end of the spectrum, some have indicated that tax protesters may number in the hundreds of thousands. David Cay Johnston, *The Anti-Tax Man Cometh*, N.Y. TIMES, July 5, 1995, at D1 (noting that "[an IRS] official testified in the trial of an anti-tax activist last year that 'hundreds of thousands of people' directly challenge the legal authority of the I.R.S. by filing protest returns or asserting a constitutional right not to file"); David Cay Johnston, *U.S. Discloses That Use of Tax Evasion Plans Is Extensive*, N.Y. TIMES, May 22, 2002, at C4 (citing Justice Department estimates of at least 152,000 individual income tax returns filed falsely claiming no taxes were due or using abusive schemes to receive a refund). Still, even taking the larger estimate and doubling it to account for those who fail to file any return, the tax protestor movement would represent only one quarter of 1 percent of individual taxpayers (400,000/154 million). See INTERNAL REVENUE SERV., INTERNAL REVENUE SERVICE DATA BOOK, 2009, pub. 55B, at 4 (2010), available at <http://www.irs.gov/pub/irs-soi/09databk.pdf> (showing 154.346 million individual returns filed in 2008).

103. See, e.g., Kornhauser, *supra* note 86, at 826-27 ("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 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.").

104. Aaron Blake, *Elusive Tea Party Democrat Is out There but Hard to Categorize*, WASH. POST, July 6, 2011, at A03 (noting that somewhere between 10 and 20 percent of tea party

party movement includes a cadre of people with legitimate concerns about the U.S. budget deficit and the role of government in addressing the country's economic woes.<sup>105</sup> While the movement is essentially a grassroots affair<sup>106</sup> and not an organized political party with an agreed-on platform of beliefs,<sup>107</sup> the bedrock principles

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supporters identify as Democrats); Neil Munro, *Do Not Boil*, NAT'L J., Apr. 24, 2010, at 63 (noting increased public support for the tea party movement, citing "A CBS News/New York Times poll conducted [in April 2010 that] found that 18 percent of adults consider themselves supporters" and a "USA Today/Gallup poll indicat[ing] that 37 percent of adults, including 14 percent of self-identified Democrats, have a favorable opinion of the movement"); Heidi Przybyla, *Tea Party: Not All Government Is Bad*, ST. LOUIS POST-DISPATCH, Mar. 26, 2010, at A21 (citing a Bloomberg News poll showing that 26 percent of the population identifies as tea party backers); Douglas E. Schoen & Patrick H. Caddell, *Avoiding a Democratic Disaster*, WASH. POST, Apr. 16, 2010, at A23 (noting that despite attempts to "demonize" it, the tea party movement has gotten stronger and advocates a fiscal responsibility agenda endorsed by a majority of Americans); Andy Barr, *Poll: 28% Support Tea Party*, POLITICO (Apr. 5, 2010), <http://www.politico.com/news/stories/0410/35395.html> (reporting Gallup poll showing 28 percent of Americans support the tea party movement); Jennifer Epstein, *Poll: GOP Should Listen to Tea Party*, POLITICO (Jan. 31, 2011), <http://www.politico.com/news/stories/0111/48473.html> (citing a USA Today/Gallup poll finding 71 percent of Americans believe Republican leadership should listen to the tea party movement in formulating policy).

105. *Today Show: Obama Takes on Tea Party and Political Divide* (NBC television broadcast Mar. 30, 2010), transcript and video available at <http://today.msnbc.msn.com/id/26184891/vp/36096587#36096587> (at 5:49 to 7:03) ("There's a part of the Tea Party movement . . . there's some folks who just weren't sure whether I was born in the United States, whether I was a socialist. . . . Then I think that there's a broader circle around that core group of people who are legitimately concerned about the deficit, who are legitimately concerned that the federal government may be taking on too much. . . . And I think those are folks who have legitimate concerns. So I wouldn't paint in broad brush and say that everybody who's involved or gone to a Tea Party rally or a meeting are [sic] somehow on the fringe. Some of them I think have some mainstream legitimate concerns.").

106. *Contra* Paul Krugman, *Tea Parties Forever*, N.Y. TIMES, Apr. 13, 2009, at A21 (maintaining that "tea parties don't represent a spontaneous outpouring of public sentiment. They are Astroturf (fake grass roots) events, manufactured by the usual suspects. In particular, a key role is being played by FreedomWorks, an organization run by Richard Armey, the former House majority leader, and supported by the usual group of right-wing billionaires"). However, even if the genesis of the movement can arguably be traced to such Republican-leaning foundations, the movement has clearly grown beyond those roots.

107. Michael Dawidziak, *Dismiss the Undefinable Tea Party at Your Peril*, NEWSDAY, Apr. 20, 2011, at A32. While "delegates" from hundreds of disparate tea party organizations gathered in an inaugural national tea party "convention" in February 2010, the tea party movement is still nowhere near being a cohesive political party fielding a national slate of candidates. *See* Ann Gerhart & Phillip Rucker, *The Tea Party Is Still Taking Shape*, WASH. POST, Feb. 6, 2010, at A01 (noting disparate beliefs of many tea party members and the lack of any organized electoral platform or strategy); Phillip Rucker, *Fractious First Tea Party Convention Gets Underway*, WASH. POST, Feb. 5, 2010, at A03. While the November 2010 elections saw the election of many legislators who were actively supported by the tea party movement, the cohesion of those members within Congress has yet to be demonstrated. Kathleen Hennessey, *Legislators Reading Tea Leaves*, CHI. TRIB., Jan. 28, 2011, at C17.

driving the movement seem to be a desire for less government spending and lower taxes.<sup>108</sup>

The deep recession the country found itself in at the end of 2008 and in early 2009 necessitated various government bailouts that provided the initial impetus for the tea party movement.<sup>109</sup> The large economic stimulus package,<sup>110</sup> passed soon after President Obama's inauguration, added further momentum to the movement, as the package contained many projects that were criticized as being wasteful and having little to do with providing a real stimulus to the economy.<sup>111</sup> The movement's concern with unrestrained government spending was then further inflamed by the push to pass major health reform legislation, which was perceived as further expanding the reach of government and representing a large increase in future government spending.<sup>112</sup> This theme of fighting against expanded and

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108. See, e.g., *CBS Poll*, *supra* note 4 (finding 45 percent of tea party supporters said the main goal of the movement is reducing the role of the federal government); Przybyla, *supra* note 104 (citing a Bloomberg News poll finding 96 percent of those supporting the tea party believe that spending is out of control, and 86 percent believe that taxes are too high). One formalized statement of tea party beliefs, the "Contract from America," was created based on a seven week contest that attracted over 450,000 votes. The Contract from America contained the following ten planks: (1) Protect the Constitution; (2) Reject Cap-and-Trade [Energy Policy]; (3) Demand a Balanced Budget; (4) Enact Fundamental Tax Reform; (5) Restore Fiscal Responsibility and Constitutionally Limited Government; (6) End Runaway Government Spending; (7) Defund, Repeal, and Replace Government-run Health Care; (8) Pass an "All-of-the-Above" Energy Policy; (9) Stop the Pork; and (10) Stop the Tax Hikes. Bernie Becker, *A Revised Contract for America, Minus 'With' and Newt*, N.Y. TIMES, Apr. 15, 2010, at A19. But see Vanessa Williamson et al., *The Tea Party and the Remaking of Republican Conservatism*, 9 PERSPECTIVES ON POLITICS 25 (2011) (maintaining that the tea party movement has more to do with generational and immigration factors than it does with commitment to a libertarian or small government ideology).

109. Ultimately, the U.S. government bailed out much of the banking, insurance, and auto industries in an effort to avoid another Great Depression. Daniel J. Morrissey, *After the Meltdown*, 45 TULSA L. REV. 393, 396 (2010); James B. Stewart, *Eight Days: The Battle to Save the American Financial System*, NEW YORKER, Sept. 21, 2009, at 59, 79 ("Bank of America and Citigroup together got \$90 billion in TARP funds and \$420 billion in guarantees. Stabilizing A.I.G. cost taxpayers \$180 billion. To combat the crisis, the size of the Fed's balance sheet—\$850 billion before the Lehman collapse—grew to \$2 trillion."). See generally Andrew Ross Sorkin, *TOO BIG TO FAIL* (2009) (providing a general discussion of the financial crisis and the government's actions in its wake).

110. American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115.

111. Michael B. Rappaport, *The Obama Administration, Fundamental Institutional Change, and the Constitutional Lawmaking System*, 26 CONST. COMMENT. 215, 232–33 (2010). In the tea party movement, the stimulus bill was often referred to as the "porkulus" bill, following the use of that term by conservative radio talk show host Rush Limbaugh. Tom Kuntz, 'Porkulus,' N.Y. TIMES IDEA OF THE DAY BLOG (Feb. 8, 2009, 6:32 AM), <http://ideas.blogs.nytimes.com/2009/02/08/porkulus/>.

112. While Congressional Budget Office (CBO) estimates for the health reform package that was signed into law on March 30, 2010, indicated that the measure would actually decrease the

wasteful government expenditures has continued and is closely tied to concerns about the size of the federal budget deficit.<sup>113</sup>

The other driving force behind the tea party movement is an abiding belief that Americans are overtaxed.<sup>114</sup> In fact, a mainstay of the movement is to hold annual tea party protest events throughout the country on April 15 to protest high taxes and government spending.<sup>115</sup> Signs at tea party rallies typically rail against high taxation.<sup>116</sup> The movement explicitly links its anti-tax stand with patriotism. Indeed, a leading group in the tea party movement refers to itself as the “Tea Party Patriots.”<sup>117</sup> In addition, the “no taxation without representation” catchphrase is often heard at modern day tea party rallies.<sup>118</sup> The tea party also insisted that absolutely no tax increases could be part of the deficit-reduction package that was agreed to in connection with raising the nation’s debt ceiling.

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federal budget deficit by \$140 billion over the next ten years and by \$1 trillion over the following ten years, those estimates have been criticized as based on accounting gimmicks, with allegations that the cost of the measure will ultimately significantly add to the deficit. Lori Montgomery, *CBO Says Tax Cuts Dim Deficit Forecast; Obama Panel Is Told Health-Care Law Makes Small Dent*, WASH. POST, July 1, 2010, at A11; *Cost of New Health-Care Law May Top \$1 Trillion*, WASH. POST, May 12, 2010, at A04.

113. Kate Zernike, *Tea Party to Come up with Debt-Cutting Proposals*, N.Y. TIMES, June 27, 2011, at A10.

114. See Hall, *supra* note 4; Przybyla, *supra* note 104.

115. Amy Gardner & Michael E. Ruane, *On Tax Day, ‘Tea Partiers’ Protest on Mall; Activists Amass in D.C. to Decry Government Taxing and Spending*, WASH. POST, Apr. 16, 2010, at A02; Agence France-Presse, *Tea Party Faithful Rally Against Taxes*, RAW STORY (Apr. 17, 2011), <http://www.rawstory.com/rs/2011/04/17/tea-party-faithful-rally-against-taxes/>.

116. Some of the more colorful anti-tax posters seen at tea party events include: “God only asks me for 10%,” “Born Free—Taxed to Death,” “Blackbeard Obama, King of the Tax Pirates,” “Taxed Enough Already,” and “Don’t Tax Me ‘Bro.’” See, e.g., GRANDMA’S NOT SHOVEL-READY! SIGNS FROM 9/12 AND THE TEA PARTIES OF 2009 (Colin A. Hanna ed., 2010) (a 64-page coffee-table book of the most witty tea party signs compiled by Let Freedom Ring, a pro-tea party group); see also, *10 Most Offensive Tea Party Signs and Extensive Photo Coverage from Tax Day Protests*, HUFFINGTON POST (Dec. 28, 2009, 11:45 AM), [http://www.huffingtonpost.com/2009/04/16/10-most-offensive-tea-par\\_n\\_187554.html](http://www.huffingtonpost.com/2009/04/16/10-most-offensive-tea-par_n_187554.html) (presenting several slide shows of tea party signs).

117. See TEA PARTY PATRIOTS, <http://www.teapartypatriots.org> (last visited Sept. 8, 2011).

118. Of course, using that slogan today is inapt as our duly elected representatives, in fact, enact the taxes Americans pay, as opposed to in colonial times when American colonists had no right to vote for members of the British Parliament. Jenna Fisher, *New Boston Tea Party: Sarah Palin Leads Defensive, Defiant Crowd*, CHRISTIAN SCI. MONITOR (Apr. 14, 2010), <http://www.csmonitor.com/USA/Politics/2010/0414/New-Boston-tea-party-Sarah-Palin-leads-defensive-defiant-crowd>; Benjamin Orr, *Just How Much Taxation Without Representation?*, NEW REPUBLIC (Apr. 15, 2010), <http://www.tnr.com/blog/the-avenue/just-how-much-taxation-without-representation>. Of course, the slogan could be, and in fact is, still validly used by residents of the District of Columbia, who have to pay federal taxes but do not have any congressional representation. *Id.*

Moreover, the movement's anti-tax rhetoric has sometimes been directly linked with its anti-spending campaign. For example, tea party supporters have suggested that citizens could refuse to pay the taxes levied as part of the recently enacted health reform legislation if certain long-accepted procedural shortcuts were used to pass it.<sup>119</sup> Similarly, congressmen elected with the support of the tea party insisted that absolutely no tax increases could be part of the deficit reduction package that was agreed to in connection with raising the nation's debt ceiling.<sup>120</sup>

Both of these central tenets of the tea party movement strike directly at the social contract framework that underlies the taxpaying ethos in the United States. By arguing that government spending is out of control and not focused on the needs of citizens, the movement fosters the view that the government is not living up to its end of the social contract by failing to provide the necessary goods and services that society needs, or, rather, by wasting money on public goods that do not align with societal priorities. By questioning the representativeness of members of Congress, the movement undercuts the legitimacy of the governing institutions and the laws that they enact. By promoting the dogma that Americans are overtaxed and have a right to rebel against taxes, including by not paying taxes that they disagree with or that were enacted to support programs that they disagree with, the movement also jeopardizes the public faith in the fairness of the tax system and in the existence of widespread compliance.

To the extent the tea party movement is regarded as a minority view in society, the negative impact of its guiding principles on the taxpaying ethos in the United States is likely to be small. But, if the movement succeeds in gaining broad middle class acceptance, then it

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119. See Eric Kleefeld, *Bachmann: We're Not Going to Obey Health Care Law—“We Don't Have To,”* TALKINGPOINTSMEMO (Mar. 15, 2010, 10:34 AM), <http://tpmdc.talkingpointsmemo.com/2010/03/bachmann-were-not-going-to-obey-health-care-law----we-dont-have-to-video.php> (noting Representative Bachmann's belief that using the “deem and pass” parliamentary procedure represents “no taxation without representation,” and that, if used, it would make an “illegitimate” law that the people could ignore and refuse to pay taxes for); see also *id.* (embedded video link at 16:30 to 21:00). Interestingly, Representative Bachmann holds an LLM in taxation from William and Mary Law School. *W&M Alumna Announces Bid for U.S. Presidency*, WILLIAM & MARY (June 28, 2011), <http://www.wm.edu/news/stories/2011/wm-alumna-announces-bid-for-u.s.-presidency-123.php>.

120. Marc A. Thiessen, *The GOP's Trump Card*, WASH. POST, June 30, 2011, at A19; Jeff Zeleny & Carl Hulse, *Candidates Warn About Debt-Deal Compromise*, N.Y. TIMES, July 10, 2011, at A17.

could impact broader societal viewpoints quickly and create a tipping point upending the stable tax compliance equilibrium that exists today. The risk of the movement gaining broader acceptance is heightened when its efforts are legitimized by endorsement from the media<sup>121</sup> and government representatives.<sup>122</sup>

## VI. THE CHALLENGE OF SEPARATING U.S. PATRIOTISM FROM ITS HISTORICAL ANTI-TAX RHETORIC

The previous discussion has shown that the tea party movement has the potential to undermine the taxpaying ethos in the United States. Further, the relevant empirical work on patriotism as a tax morale factor hints that the anti-tax tinge of American patriotism may itself represent a weak link in maintaining a stable taxpaying ethos in the United States. Given the significant impact that the tea

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121. In this regard, leading conservative radio commentators have helped promote tea party rallies by prominently covering them and encouraging participation. *See, e.g.*, Marc Cooper, Editorial, *Tea Party Protests Steeped in Insanity*, L.A. TIMES, Apr. 15, 2009, at A29 (stating that Glenn Beck, Neil Cavuto, and Sean Hannity are “actively stoking the flames” of the tea party movement); James Rainey, *Crashing the Tea Party*, L.A. TIMES, Apr. 15, 2009, at D1 (noting the efforts of FOX News to promote tea party rallies across the nation and the intense coverage of specific events by Glen Beck, Neil Cavuto, Sean Hannity, and Greta Van Susteren). Some of these commentators are now taking an even more overt political role. James Oliphant, “*Two Can Play at That Game*”; *A TV and Radio Host Who Chided Obama’s Community Organizing Plans His Own Activism*, L.A. TIMES, Nov. 24, 2009, at A14 (citing Glenn Beck’s desire to utilize his popularity for political purposes); Brian Stelter, *Pundit Stakes out a More Activist Role in Politics*, N.Y. TIMES, Nov. 22, 2009, at A25 (noting that conservative talk radio personalities Glenn Beck, Sean Hannity, and Laura Ingraham have all taken steps to be more active politically).

122. Republican members of Congress have embraced the tea party movement and tried to co-opt it for their own political ends. *See, e.g.*, Dana Milbank, *No One Said Freedom Was Pretty*, WASH. POST, Nov. 6, 2009, at A2 (noting that Republican sponsorship of a tea party health care rally on the Capitol grounds was unusual); Dana Milbank, *The Republicans Who Stirred the Tea*, WASH. POST, Mar. 22, 2010, at A1 (noting that numerous Republican elected officials encouraged the raucous tea party protests outside of Congress during the health care debate by themselves waiving protest signs and the Gadsden “Don’t Tread on Me” flag from the House balcony). One notable exception is Senator Lindsey Graham, who has refused to adhere to many of the positions advocated by tea party supporters in his home state and expressed his belief that the movement is “unsustainable” and unable to create “a coherent vision for governing the country.” Robert Draper, *Lindsay Graham, This Year’s Maverick*, N.Y. TIMES, July 4, 2010, at MM22; Dana Milbank, *Standing Tall Against the Purity Police*, WASH. POST, Mar. 14, 2010, at A17. Even the wife of Supreme Court Justice Thomas has joined the tea party movement by speaking at tea party events, founding an organization (Liberty Central) to groom grass roots activists favoring smaller government, and founding a lobbying firm from which she can act as an “ambassador” of the tea party movement. Eric Lichtblau, *Justice Thomas’s Wife Sets Up a Conservative Lobbying Shop*, N.Y. TIMES, Feb. 5, 2011, at A11; LIBERTY CENT., <http://www.libertycentral.org> (last visited Sep. 13, 2011).

party movement has had on the national debate in recent years,<sup>123</sup> the threat should not be ignored. Indeed, even if the tea party movement were to suddenly falter in the near future, it may have already served to further degrade patriotism as a tax morale factor in the United States and thereby increase the vulnerability of the taxpaying ethos in the United States to future challenges. So, regardless of what the future holds for the tea party movement, the government should consider steps that will lessen or eliminate the linkage between patriotism and anti-tax sentiment in this country. While the most overt means to accomplish this in the long run would be the alteration of school textbooks to downplay the anti-tax roots of the American Revolution,<sup>124</sup> few in this country would stand for such intentional slanting of how American history is presented.<sup>125</sup> At the other extreme, patriotic appeals for increased taxes could be mounted by the government. However, while such appeals have had some success in times of war,<sup>126</sup> their efficacy is likely to be short lived and limited to wartime situations.<sup>127</sup> Indeed, politicians who have been brave enough to advocate for tax increases by trying to explain the genuine need for increased funds have routinely suffered adverse consequences at the ballot box.<sup>128</sup> So, rational appeals to the need to

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123. *See supra* notes 121–22.

124. In this vein, Konrad and Qari suggest fostering tax compliance by employing government programs that instill patriotic feelings among the young. KONRAD & QARI, *supra* note 72, at 18.

125. Of course, just as the history of any conflict is written by the victors, a certain amount of author bias will inherently become part of any textbook. However, in reviewing and altering textbooks, drawing the line between correcting unintentional bias and factual misstatements and affirmatively creating slanted historical accounts is often a matter of debate. For instance, recent changes mandated by the Texas Board of Education (which typically result in changes to textbooks used throughout the country due to the disproportionate buying power of the Texas school system) have been challenged as politically motivated by some and defended as justifiable corrections by others. James C. McKinley, Jr., *Conservatives on Texas Panel Carry the Day on Curriculum Change*, N.Y. TIMES, Mar. 13, 2010, at A10. For illustration, one of the changes reduces the coverage of Thomas Jefferson as a leading thinker of the revolutionary period, which critics allege is to lessen his strong opinions about the separation of church and state. *Id.*

126. *See* Hill, *supra* note 51, at 416.

127. BANK ET AL., *supra* note 53, at xiv; *see supra* note 68.

128. Ronald J. Krotoszynski, Jr., *Reconsidering the Nondelegation Doctrine: Universal Service, the Power to Tax, and the Ratification Doctrine*, 80 IND. L.J. 239, 240 (2005) (“In light of all this hostility on the part of the voting public, few things inspire greater dread in most politicians than the prospect of raising taxes.”); Leo P. Martinez, *Tax Policy, Rational Actors, and Other Myths*, 40 LOY. U. CHI. L.J. 297, 306–09 (2009) (noting that raising taxes, even when justified, is a “third rail” of American politics and citing relevant examples). A recent exception to this was the election of Governor Mark Dayton in Minnesota in November 2010. Dayton succeeded in narrowly winning the election after affirmatively campaigning on raising taxes on

raise taxes to combat a looming debt crisis are likely to be either eschewed by politicians fearful of losing their jobs<sup>129</sup> or rejected by voters based on their ingrained anti-tax mindset.<sup>130</sup>

If American patriotism is to be effectively separated from its anti-tax undercurrent, the approach must nurture the growth of a new conception of American patriotism from within the ranks of those currently associating patriotism with anti-tax fervor. This section presents two possible approaches that could help plant the seeds from which a pro-tax form of patriotism could grow out of the present anti-tax framework. Both ideas draw on the tea party movement's commitment to smaller government and fiscal responsibility, and they both try to link those goals with positive incentives to *pay* taxes. That is, if the desire for a small, fiscally responsible government is the primary motivator of the tea party movement, then it may be possible to co-opt that motivating force into one promoting tax

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the wealthy as a key element in addressing his state's looming \$6.2 billion budget deficit. Rachel E. Stassen-Berger, *New Governor Won't Be Confused with Predecessor*, STAR TRIB. (Minneapolis-St. Paul), Dec. 9, 2010, at 1A. Of course, the voters also elected majorities to the state legislature that insisted on closing the entire deficit with spending cuts alone, thereby setting up a conflict that plunged the state into a protracted government shutdown. Neil Irwin & Rachel Weiner, *Budget Jam Closes Minn. Government*, WASH. POST, July 2, 2011, at A01.

129. This is especially true of many Republican politicians (including 95 percent of those in Congress) who have signed on to a pledge never to raise taxes at the prodding of Grover Norquist and his anti-tax group, Americans for Tax Reform. Editorial, *Rethinking Their Pledge: A Few Republicans Say Deficit Reduction Is More Important Than an Inflexible Anti-tax Oath*, N.Y. TIMES, Apr. 22, 2011, at A22 [hereinafter *Rethinking Their Pledge*]; Liz Marlantes, *Budget Stalemate: Why America Won't Raise Taxes*, CHRISTIAN SCI. MONITOR (Apr. 7, 2011), <http://www.csmonitor.com/USA/Politics/2011/0407/Budget-stalemate-Why-America-won-t-raise-taxes>.

130. A notable exception in this regard is the action by the Illinois legislature and governor to enact substantial tax increases to address their budget deficit. Editorial, *Illinois Wakes Up*, N.Y. TIMES, Jan. 17, 2011, at A22. Of course, an argument exists that raising tax rates is ultimately self-defeating since wealthy individuals and businesses will simply relocate out of state to avoid the higher tax burden. Carl Davis, *The Millionaire Migration Myth: Don't Fall for This Anti-tax Scare Tactic*, HUFFINGTON POST (Mar. 31, 2011, 8:21 AM), [http://www.huffingtonpost.com/carl-davis/the-millionaire-migration\\_b\\_843380.html](http://www.huffingtonpost.com/carl-davis/the-millionaire-migration_b_843380.html). Indeed, some taxpayers in Illinois actually threatened to leave as a result and the governors of other states tried to actively encourage such tax-motivated migration. Stephen Di Benedetto, *Does State Tax Hike Spell Doomsday for Business?*, CHI. SUN-TIMES, Jan. 24, 2011, at 8; Jeff Gelles, *New Jersey Looks to Poach Some Businesses from Illinois*, PHILA. INQUIRER, Jan. 26, 2011, at C02. In the end however, the relevant empirical work indicates that the magnitude and impact of tax migration in response to rate changes is negligible. See, e.g., Cristobal Young & Charles Varner, *Millionaire Migration and State Taxation of Top Incomes: Evidence from a Natural Experiment*, 64 NAT'L TAX J. 255 (2011); Salmal Qari et al., *Patriotism, Taxation, and International Mobility*, PUB. CHOICE (forthcoming 2011) (manuscript at 3) (empirically demonstrating that on a national level tax-motivated migration from highly taxed countries is significantly mitigated in countries exhibiting greater levels of patriotism).

compliance, and thereby shift the patriotic feelings of those involved in the movement away from the anti-tax undercurrent.

*A. Permitting Taxpayers to  
Earmark Their Tax Payments*

A key goal of the tea party movement is to shrink the size of the federal government.<sup>131</sup> This goal derives both from the movement's belief that the government is involved in activities well beyond its proper role and that the government should be more fiscally responsible. One approach to addressing this unease with the size of the federal government would be to simply terminate wasteful or ideologically offensive government programs. Indeed, some in the tea party movement have advocated eliminating entire federal agencies.<sup>132</sup> However, such wholesale reductions in the size and scope of the government are often politically difficult to achieve. This is especially true if the cut is in an entitlement program that is popular with a majority of voters (like Social Security or Medicare), despite the fact that the program may be ideologically unpalatable as a "socialistic" wealth redistribution.<sup>133</sup>

As a result, the conservative movement historically viewed tax cuts as a backdoor means for shrinking the government.<sup>134</sup> Under this

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131. Rebecca E. Zietlow, *Popular Originalism? The Tea Party and Constitutional Theory* (Aug. 2011) (unpublished manuscript), available at [http://works.bepress.com/cgi/viewcontent.cgi?article=1010&context=rebecca\\_zietlow](http://works.bepress.com/cgi/viewcontent.cgi?article=1010&context=rebecca_zietlow).

132. See, e.g., Jennifer E. Duffy, *A Look at the Potential Senate Shakeup*, NAT. J., July 3, 2010 (noting that, prior to his election to the Senate, Rand Paul called for the elimination of the Education Department and the Federal Reserve Board and indicated his opposition to portions of the Americans with Disabilities Act); *The Risks of "Hell, No!"*, ECONOMIST, June 12, 2010, at 26, 27 (noting that Sharron Angle, the tea party-supported Republican candidate for Senate in Nevada, advocated privatizing Social Security and eliminating the Department of Energy); Jennifer Epstein, *Rand Paul: Bring on the Cuts!*, POLITICO (Feb. 7, 2011), <http://www.politico.com/news/stories/0211/48974.html> (noting that Rand Paul's suggested cuts to the federal budget include major reductions in the budgets of the Departments of Education, Energy, Housing and Urban Development, Agriculture, and Transportation).

133. Johanna Neuman, *A Familiar Tune on Healthcare*, L.A. TIMES, Mar. 28, 2010, at A28 (noting that Medicare, a program that is sacrosanct today, was passed despite strong political opposition that denounced the program as a form of socialism); Clarence Page, *Love of Medicare Chills Tea Party Fever*, CHI. TRIB., Apr. 24, 2011, at C19 (noting a poll showing that 70 percent of tea party members are against cuts in Medicare); Tim Rutten, *Crashing the "Tea Party,"* L.A. TIMES, Apr. 17, 2010, at A27 (noting that while more than 90 percent of tea party supporters believe the Obama administration is pushing the country into socialism, a majority do not wish to see social security and Medicare cut despite their desire to see a smaller government).

134. John V. Jacobi, *Dangerous Times for Medicaid*, 33 J.L. MED. & ETHICS 834, 838 (2005) ("The 'starve the beast' position, originally attributed to Ronald Regan's OMB director David Stockman, and now advanced by anti-tax advocates such as Grover Norquist, takes as a starting

“starve the beast” strategy, it was thought that if the government had less tax revenue, then it would have to cut back its expenditures and naturally shrink in size.<sup>135</sup> Unfortunately, since the federal government does not need to live within its means, cutting taxes merely resulted in the United States increasing its debt burden.<sup>136</sup> As

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point that most social spending is wasteful and inappropriate. Acknowledging that many publicly funded social programs have a large constituency, it then advocates cutting taxes as a means to achieve surreptitiously what cannot be gained directly: at truly minimal government.”); Gebe Martinez, *The GOP’s Internal Divide*, CONG. Q. WKLY., Jan. 17, 2004, at 166, 167–68 (indicating that many believe the GOP’s goal is to cut taxes in order to force a deficit crisis which will create a situation where it becomes politically viable to cut domestic entitlement programs—a view advocated by conservative leader Grover Norquist); Mitchell Rofsky, *The Liberal Legacy (and the Myth of Conservative Primacy)*, BOS. GLOBE, Feb. 22, 2004, at D1 (“Bush’s tax cuts may well be part of a long-term strategy to ‘starve the beast’ and force huge cuts in social programs. But if the Republicans really believed that their free-market ideology was popular, wouldn’t they openly propose getting rid of all regulatory and social programs and reducing government spending by 50 or 75 percent?”); Jay A. Soled, *Refinancing America: The Republican Antitax Agenda*, TAX NOTES, Dec. 8, 2003, at 1235–36, available at LEXIS 101 Tax Notes 1235 (reviewing SHELDON D. POLLACK, *REFINANCING AMERICA: THE REPUBLICAN ANTITAX AGENDA* (2003)) (“However, behind closed doors, some Republicans acknowledge that the party’s intent is to starve the beast—the federal government—ultimately fostering a reduction of its size.”); see also Edward J. McCaffery & Jonathan Baron, *The Political Psychology of Redistribution*, 52 UCLA L. REV. 1745, 1773–81, 1784 (2005) (analyzing the psychological underpinnings that make “starve the beast” appeals acceptable to the public and noting that the focus on current tax cuts coupled with an amorphous prospect of future spending cuts exploits certain perceptual biases).

135. Soled, *supra* note 134, at 1236.

136. In the short-term analysis it is clear that the “starve the beast” strategy has not worked. See, e.g., William G. Gale & Peter R. Orszag, *An Economic Assessment of Tax Policy in the Bush Administration, 2001–2004*, 45 B.C. L. REV. 1157, 1178–83 (2004) (noting that evidence since 1981 refutes the underlying premise of the “starve the beast” philosophy by indicating that tax cuts and spending are, in fact, negatively correlated; as taxes increase, spending decreases, and as taxes decrease, spending increases); William G. Gale & Peter R. Orszag, *Bush Administration Tax Policy: Starving the Beast?*, 105 TAX NOTES 999, 1000–01 (2004); Michael J. New, *Starve the Beast: A Further Examination*, 29 CATO J. 487, 493–94 (2009); William A. Niskanen, *Limiting Government: The Failure of “Starve the Beast,”* 26 CATO J. 553, 553–54 (2006); Daniel N. Shaviro, *Can Tax Cuts Increase the Size of the Government?*, 18 CAN. J.L. & JURISPRUDENCE 135, 152 (2005); Daniel N. Shaviro, *Reckless Disregard: The Bush Administration’s Policy of Cutting Taxes in the Face of an Enormous Fiscal Gap*, 45 B.C. L. REV. 1285, 1333–34 (2004); George M. von Furstenberg et al., *Tax and Spend, or Spend and Tax?*, 68 REV. ECON. & STAT. 179, 187–88 (1986) (finding no robust relationship between tax changes and subsequent spending changes); Andrew T. Young, *Tax-Spend or Fiscal Illusion?*, 29 CATO J. 469, 482–83 (2009); Paul Krugman, *The Tax-Cut Con*, N.Y. TIMES, Sept. 14, 2003, at SM54; Christina Romer & David H. Romer, *Do Tax Cuts Starve the Beast? The Effect of Tax Changes on Government Spending* 44–45 (Nat’l Bureau of Econ. Research, Working Paper No. 13548, 2007); Bruce Bartlett, *Tax Cuts Don’t “Starve the Beast,”* N.Y. TIMES BLOG (Apr. 4, 2006, 10:10 PM), <http://bartlett.blogs.nytimes.com/2006/04/04/tax-cuts-dont-starve-the-beast>. Of course, in the long term the “starve the beast” approach may well turn out to have been a “success,” since it appears likely that entitlement programs may end up being on the chopping block as the nation acts to avert, or resolve, a future national debt crisis. See, e.g., Dan Balz, *Debt Commission Warns of Fiscal “Cancer,”* WASH. POST, July 12, 2010, at A02 (noting that all federal revenues combined are sufficient to cover only Social Security, Medicare, and Medicaid; all other federal programs

a result the country embarked on an inherently unsustainable fiscal path of increasing expenditures and decreasing tax revenues.<sup>137</sup> Today, nonpartisan assessments of the problem accept that any meaningful attempt to bring the U.S. budget deficit under control must involve both spending cuts and increased taxation.<sup>138</sup>

So, if the tea party movement's goal of dramatically shrinking the size of government by eliminating disfavored government expenditures is unlikely to succeed as a political matter, and cutting taxes as a means of achieving a smaller government has proven to be a failure, what other avenue might let the movement claim some tangible progress toward this goal? One answer would be to let tea party supporters, and everyone else, earmark how their particular tax dollars are used.<sup>139</sup> That is, the desire to shrink the government and the unwillingness to fund certain government activities could be at least partially addressed by offering taxpayers the ability to direct their tax payments only to those government functions they deem appropriate.<sup>140</sup> This solution dovetails nicely with the social contract

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are therefore funded by debt; and deep spending cuts will be needed to avert a crisis); Matthew Saltmarsh & Elisabetta Povoledo, *European Nations Take Preemptive Steps to Pare Deficits*, N.Y. TIMES, May 26, 2010, at B4 (noting that in the wake of the Greek sovereign debt crisis, many European nations are taking steps to avert their own debt crises by, among other measures, increasing retirement ages and tightening pension rules).

137. See Donald B. Marron, *America in the Red*, NAT'L AFF., Spring 2010, at 3–8.

138. See, e.g., *id.* at 3, 11–13 (reviewing the means of getting the deficit under control and concluding, “No one solution—not economic growth, not tax increases, and not spending reductions—can get us to our goal. To put ourselves on a sustainable fiscal trajectory, we will need to use all the measures at our disposal”). It should also be noted that public opinion polls in recent years have demonstrated that the American public has concluded that higher taxes will be necessary (especially on the wealthy) in order to close the budget deficit. Bruce Bartlett, *Americans Support Higher Taxes. Really.*, CAP. GAINS & GAMES BLOG (June 29, 2011), <http://capitalgainsandgames.com/blog/bruce-bartlett/2292/americans-support-higher-taxes-really> (linking to nineteen public opinion polls in 2011 alone showing solid majorities expect or favor higher taxes as part of addressing the federal deficit). Of course, this sobering reality has still not dampened the ideological fervor of many politicians who still find it unacceptable to *ever* raise any tax, despite the historically low levels of taxation seen today. *Rethinking Their Pledge*, *supra* note 129.

139. In the United States, the term “earmark” is most often associated with the recently modified congressional practice of specifically directing appropriated funds to the pet projects of particular members of Congress. Eric Lichtblau, *Leaders in House Block Earmarks to Corporations*, N.Y. TIMES, Mar. 10, 2010, at A1. However, as used herein, the term refers to any direction (including a taxpayer direction) that otherwise fungible revenue dollars be set aside and used only for a specific purpose.

140. Cait Lambertson, *Your Money, Your Choice*, DEMOCRACY, Spring 2011, at 46, 48–49, available at [http://www.democracyjournal.org/pdf/20/your\\_money\\_your\\_choice.pdf](http://www.democracyjournal.org/pdf/20/your_money_your_choice.pdf) (presenting a laboratory experiment demonstrating that allowing taxpayers to choose how their tax liability is spent mitigates individual anti-tax sentiment).

framework of tax compliance discussed above. An important component of the social contract framework is that taxpayers understand the benefits that the government provides in exchange for their tax payments. Consequently, one element of maintaining tax compliance is to make clear to taxpayers how their tax dollars are used.<sup>141</sup> If taxpayers are empowered to actually direct their taxes to those government benefits they value most, then it is likely that voluntary compliance would increase. Thus, the focus of the tea party movement on smaller government could be co-opted into a tax morale factor promoting increased tax compliance by permitting citizens to earmark their tax payments to some degree.<sup>142</sup>

Unfortunately, allowing taxpayer earmarking raises a number of problematic issues.<sup>143</sup> Most significantly, in its purest form, an allocation of tax dollars by a taxpayer would be binding and thus could not be used for purposes other than per the taxpayer's direction. Such a pure system would effectively remove the budgetary appropriation function from Congress and give it directly to the people with unpredictable, undesirable, undemocratic, and possibly unconstitutional results.<sup>144</sup> For instance, if Congress sets aside 30 percent of the total annual budget for defense and security-related expenditures, but taxpayers only allocate 10 percent of tax revenues to such purpose, the military operations of the country would be woefully underfunded for the year and necessitate drastic cuts, jeopardizing the security of the nation and potentially causing

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141. See Mann, *supra* note 96, at 923–24 (suggesting publicizing uses of tax dollars to promote compliance); Rosenberg, *supra* note 2, at 229 (same).

142. Earmarking can take many forms. For instance, one might totally eliminate all general taxes and have Congress enact specific taxes dedicated to specific programs, much like Social Security and Medicare payroll taxes are done today. See McCaffery & Baron, *supra* note 134, at 1785. Obviously, pursuing such a program would require a massive legislative effort and ultimately be less flexible in terms of government budgeting. See Mann, *supra* note 96, at 923. Alternatively, as discussed more specifically below, one might keep the general taxes in place and allow individual taxpayers some degree of either binding or nonbinding voice in how their particular tax dollars should be utilized.

143. The Treasury Department has historically been against allowing taxpayers the right to designate how any of their tax dollars are used. See, e.g., *Peace Tax Hearing*, *supra* note 43, at 66–68, 70.

144. Regarding the constitutionality of citizen earmarking, extreme situations might be seen as impermissible delegations of the appropriation functions of Congress. See, e.g., U.S. CONST. art. I, § 9 (“No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . .”). However, at least in the context of earmarking associated with a proposed Peace Tax Fund, the Congressional Research Service found the earmarking of taxpayer receipts to be constitutional. Kornhauser, *supra* note 39, at 1001 n.262.

economic upheaval due to base closings and cancelled defense industry contracts. Conversely, suppose taxpayers make their allocations shortly after a brutal terrorist attack and each individual decides he wants most of his tax dollars to go for defense. In such a situation, the percentage of tax revenue allocated to defense could be many times greater than is necessary, in turn forcing all other government services to cease operations due to lack of funds. Therefore, such a pure earmark system would be unworkable and undesirable as a means of constructing a rational government budget.

However, there is no reason that an earmark system must be completely binding on the government to be effective. For instance, if taxpayers were able to earmark only a portion of their tax liability (say, a fixed dollar amount or fixed percentage of their total tax liability), gross misallocations of resources would be unlikely since the fungible remainder would generally be sufficient to fill in and eliminate any taxpayer generated discrepancies from the congressionally determined budget.<sup>145</sup> One may argue that a taxpayer's earmarks in this type of situation are essentially illusory given that taxpayers' choices have no real impact; however, individual behavior might still be influenced by the very act of allocation, even if, logically viewed, the choices make no difference in ultimate government expenditures.<sup>146</sup>

While using a limited form of taxpayer earmarking (say, allocating only the first \$5,000 of an individual's tax liability) would

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145. This would be especially true since presumably only individuals would be able to elect an allocation, while revenue from corporate taxpayers and nonincome taxes would be treated as fungible dollars that could be used to even out the discrepancies. Finally, borrowing would also be available to fund the shortfall.

146. This possibility flows from the social contract concept discussed earlier. *See supra* Part II. To the extent that individuals view the government's provision of services as aligned with their own desires, they are more likely to exhibit higher tax compliance levels. Feld & Frey, *supra* note 11, at 111–12. Hence, creating a mechanism whereby individuals can directly feel they have an impact on the allocation of government services should promote increased compliance. This is in line with studies demonstrating that higher levels of direct democracy (e.g., tax referenda) correlate with higher tax compliance. *Id.* at 113–14. Even if individuals view the mechanism as merely a means of formally expressing their desires to the government, the act of doing so can increase taxpayer awareness of the quid pro quo received for their tax dollars and make government allocations seem more legitimate, since they are partially based on direct input from taxpayers regarding their desires. *See, e.g.*, Kornhauser, *supra* note 39, at 988–89 (noting that creating a special Peace Tax Fund for war protestor tax payment would essentially be a shell game, since aggregate military and nonmilitary appropriations would still be fixed by Congress, but that the taxpayer allocation was still expected to be a sufficient direction to convince most war-tax protestors to begin paying their taxes into such a fund).

be workable as a budgetary matter, a broader policy-based concern could be raised regarding even such a limited earmarking system.<sup>147</sup> The American political system is based on republican notions of indirect representative democracy.<sup>148</sup> Thus, citizens vote for members of Congress to represent their interests and develop legislation, rather than directly vote on the laws themselves.<sup>149</sup> Permitting taxpayer earmarking represents a form of direct democracy that is contrary to our traditional notions of representative government. Further, allowing taxpayers to direct their own tax dollars could introduce undemocratic elements into the budgetary process. While all taxpayers with a tax liability of at least \$5,000 would have an equal say in how the government spends its funds, citizens with smaller tax liabilities would be partially or wholly disenfranchised, at least in terms of the budgetary process.<sup>150</sup> While this type of policy argument against taxpayer earmarking may be persuasive to some, it does not prohibit the adoption of an earmarking system.<sup>151</sup> Indeed, since 1966

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147. Two administrative concerns are also worthy of brief mention here. First, current law prevents the executive branch from using any funds unless specifically appropriated by Congress. *Peace Tax Hearing*, *supra* note 43, at 66–67. Consequently, Congress would need to expressly modify these rules to permit a blanket advance appropriation of taxpayer funds into specific earmarked accounts. Such a delegation in the context of a limited earmarking system would be a straightforward, legislative drafting task and should not raise constitutional concerns in light of the limited nature of the earmarking and the general fungibility of the earmarked funds within the larger budgetary appropriation approved by Congress for the particular year. Second, the Treasury Department has been concerned about the administrative burden of an earmarking system. *Id.* at 68. Given the automated processing of tax returns, the limited dollar amounts involved in the earmarking program, and the general fungibility of total revenue dollars in the system, it is likely that the additional administrative costs associated with a limited earmarking system would be modest, especially in comparison to the potential tax compliance benefit.

148. INTRODUCTION TO COMPARATIVE POLITICS: POLITICAL CHALLENGES AND CHANGING AGENDAS 325 (Mark Kesselman et al. eds., 5th ed. 2009).

149. *See id.* at 337.

150. This undemocratic potential is exacerbated if the earmarking is done based on a percentage of an individual's tax liability, rather than via a fixed dollar amount. For instance, assume taxpayer A owes twice as much in yearly taxes as taxpayer B owes. If each gets to allocate how 25 percent of his tax dollars are utilized by the government, then taxpayer A has twice the impact of taxpayer B. Such a system violates our basic notions of equality by giving the wealthy a greater say in setting the country's budgetary priorities. This concern could be addressed by modifying the earmarking system to place a fixed percentage of everyone's liability into a single pot and then have allocations from that pot determined by averaging the percentage allocations from all taxpayers without weighting them based on their individual tax liabilities. Thus, taxpayer A would still contribute twice as much to the fund, but A and B would now have equal votes regarding the allocation of the total fund.

151. *Contra* Nancy Staudt, *Taxation Without Representation*, 55 TAX L. REV. 555, 566–70 (2002) (analyzing the three-dollar Presidential Election Fund check-off program and arguing that it is improper since it disenfranchises some citizens, increases the “voting” power of taxpayers

the federal government has explicitly allowed a limited form of taxpayer earmarking via the Presidential Election Campaign Fund check-off program.<sup>152</sup> Funds are appropriated to the Presidential Election Campaign Fund entirely based on individual taxpayer choice. Taxpayers may direct three dollars of their tax liability for this specific use (and therefore away from other uses) without increasing their aggregate tax liability.<sup>153</sup> Hence, taxpayers choosing this option have total control over how those three dollars of their federal tax liability are used. Citizens who do not owe at least three dollars in tax are deprived of the ability to direct any government funds. While this program only involves \$3, and not the \$5,000 tentatively proposed here, the principles and policy arguments are the same. Consequently, a limited, fixed dollar form of taxpayer earmarking is a feasible approach that could be pursued.

However, assuming *arguendo* that policy or political concerns would prevent the adoption of even a limited taxpayer earmarking system, tax compliance benefits could still be achieved by employing a *completely* nonbinding taxpayer earmarking system. For instance, each year's tax return could set forth the basic categories of federal government expenditures and the percentage of the budget that they represent.<sup>154</sup> The taxpayer would then be asked to insert his preferred allocation for his taxes. This taxpayer allocation would have no binding effect on the government and would not cause any funds to

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vis-à-vis other citizens, creates a form of national plebiscite without constitutional authority, and might be viewed as a form of impermissible poll tax).

152. Presidential Election Campaign Act of 1966, Pub. L. No. 89-809, § 302(a), 80 Stat. 1587 (codified at I.R.C. § 6096 (2006)).

153. *Id.*

154. Such a breakout of the government's expenses could be tied in with recent efforts to provide taxpayers with a yearly "receipt" showing how their tax payment was spent by the government. *See, e.g.,* Ethan Porter & David Kendall, *Seeing Where the Money Went*, DEMOCRACY, Spring 2011, at 40, available at <http://www.democracyjournal.org/20/seeing-where-the-money-went.php> (presenting the benefits of requiring the government to furnish taxpayers with a yearly receipt of how taxes were utilized). In a partial response, on April 15, 2011, the White House created an online taxpayer receipt that allows taxpayers to insert their particular tax liability to generate a breakdown listing how much of that amount went to various government expenses. *Your 2010 Federal Taxpayer Receipt*, THE WHITE HOUSE, <http://www.whitehouse.gov/taxreceipt> (last visited Sept. 16, 2011). Alternative privately created versions of such an Internet-based taxpayer receipt are available at WHAT WE PAY FOR, <http://www.whatwepayfor.com> (last visited Sept. 16, 2011), and *Your Federal Tax Receipt*, THIRD WAY, <http://www.thirdway.org/taxreceipt> (last visited Sept. 16, 2011). Additionally, Congress is currently considering bills that would require personalized receipts to be physically sent to every taxpayer each year. Patricia Sabatini, *Taxpayer Receipt Act Would Tell Where Your Dollars Go*, PITTSBURGH POST-GAZETTE, May 6, 2011, at A14.

be allocated differently from those in the congressionally appropriated budget for the year. Nevertheless, such a nonbinding voluntary expression of taxpayer desires would be useful from a tax compliance perspective. Having to make a yearly allocation would (1) focus taxpayers on how the government really does spend its money each year; (2) cause them to contemplate whether they agree with the allocations set by Congress; and (3) provide the government with direct feedback regarding public sentiment on government spending priorities. As a result, taxpayers would know that their concerns and priorities are being communicated to and considered by the government.

Conversely, the perspective of lawmakers might well be altered if the aggregate taxpayer allocations turn out to be markedly different from allocations in the actual budget. This mechanism could also be used to highlight the magnitude of the budget deficit each year and presumably to make taxpayers more viscerally aware of the increasing shortfall between taxes and government expenditures. Further, by highlighting specific programs, taxpayers would have a more concrete appreciation of the costs associated with various government benefits, which in turn could help generate a better consensus for future spending cuts or tax increases, or, more likely, both. While presently existing organizations aspire to bring the American public to grips with the unsustainable budgetary trajectory of the country, being forced to confront the issue directly each year at tax time would make the situation more personal to taxpayers and could increase a patriotic feeling toward paying the taxes necessary to address the worsening situation.<sup>155</sup>

### *B. Establishing a Patriotic Remittance Tax*

As discussed earlier, the prevailing view since the 1930s among the judiciary and tax practitioners alike has been that morality and patriotism have no role when it comes to taxation.<sup>156</sup> With no moral

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155. See, e.g., *Real Time US National Debt Clock*, U.S. NAT'L DEBT CLOCK, <http://www.usdebtclock.org/about.html> (last visited Sep. 13, 2011) (dedicating the organization to providing real time information about the nation's financial condition); see also David Leonhardt & Bill Marsh, *Get a Pencil. You're Tackling the Deficit.*, N.Y. TIMES, Nov. 14, 2010, at WK4, available at <http://graphics8.nytimes.com/packages/pdf/weekinreview/20101114-deficit-graphic.pdf> (challenging readers to wrestle with the difficult task of closing the budget deficit).

156. See *supra* notes 88–93 and accompanying text.

or patriotic duty to pay more than the law demands, taxpayers are free to skate as close to the edge of legality as they dare to minimize their tax liability while they are liberated from any concern over the larger societal consequences of their tax avoidance activities.<sup>157</sup> Because taxpaying is generally accepted as a purely dispassionate legal matter, it is understandable that patriotic appeals for increased taxation might well fall on deaf ears, except, perhaps, in time of war. Since the separation of patriotism from a positive taxpaying association works against the social contract framework for tax compliance, the government should explicitly assert that there is in fact both a moral and patriotic duty to support the government.<sup>158</sup> While speeches, public pronouncements, and mass-media public service advertisements to this effect would be helpful, at least in terms of voicing a position that has not been publicly asserted for many years, a more concrete expression of the patriotic nature of taxpaying should be undertaken to properly promote and galvanize public opinion around a pro-tax form of patriotism.

Consequently, this Article proposes that Congress adopt a *voluntary* “tax” that citizens could pay as an expression of their patriotism.<sup>159</sup> A “Patriotic Remittance Tax” perhaps?<sup>160</sup> In reality this

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157. See Richard Lavoie, *Subverting the Rule of Law: The Judiciary's Role in Fostering Unethical Behavior*, 75 U. COLO. L. REV. 115 (2004) (discussing generally the ethical implications of separating legal from moral issues in the tax evasion context).

158. That is, the government should enthusiastically embrace Vice President Biden's patriotic defense of increased taxation. See *supra* note 6 and accompanying text.

159. It should be noted that since 1961 Congress has permitted gifts to the federal government for the specific purpose of paying down the national debt. Pub.L. No. 87-58, 75 Stat. 119 (1961) (codified as amended at 31 U.S.C. § 3113 (2006)). In contrast, the Patriotic Remittance Tax would not be limited to repaying the national debt and, as discussed below, could be crafted to allow taxpayers to dedicate their gifts to specific agencies or programs. Further, the intent would be to widely publicize and market the Patriotic Remittance Tax and to accept contributions directly as part of the yearly tax-return process. Historically the existence of the “Gifts for Reduction of the Public Debt” program has not been well publicized, with most recent contributors becoming aware of the program through information provided in the instructions to IRS Form 1040. See PAMELA JACKSON, CONG. RESEARCH SERV., RS 20092, PUBLIC DEBT REDUCTION FUND (June 28, 2006), available at <http://stuff.mit.edu/afs/sipb/contrib/wikileaks-crs/wikileaks-crs-reports/RS20092.pdf>. However, despite the Form 1040 instructions, contributions toward the public debt cannot actually be made via the tax return itself. See *Frequently Asked Questions About the Public Debt*, TREASURY DIRECT, [http://www.treasurydirect.gov/govt/resources/faq/faq\\_publicdebt.htm#DebtFinance](http://www.treasurydirect.gov/govt/resources/faq/faq_publicdebt.htm#DebtFinance) (stating that there are two ways to make a contribution to public debt: by online payment or by check payable to the Bureau of the Public Debt). As a result, the program has not been very successful, with yearly contributions peaking in 2009 at just over \$3 million. *Gift Contributions to Reduce Debt Held by the Public*, TREASURY DIRECT, <http://www.treasurydirect.gov/govt/reports/pd/gift/gift.htm> (last visited Sept. 16, 2011) (showing yearly contributions under the program

would not technically be a tax at all since it would be a completely voluntary contribution to the fisc. However, including a patriotic remittance on a tax return would become a binding obligation and increase the aggregate amount payable with the tax return for that tax year.<sup>161</sup> In many ways this type of program would be no different from many state check-off programs that direct public funds to specific programs or charities and increase the tax owed accordingly.<sup>162</sup> While some may counter that no one would voluntarily increase the taxes one owes to the federal government, the experience with analogous state check-off programs leads to the contrary conclusion.<sup>163</sup> Even if a small percentage of the population made such contributions, there would be a positive impact for the fisc, and the tax morale of those making the voluntary contribution would be sure to increase.<sup>164</sup> Further, the very existence of a patriotic remittance tax, and the reality of taxpayers having to consider contributing every year at tax time, would encourage the association of patriotism with taxation in the minds of taxpayers and make at

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from 1996–2011). However, the government has now set up a website to accept online contributions from citizens. *Gifts to Reduce the Public Debt*, TREASURY DIRECT, <https://www.pay.gov/paygov/forms/formInstance.html?agencyFormId=23779454> (last visited Sept. 16, 2011).

160. Naming any new program is always of crucial importance in swaying public opinion for or against the idea. Kornhauser, *supra* note 86, at 838 (quoting *Economic Growth Through Tax Cuts: What's the Best Approach? Hearing Before the Joint Econ. Comm.*, 106th Cong. 153 (1999)) (noting that labels can impact the success of a program, e.g., who could be against “Great Society” legislation?).

161. That is, the proposed program would be markedly different from the current three-dollar check-off tax provided for funding the Presidential Election Campaign Fund, which specifically earmarks those tax dollars into a separate fund and results in no additional tax for those making an election.

162. See *Check-Off Programs See Strong Growth*, FED’N OF TAX ADM’RS, <http://www.taxadmin.org/Fta/rate/Checkoff03.html> (last visited Sept. 16, 2011) (stating that “[w]ith the exception of political campaign funds, all state check-offs are donations from a taxpayer’s refund,” or an increase in the amount paid with the tax return).

163. Taxpayers contributed \$32.8 million to the 210 programs on state tax returns processed in 2002. *Id.* (indicating that the number of check-off boxes for contributions on state personal income tax forms continues to grow and that every state with a broad-based income tax has at least one check-off program). For a chart of the types of check-off programs available in the various states and the contributions associated therewith, see *Summary of Check-Off Programs*, FED’N OF TAX ADM’RS, [http://www.taxadmin.org/fta/rate/co\\_chart03.html](http://www.taxadmin.org/fta/rate/co_chart03.html) (last visited Sept. 16, 2011).

164. See James Andreoni, *Giving with Impure Altruism: Applications to Charity and Ricardian Equivalence*, 97 J. POL. ECON. 1447, 1447 (1989); James Andreoni, *Impure Altruism and Donations to Public Goods: A Theory of Warm-Glow Giving*, 100 ECON. J. 464, 464 (1990) (positing a “warm glow altruist” whose gifts to charity are based less on specified charity needs than on the fact that his personal satisfaction increases with the value of the gift to the charity).

least a few seriously consider a contribution.<sup>165</sup> Such contributions might be especially forthcoming from taxpayers who experienced some real financial success in prior years.<sup>166</sup> So, the entrepreneur whose business had a bumper year might be reminded that his success derived, in part, from the capitalist system and entrepreneurial spirit fostered and protected by the government. Or a Wall Street banking executive receiving an overly large year-end bonus might feel a pang of guilt at his good fortune, recalling that the government bailed out his employer. Or even a recent law school graduate finally picking up a hefty paycheck after years of hard study might pause to reflect on the fact that his education, costly as it seemed, was in fact heavily subsidized by government spending for education. Yes, it might be that no one contributes, but what does the government have to lose by trying?<sup>167</sup>

The rejoinder to this approach is that it would be unlikely to convince many members of the tea party movement to willingly increase their tax burden. Since their focus is generally on shrinking government, why would they ever contribute *more* cash to the government for it to waste? At least a partial response can be found by returning to the earmarking strategy discussed above.<sup>168</sup> Unlike the earmarking of legally required tax receipts, voluntary patriotic

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165. In this regard, if a taxpayer values patriotism and begins to link supporting the government fiscally with patriotism, then making a voluntary contribution would likely increase his self-esteem and make the contribution more likely. See Lavoie, *supra* note 13, at 658–59 (discussing the use of an individual’s primal need to reaffirm his own self-esteem as a salient tax morale factor).

166. Lest one think this claim to be overly optimistic, consider that a group of millionaires is currently lobbying for tax *increases* on the wealthy, including themselves. See Dana Milbank, *Read Their Lips: Too Few Taxes*, WASH. POST, Apr. 7, 2010, at A2; see also PATRIOTIC MILLIONAIRES FOR FISCAL STRENGTH, <http://patrioticmillionaires.org> (last visited Sept. 16, 2011) (encouraging millionaires to sign a letter advocating higher taxes on millionaires); *Responsible Wealth*, UNITED FOR A FAIR ECON., [http://www.faireconomy.org/responsible\\_wealth](http://www.faireconomy.org/responsible_wealth) (last visited Sept. 16, 2011) (indicating more than 700 business leaders and wealthy individuals support the effort); Silvia Wadhwa, *German Millionaires Volunteer to Pay ‘Rich Tax’*, CNBC (June 10, 2010, 7:03 AM), <http://www.cnbc.com/id/37610762> (noting that more than fifty wealthy Germans have offered to pay 10 percent of their income for the next ten years to help Germany address its budget shortfall).

167. Actually, at least one group comes to mind, which would be almost certain to contribute: politicians seeking the presidency (who routinely are pressured to publicly disclose their tax returns). Who wants to be running in a presidential campaign where everyone knows you are a multimillionaire but your tax returns show you never put your money where your American flag lapel pin was? This pool could of course be broadened if members of Congress were actually required to disclose their personal tax returns.

168. See *supra* text accompanying notes 142–55.

remittances would have no negative impact on the budget since they would represent revenue not anticipated by the budget. As a result, there should be no serious objection to earmarking voluntary contributions to the fisc in a binding manner.<sup>169</sup> Thus, a taxpayer could direct his contribution to a specific department, or conceivably even to a specific program, and be assured that the funds would actually be put to that use. Want to see more space exploration and think the president and Congress are underfunding NASA? Well, make a contribution! Additionally, earmarking of patriotic contributions has the same benefit as does earmarking the basic tax liability, in that it signals to the government what programs the public truly supports.

But, still, an avid small-government advocate may not believe any aspect of government activity is underfunded. For these souls, there is always the holy grail of repaying the national debt. A significant corollary to a belief in small government is that the government should be fiscally responsible. Funding huge budget deficits with debt is the ultimate in fiscal irresponsibility. If one truly believes that the enormous national debt is ruining the country and will crush our children if it is not addressed, then why not start paying it down? Of course, tea party members will keep working to make government smaller, but until they reach that objective, why not help pay down the debt? Consequently, true fiscal conservatives should take personal action now on the national debt since every dollar paid now will be one (plus interest) less that is left for our grandchildren to deal with.<sup>170</sup>

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169. An argument could be made that such earmarking would encourage individual agencies within the executive branch to solicit patriotic funds from taxpayers at the expense of other departments. However, since this is extra money (i.e., it is not shifting congressionally appropriated funds), who cares if there is competition among departments? Indeed, such competition might be beneficial in highlighting the important work done by the government and could in fact encourage more patriotic contributions.

170. Of course, as noted earlier, concerned citizens can already make gifts to the government to reduce the national debt. *See supra* note 159. However, the contributions actually received each year are meager at best. In 2009, such contributions equated to only a penny for each American. An appeal by a liberal blog for fiscal conservatives to step up to the plate on this issue has gone unanswered. *See* brooklynbadboy, *A Penny to Reduce the National Debt*, DAILY KOS (July 9, 2010, 5:00 PM), <http://www.dailykos.com/story/2010/7/9/882938/-A-penny-to-reduce-the-national-debt>.

## VII. CONCLUSION

This Article has considered some of the factors that contribute to developing a self-sustaining taxpaying ethos in a society, with a focus on understanding those factors using a social contract framework. Given the rise of the tea party movement, which carries on the historical linkage between patriotism and tax protests in the United States, the role of patriotism as a general tax compliance factor was examined in light of the extant empirical evidence. This research hints that patriotism may be a weaker tax compliance factor in the United States than it is elsewhere. In light of this possibility, the tea party movement has the potential to unbalance the taxpaying ethos in the United States. In order to strengthen the impact of patriotism on tax compliance and lessen any adverse impact of the tea party movement on the country's taxpaying ethos, the government should take steps to disentangle American patriotism from its anti-tax roots. Important first steps in this regard could be taken by providing taxpayers a say in how the government uses their specific tax dollars, or at least by allowing them to make their desires known, even if in a nonbinding form. Additionally, the government should create a Patriotic Remittance Tax, through which taxpayers could make voluntary contributions and earmark their specific use. Making such changes will strengthen the bond between taxpayers and the government and make the bargain involved in the social contract framework more transparent for taxpayers. It will also help promote a vision of American patriotism that is positively associated with taxation rather than antithetical to it.

