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NOTE

THE INDIVIDUAL INCOME TAX:
A STUDY OF U.S. V. SCHIFF AND ITS SISTER CASES

Mia R. Yugo†

DUKE OF VENICE:
That thou shalt see the difference of our spirit,
I pardon thee thy life before thou ask it.
For half thy wealth, it is Antonio's.
The other half comes to the general state,
Which humbleness may drive unto a fine.

PORTIA:
Ay, for the state, not for Antonio.

SHYLOCK:
Nay, take my life and all. Pardon not that.
You take my house when you do take the prop
That doth sustain my house. You take my life
When you do take the means whereby I live.¹

William Shakespeare, The Merchant of Venice.

I. INTRODUCTION

Shakespeare’s Shylock poses an intriguing question: At what point does the confiscation of wealth infringe upon one’s liberty? Given Shylock’s predicament, the Duke’s offer of pardon appears to be the pinnacle of generosity, but Shylock refutes it as a pretext, equating the seizure of goods and property to an infringement on personal liberty.² For Shylock, the appropriation of money is merely another means of achieving the same end: the confiscation of life and liberty. The right to life, in other words, is

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¹ WILLIAM SHAKESPEARE, THE MERCHANT OF VENICE, act IV, sc. 1, 360-70.

² In modern English, the line can be translated as: “You take my house away when you take the money I need for upkeep. You take my life when you take away my means of making a living.”
intricately woven with economic freedom. Without the right to earn a living and benefit from one’s labor, the individual becomes a serf.

That principle was Irwin A. Schiff’s credo in his lifelong battle against the income tax.\(^3\) He argued that the individual income tax, as implemented in its current form, is an encroachment on economic freedom and thus an infringement on the right to life. According to Schiff, the “omnipotent state,” sometimes referred to as the welfare state, is the “antithesis of liberty.”\(^4\)

In *United States v. Schiff*, Schiff was sanctioned for what the courts have described as “frivolous appeals . . . ‘to make public his radical views on tax reform.’”\(^5\) The “grandfather of the tax protestor movement”\(^6\) challenged the validity of the federal income tax, asserting that a tax on individual income is unconstitutional. The court disagreed. Yet, Schiff views the court’s use and interpretation of case law regarding the validity of the federal income tax a product of an “ill placed” reliance on constitutional misapplications.\(^7\) Drawing upon Supreme Court precedent and legislative intent, Schiff paints a portrait of the judiciary’s role in what he views as an illegal tax regime. Schiff’s legal argument is fourfold: (1) the federal income tax is “not [directly] ‘traceable’” to the original taxing powers granted by the Constitution;\(^8\) (2) the Sixteenth Amendment “did not amend the Constitution, nor did its passage give the government any new taxing power;”\(^9\) (3) the absence of a statute precludes liability for income taxes;\(^10\)

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3. Mr. Schiff passed away in federal prison on October 16th 2015, at the age of 87, while this Note was near completion, in the final stages of editing. See Peter J. Reilly, *Irwin Schiff Famed Tax Protester Dies in Prison*, FORBES (Oct. 17, 2015, 10:21 PM), http://www.forbes.com/sites/peterjreilly/2015/10/17/irwin-schiff-famed-tax-protester-dies-in-prison/#a9b4c4426b34.


5. Schiff v. United States, 919 F.2d 830, 834 (2d Cir. 1990) (quoting Schiff v. Comm’r, 751 F.2d 116, 117 (2d Cir. 1984)).


8. *Id.* at 12.

9. *Id.*
and (4) the term “income” in Section 61 of the Internal Revenue Code refers to “income in its ‘Constitutional’ sense” not its “ordinary sense.”

According to Schiff, since the federal court lacked subject matter jurisdiction, his conviction should have been reversed and immediate release effectuated.

This Note is a four-part legal analysis of Schiff v. United States and its sister cases. Section I is an introduction to Schiff. Section II is a background section that lays the factual foundation for Schiff’s protestation of the income tax, including procedural history and the origins of the tax: from judicial interpretation in case law up until the passage of the Sixteenth Amendment. Section III analyzes the validity of the current taxation system, applying the object and scope limitations laid out in the background section to the individual income tax in its current form. With Schiff v. United States as its backdrop, this Note traces Congress’s power of taxation to the original taxing powers and analyzes the passage, purpose, and actual operation of the Sixteenth Amendment. Under that framework, the Note assesses whether the individual income tax, in its current form, is a means to an improper end, that is, whether it is prohibited by either the Constitution or natural law theory. Finally, the Note concludes with a brief look into the First Amendment implications surrounding Schiff’s cases, and then posits a possible taxation alternative for what many Americans perceive as “the worst tax—that is, the least fair.”

II. BACKGROUND

A. Procedural History

1. Tax Evasion

Following an assessment by the Commissioner of Internal Revenue Service for “income tax deficiencies for the years 1974 and 1975,” Schiff was convicted of failure to pay estimated income tax and fraudulent underpayment. Schiff appealed the decision of the United States Tax

10. Id. at 5-6.
11. Id. at 6.
12. Id. at 10.
13. Lawrence E. Zelenak, Foreward: The Fabulous Invalid Nears 100, 73 L. & CONTEMP. PROBS. i (2010) (quoting Karlyn Bowman, American Enterprise Institute, Public Opinion on Taxes 7–8 (2009)) (summarizing the results of ORC and Gallup polls asking respondents to choose from among four taxes: federal income tax, state income tax, state sales tax, and local property tax)).
Court on three bases: (1) “he could not be penalized for fraudulent underpayment of taxes when he, in fact, made no payment,” (2) “the tax on wage income is unconstitutional,” and (3) “the Commissioner is not authorized to assess a deficiency if no return was filed.” The Second Circuit denied the appeal, reasoning that the appellant’s arguments were “wholly lacking in merit” and “without any logical basis.” The court granted the Commissioner’s request for sanctions, awarding both damages and double costs.

The prosecutions against Schiff for tax evasion and his subsequent appeals span nearly four decades. In 1977, only two years after the first set of sanctions, Schiff once again “filed no tax returns at all for the years 1977 and 1978.” Schiff was convicted of failure to pay income taxes from 1976 through 1978, and again appealed the conviction. Interestingly, in 1977, Schiff “file[d] a form 1040 . . . for the year 1976,” setting forth his name, address, and social security number. That form, however, did not set forth “any financial information in the relevant portions of the return” but instead asserted in the margins the following contention:

I DO NOT UNDERSTAND THIS RETURN NOR THE LAWS THAT MAY APPLY TO ME. THIS MEANS THAT I TAKE SPECIFIC OBJECTION UNDER THE 4th or 5th AMENDMENTS OF THE U.S. CONSTITUTION TO THE SPECIFIC QUESTION.

Schiff’s objections continued on page two of the form, reasserting his belief that the federal income tax is voluntary and that there is no criminal statute making one liable for failure to pay federal income taxes. As recently as 2004, Schiff persistently maintained that “no law requires you to file income tax returns or pay this tax,” and “there are no criminal statutes that apply to income taxes . . . [a]nd there is no law giving federal courts authorization . . . to prosecute anyone for income tax ‘crimes.’” The Ninth

15. Id.
16. Id.
17. Id.
19. Id.
20. Id.
21. Id.
22. Id.
23. United States v. Schiff, 379 F.3d 621, 630 (9th Cir. 2004).
and Second Circuits have dismissed these claims as “far-fetched”24 and “frivolous.”25

a. A Dismissal of Merits

The Second Circuit rejected Schiff’s appeal and upheld the lower court’s holding that Schiff’s “failure to file tax returns for the years 1976 through 1978 was a fraudulent attempt to evade taxes.”26 The court reasoned that a 1040 tax return, which “set forth no financial information,” is “treated as if no return was filed.”27 The court further found all of Schiff’s contentions to be “completely lacking in merit.”28

First, the court dismissed Schiff’s argument that the income tax violates the original taxing powers granted by the Constitution.29 In so holding, the court relied in part upon Brushaber v. Union Pac. R. Co., which held that such arguments are “wholly without foundation,” since it is the “command of the [Sixteenth] Amendment that all income taxes shall not be subject to apportionment.”30

Second, the court reasoned that—contrary to Schiff’s contention—tax assessments do not amount to a “taking of property without due process.”31

Third, the court held that the IRS “gave timely notice to Schiff” of a tax deficiency and that “when a taxpayer does not file a tax return, it is as if he filed a return showing a zero amount for purposes of assessing a deficiency.”32 Since assessments for zero returns may be filed at any time, the three-year statute of limitations for assessments did not apply.33

b. Sanctions Revisited

Zeroing in on Schiff’s unwavering opposition to Congress’s authority to impose a non-apportioned direct tax, the court held that Schiff’s contentions merited the further imposition of sanctions pursuant to Rule 38 of the Federal Rules of Appellate Procedure.34 In justification, the court

24. Id.
25. Schiff, 919 F.2d at 831-33.
26. Id. at 833.
27. Id.
28. Id. at 832.
29. Id.
31. Schiff, 919 F.2d at 832.
32. Id. at 832-33.
33. Id. at 833.
34. Id. at 834.
highlighted Schiff’s history of “attacks on the tax system.” 35 Citing to Schiff’s previous tax evasion case, the judiciary reaffirmed its description of the appellant as “an extremist who reserve[s] the right to interpret the decisions of the Supreme Court as he read[s] them from his layman’s point of view regardless of and oblivious to the interpretations of the judiciary.” 36 Finding a “clear showing of bad faith,” the court once again ordered double costs and damages “to be paid to the United States.” 37 The court further ordered a prohibition on any further filings to the clerk from the appellant until payment of the sanctions. 38 The court concluded its rather short analysis of the merits with a mere reassertion of its previously stated contention that “‘[t]he payment of income taxes is not optional . . . and the average citizen knows that the payment of income taxes is legally required.’” 39

Interestingly, but perhaps not surprisingly, the sanctions did not have the deterrent effect the court intended. Rather than withdraw from what the courts have repeatedly dismissed as ill-placed convictions, Schiff pressed on. Not only did he continue his zero returns, he also penned books explicating those views—eventually becoming the grandfather of a movement. 40

2. First Amendment Restrictions

Despite repeated incarceration, Schiff remained firm in his convictions. Most recently, in United States v. Schiff, the Ninth Circuit noted that Schiff has maintained consistent opposition to the federal income tax for “over thirty years.” 41 The court held that Schiff’s belief in the “voluntary” nature of the income tax—also outlined in his book, The Federal Mafia—is “fraudulent commercial speech” not protected by the First Amendment. 42 Because Schiff’s speech “organize[d], market[ed], or promote[d] [a] tax evasion scheme,” 43 the court held that the prohibition on the sale and promotion of such material was properly restricted and consistent with the First Amendment. The court reasoned that the advertisement of a “tax

35. Id.
36. Id. (quoting United States v. Schiff, 612 F.2d 73, 75 (2d Cir. 1979)).
37. Id.
38. Id. at 835.
39. Id. at 834.
40. See Reilly, supra note 6.
41. United States v. Schiff, 379 F.3d 621, 623 (9th Cir. 2004). See generally Schiff, 919 F.2d at 834; United States v. Schiff, 801 F.2d 108 (2d Cir. 1986); Newman v. Schiff, 778 F.2d 460 (8th Cir. 1985); Schiff v. Comm’r, 751 F.2d 116 (2d Cir. 1984); United States v. Schiff, 647 F.2d 163 (2d Cir. 1981).
42. Schiff, 379 F.3d at 629.
43. Id. at 624.
“avoidance scheme” demonstrates a strong likelihood of future violations of the Internal Revenue Code. Furthermore, the court viewed the perpetuation of this scheme as a serious threat to the validity of the federal income tax due to “consumer confusion.” In balancing Schiff’s First Amendment interest against the state’s interest in reducing tax avoidance, the court found in favor of the state, reasoning that his commercial speech was rightly limited because it was deemed fraudulent.

B. Origins of the Income Tax

1. “Income” Defined

All U.S. citizens, residents and nonresidents, must pay individual income tax on their taxable income, which is defined as “gross income minus deductions . . .” Under *Cook v. Tait*, Congress has power to impose taxes upon income received by “native citizen[s] of the United States” who were domiciled in a foreign country “at the time the income was received.” The reach of Section 61 not only stretches beyond the nation’s borders, but also applies to noncitizens within its borders. Nonresident aliens “engaged or considered to be engaged in a trade or business in the United States during the year” must file an income tax return. The nonresident alien must

44. *Id.* at 626.
45. *Id.* at 630.
46. *Id.*
48. I.R.C. § 62. I.R.C. § 61 defines “gross income” as:
   
   [A]ll income from whatever source derived, including (but not limited to) the following items: (1) Compensation for services, including fees, commissions, fringe benefits, and similar items; (2) Gross income derived from business; (3) Gains derived from dealings in property; (4) Interest; (5) Rents; (6) Royalties; (7) Dividends; (8) Alimony and separate maintenance payments; (9) Annuities; (10) Income from life insurance and endowment contracts; (11) Pensions; (12) Income from discharge of indebtedness; (13) Distributive share of partnership gross income; (14) Income in respect of a decedent; and (15) Income from an interest in an estate or trust.
   
   I.R.C. § 61. All income derived from these sources is taxable income. Some items, however, such as income acquired by gift, bequest, devise, or inheritance or proceeds from life insurance contracts paid by reason of the death of the insured are, for policy reasons, specifically excluded from gross income. *See generally* I.R.C. §§ 101-139A.
report all income “effectively connected” with their trade or business and all “U.S. source income that is ‘fixed, determinable, annual, or periodical (FDAP).’”51

Under the current federal taxation system, all income derived from the non-exhaustive list of fifteen sources listed in Section 61 of the I.R.S. Code is taxed at a progressive rate. For single persons earning between $0 and $9,225, the 2015 marginal income tax rate is 10%.52 For persons earning between $37,450 and $90,750, the rate is 25%.53 For persons earning $413,200 and over, the rate is 39.6%.54 The higher the value of the property acquired, the higher the rate of taxation.

Failure to pay results in either “failure-to-file” or “failure-to-pay” penalties.55 Although “reasonable cause” may, in some circumstances, excuse persons from penalties, “willful neglect” on the part of the taxpayer is punished to the fullest extent of the law.56 In some cases, the consequence of willful neglect is incarceration.

The existence of this system, in its current form, is not in dispute. Schiff does not question its existence, but rather its faithfulness to its original purpose. Two issues lie at the heart of America’s individual income tax system: (1) What is the basis for the government’s power to tax individual income? and (2) Does the current system of taxation comport with the spirit of the law, as envisioned by the Founders?

2. Original Taxing Powers
   a. Schiff’s First Argument: Traceability

Schiff’s first argument is that the individual income tax is “not [directly] traceable” to the original taxing powers granted to Congress by the Constitution.57 The Constitution contains three original clauses pertaining to taxation. Article I, Section 8 grants the federal government the power to “lay and collect” taxes.58 This power, however, is limited by two additional clauses. Article I, Section 2, clause 3 imposes upon Congress the Rule of

51. Id.
53. Id.
54. Id.
56. Id. (emphasis added).
57. See Schiff, supra note 7, at 7.
Apportionment, mandating that direct taxes must be apportioned among the several states. Article I, Section 9, clause 4 further dictates that no direct tax shall be laid unless in proportion to the census or enumeration.59 Hence, any non-apportioned, direct tax is unconstitutional.

By contrast, indirect taxes, including duties, imposts, and excises, must be levied according to “geographic uniformity.”60 Any tax falling under this class of taxation need not be apportioned among the several states.

The crux of the matter is the proper classification of the individual income tax. Schiff contends the individual income tax is not imposed as either a direct or indirect tax.61 “Since the individual income tax is not imposed pursuant to either class,” he states, “it is not a tax authorized by the Constitution, and thus cannot be legally enforced by any federal court . . . .”62 In other words, he argues the income tax is unconstitutional because (a) it is a direct tax, (b) direct taxes must be apportioned among the states, (c) the income tax is not apportioned, and therefore, (d) the income tax is unconstitutional. This, in Schiff’s view, is the limitation imposed on Congress by the Constitution’s “original taxing powers.” Since the Constitution does not give Congress authority to impose non-apportioned direct taxes, the income tax is therefore not “directly traceable” to the original taxation clauses.

The Supreme Court addressed this issue in its 1895 decision in Pollock v. Farmers’ Loan and Trust Co., which was later vacated, but is essential to analyze since its reasoning is the basis upon which Schiff and the tax protester movement rely.

(1) Pollock Introduced: An Unconstitutional Direct Income Tax

The origins of the federal income tax date back to the formation of the Bureau of Internal Revenue in the 19th century. In 1862, “President Lincoln and Congress . . . created the position of commissioner of Internal Revenue and enacted an income tax to pay war expenses.”63 However questionable the legality of this measure at the time, it was enacted as temporary relief for the war effort. Ten years later, the tax was repealed.64 But the respite was

59. U.S. CONST. art. 1, § 9, cl. 4.
60. Schiff, supra note 7, at 8.
61. Id.
62. Id.
64. Id.
brief. In 1894, 22 years after the repeal, Congress “revived the income tax.”65 One year later, in *Pollock v. Farmers’ Loan and Trust Co.*, the Supreme Court struck down the income tax as unconstitutional.66

The *Pollock* Court held that the 1894 tax was a “constitutionally impermissible unapportioned direct tax.”67 The majority held that the “whole law of 1894 should be declared void and without any binding force.”68 The Court reasoned that the federal government’s tax on income from real estate, rents, and profits was outside the power of Congress because it was “not imposed by the rule of apportionment according to the representation of the [s]tates, as prescribed by the Constitution.”69 The Court similarly held that the taxation of bonds and securities of the states and municipal bodies was “beyond the power of Congress.”70 Since the 1894 income tax was a direct tax not apportioned among the several states according to population, the tax was declared void. Thus, the original taxing power of the Constitution limited the right of taxation. Any direct tax levied in violation of the rule of apportionment was declared unconstitutional:

> The inherent and fundamental nature and character of a tax is that of a contribution to the support of the government, levied upon the principle of equal and uniform apportionment among the persons taxed, and any other exaction does not come within the legal definition of a *tax*.71

A tax levied upon income but imposed unequally was deemed an “arbitrary and capricious” exercise of legislative power.72 Hence, the Court struck down the tax, declaring it a “shackle . . . upon state powers.”73

(2) *Pollock* Reinterpreted

Contrary to the interpretation of tax protesters, some scholars interpret *Pollock* as validating taxation of income from employment.74 In so arguing,
these opponents partly rely on Justice White’s dissenting opinion in *Pollock*, which states, “[I]t is expressly decided that the term [direct tax] does not include the tax on income.”75 It is admitted, however, that the precise meaning of direct taxes, “in the sense of the Constitution” is “a question not absolutely decided.”76 The dissent expressly acknowledges that “at the very birth of the government a contention arose as to the meaning of the word ‘direct’” but that the “controversy was determined by the legislative and executive branches of the government.”77 The dissent then outlines the construction of the term “direct,” relying on decades of judicial adjudication to conclude that “direct taxes within the meaning of the constitution were only taxes on land and capitation taxes.”78 The “long and settled practice” of construing direct taxation in this manner is, from the dissent’s viewpoint, unjustly overthrown.79

To declare, as the majority does, that the “vast sums” of money “collected from the people of the United States” through the income tax were wrongfully taken renders the government vulnerable to claims for “an enormous amount of money.”80 The economic repercussions of a declaration of invalidity were evidently the heart of the dissent’s concern. Its constitutional interpretation, coincidentally, alleviates that concern. For critics of the tax protester movement, the Sixteenth Amendment does away with the concern entirely.

b. Schiff’s Second Argument: Income in its ‘Constitutional’ v. ‘Ordinary’ Sense

Schiff’s second justification for “zero returns” is based on a 1921 Supreme Court decision, *Merchants’ Loan & Trust Company v. Smietenka*.81 According to Schiff, *Merchants’ Loan & Trust* provides a crucial distinction between income in its “constitutional” sense and income in the “ordinary” sense.82

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75. *Pollock*, 157 U.S. at 635 (White, J., dissenting).
76. *Id.*
77. *Id.* at 636.
78. *Id.* at 637.
79. *Id.*
80. *Id.*
81. Schiff, *supra* note 7, at 16 (citing Merchant’s Loan & Trust Co. v. Smietenka, 255 U.S. 509, 520 (1921)).
82. *Id.* at 17.
At issue in Merchants’ Loan is the meaning of the word “income” within the Income Tax Act of 1916.83 The plaintiff, a trustee of property under a will, challenged the classification of capital assets of an estate as income under (1) the 1916 Income Tax Act and (2) the Sixteenth Amendment.84 The question posed to the Court was whether the proceeds of the sale of corporate stock by testamentary trustees was income within the meaning of the Constitution and subsequently, the Income Tax Act.85

The plaintiff argued that the “appreciation in value of the capital assets of the estate” did not constitute “income” within the meaning of the Sixteenth Amendment.86 The gain or profit at issue, according to the plaintiff, did not satisfy the requirements of income classification in the constitutional sense. This was because the income from the proceeds of the sale of the stock were never received: the widow did not receive it, the children did not receive it, and the trustee did not receive it.87 Consequently, the plaintiff asserted that the “increase in value of the stock could not be lawfully taxed under the act of Congress.”88 Since the appreciation in value was never received, it should never have been classified as income.89

Two bases were offered in support of the plaintiff’s exclusion of the increase in value of the stock as income: First, the instrument that created the trust—a will—required that “stock dividends and accretions of selling value shall be considered principal and not income.”90 Second, the Supreme Court already stipulated that the type of gain or profit at issue in Merchant’s Loan & Trust was not contemplated to be “income” in the constitutional sense.91 Under Eisner v. Macomber, “the ‘common understanding’ [of] the term ‘income’ does not comprehend such a gain or profit as we have here, which it is contended is really an accretion to capital and therefore not constitutionally taxable . . . .”92

With regard to the definition of income provided in the will, the Court disregarded the instrument, reasoning, as a general rule, that “[i]t [is] not

83. Merchant’s Loan & Trust Co. v. Smietenka, 255 U.S. 509, 514 (1921)
84. Id.
85. Id.
86. Id. at 509.
87. Id. at 515.
88. Id.
89. Id.
90. Id. at 514-15.
91. Id.
92. Id. at 515 (citing Eisner v. Macomber, 252 U.S. 189 (1920)).
within the power of the testator to render [a] fund non-taxable." 93 With regard to the meaning of income in its constitutional sense, the Court turned to precedent and noted that "[t]he question is one of definition and the answer to it may be found in recent decisions of this [C]ourt." 94

One of the earliest formulations of "income" in its constitutional sense is found in *Stratton's Independence v. Howbert*. There, the Court defined income as "[a] gain derived from capital, from labor, or from both combined." 95 This definition, however, was later expanded. As the Court notes, the term income was defined with more particularity in cases "arising under" the Corporation Excise Tax Act of 1909 and the Income Tax Acts. 96 That definition, according to the *Merchants’ Loan* Court, is controlling.

The most notable addition came in *Eisner v. Macomber* where, as noted, the Court defined "income" as "a gain derived from capital, from labor, or from both combined, provided it be understood to include profit gained through sale or conversion of capital assets." 97 The Court reasoned that this definition of income under the Corporation Excise Income Tax Act of 1909 logically carries over to the Tax Act of 1913. 98 "There would seem to be no room to doubt that the word must be given the same meaning in all of the Income Tax Acts of Congress that was given to it in the Corporation Excise Tax Act and that what that meaning is has now become definitely settled by decisions of this court." 99

Schiff’s view, therefore, is that the *Merchants’ Loan* decision made clear that "[i]ncome in its 'constitutional sense' . . . means, 'income separated from its source,'" 100 If there is no separation, then the "income tax falls directly on the source (i.e. the property that generated the income),” hence "qualif[ying] it as a ‘property tax’ rather than an ‘income tax.’" 101 The enforcement of the income tax by federal courts is therefore unconstitutional, Schiff argues, because any "tax on the income from real and personal property is unconstitutional and void if not apportioned." 102

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93. *Id.* at 516.
94. *Id.* at 517.
95. *Id.* at 517 (quoting *Stratton's Independence v. Howbert*, 231 U. S. 399, 415 (1913)) (internal quotations omitted).
96. *Id.* at 518.
97. *Id.* at 518 (quoting *Eisner*, 252 U. S. at 207) (internal quotations omitted).
98. *Id.* at 518-19.
99. *Id.* at 519.
100. Schiff, supra note 7, at 18.
101. *Id.*
102. *Id.* (citing *Pollock v. Farmers' Loan and Trust Co.*, 157 U.S. 429 (1895)).
Hence, Schiff argues that Howbert, Eisner, and Merchants’ Loan render the individual income tax unconstitutional by definition.

Unlike Pollock, Merchants’ Loan was decided in 1921, after the passage of the Sixteenth Amendment. Thus, Schiff argues that when income cannot be separated from its source, any un-apportioned tax such as today’s individual income tax is unconstitutional notwithstanding the Sixteenth Amendment.103

3. The Sixteenth Amendment: Passage and Purpose
   a. Passage

In 1909, the Sixteenth Amendment was submitted to the states for ratification.104 Four years later, on February 25, 1913, the Amendment passed with more than three-fourths of the necessary support.105 With Wyoming on board, the three-quarter-majority requirement was satisfied and the Constitution amended.106 Only four states, Connecticut, Florida, Rhode Island, and Utah rejected it.107

The Sixteenth Amendment states: “The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.”108 When Wyoming finally ratified the Amendment in 1913, its passage, according to the Bureau of Internal Revenue, “gave Congress the authority to enact an income tax.”109 The original law, however, is a far cry from today’s Internal Revenue Code.

The original law, as Schiff explains, contained a mere fourteen pages and “levied a delicate tax of 1 percent, graduated as follows: 2 percent on $20,000-50,000, 3 percent on $50,000-75,000, 4 percent on $75,000-$100,000, 5 percent on $100,000-$250,000, 6 percent on $250,000-$500,000, and 7 percent thereafter.”110 Its primary purpose, according to the IRS, was to tax the wealthy in order to “pay war expenses.”111

103. SCHIFF, supra note 4, at 254.
104. Id. at 253.
105. Id.
106. Brief History of IRS, supra note 63.
107. SCHIFF, supra note 4, at 253.
108. U.S. CONST. amend. XVI.
109. Brief History of IRS, supra note 63.
110. SCHIFF, supra note 4, at 254 n.1.
111. Brief History of IRS, supra note 63.
b. Purpose

(1) War Expenses

The purpose of the original 1862 income tax was to pay war expenses during the American Civil War.\(^{112}\) When the war ended, that purpose could no longer be served. Thus the tax was repealed ten years later—and again rendered unconstitutional after a revival in 1894.\(^{113}\) The purported purpose of the 1913 Tax Act, however, is not as clear. Paying war expenses is certainly one of the purposes served by the tax. In 1918, for example, the top rate was increased to seventy-seven percent to “help finance the war effort” during World War I, then dropped to twenty-four percent in 1929, then rose again during the Great Depression.\(^{114}\) Evidently, a portion of the revenue raised was indeed used to fund war efforts, but since the tax has remained in force long after the First World War, paying war expenses may not have been its chief object. The query, therefore, is whether the purpose now served by the income tax exceeds the authority granted to Congress.

In 2013, the federal income tax celebrated its 100th birthday. The tax protestor interpretation of Pollock’s holding of a constitutionally impermissible income tax has been swept aside and the dissent’s opinion now reigns supreme. The “development of constitutional law” now stands as the primary justification for the shift from direct taxation as controversy to direct taxation as settled law.\(^{115}\)

III. CONSTITUTIONALITY OF THE INDIVIDUAL INCOME TAX

PART I

A. Reliance on Pollock and Merchants’ Loan

Schiff contends the traceability argument is valid notwithstanding the passage of the Sixteenth Amendment.\(^ {116}\) That four-line amendment, which gave Congress the power to lay and collect taxes, he argues, “did not automatically abrogate every other line and right secured to Americans by the same Constitution.”\(^ {117}\)

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112. \textit{Id.}
113. \textit{Id.}
114. \textit{Id.}
115. See Jackson, supra note 74, at 312.
116. See generally Schiff, supra note 4, at 309.
117. \textit{Id.}
First, Schiff argues that Pollock is still valid law. Notwithstanding the passage of the Sixteenth Amendment, Schiff argues Pollock was “never reversed, never overturned.”118 Hence, its limitation on Congress’ authority to tax is still in place. Second, Schiff argues that Merchants’ Loan & Trust—like Pollock—is also valid, as it too was never overturned.119 Both arguments rest on judicial interpretation. While valid case law is indeed proper legal authority, judicial interpretation is subject to change. The principle of stare decisis, for example, does not bar a court from overturning its own decision. Even if the Supreme Court one day accepts Schiff’s interpretations of both cases (which has yet to occur), those concessions would not bar the Court from overturning its own holdings. For this reason, even assuming Schiff’s reliance on past judicial interpretation is helpful to his case (a position courts have repeatedly rejected), it is insufficient to render the tax unconstitutional, particularly when the current judiciary views all challenges as “frivolous” appeals of settled law.120

Thus, as between his arguments, Schiff’s analysis of the object and operation of the income tax, in its current form, is his stronger constitutional argument. That argument is twofold. First, Schiff argues that if the object of the Sixteenth Amendment exceeds the authority granted by the People to Congress to enact laws, the tax is unconstitutional.121 Second, he asserts that even if the object of the Sixteenth Amendment was a legitimate end within the scope of authority granted to the civil government, its steady expansion could nonetheless render it unconstitutional in operation.

PART II

The Sixteenth Amendment: Exceeding the Scope of Authority
Granted by ‘We the People’

118. Schiff, supra note 7, at 17.
119. Id.
120. See, e.g., Schiff v. United States, 919 F.2d 830, 831 (2d Cir. 1990).
121. See, e.g., Schiff, supra note 4, at 253-54. Discussing the passage of the Sixteenth Amendment, Schiff states:

The U.S. electorate was tricked into voting for it because it was presented to them as a “soak-the-rich” scheme . . . Clearly, therefore, there has been a breach by the federal government of the taxing powers initially conveyed to it, which required a constitutional amendment. Since current levels of taxation go far beyond anything that consenting voters contemplated, there was, in legal parlance, no ‘meeting of the minds,’ and hence no contract binding the Sixteenth Amendment to the citizens of this republic can be assumed.

Id.
A. Object: A Tax on the Wealthy or a Pretext for the Redistribution of Wealth?

If the actual object of the individual income tax is a redistribution of wealth, Schiff argues its end is an illegitimate object, falling outside the jurisdiction of the federal government. According to Schiff, the Sixteenth Amendment, together with the creation of the Federal Reserve System, enabled the federal government to first create economic classes and then shift wealth between them.\footnote{Id.} Schiff argues that the Sixteenth Amendment and Federal Reserve System “gave the federal government the means to plunder both [American] productivity and . . . savings.”\footnote{Id. at 253.} By imposing higher taxes on wealthier individuals, the individual income tax punishes success. Contrary to a flat tax, the progressive taxation system separates individuals into classes. By imposing lower rates on lower income earners, the system in effect favors those who produce less and punishes those whose productivity earns them a higher income. The IRS calls this a “fair share.”\footnote{IRS, The Agency, its Mission, and Statutory Authority, (Nov. 4, 2014), http://www.irs.gov/uac/The-Agency,-its-Mission-and-Statutory-Authority.} Schiff calls it unconstitutional income shifting orchestrated by “too much government.”\footnote{SCHIFF, supra note 4, at 313.}

In short, if the actual purpose of the amendment is to redistribute wealth (as opposed to, for example, raising money to pay for war expenses), then Schiff views that purpose as illegitimate and unconstitutional for two reasons: firstly because he asserts people were “tricked” into voting for it (thinking it would only affect the rich, which it does not) and secondly, because that redistribution creates a system of involuntary servitude, thus violating the Thirteenth Amendment, as explained in the next section.\footnote{Id. at 254.} This object/purpose argument, as framed by Schiff, inevitably overlaps with his operation argument because the implementation of the tax system reveals its purpose.\footnote{Id. at 309-10.} Simply put, the theory posits that the actual object of the system only became visible once it was operational. Thus, once the tax system was in place, the redistribution of wealth revealed itself as the true object of the Sixteenth Amendment, which purpose according to Schiff, violates the Thirteenth Amendment.\footnote{Id.}
B. Operation: The Thirteenth Amendment and Involuntary Servitude

The next argument in the tax protestor movement is the belief that the income tax, in its current form, infringes upon the economic freedom secured by the Founders. As tax protestors argue, its operation falls outside the scope of authority granted by the People, and therefore violates the spirit of the Constitution—if not in object then in operation. It is on this ground that Schiff argues the Sixteenth Amendment was fraudulently presented to the American people as a “soak-the-rich scheme.”

Specifically, he contends the “U.S. electorate was tricked into voting for it,” believing it would “only affect the wealthy.” In support, he refers to statistics from 1916, detailing that “only 362,970 Americans out of a population of 102 million paid taxes—or less than 4/10 of one percent.” By the late 1970s, that percentage climbed to fifty percent. Today, the income tax affects a large majority of the population. In 2012, for example, “the IRS collected more than $2.5 trillion in revenue and processed more than 237 million tax returns.” Schiff concludes that the income tax, as it operates today, is unconstitutional because it exceeds the original intent of the Sixteenth Amendment:

[T]here has [clearly] been a breach by the federal government of the taxing power initially conveyed to it, which required a constitutional amendment. Since current levels of taxation go far beyond anything that consenting voters contemplated, there was, in legal parlance, no “meeting of the minds,” and hence no contract binding the Sixteenth Amendment to the citizens of this republic . . . .

Schiff argues that even if the object of the Sixteenth Amendment was legitimate, the ‘actual operation’ of the federal income tax now exceeds the amendment’s original purpose. This absence of a consensus ad item (“meeting of the minds”) to which Schiff frequently refers can also be understood as a pretext for an unconstitutional end.

Schiff contends that the “actual operation,” “current tax rates,” and “manner” in which the Sixteenth Amendment is enforced “attempt[s] to destroy all the rights which are secured by the Fourth, Fifth, Sixth, Seventh,

129. Id. at 253. (internal quotations omitted).
130. Id. at 253-54 (internal quotations omitted).
131. Id. at 254 n.1.
132. Id.
134. SCHIFF, supra note 4, at 254.
Eighth, Ninth, Tenth, and Thirteenth amendments.” 135 Of these, the prohibition in the Thirteenth Amendment against involuntary servitude is his most attractive legal basis for the unconstitutionality of the income tax in its current form. Another of Schiff’s constitutional arguments rests on the prohibition against titles of nobility in Article 1, Section 9, clause 8. 136 A Constitution built on negative rights prohibits the federal government from enforcing a system of taxation that creates a privileged class of citizens through a forced distribution of wealth.

Since the Thirteenth Amendment abolished slavery, it prohibits involuntary servitude between individuals. 137 Schiff contends that this prohibition applies not only between individuals, but “denie[s] such a relationship to the state as well.” 138 At the current rate of taxation, tax protesters argue that the individual income tax “attempts to reduce all productive citizens to peons in the service of the state.” 139

In short, the first argument asserts that if the actual object of the Sixteenth Amendment was to shift income from one economic class to another, that object would be improper because it falls outside the jurisdiction of the federal government. The second argument asserts that even if, arguendo, the original object of the Sixteenth Amendment (i.e. to pay war expenses, to provide financial security for seniors) was indeed proper, its expansion beyond that object, renders it a means to an illegitimate end: the redistribution of wealth through involuntary servitude. 140

The Constitution “was primarily established to protect the lives, property, and privacy of Americans . . . .” 141 Forcing higher income earners to subsidize lower income individuals falls outside the jurisdiction of the government. On July 4, 1776, the people of the several states formed a nation built on the unalienable right to life, liberty, and the pursuit of happiness. The pursuit of happiness, rooted in the right to property, protects the fruits of one’s labor from being plundered by the state. The Thirteenth Amendment secures that right by prohibiting the confiscation of wealth, the product of one’s labor. When the state, in this case, the federal government, forcibly confiscates a significant percentage of one’s personal

135. Id. at 309.
136. Id. at 310.
137. U.S. CONST. amend. XIII.
138. SCHIFF, supra note 4, at 310.
139. Id.
140. Id. at 309-10.
141. Id. at 309.
income, it creates a de facto state of servitude, a form of slavery. By creating economic classes, the state enslaves one portion of the population to the other.\textsuperscript{142} The private sector is taxed at exorbitant rates while the public sector reaps the benefits of forced charity—the “antithesis of [personal] liberty.”\textsuperscript{143}

C. Endowed by the Creator

Another theory favoring tax protesters, albeit not articulated by Schiff, is natural law theory. This argument espouses that all law comes from God: “Let every person be subject to the governing authorities; for there is no authority except from God, and those authorities that exist have been instituted by God.”\textsuperscript{144} The Declaration of Independence, for example, echoes this Biblical worldview, noting that the scope of the government’s powers is framed by the consent of persons already endowed by God with certain unalienable rights:

\begin{quote}
We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed.\textsuperscript{145}
\end{quote}

In 1776, the sovereign of the land—the People of the United States—formed a nation-state by consenting to limited government, instituted among men to secure life, liberty, and the pursuit of happiness.\textsuperscript{146} Reflecting the passage in Romans 13, the purpose of that government was neither to grant nor infringe upon liberty; the sole purpose, rather, was the security of existing, unalienable rights already granted by the Creator. Consent is therefore limited to the government’s proper observance of power; when the magistrate exceeds its authority, consent is not withdrawn but is absent altogether.

\begin{footnotes}
\item[142] Id.
\item[143] Id. at 313.
\item[145] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).
\item[146] See, e.g., U.S. Const. art. 1, § 3, cl. 3 (stating qualifications for Senators, the count of years which indicate the birth of the nation occurred in 1776, not 1789).
\end{footnotes}
Recall for example, the principle “lex iniusta non est lex,” meaning “an unjust law is not a law.” Although the precise origins of its wording are uncertain, the slogan can generally be traced back to a passage from Saint Augustine on the topic of free will:

A soldier is even ordered by law to kill the enemy, and if he hangs back from the slaughter, he is punished by his commander. Shall we dare to say that those laws are unjust—or, rather, no laws at all? For that which is not just does not seem to me to be a law” (“lex mihi esse non videtur, quae iusta non feurit” De libero arbitrio I v 11).148

The “non est lex” principle is now often associated with the Thomistic tradition, having been refined by Augustine’s successor, Saint Thomas Aquinas,149 though perhaps not coined by Aquinas in precisely those terms.150 Applying the principle to the tax protestor movement, the argument, in theory, is that the consent of the people is limited to laws that are just, and justice is that which protects the rights granted by the Creator. For Aquinas, “unjust laws are . . . ‘acts of violence rather than laws.’”151 They “bind in conscience, if at all, not per se, but only per accidens. They are laws, not ‘simpliciter,’ or, as we might say, in the ‘focal’ or ‘paradigmatic’ sense, but only in a derivative or secondary sense (‘secundum quid’).”152 Indeed, this relationship between morality and law is the focal point of the positivists’ attack on natural law theory:

If the positive law is, as all followers of the natural-law doctrine assert, valid only so far as it corresponds to the natural law, any norm created by custom or stipulated by a human legislator which is contrary to the law of nature must be considered null

147. 33 AM. JUR., Norman Kretzmann, Lex Iniusta Non est Lex – Laws on Trial in Aquinas’ Court of Conscience 101 (1988).
149. Robert P. George, Kelsen and Aquinas on “The Natural-Law Doctrine,” 75 NOTRE DAME L. REV. 1625, 1640 (2000). George states, “A commonplace criticism of Aquinas is that his evident endorsement of Saint Augustine’s statement that ‘a law that is not just[] seems to be no law at all’ shows that he is guilty of merging the categories of ‘legal’ and ‘moral . . .’ “ Id.
150. Id. at 101-05.
151. Id. at 1642 (quoting THOMAS AQVINAS, SUMMA THEOLOGICA pt. I-II, q. 96, art. 4 (Fathers of the Eng. Dominican Province trans., Benzinger Bros., Inc. 1947) (1485) (discussing the ways in which a law is unjust)).
152. Id. at 1642.
and void. This is the inevitable consequence of the theory which admits the possibility of positive law as a normative system inferior to natural law. The extent to which a writer abides by this consequence is a test of his sincerity. Very few stand this test.\textsuperscript{153}

Kelsen’s critique here is, as Robert P. George states, a “familiar charge against natural law theory.”\textsuperscript{154} It posits that the “lex iniusta non est lex” principle undermines the fabric of law; to base the validity of law on the laws of nature would in other words, create instability and uncertainty in the law—two unsustainable consequences of the natural law approach, at least as understood [or misunderstood] by the positivists.

In Schiff’s case, positivists would (and have) undoubtedly echoed this critique, asserting that the individual income tax, in every form, is valid manmade law, and thus binding despite the breadth of its scope. To think otherwise would destabilize the state of affairs. But is this a fair attack? Are such consequences truly attributable to Aquinas’ theory of natural law and by extension, the natural law approach to the tax system? Not on George’s account of Aquinas, at least with respect to the former.\textsuperscript{155} In fact, George explains that Aquinas’ natural law theory is highly nuanced, and despite misinterpretations by theorists such as H.L.A. Hart,\textsuperscript{156} “[n]othing in Aquinas’s legal theory suggests that the injustice of a law renders it something other than a law (or ‘legally binding’) for purposes of intrasystemic juristic analysis and argumentation.”\textsuperscript{157} Aquinas believed rather, that “human positive law creates a moral duty of obedience,” but he also believed that because of man’s imperfection, this law is, at times, unjust.\textsuperscript{158}

Where then, does the Thomistic formulation of natural law leave the tax protester movement? Assuming the passage of the Sixteenth Amendment was indeed valid, does its expansion now preclude legitimacy under natural law? For Aquinas, a tyrannical law is “essentially a criminal type of rule;” unjust acts of tyrants are not only “devoid of moral authority,” but also “constitute a kind of criminality which can justify revolutionary violence for

\textsuperscript{153} Id. at 1639 (quoting Hans Kelsen, The Natural-Law Doctrine Before the Tribunal of Science, W. Pol. Q., Dec. 1949, at 481, 481 reprinted in Hans Kelsen, What is Justice? Justice, Law, and Politics in the Mirror of Science: Collected Essays by Hans Kelsen 137, 137 (1957)).

\textsuperscript{154} Id. at 1639.

\textsuperscript{155} Id. at 1641.

\textsuperscript{156} Id. at 1643.

\textsuperscript{157} Id. at 1642.

\textsuperscript{158} Id. at 1641.
the sake of the common good, and even tyrannicide, as a kind of resistance
to, and/or just punishment of, the tyrant. 159 Does this mean that Aquinas
would automatically endorse an upheaval of an “unjust” tax system?
Certainly not. As George explains, Aquinas does not view the right of
revolution as absolute, but he does view tyrannical rule as a “perversion of
law,” which “gives rise to a (prima facie) right of resistance.” 160 Applying
this to the tax protester movement, if indeed the current form of the
individual income tax can be deemed a “perversion of law,” natural law
theory, as posited by Aquinas, would impose upon legislators the obligation
to change the tax system through lawful means. As articulated by George:

[W]here legitimate rule has degenerated into tyranny, the tyrants
are entitled to something which we might call ‘due process of
law.’ It is up to other public officials, operating as such, and not
(ordinarily) to private citizens to overthrow their regimes and, if
necessary, bring them personally to trial and punishment . . . . 161

Simply put, assuming the income tax is now overly expansive, the
Thomistic tradition would impose upon lawmakers (i.e. Congressmen) the
obligation, under natural law theory, to change whatever manmade law is
deemed “unjust.” This change could be brought about for example, by
lawfully repealing the Sixteenth Amendment and replacing the individual
income tax with a sales tax alternative.

IV. CONCLUSION

A. Tax Alternatives: A Sales Tax System

One solution for avoiding the legal problems associated with the
constitutionality debate while also returning America to the guidelines
envisioned by the Founders is to simply repeal the Sixteenth Amendment.
Such repeal would lawfully address the issue of validity presented by
Aquinas without resorting to revolutionary means. Whilst Aquinas permits
the use of force against usurping tyrants, 162 a revolutionary right is not

159. Id. at 1643.
160. Id. at 1645 (internal quotations omitted).
161. Id. at 1644.
162. Id. at 1644 (“He suggests that usurping tyrants—as, in effect, parties making war
against the political community—may legitimately be resisted and even killed by anyone
who has the effective power to do so.”).
absolute,\textsuperscript{163} and a lawful repeal would therefore be very much in accord with the duty of public officials to redress legitimate rule that has devolved into tyranny.\textsuperscript{164} Assuming Schiff is correct in his formulation of the income tax as the “antithesis of liberty,”\textsuperscript{165} legislators would have an obligation under natural law theory to make new law that comports with eternal law by not infringing upon individual rights granted by the Creator.

A burdensome income tax that infringes upon the individual’s economic freedom to such extent as to violate the right to property (i.e. the right to the fruit of one’s labor) also infringes upon the right to life. Just as Shakespeare’s Shylock equated the appropriation of wealth with the infringement on personal liberty, so too did the Founders view excessive taxation as an infringement on the right to life. Consent to any form of taxation, whether income or property, was viewed as a necessary protection against tyranny. The Stamp Act Congress, for example, noted that, “it is inseparably essential to the freedom of a people . . . that no taxes should be imposed on them, but with their own consent, given personally, or by their representatives.”\textsuperscript{166} As revolutionary lawyer Silas Downer once noted, the right to property, and thus to the fruits of one’s labor, was understood in the Founding era to be inextricably intertwined with the right to life:

> For if they can take away one penny from us against our wills, they can take all. If they have such power over our properties they must have a proportionable power over our persons; and from hence it will follow, that they can demand and take away our lives, whensoever it shall be agreeable to their sovereign wills and pleasure.\textsuperscript{167}

For Aquinas, there is no doubt that the government has a right to tax, but the question is how expansive that tax system should be. The rest of the passage from Romans 13 quoted above ends with an acknowledgement of the magistrate’s right to tax:

\begin{itemize}
\item \textsuperscript{163} \textit{Id.} at 1645 (“Aquinas does not treat the right of revolution in the face of tyranny as absolute . . .”).
\item \textsuperscript{164} \textit{Id.} at 1644.
\item \textsuperscript{165} Schiff, supra note 4, at 313.
\end{itemize}
For the same reason you also pay taxes, for the authorities are God’s servants, busy with this very thing. Pay to all what is due them—taxes to whom taxes are due, revenue to whom revenue is due, respect to whom respect is due, honor to whom honor is due.168

Contrary to popular misinterpretation, natural law theory as postulated by Aquinas evidently subjects civilians to government rule and imposes upon them the duty to pay taxes.169 This duty, however, is limited, as the plain language of the passage itself reveals, to what is “due” to the magistrate. Assuming the current tax rate is not reflective of what is actually due to the government, a sales tax substitute would reign in Caesar’s reach by leaving the federal and state governments with the sole tool of a sales tax to gather revenue. For transparency, the sales tax could be broken up to show citizens where their hard-earned money is going. For instance, if the total federal sales tax is five percent, half a percent could be used for border security, including the budget for the Armed Forces, one percent for domestic law enforcement, two percent for infrastructure and so on. Furthermore, if the Federal Reserve Act of 1913 were repealed, the power to coin money would return to Congress, as outlined in Article I, Section 8 of the Constitution.170

This alternative tax system, which would also lawfully repeal the property and estate taxes, would notably decrease state revenues and by extension greatly reduce the influence of government in citizens’ daily lives. Indeed, such a regime would allow the federal government to downsize and focus instead on maintaining infrastructure, the integrity of the nation’s borders, and upholding contract law. State government would be tasked with all other matters.

Such an alternative tax system would provide fairness by offering citizens a choice. The current income tax system, by contrast, leaves individuals with no choice to reduce confiscation of wealth, short of forgoing income. This alternative tax solution would allow an individual the election of lawfully avoiding the sales tax by simply not purchasing an item. The federal and state governments could also stimulate prosperity under this system by, for example, exempting capital goods such as factory equipment or farm machinery from the sales tax. Hence, individuals with means would have an incentive to reinvest earnings, thus creating prosperity and jobs for others rather than paying sales tax on consumable goods.

169. George, supra note 149, at 1642 (explaining that Aquinas acknowledges that an unjust law is still a law for juristic analysis).
170. U.S. CONST. art. 1, § 8, cl. 5.
Simplicity and equity would be natural outcomes of shifting the state’s revenue stream towards a sales tax system. Individuals would not need to file annual tax returns since there would be no income tax. Businesses would only need to submit forms outlining the sales tax they have collected on behalf of the government. Accusations of “tax loopholes” and the like would be meaningless. An entire level of bureaucracy would be all but eliminated.

The notion of responsible government would be restored since the government would be responsible to explain all parts of the sales tax to its citizens. The Federal Reserve would no longer be able to finance reckless government spending because its power to issue currency would be rescinded. With less income to misallocate, government waste on inefficiencies would also be greatly reduced. Finally, and most importantly, the formation of an accountable, limited government would restore Americans’ unalienable right to life, liberty, and the pursuit of happiness.

B. Sanctioning Constitutional Challenges

The sanctions and restrictions on Schiff’s speech are legal issues meriting entirely separate articles. In brief, both the Supreme Court and lower courts have dismissed challenges to the constitutionality of the income tax and repeatedly sanctioned Schiff for his appeals.\(^{171}\) The district court dubbed Schiff an “extremist” whose views make for unqualified constitutional interpretations:

\[\text{[T]he Second Circuit described Schiff as “an extremist who reserve[s] the right to interpret the decisions of the Supreme Court as he read[s] them from his layman’s point of view regardless of and oblivious to the interpretations of the judiciary.”}^{172}\]

The judiciary did not merely sanction Schiff for his appeals, but also limited his free speech by restricting the commercial sale of his book, *The Federal Mafia*. In *United States v. Schiff*, the court held that Schiff’s book, *The Federal Mafia*, was not protected by the First Amendment.\(^{173}\) Pursuant to 26 U.S.C.A. § 7408, the government sought an injunction proscribing the

\(^{171}\) See, e.g., United States v. Schiff, 269 F. Supp. 2d 1262, 1268 (D. Nev. 2003) (“Schiff’s contention that the imposition of a validly enacted income tax by Congress violates the taxing clauses of the Constitution has been rejected repeatedly by the Supreme Court and the Ninth Circuit Court of Appeals.”).

\(^{172}\) Id. at 1269 (quoting Schiff v. United States, 919 F.2d 830, 834 (2d Cir. 1990)).

\(^{173}\) Id. at 1276–77.
promoters, organizers, and marketers of Schiff’s book from engaging in its commercial sale.174 The court reasoned that Schiff crossed the line from permissible to impermissible speech by promoting fraudulent activities.175 In his defense, the American Civil Liberties Union (“ACLU”) argued that a ban on the book constituted an “impermissible prior restraint.”176 The ACLU provided three reasons why *The Federal Mafia* cannot be classified commercial speech:

1. it does not fit the definition of commercial speech as proposing no more than a commercial transaction; 
2. it is sold in bookstores and through the Internet independent of the tax scheme; and 
3. it is not promoted through paid memberships involving face-to-face communication.177

The ACLU essentially argued that the court ought to apply the “more stringent *Brandenburg* incitement standard before subjecting the book to the preliminary injunction.”178 The court rejected each argument. Central to the ACLU’s case was the claim that Schiff’s speech was not commercial but political.179 The ACLU argued that Schiff’s book contained “autobiographical and political expression” and therefore “[did] no more than propose a commercial transaction.”180 The court rejected this argument, reasoning that since the book instructs customers on the specifics of filing zero income returns, the injunction was rightly applicable to matters beyond mere advertisement: “The tax scheme's promotions identify the book as the starting point of the program, and represent that [i]t shows you how to file the zero return, stop your wage withholding, and explains the basics.”181

The ACLU further contended that *The Federal Mafia*, marketed through Freedom Books and online, was not a “direct part of the [zero income] scheme.”182 Since the book was “sold independently in bookstores or online,” it was not directly related to the marketing of the scheme.183 The

174. *Id.* at 1266.
175. *Id.*
176. *Id.* at 1277.
177. *Id.*
178. *Id.*
179. *Id.*
180. *Id.* (internal quotations omitted).
181. *Id.* at 1278 (internal quotations omitted).
182. *Id.*
183. *Id.*
court rejected this claim too, noting that the book was the starting point for the scheme. Of central concern to the court was the inclusion of a “how-to” manual in the book itself. Since the book provided actual samples of zero returns, the court declared that the samples shifted the material from protected to unprotected. The First Amendment, by this particular court’s view, did not protect work that promoted illegal activity by providing instructions on its actualization:

Far from containing merely commentary, information and expression of opinion regarding the legitimacy of the tax system, the book is, in part, a how-to manual directed to specific individuals seeking instructions, sample forms, and attachable affidavits to be used in the filing of false income tax returns and submission of false W-4s.

The line between permissible expression of opinion and impermissible instruction, however, has not yet been clearly demarcated. Would the mere exclusion of the “how-to” manual have afforded Schiff protection? Perhaps so, but are not many forms of expression also an instruction in some fashion? At what point does expression become instruction? Suffice it to say, such questions have certainly not vanished with Schiff’s passing. Indeed, Mr. Irwin A. Schiff’s story will continue to ignite contentious debate. The spirited grandfather of the tax protester movement struck the core of the American psyche. As long as the current form of the income tax is around, Americans will continue to echo Shylock in asking what value there is in life if the fruit of one’s labor is continually plundered.

184. Id. at 1278-79.
185. Id. at 1279.
186. Id. at 1279.
187. See Reilly, supra note 3.