2000

The Uneasy Case for Devolution of the Individual Income Tax

Lior Strahilevitz

The Uneasy Case for Devolution of the Individual Income Tax

Lior Jacob Strahilevitz[*]

---

* Law Clerk to the Honorable Cynthia Holcomb Hall, U.S. Court of Appeals, Ninth Circuit; Yale Law School, J.D. 1999; University of California – Berkeley, B.A. 1996. The author wishes to thank Bruce Ackerman, Anne Alstott, Theo Angelis, Kenneth Heath, Max Minzner, C. Tyler Mulligan, Eric Shumsky, Michal Strahilevitz and the participants in the 1998 Tax Policy Seminar at Yale Law School for their many helpful suggestions and comments on earlier drafts. The views expressed are the author's.

INTRODUCTION

Fourteenth-century English monarchs, like more contemporary rulers throughout the world, often found themselves in need of cash to finance the ship of state. When it came time for the King to collect the revenue he needed, he determined how much revenue he wanted to raise from the country as a whole during a given year, "and particular portions of this total were assigned to particular counties or boroughs."[1] When the tax bill arrived at the county or borough, the community leaders held "meetings of substantial local inhabitants," who divided the tax liability among themselves based on their ability to pay.[2] Each community made the necessary decisions about which of its members were in the best position to shoulder the greatest portions of the community's collective responsibility. The taxes collected were pooled and sent to London. To a communitarian, this story of shared sacrifice and collective responsibility sounds like nirvana.

To an American alive today, however, this historical narrative is likely to sound positively foreign. Taxation and community are words that rarely appear alongside each other in American political discourse. Individuals, not communities, confront the tax bill each year. The federal, rather than the local, government collects the lion's share (approximately seventy percent) of tax revenues.[3] And elected officials who preach the virtues of shared sacrifice on April 15 do not enjoy long political careers.

Indeed, the only thing that brings most Americans together when it comes to taxes is a profound distaste for the Internal Revenue Code, the tax collection bureaucracy, and the checks they must make out to Uncle Sam every year. Those politicians who best manage to tap into this anti-tax sentiment tend to curry great favor with many voters, and the result is violent rhetoric emerging from the mainstream. One serious Republican candidate this year described what would happen to the Code if he were elected President: "We're going to kill it and drive a stake through its heart so it can never rise again."[4]

This virulent opposition to the status quo of American taxation has sparked increasingly radical acts. For example, in 1998 the House of Representatives voted to let the current Internal Revenue Code expire as of

---

1. MICHAEL J. BRADDICK, THE NERVES OF STATE: TAXATION AND THE FINANCING OF THE ENGLISH STATE, 1558-1714, at 91 (1996).

2. *Id.* at 92.

3. *See infra* text accompanying note 58 (noting that state and local governments collect 30% of all taxes).

4. Anne-Marie O'Connor, *Forbes Is Forging Ahead in Iowa Campaign: He Builds Conservative Following on IRS, Abortion Issues*, L.A. TIMES, Jan. 22, 2000, at A16 (quoting Steve Forbes).

December 31, 2002. The bill was narrowly defeated in the Senate.[5] Early in 1999, during the official Republican response to the President's State of the Union Address, Representative Steve Largent reiterated his party's proposal to eliminate the current tax code, while ignoring concerns about its replacement.[6] Although many Republicans have abandoned this "bury the tax code" strategy for the time being, their revolutionary proposal of last year is symptomatic of an anti-tax mood that has enveloped the country throughout the last several decades. Almost no one is a fan of the current federal tax code. The only things preventing its elimination are serious misgivings about the alternatives and the opposition of powerful economic interests that have much invested in the perpetuation of the status quo.

This Article argues that the restoration of a communitarian approach to taxation can help soften the widespread anti-tax sentiment that has engulfed the United States. More specifically, it proposes and analyzes a concrete plan for the collection of revenue that taps into the same sense of shared community sacrifice that was invoked in fourteenth-century England. But the Article need not venture across the Atlantic, or back six hundred years, for its paradigm of community taxation.[7] Rather, it proposes that the United States adopt a modernized, decentralized system of revenue collection modeled after the requisition, which was the chief means of raising revenue in the early American republic. Whereas the federal government currently collects approximately seventy percent of the nation's tax dollars, and the state and local governments collect the remaining thirty percent, this Article contemplates how the United States, and the individual states themselves, might differ if those numbers were reversed.

Part I explains why, due to the historical peculiarities of America's fiscal history, a decentralized approach to collecting revenues is not currently under consideration. It suggests that early American statesmen moved toward centralized collection of revenues for sound reasons, but that those justifications are no longer valid. While the Article points to some palpable drawbacks of a decentralized system, it argues that the advantages of such an approach may well outweigh the drawbacks.

Part II proposes a tax system in which the federal government would

5. *See Senate Kills Bill To Scrap Tax Code*, ROCKY MTN. NEWS, July 29, 1998, at 26A.

6. *See Republicans Call for Tax and Education Efforts To Benefit Families*, N.Y. TIMES, Jan. 20, 1999, at A23.

7. Nor would I suggest that we do so. The English system had serious drawbacks in that each year's tax-burden distribution was, at least in theory, up for grabs. This fact surely presented serious possibilities for the financial oppression of unpopular minorities or individuals within the community and needlessly caused communities to revisit the same contentious issues every year.

abolish the individual income tax.[8] The federal government would compensate for some of the lost revenue through requisitions finance,[9] i.e., by requiring every state government to contribute a predetermined sum each year to pay for the operations of the federal government.[10] Subject to existing constitutional constraints,[11] each state government would exercise control over its revenue-raising strategies. Each state would also have discretion over how much revenue to raise, provided that it successfully and promptly made its contributions to the federal government. Part II concludes by discussing the likely effects of such a program on governmental spending by the states, and on citizen mobility–the most important variable in the Article's subsequent analysis.

The Article then explores in greater detail the justifications for such a devolutionary approach to taxation. This analysis proceeds in two stages. First, Part III will develop the communitarian case for a requisitions finance approach. That Part begins by asking whether the primary loyalties of people living in the United States are to the national community, their respective state communities, or smaller communities. It then suggests that state citizenship may be weak under the present regime and argues that this situation is unfortunate. Part III then engages in a detailed discussion of how requisitions finance would advance the primary goals of the commu-

---

8. The reasons for my selection of the individual income tax should become clear during the discussion *infra* Part III. Note, however, that requisitions finance could be designed to replace not the federal individual income tax, but the federal payroll tax, the federal tax on corporate income, federal excise taxes, or any other significant source of federal revenue. Among these, only the federal payroll tax collects an amount of revenue comparable to that raised by the individual income tax. Thus, only a replacement of that tax (or the individual income tax) with requisitions finance would create the meaningful shift from federal to state tax collection described herein. However, the revenues generated by the payroll tax are currently earmarked for Social Security and Medicare benefits, and, at least with the former, a taxpayer's payments correlate with the benefits she will receive later in life. In addition, the payroll tax does not generate the massive compliance costs or the widespread resentment that the individual income tax does. *See generally infra* Parts III, IV. Hence, although the federal individual income tax and requisitions finance could exist side-by-side, this Article focuses on a scenario whereby the latter would replace the former.

9. A quick note about terminology: This Article refers to its proposed tax scheme as "requisitions finance," which is one way of devolving the federal individual income tax to the states. There are other ways by which taxing authority could be devolved to the states, but I have chosen to focus this Article on what I believe is the superior way of accomplishing that objective. That said, the Article will occasionally refer to its proposal as "devolution of the individual income tax" or "tax devolution" for stylistic purposes.

10. Such contributions would be necessary if, as seems likely, the federal government's remaining revenues would be insufficient to cover its expenses.

11. For a discussion of the costs and benefits of various other constraints that could be enacted by statute to address some of the drawbacks of a requisitions approach, see *infra* Part V.B.

nitarian project. Finally, Part III explores why this communitarian analysis is useful even for those tax scholars who feel more comfortable discussing tax policies on more familiar utilitarian grounds.

Part IV consists of a utilitarian analysis of the costs and benefits of shifting to requisitions finance. This discussion is complicated somewhat by the need to engage in dynamic economic and political analysis. This analysis requires some degree of speculation about what a requisitions finance world would look like. After all, a primary argument in the Article is that requisitions finance could engender substantial changes in the nature of the American political system, its economy, and the citizenship obligation. Given the tremendous uncertainty about how the system would react to devolution of the individual income tax, it is difficult to arrive at solid conclusions about the magnitude of costs and benefits. My assessment suggests, however, that the utilitarian cases for and against shifting to requisitions finance probably negate each other.

Part V confronts the serious policy challenges that would arise if society were to implement requisitions finance. Obviously, the short-term costs of transitioning away from a federal individual income tax that is so deeply entrenched in the economy would be enormous. Accordingly, Part V ends with a discussion of several variations on the requisitions finance model that can address several of the communitarian and utilitarian criticisms. A brief conclusion follows in Part VI.

I. THE REQUISITION IN THE PRE-CONSTITUTIONAL PERIOD

Under the Articles of Confederation, the central government relied mostly on revenues contributed by the states to finance its services. The Continental Congress required each state to contribute to the common pool in proportion to the value of all land and improvements within that state.[12] The Congress also determined the mode by which the value of land and improvements were to be surveyed.

Given this land-value based apportionment, one might expect that state legislatures would raise the revenue owed to the central government

12. *See* ARTICLES OF CONFEDERATION, art. VIII (1781) ("All charges of war, and all other expences that shall be incurred for the common defence or general welfare . . . shall be defrayed out of a common treasury, which shall be supplied by the several states in proportion to the value of all land within each state . . . as such land and the buildings and improvements thereon shall be estimated according to such mode as the united states in congress assembled, shall from time to time direct and appoint."). The dispute over whether land, property values, total population, or non-slave population should be the basis for requisitions was extremely contentious. The wealthier Northern states favored total population as the basis, while the poorer Southern states favored land values or white population. *See generally* MERRILL JENSEN, THE ARTICLES OF CONFEDERATION 145-50 (1940).

by taxing their residents on the value of their land. However, not all states did so. In fact, the states employed widely divergent methods of raising revenue, ranging from poll taxes to wealth taxes to land taxes to excise taxes. By and large, these taxes were not American innovations, but, instead, came from the English system.[13] The first American colonial tax was a poll tax collected in the Virginia colony.[14] In New England a faculty tax, best understood as a proto-income tax, was widely used.[15] The colonies zealously guarded their autonomy over taxation policy and greatly valued the ability to tailor their taxes to comport with local norms.[16] In the view of many, national taxation would never work, precisely because the differing preferences among the states for raising revenues were irreconcilable.[17]

If the chief asset of the requisitions approach was its ability to adapt to divergent state preferences for revenue collection, its chief drawback was its lack of an enforcement mechanism. Quite simply, the state governments had little incentive to pay the amounts owed to the Continental Congress. The central government lacked both the political will to collect unpaid moneys from delinquent states and the coercive power to force states to comply.[18] From October 1781 to August 1786, the Congress made six fed-

---

13. *See* BRADDICK, *supra* note 1, at 91-109 (discussing poll, land, and income taxes).

14. *See* EDWIN A. SELIGMAN, THE INCOME TAX: A STUDY OF THE HISTORY, THEORY, AND PRACTICE OF INCOME TAXATION AT HOME AND ABROAD 367 (1911).

15. *See id.* at 368-84. States did not begin using what we would recognize as direct precursors to the modern income tax until the 1840s when they had to enact income taxes in order to pay off debts incurred to finance massive spending on public works projects. *See id.* at 399-400. Some Southern states later followed suit, but not because they had to pay off their debts. Rather, the early income-tax was adopted as an explicitly progressive means for raising revenue. *See id.* at 402.

16. *See* ROBERT A. BECKER, REVOLUTION, REFORM, AND THE POLITICS OF AMERICAN TAXATION, 1763-1783, at 41 (1980) ("Although none of this was apparent before 1776, one thing did seem certain: New Englanders would not look kindly on any challenge to their local autonomy over taxes, from whichever side of the Atlantic—and from whatever external government, English or American—it might come.").

17. Robert Becker best expresses these variations in state norms:

> So fundamentally did the states differ that any attempt to create a national basis for taxation would inevitably be burdensome and unjust to some. A fair and equitable tax in Delaware might be neither in Virginia. "The taxes cannot be uniform throughout the states without being oppressive to some," warned Virginia's William Grayson.

Id. at 226.

18. *See* FORREST MCDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 170-71 (1985). Dall Forsythe describes the quandary faced by the young central government:

> Under the Articles of Confederation, extractive capacity was severely limited, and neither legal authority nor bureaucratic machinery existed to enforce the demands of the Continental Congress for revenues. Congress could not directly tax citizens or commerce, but instead could only ask state governments, through requisitions, to

eral requisitions. Collectively, the states contributed merely thirty-seven percent of the amount they were supposed to send to the Congress.[19] Once it became clear to the state governments that they could free ride without suffering punishment, the problem only worsened.[20] Because the Congress relied on requisitions to finance military expenditures, the national security consequences of non-payment were especially grave.[21]

In essence, a successful requisitions method of finance required a stable, powerful central government with the power to force the states to contribute their shares. But in the republic's early years, when requisitions were to be a major source of revenue for the central government, it was the very lack of requisitioned funds that prevented the government from becoming stable and powerful.[22] Because all amendments to the Articles of Confederation required unanimous consent by the states, even the overwhelming

---

> provide it with the funds it required. When the states were slow in paying their share, as was often the case, Congress had no coercive power to compel compliance, but was limited to whatever persuasive techniques it could devise to convince the state legislatures.

DALL W. FORSYTHE, TAXATION AND POLITICAL CHANGE IN THE YOUNG NATION 1783-1833, at 14 (1997).

19. *See* ROGER H. BROWN, REDEEMING THE REPUBLIC: FEDERALISTS, TAXATION, AND THE ORIGINS OF THE CONSTITUTION 12 (1993); DONALD R. STABILE, THE ORIGINS OF AMERICAN PUBLIC FINANCE: DEBATES OVER MONEY, DEBT, AND TAXES IN THE CONSTITUTIONAL ERA, 1776-1836, at 45 (1998).

20. *See* STABILE, *supra* note 19, at 46-48; Jacques LeBoeuf, *The Economics of Federalism and the Proper Scope of the Federal Commerce Power*, 31 SAN DIEGO L. REV. 555, 594 (1994) ("While each state had an interest in obtaining the public goods that the federal government would provide, it was in the interest of no state to contribute to the federal coffers.").

21. *See* ARTICLES OF CONFEDERATION, art. IX (1781) ("The united states in congress assembled shall have authority . . . to make requisitions from each state for its quota, in proportion to the number of white inhabitants in such state; which requisitions shall be binding, and thereupon the legislature of each state shall appoint the regimental officers, raise the men and cloathe, arm and equip them in a soldier like manner, at the expence of the united states."); Kraig James Powell, *The Other Double Standard: Communitarianism, Federalism, and American Constitutional Law*, 7 SETON HALL CONST. L.J. 69, 83 (1996) (explaining this national-security drawback).

22. As James Maxwell has observed:

> The results [of Congress's reliance on requisitions] were nearly disastrous, and yet attempts to strengthen the financial powers of Congress by amending the Articles of Confederation failed because of the requirement of state unanimity. The feeling grew that the Articles provided the wrong *kind* of government. A strong nation would emerge only with a government that could levy taxes for its own use through its own officers.

JAMES A. MAXWELL, FINANCING STATE AND LOCAL GOVERNMENTS 12 (1965). Readers searching for a modern parallel should note the similarities between the financial difficulties encountered by the early American republic and the modern United Nations. In both instances the central government lacked supremacy over the sovereign states, rendering it unable to force these states to contribute badly needed revenue.

support among the states for strengthening the central government by providing it with an independent revenue source (via a tariff) was thwarted by the opposition of a single state: Rhode Island.[23]

The requisitions system may have failed for an additional reason: sabotage. During the early years of the colonial confederacy, a number of prominent and powerful Americans believed that only a strong government with its own taxing authority could build the colonies into a powerful nation. Chief among these men was Robert Morris, an immensely wealthy Philadelphia financier and Federalist. As Dall Forsythe observes:

> Morris and his nationalist comrades were less interested in making the requisition system work than in demonstrating its inadequacy and encouraging its replacement by direct taxing powers for Congress. Thus, they did little to make compliance easier for the states. In 1781, at Morris' insistence, Congress refused to accept either supplies or the states' own currencies in payment for congressional requisitions . . . . Instead the state governments were asked to pay out what was then the huge sum of $8 million in specie (in coined money, that is) or in the closest paper equivalent of hard money, Morris' own Financier's notes.[24]

According to this interpretation, requisitions were destined to fail. Those seeking to further the nationalization of government and the taxation power ensured that the states were unable to comply with the onerous terms of Congress's requisitions demands, then uttered "I told you so," when the money failed to arrive. If these nationalists could enrich themselves in the process, so much the better.

Given these factors, it is little wonder that the Framers of the Constitution considered the breakdown of the requisitions process to be a major shortcoming of the Articles of Confederation.[25] Indeed, many have argued that the central government's need for more reliable sources of revenue was

23. *See* MAX FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 5 (1913) (noting that Rhode Island's veto killed a 1781 tariff that the other 12 states had favored); STABILE, *supra* note 19, at 32, 42-43. When, in 1789, the new federal government finally obtained this authority, the tariff accounted for nearly all of the federal government's revenues, with the remainder coming from land sales. *See* U.S. DEP'T OF COMMERCE, 2 HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1970, at 1106 (1989). The tariff remained the nation's primary revenue source until 1864, and again from 1869 to 1893. *See id.*

24. FORSYTHE, *supra* note 18, at 15.

25. *See* THE FEDERALIST NO. 30, at 189-92 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (arguing that reliance on requisitions alone had rendered the new nation impotent and vulnerable).

a chief impetus for the Constitutional Convention itself.[26] Not surprisingly, then, when Martin Luther proposed that the new federal government again rely largely on requisitions to finance its services, the proposal was soundly defeated.[27] This was the case even though the Luther proposal contained significantly more teeth than did the Articles of Confederation's requisitions provisions. Luther's suggested provisions would have allowed the federal government to levy "direct taxes" upon the populace if (and only if) the states were delinquent in making their requisitions payments.[28] The Framers, however, preferred an arrangement under which the revenue-hungry central government would not have to attempt to make requisitions, but could tax the people directly from the get go.[29] The requisitions idea had been so thoroughly discredited, so closely tied to a weak national government, that even a new and improved requisitions system garnered little support.[30]

Over the next few years, the requisitions concept gradually faded from the political scene. In 1789, the House of Representatives considered and rejected a rather vague constitutional amendment that would have prevented Congress from levying direct taxes except where duties, excise taxes, and requisitions proved "insufficient" in gathering adequate revenue.[31] Martin Luther continued to agitate for reliance on requisitions, but to no avail. As trade expanded dramatically, the tariff provided increased revenue for the federal government. Once this income was supplemented by revenue from additional indirect taxes, the federal government found itself awash in cash.[32]

Given the rejection of requisitions provisions by both the Constitutional Convention and an early Congress, one might make a case that requisitions were, in fact, unconstitutional.[33] But such an argument proves un-

---

26. *See, e.g.*, FARRAND, *supra* note 23, at 47; STABILE, *supra* note 19, at 47; Eric M. Freedman, *Why Constitutional Lawyers and Historians Should Take a Fresh Look at the Emergence of the Constitution from the Confederation Period: The Case of the Drafting of the Articles of Confederation*, 60 TENN. L. REV. 783, 790 (1994).

27. *See* Erik M. Jensen, *The Apportionment of 'Direct Taxes': Are Consumption Taxes Constitutional?*, 97 COLUM. L. REV. 2334, 2398-99 (1997).

28. *Id.*

29. *See* U.S. CONST. art. I, § 8, cl. 1 ("The Congress shall have the Power To lay and collect Taxes . . . .").

30. *See* BECKER, *supra* note 16, at 228 (noting that the states' past "refusals to meet congressional requisitions" demonstrated to many that only "a superior government beyond the reach of the state legislatures" could flourish).

31. *See* Jensen, *supra* note 27, at 2399 (citing 1 ANNALS OF CONG. 773 (Joseph Gales ed., 1834)).

32. *See* U.S. DEP'T OF COMMERCE, *supra* note 23, at 1106.

33. Erik Jensen initially raised this possibility, but noted that it is "not necessarily" the case. Jensen, *supra* note 27, at 2400. Upon a rigorous examination in a subsequent work, he

persuasive upon close inspection of the historical record. The Founders never rejected Congress's power to raise revenues through requisitions; they merely defeated any efforts to require that Congress turn to requisitions revenues before relying on direct taxes. In *Federalist 36*, Hamilton explicitly recognized that Congress could always revert to requisitions finance if direct taxation proved impractical:

> It has been very properly observed by different speakers and writers on the side of the Constitution that if the exercise of the power of internal taxation by the Union should be judged beforehand upon mature consideration, or should be discovered on experiment to be really inconvenient, the federal government may forbear the use of it, and have recourse to requisitions in its stead.[34]

Indeed, Hamilton argued that requisitions would be an excellent means for raising revenues, if only the federal government could exercise some authority over the states in order to convince them to pay their fair shares.[35] Further, in an era in which the state governments had superior bureaucracies and much more contact with the citizenry than the federal government did, it was only natural to assume that states would be better

---

concluded that requisitions are constitutionally permitted. *See* Erik M. Jensen & Jonathan L. Entin, *Commandeering, the Tenth Amendment, and the Federal Requisition Power:* New York v. United States *Revisited*, 15 CONST. COMMENT. 355, 379 (1998) ("In short, there is substantial evidence that the Constitution left intact the federal government's power to impose requisitions on the states. This evidence reflects the views of both supporters and opponents of ratification, and this understanding persisted beyond the time of the framing."). Because recent Supreme Court decisions on the powers of the federal government to compel the states to administer federal programs briefly explored the history of requisitions for clues about whether Congress can now compel the states to act in a certain way, *see* Printz v. United States, 521 U.S. 898 (1997); New York v. United States, 505 U.S. 144 (1992), requisitions' constitutionality has been the subject of new scholarship. Some of it, like Jensen & Entin's work, is exhaustive and impressive. One careless paragraph, however, in an otherwise insightful article, essentially ignored the historical evidence provided here and concluded, with little justification, that an originalist interpretation of the Constitution bars Congress from reclaiming the requisitions tool. *See* Saikrishna Bangalore Prakash, *Field Office Federalism*, 79 VA. L. REV. 1957, 1988-89 (1993). In any event, unlike these scholars, I am more interested in the constitutionality of requisitions for their own sake, rather than the historical implications of requisitions finance for general principles of federalism.

34. THE FEDERALIST NO. 36, at 220 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

35. *See id.* at 221 ("[T]he existence of such a power [of internal taxation] in the Constitution will have a strong influence in giving efficacy to requisitions. When the States know that the Union can supply itself without their agency, it will be a powerful motive for exertion on their part."); *see also* Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 MICH. L. REV. 813, 837 (1997) ("Publius recommends a classic strategy of cooperative federalism: threaten to bypass state officials unless they comply with federal requisitions.").

than the federal government at collecting tax revenues.[36] Moreover, it seems highly likely that requisitions were considered the paradigmatic examples of "indirect taxes" specifically authorized by the Constitution.[37] Direct taxes, such as poll taxes, taxed people directly. Indirect taxes, like requisitions, taxed people through intermediaries.[38] James Madison even described requisitions as the opposite of direct taxes.[39] Thus, it is likely that the only constitutional constraint on requisitions is that Congress apply them "uniform[ly] throughout the United States."[40] Congress could easily comply by requiring that each state make contributions proportionate to its population,[41] its wealth, its Gross State Product, or some other rational attribute.[42] As long as Congress applied the same formula to all states, a requisition would be a constitutional indirect tax.[43]

In essence, the only problem with using requisitions as a method for

---

36. *See* George Mason, Speech in the Virginia State Ratifying Convention (June 4, 1788), *in* 5 THE COMPLETE ANTI-FEDERALIST 259 (Herbert J. Storing ed., 1981).

37. *See* HARRY EDWIN SMITH, THE UNITED STATES FEDERAL INTERNAL TAX HISTORY FROM 1861 TO 1871, at 22 (1914); Jensen, *supra* note 27, at 2402.

38. For a persuasive argument that "direct taxes" should include nothing beyond land and poll taxes, see Bruce Ackerman, *Taxation and the Constitution*, 99 COLUM. L. REV. 1, 15 n.50 (1999).

39. Letter from James Madison to George Thomson (Jan. 29, 1789), *reprinted in* 2 THE FRAMERS' CONSTITUTION 440 (Philip B. Kurland & Ralph Lerner eds., 1987).

40. U.S. CONST. art 1, § 8, cl. 1. There is language in the Supreme Court's recent *Printz* opinion that could be read to imply that Congress would need the states' consent in order to use their tax apparatuses to collect federal revenues, which could be construed broadly to apply to requisitions. *See* Printz v. United States, 521 U.S. 898, 910-11 (1997) ("'Publius' responded that Congress will probably 'make use of the State officers and State regulations, for collecting' federal taxes. . . . But none of these statements necessarily implies—what is the critical point here—that Congress could impose these responsibilities *without the consent of the States*."). However, even if this language were thought to trump the historical evidence offered above, requisitions finance would not be endangered for the simple reason that the states would jump at the possibility of gaining the flexibility inherent in such a decentralized approach. *Cf.* E. Blaine Liner, *Sorting Out State-Local Relations*, *in* A DECADE OF DEVOLUTION: PERSPECTIVES ON STATE-LOCAL RELATIONS 3, 7 (E. Blaine Liner ed., 1989) [hereinafter A DECADE OF DEVOLUTION] ("For the most part, states . . . welcomed the opportunity to move toward center stage. In general, states were eager to increase their control over the functions they carry out and most of them have been well-prepared to do so.").

41. In such an instance, even if requisitions were direct taxes, they would be constitutionally authorized. *See* U.S. CONST. art. I, § 2, cl. 3.

42. *Cf.* Nelson Lund, Comment, *The Uniformity Clause*, 51 U. CHI. L. REV. 1193, 1207 (1984) (concluding that the Supreme Court has interpreted the Uniformity Clause as a very narrow and rarely implicated limitation on congressional taxing authority). I discuss the complications that might arise if Congress had to determine how a modern requisition would be apportioned among the states *infra* text accompanying notes 356-357.

43. *But see* SMITH, *supra* note 37, at 22 (arguing that the 37th Congress was concerned about enacting a requisition because of the Constitution's failure to include requisition authority among Congress' enumerated powers).

financing the federal government is that they did not work.[44] Because America's fiscal historians are familiar with the failure of requisitions to generate sufficient revenue under the Articles of Confederation, they have discredited the idea as one that time has "passed by."[45] But alas, much has changed since the failure of requisitions in the 1780s. In the place of a weak, inefficient, far-removed, and tiny federal government, there is now a strong, centralized, bureaucratic federal government that influences the policies and economic conditions of every state. The federal government's authority to tax the people directly is well established. The ability of the federal government to exercise significant influence over how states spend resources is similarly well established.[46] There should be no doubt that today's federal government could ensure that states comply with a requisition arrangement.[47] Yet the historical failure of requisitions prevents those with knowledge of fiscal history from taking this interesting idea seriously.

II. THE STRUCTURE OF A MODERN REQUISITION ARRANGEMENT

In the more than two centuries since the demise of the requisitions system, the states have gone from being the primary collectors of tax revenue to relatively small-time collectors. At the turn of the century the federal government collected less than twenty percent of the nation's tax revenue; today the state governments collect less than twenty percent.[48] Although large sums of federal money are sent to the states each year in the form of various types of grants, the state governments play only a slightly more prominent role in spending revenue than they do in collecting it.

---

44. *Cf. Printz*, 521 U.S. at 939, 945 (Stevens, J., dissenting) (noting that requisitions finance under the Articles of Confederation "proved to be unacceptable, not because it demeaned the sovereign character of the several States, but rather because it was cumbersome and inefficient").

45. Jensen, *supra* note 27, at 2401. In 1861 Congress considered, and almost adopted, a requisition bill in place of a somewhat unpopular bill to enact a direct tax. *See* CONG. GLOBE, 37th Cong., 1st Sess. 247 (1861); SMITH, *supra* note 37, at 21-22.

46. Congress' power virtually to dictate state policy by conditioning the receipt of federal funds on the adoption of federally-favored policies has been upheld by the Supreme Court. *See* South Dakota v. Dole, 483 U.S. 203 (1987); *see also* Richard Briffault, *Federalism and Health Care Reform: Is Half a Loaf Really Worse than None?*, 21 HASTINGS CONST. L. Q. 611, 626 (1994) (noting that *Dole* was cited with approval by subsequent opinions that were dubious of other forms of federal regulation over state affairs).

47. To the extent that such doubts linger, Part II of this Article should allay them.

48. *See infra* notes 58-60 and accompanying text (noting that the state and local taxes currently account for 30% of all taxes collected, while the federal government only collected 18% of all taxes in 1900).

A. THE BASELINE

Today's fiscal federalism is properly described as a system of reverse requisitions: Whereas formerly the state governments collected revenue that was sent to Washington, D.C., the federal government now collects more revenue than it spends and sends a significant amount back to the states, in every case with strings attached.[49] This dynamic is emblematic of the strengthening of the national government at the expense of the states; it is largely the legacy of the New Deal.[50]

Although there is a moderate degree of differentiation among the states with respect to the revenue sources on which they rely, looking at aggregate levels is informative. The states have more varied revenue streams than the federal government, which relies largely on the individual income tax and secondarily on the corporate income tax,[51] or local governments, which rely largely on property tax revenues. Table 1 presents the sources of aggregate collected revenues of state governments for 1993.

Table 1 : Composition of State Revenues During 1993

Personal Income Taxes	General Sales Taxes	Corporate Income Taxes	Motor Fuels Taxes	Alcohol & Tobacco Taxes	Users' Fees & Other Charges[52]	Miscellaneous Revenue[53]
31.86%	32.52%	6.85%	6.67%	2.86%	9.93%	9.31%

Source: RANDALL G. HOLCOMBE & RUSSELL S. SOBEL, GROWTH AND VARIABILITY IN STATE TAX REVENUE: AN ANATOMY OF STATE FISCAL CRISES 37 tbl.3.1, 50 tbl.3.7 (1997).

49. *See* Ellen P. Aprill, *Excluding the Income of State and Local Governments: The Need for Congressional Action*, 26 GA. L. REV. 421, 475 n.228 (1992) (providing statistics on levels of federal grants to the states).

50. *See* Michael E. Parrish, *The Great Depression, the New Deal, and the American Legal Order*, 59 WASH. L. REV. 723, 727 (1984) ("[F]or the first time, the national government became the chief custodian of both economic security and social justice for all citizens."); Richard B. Stewart, *Madison's Nightmare*, 57 U CHI. L. REV. 335, 337 (1990) (noting that the New Deal's redistributive efforts were a response to the states' inabilities to meet the growing demand for social assistance). Harry Scheiber notes that this centralization trend began, on a much smaller scale, during the Progressive Era. Harry N. Scheiber, *Redesigning the Architecture of Federalism—An American Tradition: Modern Devolution Policies in Perspective*, 13 YALE J. REG. 227, 250 (1996).

51. *See* U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 334 (1995).

52. Among user fees, the vast majority of revenue collected were tuition and other payments for higher education, payments to public hospitals, and toll road fees.

53. Miscellaneous revenue consisted mostly of interest earnings, lottery revenues, and donations from private sources.

Taken as a whole,[54] most states do not have progressive revenue collection regimes,[55] even though most states do have graduated income tax rate schedules.[56] Because so many states rely heavily on general sales taxes, which are regressive even if food items are exempted from the tax,[57] the overall fiscal picture is skewed toward the regressive side.

State and local governments currently collect approximately thirty percent of the taxes collected in the United States.[58] State government spending accounts for approximately ten percent of Gross Domestic Product, more than a twofold increase over the levels that prevailed in the 1950s.[59] By historical standards, however, this level is quite low. At the turn of the century, federal government spending accounted for only eighteen percent of public sector expenditures.[60] Thus, a situation in which the state governments collect and spend most of the nation's tax revenue would not be unprecedented.

Prior to the New Deal era, when the state and local governments collected the lion's share of the nation's taxes, the combination of taxes they used was very different from (and possibly more progressive than) those they currently employ.[61] Part of this trend can be explained by the fact that

---

54. "Taken as a whole" means that local taxes, consisting mostly of property taxes, are included. Some states, such as Massachusetts and New Mexico, had rather progressive personal income taxes, but highly regressive property tax regimes. *See* Roger J. Vaughan, *State Taxation and Economic Development*, *in* STATE TAXATION POLICY 3, 42 tbl.7 (Michael Barker ed., 1983).

55. *See id.* at 44 (describing the vertical and horizontal inequity of current tax regimes).

56. *See* William F. Fox, *The Personal Income Tax as a Component of State Tax Structure*, 39 VAND. L. REV. 1081, 1083 (1986) (noting that 33 states have their own progressive tax structure); *see also* U.S. TREASURY DEP'T, DIVISION OF TAX RESEARCH, FEDERAL-STATE TAX COORDINATION 3 (1947) (demonstrating the historical tendency of states to use progressive rate structures).

57. *See* Fox, *supra* note 56, at 1091 (noting regressivity in "essentially every case," even when necessities are excluded from the base); Robert H. Gleason, *Reevaluating the California Sales Tax: Exemptions, Equity, Effectiveness, and the Need for a Broader Base*, 33 SAN DIEGO L. REV. 1681, 1696 n.55 (1996).

58. *See* DANIEL SHAVIRO, FEDERALISM IN TAXATION: THE CASE FOR GREATER UNIFORMITY 1 (1993).

59. *See* RANDALL G. HOLCOMBE & RUSSELL S. SOBEL, GROWTH AND VARIABILITY IN STATE TAX REVENUE: AN ANATOMY OF STATE FISCAL CRISES 3 (1997).

60. *See* Vaughan, *supra* note 54, at 28. Tax collections correlated roughly with these spending figures.

61. In 1902 states relied on property taxes for more than half of their revenues. By 1927 state reliance on the income tax was increasing, but reliance on users fees and miscellaneous forms of taxation formed the primary source of state revenue. *See* MAXWELL, *supra* note 22, at 242. Data from 1930 shows that taxes on motor fuel were actually the single largest source of state revenue, followed by general property taxes, and motor vehicle licenses. *See* U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 205 (1935). The sales tax, probably the most regressive of the major state taxes, did not come into being until 1930,

when the federal government began relying heavily on the individual income tax (the most progressive of the state taxes), the federal tax crowded out state taxation of individual income, and states turned to less progressive sources of revenue.[62] Even today, some states have personal income taxes that are more progressive than the federal income tax system.[63] Thus, there is no logical reason, other than a strong belief in the inertia of state and local government policies, to believe that if the federal government turned significant revenue-raising responsibilities over to the states, they would continue to distribute the new tax burden in a way consistent with their current practices. If the federal government eliminated its progressive system of personal income taxation and turned revenue collection over to the states, most states would probably adopt progressive revenue-raising regimes in their stead.[64]

A fair amount of differentiation currently exists among the states with respect both to what kind of taxes provide the primary sources of revenue and to per capita total taxation levels. For example, while some states have no tax on personal income, Oregon relies on the personal income tax for thirty-one percent of its revenue.[65] Examining per capita state and local taxes in 1991, Ronald John Hy and William L. Waugh, Jr. found a range of $4,411 (Alaska) to $1,305 (Mississippi).[66] Admittedly, however, Alaska is something of an outlier,[67] as demonstrated by the fact that New York and Hawaii ranked second and third, with $3,337 and $2,867 in taxes collected, respectively. In some instances, neighboring states with shared metropolitan areas impose very different tax burdens. For example, by moving from New Jersey to Pennsylvania, the average resident would have saved $891 on

---

when Mississippi introduced one. *See* William F. Fox, *Can the State Sales Tax Survive a Future Like Its Past?*, *in* THE FUTURE OF STATE TAXATION 33, 33 (David Brunori ed., 1998).

62. *See infra* note 325 and accompanying text (citing authorities who have recognized this trade-off).

63. *See* Harvey Galper & Stephen H. Pollock, *Models of State Income Tax Reform*, *in* THE UNFINISHED AGENDA FOR STATE TAX REFORM 107, 124 (Steven D. Gold ed., 1988) (comparing indexes of progressivity).

64. *See infra* Part III.F.

65. RONALD JOHN HY & WILLIAM L. WAUGH, JR., STATE AND LOCAL TAX POLICIES: A COMPARATIVE HANDBOOK 59-61 (1995). For a complete explanation of what states use what forms of taxation, see ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, 1 SIGNIFICANT FEATURES OF FISCAL FEDERALISM: BUDGET PROCESSES AND TAX SYSTEMS 34-35 (1995).

66. *See* HY & WAUGH, *supra* note 65, at 4.

67. Alaska's numbers may also be misleading because a large number of its residents are eligible to receive annual payments from the state government, reflecting the state's bountiful income from its natural resources. *See generally* Laurence C. Smith, Note, *A Proposed Solution to the Federal Taxation of Alaska Permanent Fund Dividend Payments*, 11 ALASKA L. REV. 97 (1994) (discussing the payments and their treatment under the federal income tax).

her 1991 state taxes.[68] Compound these numbers for joint earner couples and increase them for people in high tax brackets, and the incentives to relocate can become dramatic. This difference is offset only in part by the deductibility of state income taxes.[69] Nevertheless, there is little empirical evidence suggesting that these differentials prompt much citizen mobility.[70]

B. *THE PROPOSAL*

In order to put a modern requisition arrangement like the one envisioned here into effect, Congress would first have to phase out its most important source of revenue: the federal tax on individual income.[71] Congress could then devise a system whereby requisitions make up some or all of the lost revenue.[72] In order to adopt a requisitions approach, Congress would

---

68. *See* HY & WAUGH, *supra* note 65, at 4 (supplying the numbers used in this calculation). On the other hand, neighboring states sometimes have tax differentials of a few hundred dollars per capita. For example, less than $350 separates Maryland from Virginia, and Kansas from Missouri; less than $150 separates Ohio from Kentucky; and less than $60 separates Alabama from Mississippi. *See id.*

69. Since the enactment of the 1986 federal Tax Reform Act, state and local general sales taxes have not been deductible. *See* Daphne A. Kenyon, *Reforming State Policies That Affect Local Taxing and Borrowing*, *in* A DECADE OF DEVOLUTION, *supra* note 40, at 223, 245.

70. *See, e.g.*, ALBERT BRETON, THE ECONOMIC THEORY OF REPRESENTATIVE GOVERNMENT 112-13 (1974) ("Indeed, the studies we possess of the effect of taxes on the supply of labor all indicate that this effect is small or nonexistent."); WALLACE E. OATES, FISCAL FEDERALISM 143 (1974) ("For relatively large provinces or states, for example, labor may be, for all practical purposes, immobile with respect to modest levels of taxation of personal income."); Benjamin Bridges, Jr., *Allowances for State and Local Nonbusiness Taxes*, *in* ESSAYS IN FISCAL FEDERALISM 187, 214 (Richard A. Musgrave ed., 1965) ("[P]oliticians and voters believe that changes in interstate income tax differentials significantly affect citizens' choices of residence, place of work, and business location. This belief may or may not be justified . . . for personal income taxes."); Andrew Reschovsky, *The Progressivity of State Tax Systems*, *in* THE FUTURE OF STATE TAXATION, *supra* note 61, at 161, 163; Vaughan, *supra* note 54, at 109 (concluding that the evidence that rich individuals move from one state to another to reduce tax burdens is weak).

71. In principle, there is little reason why requisitions cannot be overlaid in the United States' current fiscal scheme. For example, if the federal government needs a new revenue source to finance a war, it could keep current federal taxes at their current levels and call upon the state governments to deliver the extra revenue. Such a scheme, however, would be a poor cousin of the vigorous requisitions approach envisioned by the colonial Americans. For requisitions to truly matter, and for the scheme to bring about the advantages discussed below, it would have to be a primary, rather than a secondary, source of revenue for the federal government.

72. In order to make up some of the revenue, Congress might pass legislation, under its Commerce Clause authority, that prohibits states from taxing corporate incomes. Congress could then raise the federal corporate tax by an amount equal to the amount that the states would lose from the state taxes on corporations. Currently, the states raise four and one half times more revenue through taxing personal income than through taxes on corporate income. *See* HOLCOMBE & SOBEL, *supra* note 59, at 36; *see also* CAROLYN WEBBER & AARON WILDAVSKY,

only need to devise a formula that would govern the amount of each state's obligations to the federal treasury. Admittedly, developing such a formula would prove politically contentious.[73] However, a rule that required contributions in proportion to the collective income of the residents of each state would approximate closely the current distribution, in which the individual incomes of state residents are aggregated, and, therefore, would likely constitute a plausible compromise.

Congress then would need to establish penalties for late payment or nonpayment by the states. Although a number of creative methods spring to mind,[74] increasing payroll taxes collected from residents of the noncompliant state would be the most effective means for ensuring compliance. The federal government could increase taxes enough to compensate for the requisition shortfall, in addition to a further increase that would eliminate any incentive for states to breach their obligations. Admittedly, the burden

---

A HISTORY OF TAXATION AND EXPENDITURE IN THE WESTERN WORLD 552-55 (1986) (explaining why even progressive states are unlikely to rely heavily on taxing corporate income). Accordingly, unless the federal government was willing to operate with drastically reduced revenues, some requisitions would be necessary, even after such a swap of taxation bases. Some scholars have argued that the lack of uniformity among state taxation of corporate income regimes engenders significant inefficiencies. *See* SHAVIRO, *supra* note 58, at 19; Kathryn L. Moore, *State and Local Taxation of Interstate and Foreign Commerce: The Second Best Solution*, 42 WAYNE L. REV. 1425, 1430 (1996). Undeniably, the costs of non-uniformity are much higher for corporations, which are likely to have business dealings in multiple states, than for individuals, most of whom live and work in the same state. Additionally, because corporations appear to be much more mobile than individuals, and better able to shift income from one jurisdiction to another, the grounds for exclusive federal tax jurisdiction over corporate income may be compelling. In any event, while the centralization of corporate tax jurisdiction in the federal government would nicely complement the devolution of the federal individual income tax, the merits of each proposal can and should be considered separately.

73. *See infra* notes 354-359 and accompanying text (discussing the potential for animosity between rich and poor states' representatives on this issue).

74. For example, Congress could withhold grant payments to the states until the state was in compliance. However, depending on the amount of revenue that was budgeted for distribution to the states under a requisition arrangement, the amount of the requisition might well exceed the value of all grants. Under such circumstances, if a state did not make even a partial payment on its requisition obligation, such a tool would prove incomplete. Moreover, given the likely withering away of grant programs that would naturally follow from a shift to requisitions, grant reductions might not be a viable congressional option. At the same time, however, Congress would retain a number of coercive options. For example, Congress could refuse to seat a state's congressional delegation until that state paid its requisition, although such a move might provoke constitutional scrutiny. Congress could wreak havoc with the states by refusing their residents access to federally funded public goods, such as national parks, museums, the federal reserve system, Colorado River water, etc. Finally, Congress might authorize the federal government to seize state assets in the amount of the requisition due. While fun to imagine, this Article's strong presumption is that heavy-handed tactics of this sort never would be necessary.

of a payroll tax would not burden the same people to the same extent as an income tax, but that should not be particularly troublesome, since a state could always choose to replace its income tax with a payroll tax of its own under a requisitions scheme without having to default on its federal obligation.[75]

In the alternative, Congress could directly tax the income of residents of a non-compliant state—a power the Continental Congress never possessed. Today, Congress has both the authority and the means to levy a direct tax. The threat of losing their newly won authority over revenue collection should suffice to ensure that the states make their requisition payments in full and on time. Of course, that threat would be made less credible by the withering away of the federal tax apparatus, which could not be created anew on short notice. Accordingly, it would make sense for the federal government to maintain some income tax presence. For example, some federal information reporting should continue. The federal government might require all states that collect individual income taxes to file the information disclosed by taxpayers with the federal government, and the federal government could require employers and financial institutions to provide them with copies of the information currently included on federal W2 and 1099 forms. With the credible threat of raising payroll and individual income taxes to punish a state that did not make its payments on time, the federal government should be able to avoid a repetition of the enforcement problems that plagued the central government's requisition efforts two centuries ago.

Congress's duties complete, the tax ball would then be in the states' respective courts. With this new flexibility in revenue collection, it is likely that most states would dramatically alter their current tax structures. Indeed, it is a central assertion of this Article that a return to a requisitions finance system would create major, somewhat unpredictable changes in how states currently raise revenues and alter the relationships of citizens to their state governments. At the very least, the existing differences among the states with respect to taxation policy would multiply.[76]

C. *REQUISITIONS FINANCE'S EFFECT ON SPENDING*

Put into practice, requisitions finance would be an engine of decentralization. Currently, the federal government justifies its influence over

75. Under one variation of a requisitions scheme, this power to institute a payroll tax might be subject to some limitations so as to prevent excessive tax exporting. *See infra* text accompanying notes 364-366 (discussing the possibility of judicially enforceable limits on tax exporting).

76. For an analysis of why such differentiation is a good thing, see *infra* Parts III.D, IV.A, IV.B, and IV.C.

state spending with a simple "power of the purse" argument: The federal government collects the revenue, so the federal government should have a say in the ways the state governments spend it. If that authority is eliminated, the legitimacy of central control will diminish.[77]

One need not question the supremacy of the federal government over the states in order to accept that proposition. Those who justify federal grant programs generally do so on functional grounds: The federal government is more efficient than the states at collecting revenue, so it makes economic sense to have the federal government collect extra revenue and then distribute it to the states.[78] In a requisitions world, the federal government might no longer be the most efficient tax collector and, regardless of efficiency, would not be seen as the most socially desirable tax collector. Indeed, considering the inefficiencies of needless distributional haggling in Congress and the transaction costs of federal administration of grant programs, it almost would be irrational for the state governments to collect revenues that are then sent to Washington, before being sent back to the state governments in the form of grants.[79] The logic of a requisitions approach thus strongly favors leaving the revenue in the states to begin with, and letting states choose how much to tax and how to spend the revenue raised.

Relatedly, a public finance phenomenon known as the flypaper effect

---

77. I am not suggesting that congressional efforts to enforce uniform national policy, pursuant to Congress's powers under the Supremacy Clause, are illegitimate. Rather, I merely propose that state governments will have a more persuasive moral claim to state autonomy when they are spending funds that they have raised. *Cf.* Enid Beaumont, *Status of the Devolution Revolution*, PUB. MANAGER: NEW BUREAUCRAT, Dec. 1, 1996, at 23, *available in* 1996 WL 12015805, at *1 ("The more the federal government withdraws financial support [from the states], the less federal oversight there should be.").

78. The other typical justification for grants is to compensate for wealth disparities among the states. While redistributive policies of that sort are desirable, adjusting the requisition burden of each state will be just as effective in redistributing income from rich states to poor states as would block grants or revenue sharing. *See infra* text accompanying note 359.

79. Under the status quo, we can conceptualize four levels of federal fiscal involvement in state-level activities. Ranked from the most to least federal involvement they are: (1) direct federal government programs; (2) block and category grants to state and local governments, with various "strings attached" to govern how the money can be spent; (3) revenue sharing, i.e., the direct transfer of funds collected by the federal government to state and local governments without strings attached; and (4) the federal government's decision not to tax a certain base of revenue so that the state and local governments can be left to decide whether to tax the base or leave it untaxed. For helpful overviews, see Bruce J. Casino, *Federal Grants-in-Aid: Evolution, Crisis, and Future*, 20 URB. LAW. 25 (1988); and Jerry L. Mashaw & Dylan S. Calsyn, *Block Grants, Entitlements, and Federalism: A Conceptual Map of Contested Terrain*, 14 YALE L. & POL'Y REV. 297, 302-03 (1996). One likely side effect of requisitions finance's rearrangement of federal-state relations on the taxation side of the ledger is to further the expenditure-side movement from categories (1) and (2) to category (4).

suggests that tax revenue tends to stick where it is collected. If the federal government collects most of the revenue, it will spend most of the revenue, even if those funds are most efficiently spent by state governments.[80] It follows that if the state governments begin collecting a much higher percentage of the nation's tax revenue, the federal government's appetite for spending will shrink. Although members of Congress would lose neither the authority nor the temptation to overtax at the federal level and distribute money to the states with strings attached,[81] it remains a likely consequence of requisitions finance that state government spending would rise as a proportion of total government spending. In the long run, one could expect to see the trimming down or elimination of federal grants in aid to the states. That said, even for those who find this devolution on the spending side implausible, the proposal for requisitions finance largely stands on its own. Furthering state autonomy over both revenue collection and expenditures would be the ideal, but the benefits of devolution on the tax collection side alone will be significant enough to merit considering the proposal seriously.

D. Requisitions Finance's Effect on Citizen Mobility

The analysis that follows in Parts III and IV will explore, from communitarian and utilitarian perspectives, the likely advantages and drawbacks of shifting to a requisitions finance system. The analysis in those Parts will flesh out some of the many societal changes that would result from such a shift. Before engaging in that analysis, however, it is worth exploring the most important variable in determining what the nation will look like in a requisitions world: citizen mobility. In light of the significant variations among the states with respect to aggregate taxation levels and the distribution of tax burdens,[82] it is worth exploring why these differentials have not engendered greater citizen mobility.

Perhaps the simplest answer, that Americans are by nature not a mobile people, can be dismissed immediately. As Michael Walzer observes, "Americans apparently change their residence more often than any people in history, at least since the barbarian migrations, excluding only nomadic

---

80. *See* Wallace E. Oates, *Federalism and Government Finance*, *in* MODERN PUBLIC FINANCE 135 (John M. Quigley & Eugene Smolensky eds., 1994) (describing the flypaper effect).

81. More precisely, the argument goes, members of Congress would raise taxes elsewhere in the budget to make up for the loss of individual income tax revenues. They would then take credit for federal spending on popular objectives, while forcing the state legislators to do the dirty work of raising revenues. This Article responds to that criticism *infra* text accompanying note 261.

82. *See supra* notes 64-69 and accompanying text (noting the disparities in personal income tax rates among various states).

tribes and families caught up in foreign or civil wars."[83] Thus, although residential mobility is limited by "substantial moving costs, psychological connections to geographic areas, and many other factors,"[84] such as the prospect of searching for employment in a new community[85] and fears that moving will impede the educational progress of school-aged family members,[86] Americans are highly mobile in relative terms. And by reading a fundamental right-to-travel into the Fourteenth Amendment, the courts have made the United States a nation that legally, as well as culturally, embraces the right of a citizen to move to a different state.[87]

Those who do move can be separated into two groups: persons who stay in the same metropolitan area–who account for the bulk of all mobile residents[88]–and those who move out of state. Surprisingly, given the existence of greater metropolitan areas such as Washington, D.C., New York City, Chicago, Kansas City, Portland, and Philadelphia, which include portions of two or more states, people who remain in the same metropolitan area account for a paltry share of all interstate moves.[89] The overlap between the two groups of movers is therefore minimal. The metropolitan-area group is a fairly representative slice of society, consisting largely of newly married couples, families upgrading their homes or moving from apartments into homes in response to increasing incomes or family sizes, divorcees seeking new environs, and retirees looking for more tranquil confines. The out-of-state group consists largely of "repeat interstate immigrants [who are] highly qualified persons with the most choices among educational opportunities,"[90] students,[91] and those returning to their state of

83. Michael Walzer, *The Communitarian Critique of Liberalism*, *in* NEW COMMUNITARIAN THINKING 52, 58 (Amitai Etzioni ed., 1995).

84. LeBoeuf, *supra* note 20, at 580 (1994) (citing L.F. Dunn, *Measuring the Value of Community*, 6 J. URB. ECON. 371 (1979)).

85. *See* Wallace E. Oates, *An Economist's Perspective on Fiscal Federalism*, *in* THE POLITICAL ECONOMY OF FISCAL FEDERALISM 3, 9 (Wallace E. Oates ed., 1977).

86. *See* LARRY LONG, MIGRATION AND RESIDENTIAL MOBILITY IN THE UNITED STATES 187 (1988).

87. This jurisprudence was recently reaffirmed and extended by a seven-to-two majority in *Saenz v. Roe*, 526 U.S. 489, 503-04 (1999) ("A citizen of the United States has a perfect constitutional right to go to and reside in any state he chooses, and to claim citizenship therein . . . .").

88. *See* MIGRATION STATISTICS IN THE UNITED STATES: A REPORT OF THE SUBCOMMITTEE ON MIGRATION STATISTICS, COMMITTEE ON POPULATION STATISTICS, POPULATION ASSOCIATION OF AMERICA 20 (1988) (noting that 63% of all moves between 1975 and 1980 were within the same metropolitan area); PETER H. ROSSI, WHY FAMILIES MOVE 32 (3d ed. 1980) (citing a study estimating that the majority of moves are fewer than three miles).

89. *See* LONG, *supra* note 86, at 207.

90. *Id.* at 134.

91. *See id.* at 36.

birth.[92] These repeat migrants account for a significant share of interstate movers.[93]

Why do people move from one state to another? The primary reason people give for moving is a job transfer or employment opportunity in another state.[94] Undeniably, the business cycle is an important factor in residential mobility, as people move to booming cities, states, or regions.[95] People with specialized skills often move to areas where those skills are in short supply, so as to increase their earning potential.[96] Additional factors, such as school attendance, retirement, divorce, moving closer to relatives, or a desire for a change in climate, explained most of the other moves.[97] Differentials in public-school quality are also significantly more important than income tax differentials.[98] Moreover, people often move to accommodate lifestyle choices; moves to states such as California, Florida, Hawaii, and Arizona seem to be motivated largely by such factors.[99]

Despite the prominence of these factors, it is unwise to conclude hastily that taxes do not make a difference. After all, numerous capitalization studies have indicated that "interjurisdictional tax/service differentials are incorporated into housing values, demonstrating that taxpayers do take account of fiscal characteristics in their choice of jurisdictions."[100] Cost of living is a factor in citizens' decisions about where to live. Thus, they may be factoring tax differentials into their decisions without even recognizing its role. Nevertheless, the evidence reveals that income tax differentials are not presently the major factor that leads people to move from one state to another. Of course, the interesting question for our purposes is whether a requisitions finance system would change that. The answer will depend largely on the magnitude of interstate disparities under requisitions finance. All the existing studies on residential mobility and people's respon-

92. *See id.* at 105.

93. *See id.* at 114; *see also id.* at 29 (noting that the 1980 census revealed that 64% of Americans still live in their state of birth).

94. *See* LONG, *supra* note 86, at 235 tbl.7.1 (noting that job transfers, looking for a new job, taking a new job, and entering or leaving the armed forces accounted for 22.2%, 6.3%, 18.7%, and 3.4% of all moves, respectively).

95. *See* GORDON L. CLARK, INTERREGIONAL MIGRATION, NATIONAL POLICY, AND SOCIAL JUSTICE 69 (1983).

96. *See* LONG, *supra* note 86, at 83 (identifying this factor as a considerable motivation for Northerners' migration to the South).

97. *See id.*; Oates, *supra* note 85, at 9.

98. *See* Bridges, *supra* note 70, at 218.

99. *See* GEORGE E. PETERSON & THOMAS MULLER, THE ECONOMIC AND FISCAL ACCOMPANIMENTS OF POPULATION CHANGE 76 (1980) (noting that older residents figure prominently among those who move to these states).

100. Kirk J. Stark, *City Welfare: Views from Theory, History, and Practice*, 27 URB. LAW. 495, 500-01 (1995) (citing these studies).

siveness to tax differentials contemplate a world in which citizens' primary tax bills–currently the federal individual income and payroll taxes–are geographically neutral.[101] Under a requisitions finance system, it is safe to assume that differentials among the states would increase substantially and that citizens would find greater differentiation in the distributions of tax burdens among jurisdictions. Assuming that citizens were aware of these differentials, geographic mobility would certainly increase as a consequence. Moreover, bear in mind that employment-related motivations are currently the primary cause for interstate moves. Although requisitions finance would not affect the federal tax on corporations, it might still prompt some firm mobility if firms see advantages in relocating to jurisdictions that have certain tax packages.[102] Since many workers would follow their firms across state lines, significant residential mobility might result.

Requisitions finance could boost residential mobility by providing citizens with ideological motives for moving. A goal, and likely consequence, of requisitions finance is to encourage states to adopt fiscal policies that are better tailored to state preferences. Currently, because of the largely federal (uniform) nature of income taxation and governmental spending, there is

---

101. In practice, the federal income and payroll taxes are not geographically neutral. For example, the home mortgage interest deduction is of greater value to residents of high wage, high property-value states. *See* WILLIAM C. APGAR ET AL., HOUSING IN AMERICA: 1970-2000, THE NATION'S HOUSING NEEDS FOR THE BALANCE OF THE 20TH CENTURY 80-81 (1991). The payroll tax hits those living in high wage, high cost-of-living states disproportionately hard.

102. A 1988 GAO survey asked executives what the most important factors were for firm locational decisions. Ranked from most to least important, these factors were: market access, community characteristics, site characteristics, government cooperation, transportation, real estate costs, financial health of the region, quality of life, regulatory practices, miscellaneous taxes, labor force, financial inducements, and technical assistance. *See* HY & WAUGH, *supra* note 65, at 213 ex.8.2 (analyzing the criteria). Differing packages of taxes on individual income and government services may affect several of these factors, most notably community characteristics, government cooperation, real estate costs, financial health of the region, quality of life, miscellaneous taxes, and labor force; thereby playing a role in affecting firm location. The fact that financial inducements (corporate income tax rates and special one time targeted tax breaks) rank so low is surprising to many. As Hy & Waugh observe:

> A predominant fear of state and local officials is that their tax rate structures may be so out of line with those of other states and communities that businesses will flee to locations with the lowest tax rates or those offering the best tax incentives. For the most part, that fear is unfounded.

Id. at 222. Other scholarship also concludes that taxes play a small role in firm decision-making about location, but that state governments presume that they play a very large role. *See* HENRY J. RAIMONDO, ECONOMICS OF STATE AND LOCAL GOVERNMENT 112 (1992). *But cf.* Bridges, *supra* note 70, at 214 n.34 ("It is alleged that personal income tax rate differentials for salary income discourage business firms from locating in high-income-tax states because of the difficulty of attracting executive talent to such states."); Kenyon, *supra* note 69, at 245 (arguing that both individuals and firms do take tax levels into account when choosing where to live).

relatively little variation in the character of state governments. If decision-making about whom to tax and how much to tax is decentralized, individual states will be able to pursue policies that reflect state-level norms, rather than national norms. To the extent that there is divergence among the states, mobility would be boosted in two related ways. First, some states will position themselves far away from the national tax consensus as reflected in the Internal Revenue Code provisions governing the individual income tax. This will attract the interest of like-minded individuals in other states whose governments have not made such bold moves. Second, as states pursue policies further to the left or further to the right of the national consensus, those residents of states who see their governments adopting tax systems that increasingly deviate from their own preferences will become increasingly likely to move to states that have adopted systems that better reflect their preferences. These sources of diversity will increase mobility marginally, in a Tieboutesque manner.[103] The increased mobility relative to the status quo should be apparent. State tax policies do currently diverge somewhat, but that divergence only matters for the less than twenty percent of total tax revenues that states collect.

Given these factors, this Article continues on the assumption that requisitions finance will increase residential mobility substantially,[104] and that tax-related factors will go from being a relatively minor factor in people's choices about where to live, to one of the more important factors. This

---

103. *See generally infra* notes 162-166 and accompanying text (discussing the Tiebout hypothesis).

104. That outcome should not be immediately apparent. Arguably, the fact that each state would have to raise at least enough revenue to meet its federal quota seems to indicate that poorer states would converge upward toward this newly raised floor. But two related dynamics illustrate why this will not be the case. First, the amount of each state's quota presumably would be set so that poorer states faced a much lower per capita requisition burden than richer states. *See infra* text accompanying note 359 (noting that the tax system's progressivity can be maintained through quota adjustments). The floor required to meet the requisition burden thus would not be uniform among the states, but would vary dramatically to reflect the differing economic circumstances in each state. Second, in comparing the current individual income tax to requisitions finance, it is important to assume that the two systems would, at least initially, draw the same amount of tax dollars from each state. For example, under the status quo, the average Alabama resident would pay $5,000 in state taxes and $10,000 in federal income taxes. Under requisitions finance, the average Alabama resident would pay $15,000 in state taxes, $10,000 of which would go to the federal government (assuming no immediate reduction in grants-in-aid). This stipulation, which is necessary to fairly compare the two revenue-raising schemes, makes it clear that the aggregate level of state taxation will not immediately differ in a way that would affect the overall amount of taxation in a given state or produce any convergence toward a minimum level of taxation. What would happen is that differences among the states over *who they taxed* to raise their revenues would become more pronounced, because the entire $15,000 of liability, as opposed to the $5,000 that the state formerly controlled, would be influenced by the different tax distributional schemes within each state.

change would boost already high American residential mobility to unprecedented levels.[105] The Parts that follow explain in more detail why the nation would be strengthened by increased interstate mobility.[106]

III. THE COMMUNITARIAN ANALYSIS OF REQUISITIONS FINANCE

Among the many decisions that a democratic community must make, perhaps none are more central to community definition than the questions of who shall bear the burdens of government taxation and how much they shall pay.[107] These decisions are inherently value-laden and contentious. They present an opportunity for dialogue between the economically privileged and the less privileged. They offer the community a rare instance in which almost everyone must make a tangible, shared sacrifice for the greater good. Unfortunately, in the modern United States, community and taxation are not two concepts that frequently appear alongside each other. Largely as a result, "tax" is a dirty word in many circles. That is the first problem.

In American society, citizens' relationships with their state governments are complicated and problematic. On the one hand, citizens tend to have much higher regard for their respective state governments than for

105. Though one might expect to see the greatest mobility in the years immediately following the enactment of a requisitions scheme, one should anticipate that adopting such a scheme would bring about much more than a one-time reshuffling of the population. People's preferences change over time. As those preferences change, citizens may find that migration to another state becomes increasingly attractive. Similarly, the newer members of society, while likely feeling some attachment to their parents' home states, will in many instances want to migrate elsewhere once they reach adulthood.

106. Although it is not central to this Article, I would submit that even if an individual does not exercise her right to move to another state, the fact that requisitions finance gives her a more meaningful right to move to a community that has a different character than the one in which she currently lives is normatively attractive. The intuition underlying the Supreme Court's right-to-travel jurisprudence is founded upon the idea that being able to move to another state is a fundamental right that is important to preserving individual autonomy in much the same way as rights to free speech and free exercise of religion. By making the current distinctions between states more substantial, requisitions finance would strengthen the right to travel in a manner no less significant than the *Saenz* rule, which removed barriers to travel between slightly differentiated states. *See* Saenz v. Roe, 526 U.S. 489 (1999) (holding that states' durational residency requirements for welfare benefits violate the fundamental right to travel). Indeed, I would posit that it is not the right to travel long geographic distances that makes the constitutional "right to travel" compelling, but the right to travel to an area that is economically, socially, ecologically, climatically, or culturally different from the community in which one resides: Whether the traveler's destination lies three or three thousand miles away is immaterial.

107. *See infra* note 118 and sources cited therein (discussing the community-defining possibilities of tax-burden allocation).

the federal government.[108] Governors are sometimes elected with astounding majorities of which presidential candidates can only dream.[109] State governments are perceived as more accessible and responsive to constituent needs than the federal government.[110] On the other hand, citizens are largely ignorant about events in state government. Few can name their elected state officials, and few vote in elections when candidates for the Presidency are not on the ballot.[111] Voters know more about policy decisions made by Congress than those of state legislatures.[112] State governments are perceived as dealing with issues that are not as significant or sexy as those addressed by the national government. As a result, media coverage of state lawmaking tends to be exceedingly weak.[113] Yet those same media outlets are perpetually seeking a state or local angle on national or international stories.[114] This contrast reveals an interesting paradox: People

---

108. *See* JOHN D. DONOHUE, DISUNITED STATES 13 (1997) (citing studies showing much higher levels of citizen trust in state than federal governments); Mashaw & Calsyn, *supra* note 79, at 311 (commenting that polling data suggests that people have higher confidence in state governments); NATIONAL CONFERENCE OF STATE LEGISLATURES, STATE LEGISLATURES: TAKING ON AMERICA'S ISSUES (1998), *available in* 1998 WL 12872097 (citing its own study reporting similar results). Admittedly, the data collected in this latter source should be interpreted with caution. One suspects that the National Conference might create a questionnaire that presents their constituent legislatures in a favorable light.

109. *See* <www.cnn.com/Election/1998/results/governor.html> (visited Jan. 21, 1999) (showing that, in 1998, thirteen governors were elected with 60% or more of the vote, led by Kansas's governor, who won 74% of his state's vote).

110. *See* sources cited *supra* note 108.

111. *See* John Marelius, *6 Million May Vote in Open Primary*, SAN DIEGO UNION & TRIB., June 2, 1998, at A1 (noting "a steady trend toward declining participation in state primaries"); John Marelius, *Voters Wait and See on Most Races*, SAN DIEGO UNION & TRIB., Aug. 31, 1998, at A3 (noting a lack of interest in and awareness of candidates for statewide office).

112. *See* Mashaw & Calsyn, *supra* note 79, at 310.

113. *See* Susan B. Hansen, *Disunited States: What's at Stake as Washington Fades and the States Take the Lead*, 113 POL. SCI. Q. 527, 527 (1998) (reviewing DONOHUE, *supra* note 108); Joe Nicholson, *Are Newspapers Abandoning Their Statehouse Coverage?*, EDITOR & PUBLISHER, Sept. 12, 1998, at 16 (noting the dwindling numbers of reporters assigned to cover state governments); *cf.* RICHARD C. BOX, CITIZEN GOVERNANCE: LEADING AMERICAN COMMUNITIES INTO THE 21ST CENTURY 41 (1998) (arguing that local governments get very little media coverage). It is likely that requisitions finance, by increasing the pocket-book importance of state governmental activities, would prompt the media to increase coverage of state-level political activities. *Cf.* DONOHUE, *supra* note 108, at 46 (suggesting that the media focuses on issues for which viewers' pocket-books are likely to be effected significantly).

114. *See* Scott Broom, *Media Relations Tips To Get Your Segment on the Ten O'clock News*, PR NEWS, Nov. 30, 1998, *available in* 1998 WL 7331277 (noting that providing a local angle on a news story will increase its odds of getting on the air). For an example that the *Iowa Law Review*'s statewide readership will appreciate, see Rob Borsellino, *Finding the 'Iowa Connection' to Judge Kenneth Starr*, DES MOINES REG., Feb. 21, 1998, at 1 ("In the never ending effort to find a 'local angle' for every possible story – no matter how thin the connection – I've dug up Kevin Saunders, Drake law professor, legal scholar and former clerk for one-time federal Judge

strongly identify as members of their state communities, but not as members of state polities.[115] The potential for state-based citizenship is latent,[116] but largely untapped. Instead, citizenship is largely nationalized, even though the federal government is less cohesive, less popular, less homogeneous, and less participatory than the state governments. Therein lies the second problem.

The communitarian case for requisitions finance seeks to understand and address these two coexisting problems.[117] Requisitions can be understood as a means of reinvigorating state-level political activity, reorienting citizens toward political decisions made by the state government, and transforming taxation into a community-defining act in which the citizenry feel comfortable participating.

Part III covers a great deal of ground. It begins with a discussion of the communitarian benefits of shifting an increased portion of the financial stakes to the state governments. An exploration of how requisitions allow

---

Kenneth Starr."). Of course, in large states like California and New York, a local angle may differ dramatically from a statewide angle.

115. *Cf.* Edward L. Rubin & Malcolm Feely, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 944 (1994) ("Most of our states, the alleged political communities that federalism would preserve, are mere administrative units; rectangular swatches of the prairie with nothing but their legal definitions to distinguish them from one another."); Charles Taylor, *Hegel: History and Politics*, *in* LIBERALISM AND ITS DISCONTENTS 177, 195 (Michael J. Sandel ed., 1992) ("There is no advantage in an artificial carving up of society into manageable units. If in fact no one identifies strongly with these units, participation will be minimal, as we see in much of our urban politics today.").

116. *See infra* notes 171-176 and accompanying text (noting that residents within a state already have much in common, but arguing that a requisitions finance system would allow residents to further define their communities based on shared preferences and ideologies).

117. By now, communitarianism has made such heavy inroads into the legal academy that this Article's readers should be familiar with the concept. At the same time, as Philip Selznick has observed, "the communitarian idea is vague; in contemporary writing it is more often alluded to and hinted at then explicated." Philp Selznick, *The Idea of a Communitarian Morality*, 75 CAL. L. REV. 445, 445 (1987). Lest this Article continue that trend of definition dodging, I will say the following: Communitarianism is characterized by a belief that when individuals come together with their neighbors to make decisions or socialize, they derive extremely valuable benefits that they cannot achieve as isolated individuals. Communitarianism, in that sense, draws heavily from civic republican ideals. As such, communitarians are likely to embrace institutional arrangements that successfully bring people into public spaces, where they can interact with their peers. Communitarians are also likely to recognize that the bonds between members of a community will be greatest when the community's population is not so large as to eviscerate opportunities for members to interact repeatedly with each other. Communitarians tend to recognize and embrace the commonalties within communities and the differences among communities. Finally, communitarians are likely to favor decision-making paradigms that value the community's interests over the individual's self-interest. For further elaboration, see AMITAI ETZIONI, THE SPIRIT OF COMMUNITY: RIGHTS, RESPONSIBILITIES, AND THE COMMUNITARIAN APPROACH (1993), and the sources cited *infra* notes 118, 135, and 164.

for improved tailoring of taxation policies to local preferences follows. The next section discusses the prospects for utilizing community ties and sentiments to boost tax enforcement. The section following that examines the community-strengthening and community-weakening aspects of increased interstate residential mobility. The Article then discusses the possibility that redistribution through taxation works best when the benefits flow to people who live close to those who are supporting them. Part III then addresses two communitarian critiques of requisitions: first, that it disempowers the state governments by leaving the fundamental decision about the size of the requisition in the hands of the central government, and second, that it weakens community sentiments at the national level.

A. SHIFTING THE STAKES TO THE STATES

The decision about who should bear the burden of government taxation is a fundamental act of community self-definition.[118] Dialogues about the burdens of taxation can be community-building exercises, drawing on notions of mutual obligation and shared sacrifice. But, in practice, revenue-raising exercises rarely evoke an enlightened discourse. Instead, voters seem primarily concerned with ensuring that somebody else bears the burden of new taxation, and legislators are eager to please.[119]

In a nation as large as the United States, there are plenty of opportunities for taxing "somebody else." Tax increases in recent years have skillfully avoided raising tax rates for the so-called middle class.[120] Instead, politicians propose narrow tax increases.[121] In a global economy, the government may even raise significant revenue by enacting taxes that primarily affect foreign corporations.[122] While the middle class—however de-

118. *See, e.g.*, MICHAEL J. SANDEL, DEMOCRACY'S DISCONTENT: AMERICAN IN SEARCH OF A PUBLIC PHILOSOPHY 280-84 (1996); ROBERTO MANGABEIRA UNGER, WHAT SHOULD LEGAL ANALYSIS BECOME? 96, 97 (1996); MICHAEL WALZER, SPHERES OF JUSTICE 119-23 (1983).

119. Russell Long's oft-quoted statement, "Don't tax you, don't tax me: Tax that fellow behind the tree," is illustrative. *See* John A. Miller, *Rationalizing Injustice: The Supreme Court and the Property Tax*, 22 HOFSTRA L. REV. 79, 79 (1993) (quoting Long).

120. For a discussion of the Clinton Administration's reluctance to appear as if it is increasing the tax burden on middle-class taxpayers, see generally Michael J. Graetz, *Paint-by-Numbers Tax Lawmaking*, 95 COLUM. L. REV. 609 (1995).

121. For example, President Clinton's recent efforts to increase revenues have targeted the insurance industry, the tobacco industry, and other corporations. *See* Elizabeth D. Festa, *Industry Girds for Long Battle To Save VAs*, INS. ACCT., Feb. 16, 1998, at 1 (describing the impact on the insurance industry); Alan Fram, *Facing Elections, Republicans Wrestle over Tax Cut Strategy*, AP POL. SERV., Feb. 25, 1998, *available in* 1998 WL 7390233 (describing broader impacts of Clinton's tax policy on the corporate community).

122. In 1992, then-Chairman of the House Ways and Means Committee, Dan Rostenkowski, reformulated Russell Long's statement to read: "Don't tax you. Don't tax me. Tax the companies across the sea." MICHAEL J. GRAETZ, THE DECLINE (AND FALL?) OF THE INCOME

fined—bears the bulk of the nation's tax burden, visible[123] efforts to increase the middle class burden are unlikely to succeed any time soon.

When smaller, more economically integrated political units make decisions about who should bear the burdens of taxation, the opportunities for increasing revenues without adversely affecting the interests of a large segment of the community are necessarily limited.[124] The individual legislator is unlikely to be able to vote for a substantial tax increase that does not burden at least a significant minority of her constituency.[125] This discipline is likely to engender a more honest and legitimate approach to taxation. While the legislative meetings to apportion the burden might not duplicate the communitarian nirvana of fourteenth-century England's "meetings of substantial local inhabitants,"[126] they would constitute a step in that direction.

More importantly, when decisions about burden-bearing are made at the state or local level, it is possible to draw upon the greater familiarity with the underlying issues possessed by legislators and citizens. For example, if a state legislature considers a bill to increase revenues by raising fees on toll bridges or reducing family farmers' exclusion from estate taxation, citizens affected by the policy change will be able to testify about its impacts on them in ways that are meaningful to voters and legislators. The consideration of such issues will become less abstract.[127] Given the limited number

---

TAX 6 (1997).

123. This is an important caveat. For many taxes, such as the tax on corporate income and the employer portion of the payroll tax, the middle class bears the primary burden but its members do not realize it because that tax is initially paid by another entity and then partially passed along to middle class consumers or employees through higher prices or lower wages.

124. The potential for shifting the tax burden to out-of-state residents is an important qualification to this blanket statement. *See infra* Part IV.F (discussing the tax export problem).

125. *See* OATES, *supra* note 70, at 13 ("If a community is required to finance its own public program through local taxation, residents are more likely to weigh the benefits of the program against its actual costs.").

126. *See supra* text accompanying note 2.

127. To be sure, if the federal estate tax is made applicable to more farms, then the same constituents may well descend upon their representative to make their case for or against the change. However, the chief difference will be that legislators will feel much more comfortable assessing the impact of the policy change on unseen voters in a smaller community than in a large one. In the toll bridge example, the legislature may be able to reason in the following manner: "There are forty-five toll bridges in this state. Sixteen are in Jefferson County. Nineteen are in Williams County. The remainder are scattered. That means the economies of Jefferson and Williams County will be adversely affected." Meanwhile, the national picture, encompassing thousands of toll bridges, would defy simple comprehension. Congressional staff could supply a breakdown of how many bridges are rural and how many are urban, thus indicating the *type* of people who would be affected. Such statistics will be less informative, however, than information that can be drawn from the legislator's inherent knowledge about the communities and people who would be affected by the policy change.

of toll bridges and farming communities in most states, the legislature will have a better understanding of what interests are implicated by the policy change.

Deciding important burden-bearing issues at the state level will also provide citizens with greater opportunities for involvement in governmental decision-making. State capitols are geographically closer to most citizens than Washington, D.C. State legislators represent smaller districts than members of Congress and are more accessible to the average voter.[128] Distrust of state governments is not nearly as pronounced as distrust of the federal government.[129] In sum, these factors indicate that by shifting an important substantive policy area from federal to state control, the opportunities for increasing levels of citizen involvement in civic affairs would be substantial.

Perhaps as a corollary, shifting greater authority over revenue to the state level might attract more ambitious and visionary public officials to state government. Currently, candidates often receive state elected office as merely a stepping stone to a federal post. The most successful, visionary, or powerful legislators often hope to graduate from the state legislatures to bigger and better things in Washington. This hierarchical notion of government status stems in part from salary differentials,[130] but the notion that the "action" is at the federal level also plays a role. Most tax revenue is collected and spent by the federal government. With that authority comes power.[131]

When the stakes are shifted to the states, state governments will garner more respect. They will no longer be perceived as less important governmental bodies dealing with less important issues. As the Republican party

---

128. *See* LeBoeuf, *supra* note 20, at 564-65 ("[A]s the ratio of citizens to representatives falls, the citizens become more aware of the activities of their elected officials.").

129. *See supra* note 108 (citing sources discussing citizen distrust of the federal government).

130. While the trend over the last few decades has been toward the professionalization of state legislatures, *see* TIMOTHY CONLAN, FROM NEW FEDERALISM TO DEVOLUTION: TWENTY-FIVE YEARS OF INTERGOVERNMENTAL REFORM 310 (1998), state legislators' salaries are still quite low. *See* Andrew Blum, *Losing Its Allure: Lawyer/Legislators Are a Dying Breed. It Just Doesn't Pay*, NAT'L L.J., Sept. 7, 1992, at 1, 34 (criticizing low legislative salaries as a disincentive to service).

131. Admittedly, legislators prefer spending over taxing. Thus, if requisitions remained large, and the federal government continued to spend the bulk of the nation's public-sector dollars, devolution of the individual income tax might have little effect on legislators seeking to climb the social ladder. However, recall that the flypaper effect implies that tax revenue tends to stick where it is collected. *See* text accompanying *supra* note 80. Thus, devolution of the individual income tax may eventually result in the state governments spending an increased percentage of government dollars. Among the many consequences of such a shift would be an increase in the number of ambitious civil servants remaining in state government.

has demonstrated in numerous recent national elections, the issue of taxes can be enormously important in bringing people to the polls, getting them to feel that what happens on election day matters, and provoking discussion and argument. Because the federal government is the primary agent of tax collection in the United States, disputes over taxation are fought primarily in the federal forum. But Jerry Mashaw and Dylan Calsyn suggest that changing that dynamic might alter the nature of state citizenship significantly. They assert:

> Americans generally view themselves as Americans first and citizens of their states second . . . . There is, of course, a chicken and egg problem at the core of this description of the phenomenology of citizenship. Were states more thoroughly empowered to make important policy choices, involvement of citizens with state governments might rise as well.[132]

By increasing the prominence of the tax issue at the state level, state governments will be given a shot in the arm. Greater citizen participation, increased media coverage, better candidates, and more political expenditures are among the likely outcomes.

There is a final advantage closely connected with shifting the stakes to the states. That advantage concerns more than making citizens feel that they are participating in the process. It has to do with making citizens of a given state feel as if they are winners in the political process, that the policies adopted by the state reflect their preferences. The next section discusses that dynamic.

B. *TAILORING TAX POLICY TO LOCAL POLITICAL AND ECONOMIC CONDITIONS*

It has long been a staple of American political theory that participation by the citizenry is, on balance, a good thing.[133] Indeed, that notion still commands widespread respect, largely for the reasons discussed in the previous section. Communitarians, in particular, are likely to believe that "[s]trong democracies require active citizens, ones who participate in civic affairs and who shoulder responsibilities for the common good."[134] Such

---

132. Mashaw & Calsyn, *supra* note 79, at 310-11.

133. *See* ALEXIS DE TOCQUEVILLE, 1 DEMOCRACY IN AMERICA 251 (Phillips Bradley ed., Vintage Books 1990) (1835) ("[I]t is impossible that the lower orders should take a part in public business without extending the circle of their ideas and quitting the ordinary routine of their thoughts. The humblest individual who co-operates in the government of society acquires a certain degree of self-respect . . . .").

134. Thomas A. Spragens, Jr., *Communitarian Liberalism*, *in* NEW COMMUNITARIAN THINKING, *supra* note 83, at 37, 50.

participation is valorized by communitarians, not simply because it produces governments that are responsive to citizen preferences, but because the process of participation engenders benefits that humans, as social animals, can only gain through dialogue in concert with their fellows.[135] To some communitarians, political dialogue is the most important form of activity[136] because it builds trust and social bonds among community members.[137] By virtue of their smaller size, state governments are more easily influenced by the efforts of individual citizens, more easily monitored by the citizenry,[138] and may be more receptive to citizen input.[139] As a result, citizens, in theory, are more likely to participate in politics and feel the rewards of this participation when important decisions are left to lower levels of government.[140] Thus, the communitarian argument goes, devolving power to state governments garners participatory benefits that foster better decision-making.

Nevertheless, not everyone embraces participation. Nelson Rosenbaum has argued provocatively that participation itself is neither rewarding nor conducive to the growth of strong community bonds. Rather, support for the political process and the community is highest among those who

---

135. *See generally* HANNAH ARENDT, THE HUMAN CONDITION 175-247 (1958) (recognizing the importance of speech and action).

136. Hannah Arendt writes:

> In acting and speaking, men show who they are, reveal actively their unique personal identities and thus make their appearance in the human world, while their physical identities appear without any activity of their own in the unique shape of the body and sound of the voice.... Because of its inherent tendency to disclose the agent together with the act, action needs for its full appearance the shining brightness we once called glory, and which is possible only in the public realm.

Id. at 179-80.

137. For sources discussing this proposition, see BENJAMIN R. BARBER, STRONG DEMOCRACY 152 (1984) and Hannah Pitkin, *Justice: On Relating Private and Public*, 9 POL. THEORY 327, 349 (1981).

138. *See* BRETON, *supra* note 70, at 83 ("If the desire is for new, smaller political units, citizens are more able to supervise and control what is supplied to them than in larger units."); LeBoeuf, *supra* note 20, at 565 (noting that decentralization is conducive to greater accountability due to both geographical and numerical considerations).

139. *Cf.* Stuart Langton, *Citizen Participation in America: Current Reflections on the State of the Art*, *in* CITIZEN PARTICIPATION IN AMERICA: CURRENT REFLECTIONS ON THE STATE OF THE ART 1, 5 (Stuart Langton ed., 1978) [hereinafter CITIZEN PARTICIPATION IN AMERICA] (discussing state governments' efforts to coordinate and increase the efficacy of citizen involvement in decision-making).

140. *See* Evan H. Caminker, *State Sovereignty and Subordinancy: May Congress Commandeer State Officers To Implement Federal Law?*, 95 COLUM. L. REV. 1001, 1077-78 (1995) (explaining how state and local government fosters greater citizen involvement); Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1068 (1980) (detailing the benefits of shifting more political power to localities, whose governments are generally more accessible).

participate *and prevail,* and low among those who participate and lose.[141] The reason for this tendency is clear enough: People become frustrated when they feel that the government or community has heard their concerns and ignored them. It is as if the losers of political disputes collectively ask, "Why did you bother to ask what we think if you were just going to ignore our concerns anyway?" The appearance of responsiveness raises citizen expectations, which are subsequently dashed for the losers.[142] The implication of this argument for communitarians is clear: It is not bringing people together to debate, but getting as many of the participants as possible to feel that their side won that fosters strong community ties.[143]

This perspective on the type of participation that is most beneficial strengthens the case for requisitions finance. Within a smaller jurisdiction, such as a state, citizens are likely to have homogeneous preferences for redistribution and taxation levels, relative to the preferences of the nation as a whole.[144] Different jurisdictions often have noticeably divergent tastes for redistribution.[145] Next-door neighbors Vermont and New Hampshire provide an interesting example of this divergence. Vermont supports redistribution more than the nation as a whole, while New Hampshire is among those states that are the least receptive to taxation.[146] If tax policies

141. *See* Nelson M. Rosenbaum, *Citizen Participation and Democratic Theory, in* CITIZEN PARTICIPATION IN AMERICA, *supra* note 139, at 43, 49 ("[P]articipation *per se* demonstrates little association with trust and support. Rather, it is substantive satisfaction with a decision that leads to faith in the political system.").

142. As Rosenbaum puts it:

> [R]ather than increasing the sense of political obligation and support for government, as proponents suggest, participation often results in ever greater instability and discontent. Many critics focus upon the danger of overloading the political system with irresponsible demands for services and subsidies that government cannot realistically provide. The inflation of expectations precipitated by citizen participation creates increased dissatisfaction and unrest when needs are not met.

Id.

143. *Cf.* Spragens, *supra* note 134, at 37 ("Communitarians will be inclined to believe that a society which makes juridicial combat its paradigmatic form of political interaction will be unnecessarily acrimonious and divided. They will therefore want to promote political modes of mediation, reconciliation, and compromise that seek creative syntheses from different interests and divergent moral concerns.").

144. *See* GEORGE F. BREAK, FINANCING GOVERNMENT IN A FEDERAL SYSTEM 14 (1980); BRETON, *supra* note 70, at 41, 116; OATES, *supra* note 70, at 11; *cf.* Craig Volden, *Entrusting the States with Welfare Reform, in* THE NEW FEDERALISM: CAN THE STATES BE TRUSTED? 66, 83 (John A. Ferejohn & Barry K. Weingart eds., 1997) [hereinafter THE NEW FEDERALISM] (noting that political circumstances vary dramatically from one state to the next).

145. *See* David E. Wildasin, *Income Redistribution in a Common Labor Market,* 81 AM. ECON. REV. 757 (1991) (discussing the dramatically differing levels of AFDC benefits among states).

146. *See* Reschovsky, *supra* note 70, at 166 (surveying the attitudes of states toward taxation). In 1997, New Hampshire's high court ordered it to equalize funding to public school districts, and it was widely perceived that the decision would force New Hampshire's legisla-

are designed to please these narrower constituencies, then more people will be satisfied with the final product than if efforts are made at the federal level to reconcile these diametrically opposed views. If preferences of individual states indeed differ from the compromise preferences of the nation as a whole–an assumption with which it is difficult to quarrel–then a series of taxation policies designed at the state level will almost certainly create more "winners," fewer "losers," and higher levels of trust in the political process.[147] Moreover, because significant differences of opinion over tax policy may prompt individuals to exercise their "exit" option when their jurisdiction deviates from the existing federal compromise, some of the most embittered losers will eventually leave for jurisdictions that they perceive as being friendlier to their concerns.

C. *USING COMMUNAL TIES TO BOOST ENFORCEMENT*

In the United States there is a pervasive feeling that a large proportion of the nation's tax dollars are "wasted."[148] This sentiment stems in part from voters' inaccurate perceptions. Voters concerned about waste emphasize expenditures such as the Department of Defense's $532.74 hammers,[149] the Lawrence Welk Museum,[150] and agricultural price support programs that subsidize farmers for not growing crops.[151] While these well-publicized expenditures make for provocative television news segments and

---

ture to enact a personal income tax. But after a prolonged debate, the legislature worked out a plan that raised $825 million for school funding equalization without imposing an income tax. *See N.H. Resolves School Crisis Without Imposing Income Tax*, BALT. SUN, Apr. 30, 1999, at 14A.

147. A theoretically important caveat is in order. The above analysis skirts utilitarian questions of interpersonal utility comparisons by framing a binary question: "Did you prevail in getting the kind of tax code for which you were lobbying or not?" Such a binary choice allows for simple head-counting as a measure of welfare aggregation. However, it is conceivable that those who are more likely to lose if the most significant tax policy decisions are made at the state level will feel more resentful about the loss, or be more discouraged, than those who are "losers" under the current arrangement. In such an instance, the analysis in text would not hold. However, because of the seemingly insurmountable problems that arise from efforts to make interpersonal utility or intensity of preference comparisons, this possibility will be set aside.

148. *See* GRAETZ, *supra* note 122, at 91.

149. *See* Julie Esther Keller, Comment, *Access Deferred Is Access Denied*, 15 WM. MITCHELL L. REV. 739, 740 (1989) (referring to public outrage over the $532.74 hammers, $350 screws, and $700 toilet seat covers).

150. *See* George F. Will, *Lawrence Welk and Line Items*, WASH. POST, Feb. 23, 1992, at C7 (characterizing the Welk Museum as classic pork-barrel spending).

151. *See* Robert Jerome Glennon, *Federalism as a Regional Issue: "Get Out! And Give Us More Money,"* 38 ARIZ. L. REV. 829, 841 (1996) ("While the Department of Agriculture provided crop subsidies and payments to farmers not to grow certain crops, the Bureau of Reclamation built dams to allow these crops to be grown in areas of the country not naturally suited to their production.").

newspaper editorials, they represent a miniscule percentage of federal spending. Indeed, over the last two decades, discretionary spending (i.e., spending that is funded through one of Congress's thirteen annual appropriations bills) has fallen to one-third of the budget.[152] Nevertheless, the perception that the revenues collected by the federal government are used to benefit far-flung special interests undoubtedly erodes the system's legitimacy, as well as compliance with federal income tax requirements.[153] Willful noncompliance with the tax code results in government revenue losses worth tens of billions of dollars each year, and the number of Americans who cheat on their taxes is growing, thus resulting in weak social norms against cheating.[154]

Taxpayers feel resentment not only because of antipathy toward the type of people who are perceived to benefit from tax expenditures, but also because the locations of these beneficiaries often seem remote and, thus, removed from their daily lives.[155] Virtually no one in North Dakota has a problem with federal expenditures for the Lawrence Welk Museum, because the museum honors that state's favorite son. Joshua Rosenberg argues that it is precisely this physical separation of the taxpayer from the benefits of government spending that results in animosity toward the tax code and high levels of tax evasion.[156] The federal government provides benefits that people utilize every day, such as highways, but because the individual taxpayer can easily free ride and still see the government provide many of those services from its vast pool of resources, the taxpayer rarely connects her own payments to a tangible benefit. Perhaps for that

152. *See* Pete V. Domenici, *Fighting the Good Fight: Washington's Quest for a Balanced Budget*, 16 ST. LOUIS. U. PUB. L. REV. 17, 20 (1996); *see also* John W. Ellwood & Eric M. Patashnik, *In Praise of Pork*, 110 PUB. INTEREST 19, 21 (1993) (arguing that discretionary spending is superior to entitlement spending because it allows legislators to provide interest groups with favors at a relatively low (one-time) cost).

153. *See* Graeme S. Cooper, *Analyzing Corporate Tax Evasion*, 50 TAX L. REV. 33, 65 (1994) (discussing empirical studies showing "that favorable attitudes to taxpaying, which are believed to be manifest in actual behavior, apparently are associated with the belief that others are paying their share and that the system as a whole is fair," and correlate with higher levels of taxpayer compliance); *see also* GRAETZ, *supra* note 122, at 91, 106 (linking increasing tolerance for tax evasion to perceived waste in government spending).

154. *See* Am. Bar Ass'n Comm'n on Taxpayer Compliance, *Report and Recommendations on Taxpayer Compliance*, 41 TAX LAW. 329, 335 (1988) (providing statistics on the decline). For an extended discussion of the relationship between social norms and compliance with the law, see generally Lior Jacob Strahilevitz, *How Changes in Property Regimes Influence Social Norms: Commodifying California's Carpool Lanes*, 75 IND. L.J. (forthcoming 2000).

155. *See* James Alm et al., *Why Do People Pay Taxes?*, 48 J. PUB. ECON. 21, 32-34 (1992) (discussing how these factors affect tax compliance).

156. Joshua D. Rosenberg, *The Psychology of Taxes: Why They Drive Us Crazy, and How We Can Make Them Sane*, 16 VA. TAX. REV. 155, 180 (1996).

reason the federal income tax is far less popular with voters than the state income taxes.[157]

The devolution of income taxation via requisitions finance is not a complete cure for this cognitive problem. However, especially in smaller, more homogenous states, the connection between taxes collected and benefits observed would be more apparent. Though a large portion of taxes collected within the state would be contributed to the national coffer, the state governments would stress (and many taxpayers would eventually come to recognize) that if the taxpayer evaded his obligation to pay taxes, someone else in her home state would have to compensate for the lacking funds.[158] Following this logic, it seems that the smaller the governmental unit, the less shirking one expects to see.[159]

Finally, because the state governments can be more responsive to the preferences of residents than the federal government, state governments generally have high approval ratings.[160] It follows from the previous analysis that people are less likely to pay taxes to a government they dislike.[161]

---

157. *See* Fox, *supra* note 56, at 1091. Fox mentions that the federal income tax may be the least popular tax because it collects the most revenue. *See id.* Though plausible, that logic is not completely satisfying because it does not explain why the state property tax is much less popular than the state income tax.

158. *See* Roger Conner, *Communitarianism: A New Balance Between Rights and Responsibilities*, *in* BUILDING A COMMUNITY OF CITIZENS 305, 306-17 (Don E. Eberly ed., 1994) (arguing that lower levels of civic involvement result in an increasing number of Americans attempting to cheat the government). To the extent that one believes that communitarian ties within a state are no stronger than they are at the national level, requisitions finance would make no difference. Nevertheless, even if one assumes that the only functional communitarian units are local (or even neighborhood) governments, then the states could still arrange a devolved tax system so as to maximize compliance by requiring each municipality, county, or school district to contribute a quota of revenue to the state's coffers. *See infra* Part V.B. (discussing subdevolution).

159. *Cf.* Richard D. Schwartz & Sonya Orleans, *On Legal Sanctions*, 34 U. CHI. L. REV. 274, 290-99 (1966) (concluding, based on an empirical study, that appeals to community norms and conscience are the most effective means of promoting taxpayer compliance). There is a dearth of empirical evidence demonstrating whether tax-shirking is higher or lower at various levels of the federal system. In the American context it is virtually impossible to test this assertion because different levels of government impose different kinds of taxes; and even when they administer the same kinds of tax, governments continually share information that is used for enforcement purposes. Thus, while states must spend less than the federal government on enforcement efforts for their respective individual income taxes, this burden may result largely from the ability of states to piggy-back on IRS enforcement efforts. *See infra* notes 326-330 and accompanying text.

160. *See* sources cited *supra* note 108; *cf.* Liner, *supra* note 40, at 12 (citing empirical studies confirming "that the states have indeed made progress in the minds of the public and the media, and have in fact become a principal innovator and manager in the intergovernmental system").

161. *See supra* text accompanying note 153 (noting the connection between compliance

Thus, because the state governments are more likely to be responsive to the values and preferences of the average voter in a given state (assuming that attitudes within a state are more homogenous than attitudes within a nation), devolution of taxing authority to the states should result in higher levels of compliance.

D. *INTERSTATE TIEBOUT*

The adoption of a requisitions finance system would significantly enhance the current degree of differentiation among the states with respect to tax policy. According to a classical theory of governmental behavior first proposed by Charles Tiebout in 1956,[162] communities will compete with their neighbors to adopt policies that best suit the desires of certain residents. Residents dissatisfied with the package of taxes and benefits offered in their jurisdictions may exercise their exit options by migrating to communities that better suit their preferences. This competition will result in two trends: 1) enhanced efficiency of government[163] and 2) the development by each jurisdiction of a niche approach to governance that is aimed at attracting valued residents.

An example illustrates the community-defining possibilities of Tiebout competition. Jurisdiction *A* may wish to attract wealthy retirees by taxing property at low levels, taxing earned income at high levels, and spending resources on providing ample public transportation from retirement communities to shopping areas and the state capitol.[164] Sensing that Jurisdiction *A*'s younger families are unlikely to approve of this resource allocation, Jurisdiction *B* may raise taxes on interest income, subsidize purchases of first homes, and devote resources to improving public schools. As *B*'s older residents move to *A*, and *A*'s younger families move to *B*, both communities will become more politically and socially cohesive.[165] This niche-

---

and support for government spending practices).

162. *See* Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956). Tiebout assumed that citizens "shop" for political jurisdictions that most accurately reflect their preferences and locate in the jurisdiction that best satisfies their desires. As long as exit costs are ignored and the taxes paid by an individual reflect the marginal cost of extending government services to that individual, the outcome will be Pareto efficient. *See id.* at 422.

163. This issue is considered *infra* Part IV.C.

164. The implication here is that senior citizens love to vote and lobby public officials. *See* LIOR JACOB STRAHILEVITZ, SHADES OF GRAY: INTERGENERATIONAL EQUITY IN THE ERA OF ENTITLEMENT REFORM 17-24 (1997).

165. Admittedly, economic feedback effects will constrain some states from becoming completely homogeneous or from pursuing some groups of people to the exclusion of all others. For example, in the text's hypothetical, state *A* will likely lose jobs, as well as residents, to state *B*. This will mean that corporate taxes, payroll taxes, and other possible sources of

development behavior will be enhanced by requisitions finance, which allows jurisdictions much greater flexibility than they currently offer, through taxation packages that differ in meaningful ways from those offered in similar jurisdictions.[166] To the communitarian, this type of sorting seems to offer yet another reason for embracing requisitions finance. But there are problems with this kind of arrangement from a communitarian perspective.

One of the many issues that sparks considerable debate among communitarians is the desirability of mobility among communities.[167] One school of thought argues that residential mobility robs a community of its sense of history; destroys accumulated social capital and attachment to a place, thereby robbing individuals of the bases for their own identities; and introduces too many strangers for even the heartiest communities to absorb.[168] The other camp in communitarian thought sees opposition to migration as an embrace of stagnant, exclusionary, introverted, and unnatural communities. These communitarians argue that community integrity is maximized when people affirmatively choose to join a community of like-minded individuals, when these communities are continually reinvigorated with new immigrants and their new ideas,[169] and when the ability to leave

---

state revenues will flow from state *A* to state *B*. But even so, that will not deter some states from actively attempting to woo seniors. *See* Francis X. Clines, *West Virginia, Home of the Gray in America*, N.Y. TIMES, July 17, 1999, at 8 (discussing West Virginia's efforts to recruit retirees).

166. Tiebout's hypothesis has its critics who cast doubt on the real-world relevance of this theory. One critique of Tiebout stems from the high cost of obtaining information. Urban areas containing a number of local governments, each with different tax regimes, appear to be the ideal test case for the Tiebout hypothesis. However, even in those situations, taxpayers typically lack the information about tax levels and government services that are necessary to allow them to accurately "vote with their feet." *See* David Lowery & William E. Lyons, *The Impact of Jurisdictional Boundaries: An Individual-Level Test of the Tiebout Model*, 51 J. OF POL. 73 (1989). Also note the normative critique of the Tiebout hypothesis—those without resources have fewer choices about where to live than those with resources. We are less comfortable with this constraint on choices among governments than we are with constraining choices in the private sector. This is particularly true where government-induced Tiebout mobility exacerbates racial discrimination and segregation.

167. In many respects this debate parallels the one that rages among communitarians over international immigration policy. For an interesting review, see generally Daniel J. Tichenor, *Immigration and Political Community in the United States*, *in* NEW COMMUNITARIAN THINKING, *supra* note 83, at 259.

168. *See* Charles Taylor, *The Modern Identity*, *in* COMMUNITARIANISM: A NEW PUBLIC ETHICS 55, 70 (M. Daly ed., 1994) ("[F]reedom of mobility has begun to destroy the very conditions, in family and citizen community, of the identity of freedom."); Walzer, *supra* note 83, at 58 ("The sense of place must be greatly weakened by . . . extensive geographic mobility, although I find it hard to say whether it is superseded by mere insensitivity or by a new sense of many places. Either way, communitarian feeling seems likely to decline in importance.").

169. *See* CLARK, *supra* note 95, at 140 (arguing that community integrity is maximized when people settle in a place after being given real choices about where to live); *see also* Powell, *supra* note 21, at 78 ("Communitarian federalism not only facilitates the identification of a

communities that are poor matches allows residents to "escape from oppressive circumstances that prevent them from reshaping (and reintegrating) their identities."[170]

The requisitions finance system, with the heightened interstate mobility that it would entail, presents an interesting case study by which to test each of these views. Ultimately, each has some persuasive force and the individual reader will have to decide whether, on balance, interstate migration will strengthen community ties. This Article suggests that, given the currently weak nature of citizenship in state governments, the realignment of state communities that requisitions finance seeks to bring about would place a rather unimpressive nest egg of state level community ties at risk, while potentially producing impressive gains.

Residents of American states currently have much in common, and it is still possible to describe accurately significant differentiation among the states based on citizen preferences, behavioral norms, and goals.[171] As Peter Schuck observes:

> The states are distinct from one another with respect to most of the variables that affect and thus differentiate their political behavior: wealth, public services, cultural institutions, age, distribution and urbanization of the population, economic development, climate, ethnic and religious patterns, partisan division, political structure, style and culture, and the like. . . . By now, each state possesses a distinctive social character and political culture.[172]

Yet the states cannot be described as particularly vigorous communities. Part of the problem is that the states are simply too large to foster cohesive personal ties among the members. Everyone cannot know everyone else[173] and, perhaps more important to a "thick" community, everyone cannot know everyone else's business. A more realistic aspiration is for states to be webs "of social relations that encompass shared meanings and

---

community's political norms; it also affords individuals ample opportunities to revise their commitments and conduct if they so wish.").

170. DAVID INGRAM, REASON, HISTORY, & POLITICS: THE COMMUNITARIAN GROUNDS OF LEGITIMATION IN THE MODERN AGE 116 (1995).

171. *See* DONOHUE, *supra* note 108, at 41.

172. Peter H. Schuck, *Introduction: Some Reflections on the Federalism Debate*, 13 YALE J. ON REG. 1, 13 (1996). The challenges faced by Senate candidate Hillary Clinton in learning the political culture of New York State and understanding the peculiar issues that matter to New York's constituencies is an excellent example.

173. *See* DONOHUE, *supra* note 108, at 46 ("Even Rhode Island, however, is far larger than the intimate republics that Montesquieu envisioned . . . . States, even in principle, fall short of the ideal of grassroots democracy."); Rubin & Feely, *supra* note 115, at 940 ("American states are far too large to function as affective communities.").

above all shared values."[174] Here, it is possible to characterize states as being anywhere from highly cohesive to marginally cohesive.[175] Given that sixty-four percent of Americans still live in their states of birth,[176] community cohesion is likely to depend on factors involving upbringing, such as shared educational exposure, shared life-shaping experiences, and shared memories. An America with higher levels of interstate mobility in response to dramatically different packages of taxes and services might contain communities in which the aforementioned factors are less relevant than shared ideology, shared economic ambitions, and shared preferences. Determining whether requisitions finance strengthens communities thus depends on how one defines a strong community.[177]

E. POWER TO THE PEOPLE? – SPECIAL INTERESTS AND TAXATION

In *Federalist 51*, James Madison famously asserted that large nations were less susceptible than small states to the tyranny of majority factions.[178] While Madison's assertion remains plausible, it raises the question of who, in the absence of a majority faction, exercises control over national policy. Either a tyrant must control the nation, or a collection of smaller interests unify to form temporary, issue-oriented (or logrolling) majorities. Enter into this fold the interest group theory of democracy, whereby well-organized minority interest groups control national policy on substantive topics of particular interest to them.[179]

In the realm of tax policy, the problem of narrow economic interests

---

174. Amitai Etzioni, *Old Chestnuts and New Spurs*, *in* NEW COMMUNITARIAN THINKING, *supra* note 83, at 16, 23.

175. *See generally* DANIEL ELAZAR, AMERICAN FEDERALISM: A VIEW FROM THE STATES (3d ed.,.1984) (discussing variations in state culture).

176. *See* LONG, *supra* note 86, at 29.

177. The distinction alluded to in the text roughly tracks the difference between unintentional and intentional communities. My view is that intentional, or ideological, communities are more normatively attractive because they are likely to be characterized by stronger bonds between community members. One need not believe that ideology is stronger than history in order to accept such a view. As ideological communities mature, their members presumably will acquire the similar life-shaping experiences and memories that are shared by members of unintentional communities. By contrast, there is little evidence that ideologies converge among members of unintentional communities.

178. *See* THE FEDERALIST NO. 51, at 325 (James Madison) (Clinton Rossiter ed., 1961).

179. For the classic description of the role of interest groups in American politics, see generally DAVID B. TRUMAN, THE GOVERNMENTAL PROCESS: POLITICAL INTERESTS AND PUBLIC OPINION (2d. ed. 1971). Truman's pluralist vision is, by contemporary standards, rather sympathetic to narrow interest groups' influence over policy. For a more hostile analysis of the role of interest groups at the national political level, see generally MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (1976).

securing favorable tax code provisions is significant at the national level.[180] While certain small groups of wealthy individuals often manage to convince Congress to enact provisions that help only a few personal income taxpayers,[181] the most costly tax expenditures in the personal income tax code seem to provide large segments of the population with some economic benefit.[182] Indeed, a great number of the tax breaks that benefit only a few taxpayers are aimed at helping particular businesses or industries rather than individuals.[183]

To date, there has been a complete dearth of comparative work on tax expenditures at the state and federal levels. This makes it impossible to judge accurately whether narrowly-drawn provisions designed to benefit only a few taxpayers appear more often in state or federal income tax codes. Nevertheless, a number of scholars have theorized on an answer.[184] A number of interesting, but ultimately unverified claims have been advanced. For example, there are a number of plausible arguments for why we might expect to find cleaner tax codes at the federal level: more media scrutiny, better trained tax-policy advisers, and a greater likelihood of competing (as opposed to dominant) political interests. On the other hand, the federal government's monopoly on taxation has arguably left it less

---

180. *See* William Blatt, *The American Dream in Legislation: The Role of Popular Symbols in Wealth Tax Policy*, 51 TAX L. REV. 287, 308-10 (1996) (stating that powerful special interests influence tax legislation); Ronald F. Wilson, *Federal Tax Policy: The Political Influence of American Small Business*, 37 S. TEX. L. REV. 15, 32-59 (1996) (discussing the role of a particular special interest in influencing tax policy).

181. *See* Clay Chandler, *Small Interests Targeted for Big Tax Breaks*, WASH. POST, June 29, 1997, at A1 (describing, *inter alia*, Alaskan truck drivers, airline pilots, laborers in fishing camps who eat meals away from home, 40 Native American whaling captains, wealthy households who established certain kinds of trust funds before 1984, sky divers who must pay an airline ticket tax before jumps, relatives of police officers killed in the line of duty, and low-income farmers who sell aging cows or draft horses as big winners of a recently passed tax bill).

182. For example, the four largest tax expenditures in the 1998 budget were for employer contributions to medical insurance and care, employer contributions to pension plans, the home mortgage interest deduction, and the stepped up basis for capital gains at death. *See* William C. Whitford, *Remarkable*, 76 N.C. L. REV. 1639, 1647 (1998).

183. *See* Art Pine, *Tax Bill Peppered with Breaks for Special Interests*, L.A. TIMES, Aug. 2, 1997, at 11A (describing new tax breaks for hard cider brewers, Amtrak, the Big-3 American auto makers, pharmaceutical firms developing vaccines, life insurance companies earning profits overseas, software makers, service-station chains selling gasoline to local governments, Amway, the Archer-Daniels-Midland Company, and Texas's Sammons Enterprises, Inc.).

184. *Compare* JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT (1962) (providing a theoretical argument for why state tax codes should be cleaner), *and* F.H. Buckley & Margaret F. Brinig, *Welfare Magnets: The Race for the Top*, 5 SUP. CT. ECON. REV. 141, 153 (1997) (arguing that interest groups are much stronger at the federal level than at the state and local level), *with* DONOHUE, *supra* note 108, at 49 (arguing that state legislatures are just as susceptible to special interest influence as Congress is, and that as more of the stakes have shifted to the states in recent years, lobbyists have followed).

disciplined, whereas state governments that enact socially inefficient or corruption-tainted tax codes may risk an exodus of citizens or corporations to other jurisdictions.[185] Some scholars also have suggested that because state legislators are "closer to the people" and represent smaller constituencies, they are better able to enact policies that reflect the community's preference for clean tax codes. Others, who have less confidence in the inherent or institutional ability of state legislators to "do the people's bidding," posit that, given a choice between lobbying at a central location and lobbying in fifty separate venues, special interests[186] will choose to focus their efforts on Congress–where the transaction costs of swaying politicians are lowest,[187] and the dollars at stake are greatest.[188] For corporations that do business in a number of states, the lobbying economies of scale are likely to be particularly important. Or, perhaps, since more than a few states incorporate the provisions of the federal income tax into their own tax codes,[189] lobbyists realize that by winning the federal battle, they can make great inroads in the states.

Even assuming, arguendo, that state codes are currently "cleaner" than the federal tax code, the potential implications of tax devolution for special-interest lobbying remain unclear.[190] If state tax codes are cleaner only because special interests have had little reason to lobby for tax breaks in the states, then a devolution of the individual income tax accomplished via requisitions finance might do little to stem the power of special interests. To be sure, devolution would raise the transaction costs for lobbying efforts that attempt to secure nationwide tax breaks, but few individuals seek or need such breaks. Indeed, perhaps if legislatures design state income tax

---

185. *Cf.* HENRY N. BUTLER & JONATHAN R. MACEY, USING FEDERALISM TO IMPROVE ENVIRONMENTAL POLICY 21-22 (1996) (arguing that the federal government's monopoly over environmental regulation makes it a less efficient regulator than the states, which are forced to compete with each other to produce the most efficient basket of policies).

186. This argument would not apply to special interests exclusively. Without the economies of scale stemming from being able to operate at the federal level, some public-spirited watchdog organizations, ranging from Common Cause to the National Taxpayer's Union, might be unable to operate effectively.

187. *See* BRETON, *supra* note 70, at 115. *Cf.* PAUL E. PETERSON, THE PRICE OF FEDERALISM 36-37 (1995) (noting that interest groups advocating redistribution of wealth tend to focus their efforts on Congress, while interest groups seeking to promote economic development focus on state and local government decision-makers).

188. *See* Vaughan, *supra* note 54, at 28 (noting that the states' role in shaping overall tax policy is limited).

189. *See* JEROME R. HELLERSTEIN & WALTER HELLERSTEIN, STATE AND LOCAL TAXATION: CASES AND MATERIALS 933 (5th ed. 1988).

190. If the federal code is cleaner, even under the status quo, then we should anticipate, all else being equal, that requisitions finance would prompt greater citizen frustration than currently exists.

regimes so that an individual pays income taxes only in his place of residence,[191] then instead of convincing a majority of Congress to vote for a favorable provision,[192] a fat-cat taxpayer would only need to convince a majority of legislators in a single state to approve a tax expenditure. Of course, because the state government will bear the entire costs of the expenditure, rather than diffusing the costs over forty-nine other states, a sweetheart tax deal may prove a harder sell.

On the other hand, if we assume that state tax codes are cleaner because of the virtues of civic republicanism and state government generally, then devolving tax authority to the states may represent a significant improvement. The presence of narrowly-drawn tax provisions in a code reduces the legitimacy of the taxation enterprise and probably results in the creation of a culture of avoidance, resulting in diminished governmental tax revenue.[193] If these two institutional problems with the code could be mitigated by a substantive alteration in the way taxes are enacted and collected, then devolution may be worth pursuing. But again, until we have a better sense of whether the federal or state tax codes are filled with more special-interest provisions, any discussion here is purely speculative.

In the midst of all this empirical uncertainty, a final institutional factor has bearing on this issue. State taxation policies, unlike federal taxation policies, are subject to the pressures of direct democracy through voter initiatives and referenda in many states. Proposition 13, California's constitutional amendment limiting property tax increases, is the most well-known exercise of voter control over taxation.[194] Several states have also enacted balanced-budget requirements through the ballot box.[195] But there is no reason why the initiative and referendum could not be used to achieve

191. A more extensive discussion of this possibility appears below. *See infra* Section IV.F (discussing tax exporting).

192. In reality, because of log-rolling, the fat cat frequently only needs to convince one powerful member of Congress to back the provision and never needs to interact with the many legislators who will dutifully vote for the tax expenditure in anticipation of reciprocal favors from its sponsor.

193. *See supra* note 153 and accompanying text (noting that people are more likely to refuse to comply with federal income tax requirements if they perceive their taxes benefiting "far-flung" special interests).

194. *See* Advisory Comm'n on Intergovernmental Relations, *The Taxpayers Speak: Proposition 13 and Intergovernmental Relations*, INTERGOVERNMENTAL PERSP., Summer 1978, at No. 3. For a general discussion of Proposition 13 and its fiscal consequences for state and local governments in California, see Julie K. Koyama, Comment, *Financing Local Government in the Post-Proposition 13 Era: The Use and Effectiveness of Nontaxing Revenue Sources*, 22 PAC. L.J. 1333 (1991).

195. *See generally* Lior Jacob Strahilevitz, *The Balanced Budget Amendment and Social Security: An Alternative Means of Judicial Enforcement*, 22 SETON HALL LEGIS. J. 513, 525-27 (1998) (discussing judicial enforcement of such requirements).

different policy goals.[196] For example, it is widely believed by policy professionals that broadening the base of an income tax through the elimination of tax expenditures is a socially desirable goal. At the same time, because legislators are too susceptible to pressure from the special interests that benefit from narrow provisions, base broadening tax reform rarely occurs.[197] While recent history shows that business interests can persuade voters to reject populist ballot initiatives through the expenditure of money on political campaigns,[198] these initiatives occasionally pass despite massive spending by opponents.[199] A ballot initiative to repeal a package of specified narrow tax expenditures for unpopular businesses might well pass easily. An initiative to eliminate all provisions that benefit fewer than 100 taxpayers might similarly be approved (although it would no doubt create logistical nightmares for the state's tax administrators and courts). In short, the possibilities for tax reform through direct democracy are intriguing. At the very least, the prospect of voters repealing recently enacted tax expenditures would almost certainly hinder efforts to craft tax bills with narrow benefits. In this respect, devolution of the individual income tax could function like an anti tax-expenditure line-item veto, with the veto pen wielded by the populace rather than the executive.

F. CHARITY BEGINS AT HOME: REDISTRIBUTION AS A LOCAL PUBLIC GOOD

Because it has not been proposed seriously for almost one hundred years, requisitions finance can claim no critics (and, for the moment, only one advocate).[200] If the idea of requisitions finance were to receive more

---

196. For a general discussion of the perils of governance by referenda, see Sherman J. Clark, *A Populist Critique of Direct Democracy*, 112 HARV. L. REV. 434 (1998).

197. *See generally* JEFFREY H. BIRNBAUM & ALAN S. MURRAY, SHOWDOWN AT GUCCI GULCH: LAWMAKERS, LOBBYISTS, AND THE UNLIKELY TRIUMPH OF TAX REFORM (1987) (discussing the impediments to base-broadening reform and how they have been overcome).

198. *See* David R. Lagasse, Note, *Undue Influence: Corporate Political Speech, Power, and the Initiative Process*, 61 BROOK. L. REV. 1347, 1347-48 (1995) (citing originally popular initiatives that were soundly defeated in California, Massachusetts, Ohio, and Oregon after corporate opponents far outspent initiative proponents); *see also* Wilson, *supra* note 180, at 49 (describing massive spending by the small business lobby to defeat a proposition requiring employer-mandated health insurance coverage).

199. For example, in the 1998 election, Proposition 10, a California proposition that increased cigarette taxes and spent the revenue on health programs for children, narrowly passed, despite the fact that opponents outspent proponents by a five-to-one margin. *See Statelines California: Anti-Tobacco Initiative Squeaks By*, AM. HEALTH LINE, Nov. 13, 1998, at 6. Such victories, however, are aberrations; when opponents outspend proponents by a two-to-one or greater margin, 87% of all initiatives fail. *See* Jamin B. Raskin, *Direct Democracy, Corporate Power and Judicial Review of Popularly-Enacted Campaign Finance Reform*, 1996 ANN. SURV. AM. L. 393, 399.

200. That would be me.

attention, however, those seeking to defeat it would surely argue that requisitions finance would result in a sub-optimal level of wealth redistribution. Although there are some who might embrace a requisitions system precisely because of its supposed regressivity, I view this redistributive argument as the most damaging potential critique of the proposal. Accordingly, it will command significant attention here.

A central premise of tax theory is that state governments are less able to redistribute income than the federal government. Richard Musgrave's book, *The Theory of Public Finance*,[201] is generally recognized as the seminal work on fiscal federalism. Musgrave contended that highly progressive taxes should be centralized because of the danger that wealthy residents might move to jurisdictions with lower tax rates.[202] This intuition of adverse selection among the states helped explain and reify the prevailing reality in most nations,[203] where progressive taxes generally were collected only at the national level. Today, there is a strong consensus that progressive taxation does work best when done by the central government.

Musgrave's argument remains the conventional wisdom despite slim empirical support for the proposition that rich taxpayers leave progressive states for regressive states.[204] Moreover, it is difficult to reconcile the Musgrave theory with the empirical reality that in recent decades, although impediments to interstate mobility have disappeared and the costs of moving from one state to another have decreased, the state governments have become more progressive in terms of taxation policy, while the federal government has become more regressive.[205]

The dearth of clear evidence supporting the Musgrave theory leaves open two possibilities for its vindication. First, one does not observe tax-induced migration among the states precisely because states are deterred from adopting progressive taxation regimes by Musgravian fears.[206] Sec-

201. RICHARD A. MUSGRAVE, THE THEORY OF PUBLIC FINANCE (1959).

202. *See id.* at 181.

203. *See* Oates, *supra* note 80, at 132.

204. *See supra* note 70 (citing empirical work that casts doubt on the veracity of Musgrave's claim).

205. *See* JOSEPH A. PECHMAN, THE RICH, THE POOR, AND THE TAXES THEY PAY 37-38 (1986) (finding that between 1966 and 1985 the federal tax system became less progressive while "state and local tax [systems] became more . . . progressive or retained the same degree of progressivity"). In fairness, it appears that federal tax progressivity did increase after 1985, *see* Richard Kasten, *Trends in Federal Tax Progressivity, 1980-93*, *in* TAX PROGRESSIVITY AND INCOME INEQUALITY 1, 47 (Joel Slemrod ed., 1994), and that some state taxes became more progressive while others became more regressive during the 1980s, *see* Gilbert E. Metcalf, *The Lifetime Incidence of State and Local Taxes: Measuring Changes During the 1980s*, *in* TAX PROGRESSIVITY AND INCOME INEQUALITY, *supra*, at 59.

206. *See* RAIMONDO, *supra* note 102, at 200 (concluding that state income taxes are moderately progressive, but "a fear of flight . . . of higher income individuals from one state to an-

ond, although states may tax progressively, the magnitude of their taxation is so small that they do not overcome the costs of relocating. The first of these responses is simply not borne out by the empirical evidence. There are major differences among the states in levels of tax progressivity, both for state individual income taxes and for tax systems as a whole.[207] The second response has inherent plausibility and suggests that a requisitions finance system, which would increase preference-based taxation differentials among the states, might indeed cause the wealthiest residents to begin relocating. This, in turn, would deter states with progressive tendencies from satisfying those progressive preferences fully.

Communitarian theory proves useful in parrying the Musgravian attack on the ability of requisitions finance to support optimal income distribution. An important element of communitarian thought is the belief that people do, and should, feel justified in assisting downtrodden members of their own community (however defined) before assisting downtrodden individuals who are not part of their community.[208] If people are more likely to support redistribution when the money remains close to home, and if intrastate redistribution qualifies as keeping the revenue "close to home," then the Musgrave effect may be reversed.

Since the early 1980s, support for redistribution of income has apparently waned in the United States.[209] The changing public perception about the nature of welfare recipients is probably a primary cause for this reduction in support. Ronald Reagan's first salvo against "welfare queens" initiated a period of harsher rhetoric against the beneficiaries of means-tested programs.[210] Inevitably, some of the mud slung at welfare recipients stuck,

---

other tempers any progressive tax leanings that state tax planners might harbor").

207. *See* Vaughan, *supra* note 54, at 42-44; *supra* notes 145-146 and accompanying text (comparing Vermont and New Hampshire).

208. *See* Charles R. O'Kelley, Jr., *Tax Policy for Post-Liberal Society: A Flat-Tax-Inspired Redefinition of the Purpose and Ideal Structure of a Progressive Income Tax*, 58 S. CAL. L. REV. 727, 737 n.29 (1985); Selznick, *supra* note 117, at 450-51, 454; *see also* Robert A. Baruch Bush, *Between Two Worlds: The Shift from Individual to Group Responsibility in the Law of Causation of Injury*, 33 UCLA L. REV. 1473, 1540 (1986) ("[T]hrough the shared reflection and common enterprise required in constitutive communities, individuals could more readily realize and sustain intrinsic values such as friendship, loyalty, and charity.").

209. *See* Mark Neal Aaronson, *Scapegoating the Poor: Welfare Reform All Over Again and the Undermining of Democratic Citizenship*, 7 HASTINGS WOMEN'S L.J. 213, 214, 239 (1996); Michael M. Burns, *Fearing the Mirror: Responding to Beggars in a "Kinder and Gentler America,"* 19 HASTINGS CONST. L.Q. 783, 836 (1992) ("[I]n recent decades, our defining concerns have shifted from 'production to consumption, from . . . sacrifice to greed, from the public interest to self-interest, . . . ' [W]e are experiencing a spiritual malaise, turning ourselves into 'relentless market maximizers' and undermining our commitments to self-cultivation, family, and community.").

210. *See, e.g.*, PETERSON, *supra* note 187, at 117; Eric G. Luna, *Welfare Fraud and the Fourth*

and much of the public came to see the poor as undeserving of assistance.[211]

One important strategy used by those who portrayed welfare recipients as undeserving was to make it more difficult for voters to identify with recipients. As part of this rhetorical effort, welfare foes emphasized the composition of recipient pools. For instance, rural white representatives described welfare programs as primarily designed to help urban blacks living in metropolitan ghettos.[212] As long as constituents perceived that welfare dollars were committed to groups of "others," conservative and moderate elected officials could easily vote to cut benefit levels.

This example illustrates an important point: People are reluctant to support wealth redistribution when they believe that the benefits of redistribution go to citizens with whom they have trouble identifying.[213] A taxpayer living in Tempe, Arizona will feel better about seeing his tax dollars go to a poor family in Phoenix than a poor family in New York City.[214] Although it is an empirical question that will be explored shortly,[215] it seems intuitively reasonable that taxpayers have an easier time supporting redistribution when their resources stay completely within their own state. Even where the total amount of redistributed resources does not change, the political gimmick of a "trust fund" or a "lockbox" can enhance the political palatability of a redistribution scheme.[216]

Amendment, 24 PEPP. L. REV. 1235, 1244 (1997) (noting that the "welfare queen" image continues to haunt American discourse); Dorothy E. Roberts, *The Value of Black Mothers' Work*, 26 CONN. L. REV. 871, 873 (1994) ("The image of the lazy Black welfare queen who breeds children to fatten her allowance shapes public attitudes about welfare policy.").

211. *See* PETERSON, *supra* note 187, at 112-14.

212. *See generally* Aaronson, *supra* note 209; April L. Cherry, *Social Contract Theory, Welfare Reform, Race, and the Male Sex-Right*, 75 OR. L. REV. 1037, 1041 (1996). In fact, rural whites rely heavily on welfare. *See* Meredith Blake, *Welfare and Coerced Contraception: Morality Implications of State Sponsored Reproductive Control*, 34 U. OF LOUISVILLE J. FAM. L. 311, 323-25 (1996).

213. The same dynamic largely explains the widespread sentiment that payments to poor Americans should take precedence over foreign aid programs.

214. The rise of gated communities, private clubs, and other institutions that segregate citizens of communities based on income undoubtedly erodes the parochial desire to help those living in the same state. *See* SANDEL, *supra* note 118, at 331-33.

215. *See infra* text accompanying notes 236-242 (noting empirical studies indicating that people are more likely to support redistribution to members of their own identity group).

216. *Cf.* Charles Tiefer, *"Budgetized" Health Entitlements and the Fiscal Constitution in Congress's 1995-1996 Budget Battle*, 33 HARV. J. ON LEGIS. 411, 416 (1996) (discussing the politics of "trust funds" in entitlement policy). An alternative explanation for the parochial / communitarian sentiments lauded here is that self interest fuels the populace's preference that welfare payments stay at home. If food stamps are used within the local economy, they contribute disproportionately to jobs on nearby farms, in local stores, etc. In that case, the lock-box type reasoning might still argue in favor of state-level redistribution, even in those states that receive a relatively high level of federal funds through national redistribution.

The applicability of this "parochialist progressivism" principle to tax theory should be clear. If citizens are more likely to favor wealth redistribution through an entitlement program when the dollars stay within the state, then they may be more likely to support progressive taxation regimes carried out at the state, rather than the national, level. Admittedly, whether redistribution through a tax scheme taps into the same communitarian sentiments as a welfare program is a complicated question.[217] If it does, however, then an important counterweight to Musgrave's functional theory of taxation exists.[218]

If this view is correct, then a return of substantial decision-making powers to state and local governments might, by itself, promote greater redistribution of wealth. Communitarians view the centralization of government power and the erosion of the American community as interconnected.[219] In this respect, they are the intellectual heirs to the Anti-Federalists, who feared that a strong federal government would weaken the tight bonds that held colonial and revolutionary society together.[220] Congressional decisions about wealth distribution are likely to conflict with the varying sentiments of smaller communities.[221] Individual citizens feel less

---

217. A progressive tax scheme that does not involve negative taxation probably provides taxpayers with little "warm glow" from giving. After all, such a scheme cannot be cast as a program that makes the poor richer, only as one that fails to make them even poorer. Thus, even though citizen awareness of the tax code's progressive rate structure is widespread (a glance at the rate schedule and a moment's reflection reveals to all taxpayers that poorer taxpayers pay at a lower average rate, deductions notwithstanding), it may not prompt the same communitarian sentiments of shared sacrifice for the collective good that a welfare program or community charity does. As for a negative income tax, assuming broad taxpayer awareness of the availability of direct payments to the poorest taxpayers, most citizens probably would perceive the program to be similar to a welfare program insofar as it strengthens community bonds.

218. A simple, but unsuccessful, way of discrediting the local redistribution theory is by pointing to the existing tax structure, which is, as mentioned earlier, progressive at the national level, but less so in most states. However, one can understand this reality as a reaction to two mutually reinforcing phenomena: the enactment of a progressive federal tax (which took the pressure off state governments to instill additional progressivity in their state tax systems), and the widespread adherence of policymakers to the Musgrave "exit" theory. In a dynamic environment, where the federal individual income tax was eliminated, and where the decision over how much redistribution there should be is left entirely to the states, it might well prove that states would design highly progressive rate structures if they managed to overcome their overblown fear of an exodus of wealthy taxpayers in response.

219. *See* SANDEL, *supra* note 118, at 205.

220. *Cf.* Eugene H. Hickok, Jr., *Federalism, Citizenship, and Community*, *in* BUILDING A COMMUNITY OF CITIZENS, *supra* note 158, at 194-95 (describing the Anti-Federalist view that the central government would be too far removed to allow for the flourishing of citizenship and the effective monitoring of government by the populace).

221. *See generally* Moore, *supra* note 72, at 1432-33 (discussing the difficulties of making uniform policies responsive to variations in size, social make-up, property, and resources

able to influence Congress's decisions than decisions made by their municipal or state governments. This lack of citizen control over a fundamental, community-defining issue results, in turn, in a further withdrawal from political participation in the community. If local government has no power over major decisions that people care about, then citizens will be less likely to participate in local civic life.

Communitarians push the analysis a step further, emphasizing that citizens who become withdrawn from local governance are less likely to feel a connection with their fellow citizens.[222] This lack of cohesion precludes citizens from feeling mutual obligations with members of their community.[223] Because the social and civic solidarity among citizens is so weak, the wealthier members of the community do not feel obliged to provide their less fortunate brethren with financial assistance.[224] As a result, centralization of taxing power, and the lack of social solidarity that ensues, may well discourage the adoption of progressive taxation regimes. Devolving tax authority to state governments via requisitions finance would help restore civic and economic ties within politically viable communities.[225]

This communitarian story is buttressed by a body of economics scholarship that originated with Mark Pauly's 1973 essay, *Income Redistribution as a Local Public Good*.[226] Pauly hypothesized that residents of a community might be much more concerned with the distribution of wealth in their own community than that of other communities.[227] Pauly spoke in exclusively utilitarian terms, suggesting that an observer derives more utility from directing that a dollar be redistributed from the community-at-large to a poor person depending on the poor person's proximity to the observer; he referred to this as the "spatial element in the motivation for redistribution."[228] Pauly offered two justifications for this phenomenon—one based on altruism, and a second based on externalities.[229]

Pauly's altruism-based explanation for this spatial element in redistribution preferences relies on the notion that social problems that are out of sight are out of mind. He explained:

---

among various state and local jurisdictions).

222. *See* SANDEL, *supra* note 118, at 348.

223. *See* WALZER, *supra* note 118, at 84.

224. *See* SANDEL, *supra* note 118, at 346.

225. *Cf.* Hickok, *supra* note 220, at 205 (arguing that devolution generally increases civic involvement in state government).

226. Mark V. Pauly, *Income Redistribution as a Local Public Good*, 2 J. PUB. ECON. 35 (1973).

227. *See id.* at 41.

228. *Id.* at 57.

229. *See id.* at 37-38; *see also* Stark, *supra* note 100, at 501-02 (discussing Pauly's assumptions).

> Certainly one reason for income redistribution is pure altruism. But the desire to do good is conditional on the perception of bad circumstances, and bad circumstances close at hand are more likely to be perceived than those at a distance. If we look at poverty as a kind of external diseconomy which offends the esthetic and moral sensibilities of others, the degree of offense too is likely to depend on the frequency of contact.[230]

But Pauly's intuition is supported by more than just the visibility factor. People living in the same area are more likely than randomly selected Americans to share some of the same values, life experiences, ethnic backgrounds, and allegiances. Because of these commonalties, it may be easier for the more fortunate to identify with their downtrodden counterparts: "But for the grace of God there go I." Moreover, people may have a more nuanced understanding of local economic conditions and how they might lead someone who is neither lazy nor incompetent to become impoverished. Under such circumstances, individuals may receive a greater "warm glow" from redistribution when the redistributed wealth remains within the community[231] and, therefore, be more likely to support higher levels of redistribution.

Pauly's externalities-based motivation for local redistribution also merges nicely with the communitarian story. He observes:

> There is another reason for redistributing income, even where genuine concern for poverty is not involved. It may be that some of the manifestations of poverty are undesirable, even when the poverty itself is of little concern. For example, if poverty contributes to the incidence of crimes against property and persons, one way to reduce crime may be to redistribute income. Even if the affluent make income available to the poor only to avoid the threat that the poor will burn and riot, the motivation can still be expressed as based on utility interdependence. Or the increased consumption of certain goods, such a education or housing, may generate external benefits.[232]

The selfish concerns identified by Pauly are by no means an exclusive list. For example, there is a close connection between poverty and the spread of

230. Pauly, *supra* note 226, at 37.

231. The warm glow effect has also been dubbed "impure altruism." The idea is that people derive personal satisfaction from giving to others, and that seeking this satisfaction largely motivates giving. *See generally* James Andreoni, *Giving with Impure Altruism: Applications to Charity and Ricardian Equivalence*, 97 J. POL. ECON. 1447, 1448-49 (1989).

232. Pauly, *supra* note 226, at 37-38.

many communicable diseases.[233] Thus, income redistribution may have significant public health benefits for the wealthy. Tourism and mercantile concerns are another major motivator of redistribution. Homeless individuals gathered along commercial thoroughfares discourage pedestrian traffic and, thus, the dollars that shoppers and tourists bring to communities.[234] These factors can, therefore, motivate greater redistribution, especially in the form of housing subsidies and homeless shelters.

An additional communitarian motivation for altruism straddles Pauly's categorization of altruistic versus externalities-based incentives for redistribution. This motivation stems from the essential community-defining nature of the public's decision about levels of income redistribution. For many people, the most troubling aspect of poverty is "what it says about the community that people are permitted to live in this way." This concern probably involves altruistic motivations (the success of our society should be measured by how well we treat our worst-off class)[235] and concerns about what outsiders or historians will think of the community.

Empirical work suggesting that people are more likely to support redistribution to members of their own group (or groups), whenever the group is defined in a way that forms a basis for the giver's identity, also buttresses Pauly's argument.[236] In particular, individuals in group contexts cite "group welfare" concerns as a key factor in preventing their own selfish behavior.[237] C. Daniel Batson implies that this collective motive for pursuing the public good explains why individuals favor redistribution within a group to which they belong, even when they cannot see the actual beneficiaries.[238]

Recent empirical work in the contingent-valuation literature provides further support for the Pauly thesis. Under some circumstances, people are

---

233. *See generally* Mary Haan et al., *Poverty and Health: Prospective Evidence from the Alameda County Study*, 125 AM. J. EPIDEMIOLOGY 989, 989 (1987); William E. Morton et al., *Effects of Socioeconomic Status on Incidence of Three Sexually Transmitted Diseases*, 6 SEXUALLY TRANSMITTED DISEASES 206 (1979).

234. *See* Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning*, 105 YALE L.J. 1165, 1181 (1996) (noting that merchants generally regard panhandling as bad for business).

235. *Cf.* JOHN RAWLS, A THEORY OF JUSTICE 152-53 (1971) (introducing the Rawlsian maximin rule).

236. *See* HENRI TAJFEL, DIFFERENTIATION BETWEEN SOCIAL GROUPS: STUDIES IN THE SOCIAL PSYCHOLOGY OF INTERGROUP RELATIONS 80 (1978); Henri Tajfel & J.C. Turner, *The Social Identity Theory of Intergroup Behavior*, *in* PSYCHOLOGY OF INTERGROUP RELATIONS 7, 13-14 (S. Worschel & W. Austin eds., 1986).

237. *See* Robyn M. Dawes et al., *Cooperation for the Benefit of Us – Not Me, or My Conscience*, *in* BEYOND SELF INTEREST 97, 99 (J.J. Manbridge ed., 1990).

238. *See* C. Daniel Batson, *Why Act for the Public Good? Four Answers*, 20 PERSONALITY & SOC. PSYCHOL. BULL. 603, 605-07 (1994).

likely to give greater monetary support to and derive greater moral satisfaction from making donations to geographically limited causes, rather than more broadly defined causes.[239] Work by Daniel Kahneman and Jack Knetsch has shown that residents of Vancouver, British Columbia were noticeably more supportive of increased governmental spending to improve sports facilities in small communities in British Columbia, as opposed to small communities throughout Canada.[240] This was the case even though, as residents of a large metropolitan area, those individuals polled would not directly benefit from such spending in either event. With other types of public goods, such as funds to increase fishing stocks in fresh water, Vancouver residents were more supportive of spending to improve stocks throughout Canada than they were of British Columbia specific spending.[241] Notably, however, in the poverty-relief context, geographic specificity can prompt greater willingness to give, even when one is far removed from the community that benefits. For example, Vancouver residents were far more supportive of spending government money on famine relief in Ethiopia than on famine relief in Africa generally.[242] Thus, it may be that the better sense citizens have of where the money is going, the more support there will be for governmental redistribution, even when none of the money "stays at home." Of course, when the money does stay at home, the list of possible beneficiaries is necessarily shorter. As a result, this analysis provides further support for Pauly's argument that redistribution is a local public good.

Pauly used his insight to argue against Musgrave's assertion that centralized governments are always the appropriate agents for redistribution. He asserts that people would support high levels of redistribution if they could receive assurances that the resources they sacrificed would go to poorer members of their own communities. He also speculated that once funds were redistributed to poor people in other communities (as they are through federal taxation and spending), support for redistribution would drop dramatically.[243] Thus, federal taxation might lead to suboptimal re-

239. *See* Daniel Kahneman & Jack L. Knetsch, *Valuing Public Goods: The Purchase of Moral Satisfaction*, 22 J. ENV. ECON. & MGMT. 57, 65 tbl.2 (1992).

240. *Id.*

241. *Id.* The researchers do not conjecture as to the cause of this variation. Their primary interest is in using all these examples to show the existence of embedding effects and how they can influence contingent valuation method studies.

242. *Id.*

243. *See* Pauly, *supra* note 226, at 51 ("[I]t is clearly possible that aggregate redistribution may be greater under a system of local governments than under a unitary one . . . since it is possible for the level chosen in each community to be greater than that which would have been chosen by a unitary government."); *id.* at 57 ("Welfare payments or taxes which are uniform with respect to location are inconsistent with Pareto optimality in the utility-interdependence

distribution levels, as compared to state or local taxation.[244]

Assuming that the Pauly effect dominates the Musgrave effect,[245] does that unambiguously support the case for requisitions finance? The answer is yes, although two considerations are worth noting. First, some states, such as California and New York, may simply be so large that a taxpayer does not feel noticeably different about revenue being redistributed via Sacramento or Albany than she would about the same revenue being redistributed via Washington, D.C.[246] At the very least, however, taxpayers should recognize that keeping the money in the state increases the probability that revenue will return to its community of origin. Second, and more importantly, it is worth asking whether Pauly proves too much, namely, that local governments, rather than state governments, are the appropriate agents for redistribution. Pauly confronts and answers that very question in the negative:

> To the extent that suburbs stratify by income as perfectly as some models suggest, increased aggregate redistribution is more likely in a system in which governments are fragmented into larger units (e.g., states), each of which still contain some poor, than in one in which each suburb and city could choose different levels of redistribution.[247]

Indeed, redistribution by the local government of Aspen, at one extreme, or East St. Louis, at the other extreme, would be something of a farce. Although poverty may be less visible statewide than within a smaller geographical area, states represent the best redistributive compromise. States

---

sense, and may lead to lower average levels of redistribution.").

244. Then again, it might not. There is clearly something to both the Musgrave theory and Pauly's counter-theory. Which effect is more powerful has not yet been settled. *See generally* Louis Kaplow, *Fiscal Federalism and the Deductibility of State and Local Taxes Under the Federal Income Tax*, 82 VA. L. REV. 413, 478 (1996) ("Redistribution, *to some extent, may be* a local public good.") (emphasis added); Stark, *supra* note 100, at 502 ("The Pauly theory has had important implications for economic theories of the local welfare role. Other economists have incorporated Pauly's assumptions into economic models of local welfare provision, and even those economists who dissent from the Pauly view seem to defer to the importance of his essay.") (footnotes omitted).

245. This is a serious assumption. To reiterate, no empirical work testing the relative strength of the two hypotheses was located.

246. Indeed, these states are illustrative examples because there seems to be a fair amount of animosity between northern and southern Californians, and between upstate and downstate New Yorkers. In a 1992 advisory referendum, voters in 27 of California's northern counties voted to secede from the rest of the state. *See A Split California? 27 Counties Want To Form New State*, ORANGE COUNTY REG., June 3, 1992, at A10. Two years later, the state's voters rejected a ballot initiative to do just that.

247. Pauly, *supra* note 226, at 45 (citations omitted).

are small enough to ensure that communal bonds and externality concerns will make wealthier residents more receptive to redistribution, diverse enough to contain a mix of rich, middle-class, and poor residents, and large enough to impose some costs on wealthier residents who will nevertheless remain in the state.[248]

Even if the Musgrave effect dominates the Pauly counter-effect, the existence of the latter softens the progressive case against requisitions finance. To the extent that progressives also share many of the concerns that are prominent among communitarians, including concerns about citizen participation, community bonds, and tax equity, their opposition to requisitions finance should not be a foregone conclusion.[249]

G. *WOULD REQUISITIONS WEAKEN COMMUNITARIAN VALUES AT THE NATIONAL LEVEL?*

Since the nation's founding, the federal government has gone to great lengths to prompt its citizens to think of themselves as Americans first and Virginians, Texans, or Oregonians second. This has been no easy task.[250] Yet by all accounts, the effort to create a national community has been extraordinarily successful.[251] Perhaps a shift to requisitions finance would

---

248. Admittedly there is some tension between this assertion and the one that people are likely to sort themselves according to the types of communities in which they would prefer to live if requisitions were implemented. As the Pauly statement makes clear, states are best thought of as entities that foster a balance between these two competing visions: large enough so that they will always contain at least pockets of poverty, but small enough so that they can offer a more cohesive sense of community than the nation as a whole can.

249. For those who still prioritize progressivity in the tax code, but remain unconvinced by the theoretical and empirical case that this Article has made, another option remains: Replace a less progressive federal tax, such as the payroll tax, with requisitions finance. That way systemic progressivity would likely be improved without sacrificing the communitarian benefits discussed herein. For a brief discussion of the possibilities, see *supra* note 8 and accompanying text.

250. A wonderful passage from *The Federalist* illustrates how dramatic the nation's transformation has been in the intervening years:

> Many considerations . . . seem to place it beyond doubt that the first and most natural attachment to the people will be to the governments of their respective States. . . . If . . . the people should in the future become more partial to the federal government than to the State governments, the change can only result from such manifest and irresistible proofs of a better administration as will overcome all their antecedent propensities.

THE FEDERALIST NO. 46, at 294-95 (James Madison) (Clinton Rossiter ed., 1961).

251. Rubin and Feely certainly exaggerate, but their statement that "the United States has one political community, and that political community is the United States" does make for an excellent soundbyte. Rubin & Feely, *supra* note 115, at 945. *But cf.* Mashaw & Calsyn, *supra* note 79, at 310 ("Americans generally view themselves as Americans first and citizens of their states second."); William A. Schambra, *From Self-Interest to Social Obligation: Local Communities v.*

undo this important achievement. After all, the requisitions approach is an intentional effort to favor state-community decision-making over federal-community decision-making. Maybe to reject the national income tax code is to suggest, implicitly, that a national consensus on the burdens of raising revenue is unattainable. Doing so may erode an important force that unifies all Americans and foster a breakdown of the national community. These arguments, however, overstate the possible effects of requisitions on the American national community.

Requisitions finance's first trial run occurred in the context of strong identification with state governments. A modern requisitions finance system would not return society to such a conception of citizenship. The United States possesses a national community, and it is difficult to imagine anything eroding it significantly. That said, the national community need not trump all other communities in all other contexts. In policy areas such as education, crime prevention, and cultural zones such as music[252] and team sporting events,[253] people often identify as members of a state or locality before identifying as Americans. These loyalties thus coexist with a strong sense of nationalism.

Seen in this light, the primary objective of requisitions finance is not to weaken communitarian values at the national level, but to shift one sphere of human activity to a more appropriate basis for identification. In other words, tax policy, like education policy, roadway speed limits, and law enforcement,[254] is most appropriately handled at the state government level because of dramatically differing state policy preferences and the inability of a national compromise to please a majority of the citizens.

The Internal Revenue Code is not a repository of national sentiments. In reality, the only thing that brings Americans together with respect to the national income tax is their intense dislike for it.[255] The question of who

---

the National Community, *in* MEETING HUMAN NEEDS 33, 38 (Jack A. Meyer ed., 1982) (arguing that the national community is breaking down, and that people are withdrawing into local communities).

252. The recent inroads that country music has made into the midwestern and northeastern states is an important counter-example, and may be an indication (combined with the increased national appeal of Louisiana zydeco and urban gangsta rap) that music is becoming less regionally determinant than it has been in the past.

253. The Olympic Games and, more recently, the Women's World Cup Soccer team are rare exceptions to this trend. But even there, the vehemence of communal feeling that surrounds the success of an outstanding American gold medal winner (e.g., Michael Johnson's world record in the 200 meters or the Dream Team's basketball exploits) does not foster anywhere near the same type of mass euphoria that ensued in New York after yet another Yankees World Series triumph, or Colorado after the Denver Broncos' recent Super Bowl victory).

254. *See* DONOHUE, *supra* note 108, at 42-43, 237 (discussing the value of state autonomy in the highway safety and law enforcement areas).

255. *See* Rosenberg, *supra* note 156, at 155 (noting that the tax code is "always a source of

should bear the tax is an important opportunity for community self-definition. That said, the "national community" harbors no significant sense of ownership over the tax code. Individual citizens feel powerless to improve it or to stop pernicious alterations. Because of the peculiarities of the legislative process in Congress, far fewer legislators have the opportunity to alter the tax code substantially than, say, have a hand in determining spending on infrastructure or defense.[256]

While the existence of a national community is particularly important in some contexts, it may well be that a national community is dysfunctional in others. Citizens direct a great deal of resentment at the tax code because it represents an uncomfortable compromise among the diverse and contradictory values held by America's diverse population.[257] The tax issue is frequently important in national elections, and has been for quite some time. But a lasting consensus has never emerged, and in recent years even the major political parties have become internally fragmented over taxation issues.[258] While any legislatively enacted tax code will necessarily be filled with compromises, the more diverse the population, the more conflict will exist between the actual code and each citizen's ideal code. Because the resulting dissonance discourages civic engagement in a society where such involvement is sorely lacking,[259] the communitarian case for requisitions is rather compelling.

H. REQUISITIONS FINANCE AND POLITICAL ACCOUNTABILITY

This Part has argued that requisitions finance will reinvigorate state government decision-making and empower the states. In that vein, it is important to address a facially appealing counter-argument. Requisitions finance might actually disempower the states by converting state governments into mere agents of the federal government. After all, while the requisitions plan gives the state governments significant flexibility in their

---

displeasure").

256. The tax code is on the same track as non-means tested entitlements, which renders it better insulated from legislative change than discretionary spending. Moreover, discretionary spending programs will, assuming they find their way into appropriations bills via the usual mechanisms, have more fingerprints on them than tax bills will. *See* AARON WILDAVSKY, THE NEW POLITICS OF THE BUDGETARY PROCESS 354-62 (2d ed. 1992).

257. *See generally* Marjorie E. Kornhauser, *Equality, Liberty, and a Fair Income Tax*, 23 FORDHAM URB. L.J. 607, 608 (1996) (suggesting that the complexity of the tax code "stems from America's complex sense of distributive justice").

258. *See Clinton, Democrats Unite on Patient 'Bill of Rights,'* BALT. SUN, Jan. 15, 1998, at 4A (noting Republican divisions over the tax issue).

259. *See supra* notes 141-142 and accompanying text (noting that the appearance of government responsiveness to participation raises expectations, which are subsequently dashed for losers in a political dispute).

choice of how to raise revenue, that revenue must still be sent to the federal government. Thus, the argument goes, a state government that develops an innovative and effective way of raising revenue will soon be disheartened if it cannot reap any of the rewards of its creativity.

This objection fundamentally misconceives the way in which a requisitions scheme would work. States would have a strong incentive to develop more efficient means of collecting revenue because state governments could keep any revenue collected above the predetermined quota. Because each state's quota presumably will be set with respect to the net income of that state's residents, as opposed to the previous year's taxes paid, states would have a strong incentive to develop the most efficient means possible for collecting revenues.[260] Of course, this dynamic is not without its potential downside. A state that experiences an unforeseen shortfall in tax revenues or has an inefficient tax collection system will have to dip into the state's operating budget for the extra revenue needed to meet its quota. But one person's downside is a federalist's fiscal discipline.

A related and more serious criticism of requisitions finance relates to the asymmetries of political accountability. The theory, as articulated by Justice O'Connor in *New York v. United States*, is that Congress's efforts to use the states as its regulatory agents undermine political accountability because voters will blame state officials, not members of Congress, for the failures and burdens of the new regulatory regimes.[261] As applied to requisitions finance, the critique would assert that members of Congress will be able to raise revenue for federal programs while forcing the electoral backlash for such tax increases onto state elected officials–thereby passing the buck while receiving the bucks. Because the most potent current check on federal spending will diminish, federal officials will demand (in the form of requisitions) more revenue than they actually need, and the excessive taxa-

260. Admittedly, the fact that the federal government will siphon off some of the funds generated by economic growth within a state (by making an upward adjustment to the state's quota for the following year to reflect the state's greater relative resources) diminishes states' incentive to pursue tax policies that promote economic growth. Note, however, that the state government will always retain the extra revenue from the first year of unanticipated growth.

261. Justice O'Connor's majority opinion notes:

> Where the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision. Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation.

505 U.S. 144, 169 (1992); *see also* D. Bruce La Pierre, *Political Accountability in the National Political Process—The Alternative to Judicial Review of Federalism Issues*, 80 NW. U. L. REV. 577, 648-56 (1985) (applying the political-accountability theory to a number of cases in which the Supreme Court confronted federalism issues).

tion that results will hinder economic growth and force innocent state officials out of office.

This critique certainly has some force when applied to general regulatory schemes enacted by Congress, but the political accountability argument actually buttresses the case for requisitions finance. The fundamental difference between Congress's role in creating a regulatory regime and Congress's role in setting requisitions explains why that is the case. The political accountability argument employed by Justice O'Connor basically relies on a kind of "hide the ball" dynamic. It suggests that voters will be unable to see Congress's fingerprints on a failed regulatory regime when state governments are charged with implementing the scheme. For certain complex regulatory regimes, this argument retains a level of plausibility. On the other hand, Congress's role in a requisitions regime is extremely limited. Congress merely determines how much money is needed from each state and spends the money once it arrives in the federal coffers. In essence, then, the congressional decision with respect to revenue will boil down to a simple question: By how much did Congress increase the aggregate requisition this year? The answer, especially when given in terms of the previous year's taxes, will provide an easy subject for public debate. Unseemly debates about whether a tax provision constituted a tax increase or a tax cut will become a thing of the past, at least at the federal level. When members of Congress run for reelection the voters will be able to evaluate their representatives according to the most comprehensible tax-related criteria: Did they vote to increase requisitions, and, if so, by how much?

If the federal government requires a large increase in requisitions during a given year, this information will become widely known to the public. When state governments raise their own taxes in order to pay the requisition, they will have every incentive to scream about how the federal government is forcing them to do it and will be able to point to a concrete increase that is easily verifiable. State officials will point out that the overwhelming majority of the increased revenues flowed to Washington, D.C., rather than state capitals. Under such circumstances, the accountability concerns that frame the federalism debate in the regulatory context are not compelling.

I. ASSESSMENT

The previous discussion has shown that there is a compelling communitarian case to be made for requisitions finance. To summarize briefly, requisitions would shift important economic stakes closer to the people, leaving tax decisions to a more responsive, more comprehensible, and more participatory layer of government. Requisitions, because they allow noticeable variations among the states with respect to tax preferences to be reflected as meaningful policies, would actually boost support for the tax system and, in the process, increase citizen participation by making more people feel like winners. Requisitions finance would tap into communal sentiments to increase support for the tax system generally, conceivably increasing compliance in the process. It would encourage the creation of vigorous communities brought together by preferences and values, though possibly furthering the disintegration of communities that cohere because of tradition and shared experiences. Though requisitions might prompt governments to redistribute too little because of fears that the rich will be driven to less progressive states, this effect might be outweighed by requisitions' promise of redistribution when the money remains at home. Finally, requisitions finance may weaken communitarian values at the national level, but do so in a manner that removes a stumbling block to national political reconciliation, by removing a contentious issue from a national political sphere that has never satisfactorily dealt with the problem.

It is worth bearing these communitarian advantages in mind for two reasons as the Article moves to Part IV, which analyzes the requisitions system from a utilitarian perspective. First, at times the utilitarian case for requisitions will seem noticeably less compelling than its communitarian counterpart. Second, the communitarian factors discussed herein will generate tangible benefits that should be weighed in any sensible utilitarian analysis of the requisitions finance system. For example, making people feel better about their tax system and about poorer individuals who are benefiting from tax redistribution will certainly generate utility gains, as will improving compliance and encouraging successful citizen participation. In other cases, utility benefits are implicit in the analysis contained above. For example, the discussion in Part III.C of using communal ties to improve enforcement suggests that requisitions finance would make it easier for citizens to perceive the benefits of taxation (because the money would stay closer to home). The increased support for the tax system, and for government in general, should certainly factor into a utilitarian analysis of the proposal.

IV. THE UTILITARIAN ANALYSIS OF REQUISITIONS FINANCE

The utilitarian[262] analysis in this Part proceeds with a discussion of the

262. In the context of this Article, "utilitarian" refers to a means of analysis that compares the economic costs and benefits of a requisitions finance system to the current system of largely centralized revenue collection. A utilitarian fundamentalist might point out that a system that is more economically efficient than the status quo could nevertheless impose more disutility than utility on society. However, this Article ignores that possibility and presumes that such a system in fact improves society's welfare. In so doing, I follow the traditional "utilitarian" tax scholarship. For examples of this scholarship, see Louis Kaplow, *A Fundamen-*

important welfare-improving traits of requisitions finance. These include its prospects for using the states as laboratories of innovation in the tax policy arena, its propensity to engender efficiency-promoting competition for a mobile citizenry by state governments, its ability to make the benefits of taxation more tangible, and its elimination of the requirement that most American households file two separate tax returns. This Part then explores significant inefficiencies that might result from a shift to requisitions: eliminating current administrative efficiencies that are related to a uniform, centralized system of taxation and tax collection; and increasing the incentive for states to export taxes so that they are borne by residents of other states.

A. USING STATE TAX SYSTEMS AS LABORATORIES OF INNOVATION

One potential advantage of shifting to requisitions finance in the tax policy realm is that such a shift would provide more forums for innovation and the testing of new policies.[263] The federal government is often forced to take leaps of faith in the creation of new tax policy. The Reagan tax cut of 1981 is the most recent demonstration of the dangers of relying on untested taxation theories in the creation of fiscal policy. In 1981, the Reagan administration proposed, and Congress approved, large tax-rate reductions that were designed to produce very high economic growth. The administration anticipated that this growth would boost tax receipts significantly, thereby offsetting the lost revenue from the rate reductions.[264] While the effect of the tax cuts is impossible to isolate, the consensus among economists is that these cuts were responsible for ballooning the national budget deficit and debt.[265] Had supply-side tax theory been tested in one or a few of the states beforehand, this fiscal crisis might have been averted.

---

tal Objection to Tax Equity Norms: A Call for Utilitarianism, 48 NAT'L TAX J. 497 (1995); and Daniel Shaviro, *The Minimum Wage, the Earned Income Tax Credit, and Optimal Subsidy Policy*, 64 U. CHI. L. REV. 405 (1997).

263. *See generally* Gregory v. Ashcroft, 501 U.S. 452, 458 (1991) (describing the experimentation and innovation-inducing benefits of granting states authority over policy spheres); New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

264. *See* Nancy E. Shurtz, *A Critical View of Traditional Tax Policy Theory: A Pragmatic Alternative*, 31 VILL. L. REV. 1665, 1699 & n.145 (1986) (describing the process the administration used to reach that conclusion).

265. *See* John W. Lee, *Critique of Current Congressional Capital Gains Contentions*, 15 VA. TAX REV. 1, 66-67 (1995) (summarizing assessments of the 1981 tax cuts); Lee A. Sheppard, *Supply Side Economics and the 1981 Tax Cuts Revisited by Joint Economic Committee*, 28 TAX NOTES 1423, 1423-24 (1985) (charting the cuts' economic effects); Tiefer, *supra* note 216, at 412 (linking high deficits to the tax cuts of the early 1980s).

At the same time, there are reasons to doubt the utilitarian benefits that would stem from such testing. First, some suggest that the federal government can learn lessons from international experiments with tax policy.[266] Second, some have argued that the benefits of testing tax policies are overstated.[267] Indeed, it is difficult to show that a given tax policy led to a certain economic consequence. There are always many exogenous causal factors and no "control group" in sight. Third, as Daniel Shaviro argues, it may be that politicians and voters do not really care about the economic consequences of tax policies and are more interested in disingenuously using these arguments to buttress whatever distributional outcomes they see as morally correct.[268] Finally, under a decentralized system of tax policy-making, the states will have insufficient incentives to experiment in ways that will be helpful to other states: States will not have an incentive to try the riskiest policies-precisely those most worth testing,[269] and states will have insufficient incentives to generate accurate data on the tax experiments they conduct.[270]

These concerns all have some merit, but none is overwhelming. The case for relying on international experiments in lieu of state experiments is particularly weak. If anything, state data would be more relevant than international data because state governments, unlike their national counterparts, have no central banks and therefore exercise little control over monetary policy. As a result, when one state experiments with a tax policy and another does not, then at least the important variable of monetary policy can be held constant. In addition, the economic structure of one American state is more likely to be similar to the economic structure of another American state (or to the nation as a whole) than to the economic structure of a foreign country. Thus, state experimentation provides a better, albeit far from sterile, "laboratory setting."

The second objection raised above suggests that experimental data, whether collected at the state or international level, is not likely to be useful to policy-makers. This concern is not without force. A partial response to this view is that one must avoid having a static view of the states' ability to experiment. In a world where state governments collect only thirty percent of the nation's tax revenues, their ability to influence macroeconomic conditions within those states is limited. Once the ratios are reversed, their

266. *See supra* note 265 (citing sources suggesting the value of international experiments).

267. *See* SHAVIRO, *supra* note 58, at 93.

268. *See id.* at 93.

269. *See* Rubin & Feely, *supra* note 115, at 925 (predicting that each state would wait for the other states to act first).

270. *See id.* at 926. Indeed, governors may have incentives to try to cook the books so as to justify their policy choices and win voter approval.

ability to alter economic conditions will be much greater. There may still be too much background noise to isolate the effects of a given tax policy (especially when the change in policy is not radical), but the sound for which economists and policy-makers are listening will at least be louder. Acting on the basis of imperfect experiential data is far better than acting on blind faith.

The third objection to using tax policy experimentation in one jurisdiction to influence policy-making in other jurisdictions presents what seems to be a cynical, and hence somewhat appealing, picture of legislative behavior: Politicians will ignore the data. However, it is also a static picture, when times call for a bit of dynamism. Not only would state governments play a bigger role in their economies, but as economists came to see divergent state fiscal policies as a baseline, they might devote more resources to effectively studying the impacts of various tax policies. Currently, there is so much uniformity in income taxation that respectable economists have few incentives to design solid studies that attempt to isolate causal trends. Though the presence of a multitude of confounding factors in the present system discourages economists from devoting their energies to producing methodologically rigorous studies, one should not assume that the same dearth of research would exist under a requisitions finance system. Along the same lines, if legislators were presented with rigorous, useful studies of the effects of tax experimentation in other jurisdictions, they could come to rely on these studies and give much more credence to objective analysis than they currently do.[271]

The fourth objection to the utility of experimentation in the tax realm boils down to a multi-faceted attack on state experimentation generally. The first facet—that experimentation is a public good, and unless it is subsidized by the federal government there will be too little of it, is surely valid. Indeed, to the extent that states feel their successful innovations can provide them with comparative advantages in interstate competition, they may be hostile to sharing knowledge of their effectiveness.[272] But this argument mistakenly compares a decentralized regime to an "ideal" regime in which the federal government actually subsidizes such tax experimentation (it does not). It also ignores the fact that federal subsidies would almost certainly be accompanied by federal oversight with respect to which innovations were worth pursuing. The moment such oversight becomes part of the process, the federal government will be tempted to exclude experimentation by states whose preferences are farthest from the federal norm.

271. In other words, when the studies are bad, and the legislators know this, they have a greater incentive to demagogue the tax issue. But if economists and policy analysts provided them with better data, they might alter their behavior.

272. *See* DONOHUE, *supra* note 108, at 45.

This response also undermines the salience of the argument that states will not have an incentive to try the riskiest policies. The incentive to do so may not be as great as some would like, but it would still constitute an improvement over the status quo. Moreover, even if no state is willing to experiment with the most radical policies, the sheer number of states, and the diversity of opinion among the states with respect to tax policy, implies that a substantial level of experimentation will occur and that some tax experiments will deviate significantly from the federal mean.[273] History bears this out: The federal government only implemented its current income tax after Wisconsin's (unsubsidized) experiments with a similar state income tax proved successful.[274] More recently, Florida's innovative (unsubsidized) effort to broaden its tax base by taxing services produced within the state met with severe difficulties, and other states learned a great deal from the failed experiment.[275]

As for the data collection problem, there will admittedly be perverse incentives for the states to report overly rosy or insufficiently rigorous data. Governors will want to point to successful fiscal experiments when they seek re-election and may be tempted to manipulate the data so that it demonstrates favorable numbers. Indeed, a strong case can be made for federal intervention in data collection. Such data is a public good that can be shared among the fifty states. Using a relatively unbiased central agency to measure the successes and failures of various tax experiments in the states would be money well spent. Alternatively, the states could enter into an interstate compact to address and finance this concern.

These concerns having been addressed, the innovation and experimentation case for replacement of the personal income tax with requisitions finance begins to look suspiciously like the argument for devolution of welfare policy to the states. Since welfare devolution is such a recent phenomenon,[276] the degree to which welfare policy is improved when one state adopts another's successful programs is still unknown. Certainly, however,

273. *Cf.* Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1498 (1987) (reviewing RAOUL BERGER, FEDERALISM: THE FOUNDER'S DESIGN (1987)) (offering these arguments in defense of state experimentation generally).

274. *See* HY & WAUGH, *supra* note 65, at 62; LeBoeuf, *supra* note 20, at 563. Enterprise zones offer a more recent example of the federal government borrowing tax policies from state governments. Congress first enacted enterprise zones in 1993 after a decade of experimentation by the states. *See* Wilton Hyman, *Empowerment Zones, Enterprise Communities, Black Businesses, and Unemployment*, 53 WASH. U. J. URB. & CONTEMP. L. 143, 149 (1998).

275. *See* Kenyon, *supra* note 69, at 238 (discussing Florida's difficulties with taxation of services).

276. *See* The Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (to be codified in scattered sections of 7, 8, 21, and 42 U.S.C.).

there have been some pilot programs that Congress or state legislatures have seen fit to copy.[277] In the realm of tax policy, as with welfare reform, states presumably will be cognizant that some reforms work because they are solid policy innovations, but others work because of fortuitous circumstances or specific conditions prevailing only in the laboratory state.[278] Even so, experimentation with policy innovation would give each state much more information about the outcomes of various policy choices than they currently have. As a result, the diffusion of tax policy options, like the diffusion of welfare reforms between states, is likely to produce moderate efficiency gains.[279]

B. ECONOMIC ADVANTAGES OF TAILORING

Part III.B discussed the participatory benefits that would accrue if tax policies were tailored more closely to the preferences of state residents. The utilitarian argument for requisitions finance asserts that tailoring makes economic sense as well. Policymakers in the United States are conditioned to see the tax code as a means for stimulating the economy and promoting desirable economic objectives. Over the past two decades, many elected officials have justified targeted tax cuts to stimulate economic growth. However, personal income tax breaks have proved to be a blunt instrument for accomplishing fiscal policy goals. Because of the Constitution's Uniformity Clause, Congress is required to give individuals in Montana the same tax breaks as those in Vermont,[280] even when there may be little economic justification for doing so. While it is certainly true that the states' economic growth statistics tend to rise and fall together, those correlations are hardly absolute. In fact, *during the most recent "national" recession of 1990-91, a majority of American states actually saw their economies grow in real terms.*[281] Indeed, not a single mountain state saw its economy contract during that

---

277. *See* Lyke Thompson & Donald F. Norris, *Introduction* to THE POLITICS OF WELFARE REFORM 1, 5-6 (Donald F. Norris & Lyke Thompson eds., 1995) (discussing how successful state experimentation with workfare eventually led the federal government to adopt the approach).

278. *See* Volden, *supra* note 144, at 83.

279. *See id.* at 85 (predicting moderate to high benefits from using the states as laboratories in the welfare reform arena).

280. Congress can, and does, give tax breaks to specific corporations in Montana, but not Vermont. Depending on one's conception of Congress's motivations for doing so, this may either be a blessing or evidence of the inherent corruption likely to develop in any federal system.

281. Twenty-six states saw increases in their Gross State Product and two more saw no change in real terms. *See* U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 450 (1997).

time span.[282] Americans seem to take it for granted that recessions are national rather than regional or local in scope, even in the face of strong evidence to the contrary.[283] If the government wants to stimulate an economy out of a recession through tax cuts (or cut inflation in an overheated economy through tax increases), it is wasteful to funnel money to states in which economic conditions diverge from the prevailing national trend.

It is something of a response to note that the states can themselves target tax cuts or increases as conditions warrant them. However, their ability to do so is significantly reduced by the fact that the federal government collects seventy percent of the nation's tax revenues. In order to pay for the kind of tax cut that will have a meaningful effect on consumer behavior, a state must enact sweeping reductions in state services.[284] That follows because the states have much smaller amounts of revenue with which to play.[285] This has not stopped governors and state legislators, however, from attempting to use their tax systems to influence macroeconomic conditions in their states and taking all the credit for any subsequent economic prosperity.[286] Nonetheless, their effectiveness in actually stimulating economic growth has been rather limited.[287] If requisitions finance ultimately results in the states obtaining more control over the spending side, then the ability of the states to influence macroeconomic policy should be significant. But even in the short term, requisitions would enhance the

---

282. *See id.* The mountain states consist of Montana, Idaho, Wyoming, Colorado, New Mexico, Arizona, Utah, and Nevada.

283. The 1990-91 recession was largely a story about significant economic downturns in California, New England, New York, and Michigan, with steady, albeit unremarkable growth throughout the rest of the nation. *See id.*; *see also* Stanley Engerman, *Regional Aspects of Stabilization Policy*, *in* ESSAYS IN FISCAL FEDERALISM, *supra* note 70, at 30-31 ("It appears that regional cyclical differentials are of considerable importance, and that they are caused to a significant degree by specifically regional (as distinct from purely industrial composition) factors. This suggests that regionally-oriented stabilization policies would be desirable if feasible.").

284. A supply-side economist might believe otherwise, although little theorizing has been done with respect to the efficacy of state tax cuts in increasing net state revenue.

285. In other words, assuming that New York's state government accounts for 30% of the taxes collected in New York state, and the federal government accounts for the other 70%; if the state government wishes to provide each household head with a $500 tax credit, it will require that the state government take a revenue hit that is 133% greater—as a percentage of tax revenues—than the hit that would be required if the federal government were to enact a tax cut in the same amount.

286. *Cf.* Edward J. McCaffery, *Tax's Empire*, 85 GEO. L.J. 71, 73 (1996) (noting that the tax-cutting efforts of Governors Whitman and Engler propelled them to national prominence).

287. *See* Jan Ellen Rein, *Misinformation and Self-Deception in Recent Long-Term Care Policy Trends*, 12 J.L. & POL. 195, 332 n.661 (1996) (noting that Governor Whitman's New Jersey tax cuts failed to increase state revenues, forcing the Governor to raid the state pension fund, freeze state employee salaries, and reschedule debt payments in order to balance the state's budget).

states' abilities to influence economic conditions by altering the *distribution* of their tax bills.[288]

The widespread attachment to uniform baseline personal income taxation as an element of coordinated economic planning is somewhat mystifying. The current system of taxation is uncoordinated. It is the equivalent of the patients in every ward of a hospital being given the same treatment. At the margins, nurses (the state governments) step in and provide somewhat appropriate care (a targeted tax expenditure here and there). But forcing the federal doctor to give the patients in the maternity ward and the cancer ward a steady dose of the same drugs in the name of coordinated wellness policy is not socially efficient.

Admittedly, the argument that state-targeted taxation will more appropriately influence macroeconomic policy relies on at least two important assumptions. The first assumption is the belief that state governments' tax policy choices can influence economic conditions. While it is widely accepted that federal fiscal policies influence the economy, it is difficult to make the case that states' fiscal policies have much effect on the business cycles in the individual states.[289] Given more money with which to play, it seems plausible that state government policies would have greater influence. But it is worth bearing in mind that with state stimulation efforts there is always a significant danger that money spent on stimulation will "leak" to out-of-state residents. The second assumption is a belief in the institutional competence of state governments to discern accurately the ailments from which their economies are suffering and how best to cure those conditions.[290] The assertion that states would do a better job, though speculative, seems highly plausible because state economies tend to be less diversified, and hence less complicated, than the national economy.

---

288. For example, a state could cut sales taxes as a means of invigorating retail sales during a slow period and compensate for the lost revenue by raising taxes on short-term capital gains as a means of promoting longer-term investment.

289. Numerous state governments have, in the past fifteen years, turned to enterprise zones as means of influencing macroeconomic activity within the states. Enterprise zones are typically areas of significant poverty where businesses are given significant tax incentives to set up shop or increase employment. Although it appears that these experiments have had some beneficial consequences for the zones in which they have been set up, empirical uncertainty about the effect of enterprise zones on economic conditions remains. *See* Richard Briffault, *The Rise of Sublocal Structures in Urban Governance*, 82 MINN. L. REV. 503, 510-11 (1997) (noting that enterprise zones have received "mixed reviews" in terms of their ability to stimulate development); Hyman, *supra* note 274, at 149-52 (1998) (noting that state experimentation with enterprise zones in the 1980s prompted two major studies, which reached conflicting conclusions about their effectiveness).

290. *See* DONOHUE, *supra* note 108, at 46-48 (discussing the relationship between decentralization and administrative efficiency).

C. ENHANCING DISCIPLINE AND EFFICIENCY THROUGH COMPETITION

More efficient outcomes also may result from competition among states over economically desirable citizens. Admittedly, as "race to the bottom" theorists suggest, residents will prefer low taxes to high taxes, but they will also prefer generous government services to skeletal services.[291] The strong connection between the amount of revenue raised through taxation and the amount of revenue available for social spending[292] will prompt states to attempt to improve the efficiency of the services provided.[293] At the margins, residents will move to those states that provide government services most efficiently.

Moreover, because some residents will prefer big government and some will prefer small government, states will probably find it in their best interests to develop niche approaches to governance.[294] There may be little divergence from the mean, but the mean will not be at the bottom. While some states will be tempted to entice multi-millionaires to move to their states by enacting very low income taxes on capital,[295] there is little evi-

291. *See also supra* text accompanying note 98 (noting that the quality of an area's public schools, which will correlate positively with higher taxes, is an important factor influencing many families' decisions about where to live).

292. This assumes states will not be able to tax non-residents to pay for services for residents, or, to the extent that such taxation of outsiders does occur, all states are presumed to be equally effective at doing so. Of course, such an assumption is not entirely realistic. *See infra* note 332 and accompanying text (noting that imbalances in states' economic positions create power asymmetries in interstate taxation).

293. George Break's explication is particularly clear:

> Competition among governments may also be a means of controlling the level, as well as the composition, of public spending. A large number of independently operating units, like a large number of separate business enterprises, is likely to be more responsive to consumer demands, and more efficient in satisfying them, than a small number of units each with significant monopoly powers.

BREAK, *supra* note 144, at 15.

294. *See supra* text accompanying note 165 (noting that niche approaches will result in more politically and socially cohesive communities). Daniel Shaviro points out one important complication to this theory. Voters who prefer high levels of wealth redistribution will not necessarily opt for states with high levels of taxation. They may instead choose to live in low tax states and make large donations to charities that serve redistributive purposes. *See* SHAVIRO, *supra* note 58, at 84. This point has particular salience because voters generally prefer direct charitable giving to charitable giving under the auspices of the state. *See* James Andreoni, *Impure Altruism and Donations to Public Goods: A Theory of Warm-Glow Giving*, 100 ECON. J. 464, 470 (1990).

295. It is by no means safe to assume, as Shaviro does, that the wealthiest taxpayers are the ones with the most mobility. *See* SHAVIRO, *supra* note 58, at 85. In a narrow sense, of course, moving expenses will be less of a relative burden on wealthy households. On the other hand, wealthy individuals will likely have valuable social and professional circles in their home towns. (Perhaps that is how some of them became wealthy.) In other words, there will not be an exodus of Los Angeles law partners or movie producers to Arizona, no matter how low Arizona's

dence that this factor alone would suffice to trigger a race to the bottom.[296] It cannot be assumed conveniently that state governments will be devoid of compassion, even where wealthier voters move to that state because of "race to the bottom" inducements.[297]

The primary check on all-out state competitions for millionaires, however, will stem not from compassion but from cold political reality. States qua economic actors will have strong incentives to attract wealthy residents from out of state, but states qua democratic entities will face strong pressures to adopt policies that benefit existing residents. This is an important point. While mobility will increase significantly as a result of requisitions finance, recent and potential interstate migrants will always form a minority of the population of a given state, at least for the foreseeable future. Thus, although states will face pressures to adopt policies that attract wealthy migrants, these pressures will not often find their way into policy. No elected official will get re-elected on a platform of "soak the longtime residents in

---

taxes fall. *See* LONG, *supra* note 86, at 41 (noting that very high income earners tend not to be mobile); Vaughan, *supra* note 54, at 109 (observing that the evidence supporting the proposition that rich individuals move from one state to another in order to reduce their tax burdens is weak).

296. *Cf.* BUTLER & MACEY, *supra* note 185, at 19-21 (attacking the race-to-the-bottom theory's underpinnings); Buckley & Brinig, *supra* note 184, at 157-77 (observing that empirical evidence does not support the race-to-the-bottom theory in AFDC payments); Richard L. Revesz, *Federalism and Environmental Regulation: A Normative Critique*, *in* THE NEW FEDERALISM, *supra* note 144, at 97, 105 (criticizing the race-to-the-bottom theory as overly simplistic in the environmental regulatory context); Volden, *supra* note 144, at 74-75 (rejecting evidence of a race to the bottom in welfare benefits). *But see* PETERSON, *supra* note 187, at 108-10 (arguing that a race to the bottom has occurred in AFDC benefit levels). Peterson is the most cited author for the proposition that a race to the bottom is occurring in the realm of welfare benefits. It is worth noting that by a race to the bottom, Peterson apparently only means that real welfare benefit levels have declined. It is far from clear that he can pin the blame on competition between states to avoid becoming welfare magnets. He notes that a national slowdown in economic growth, *see id.* at 112, a decreased perception that the poor are deserving of assistance, *see id.* at 114, and a recent increase in federal welfare payments, *see id.* at 121, all contributed to the reduction in benefit levels.

In addition, several authors have concluded that state taxation of corporate income has reflected something of a race towards the bottom, although the race has been proceeding for decades now, and the finish line (the elimination of such taxes) is nowhere in sight. *See* GEORGE F. BREAK, INTERGOVERNMENTAL FISCAL RELATIONS IN THE UNITED STATES 145 (1967); Vaughan, *supra* note 54, at 78. Vaughan's findings seem the most plausible. He concludes that states have used the corporate tax code, but not the personal income tax code, to woo wealthy taxpayers from other states. As a result of this competition, states have relied on the personal income tax for an ever-increasing portion of their revenues. However, because wealthy taxpayers are unlikely to move to states because of reduced tax burdens, a race to the bottom in that arena has not been triggered. *See supra* notes 70, 295.

297. *Cf.* Volden, *supra* note 144, at 94 (pointing out that race to the bottom models usually suppose unrealistically low levels of compassion at the state level).

order to attract newer, wealthier residents." Someone will have to pay extra taxes if the tax burden on the wealthy is lowered measurably, and it is unlikely that state officials will be able to convince voters that the influx of rich migrants will compensate for the revenue shortfalls that will result when taxes on the wealthy are reduced. Poorer and middle-class taxpayers will have incentives to organize politically to ensure that tax policies do not become overly regressive.

This political dynamic also will counteract to some degree a potentially regressive consequence of requisitions finance. Thinking of the states as purely economic actors, one might expect to see them rely more significantly on immobile bases of taxation, particularly the real property tax, and less on mobile bases, like the tax on individual incomes.[298] Unlike individuals, who have a credible exit threat if taxes become too high, real property has "nowhere to go." Because the tax on real property is among the least progressive of the taxes used today, this shift might cause a more regressive tilt in overall state taxation policies. But again, the constituency that pays the property tax is very likely to use its political leverage to resist this shift[299] or to ensure that the property tax is made more progressive, for example, through the use of a graduated tax on real property or a "mansion tax." Thus, while there will be an added incentive for states to shift toward certain bases of taxation, this incentive will be opposed by political forces that will become increasingly galvanized as the stakes rise. Accordingly, this democratic check forms an important variant on the degree to which competition among the states for residents will follow traditional market paradigms.[300] Political constraints will mean that states compete for niche groups in ways that are not perceived as hostile to important groups already living there. Thus, Florida will not raise taxes on seniors in order to attract more young migrants, and Iowa will not increase the tax burden on

298. In other words, real property cannot relocate itself, but people can. Hence real property is thought of as an immobile tax base.

299. *See generally* Koyama, *supra* note 194, at 1333 (discussing California's revolt against the property tax).

300. Indeed, contrast this picture with our understanding of state competition for corporate jobs. Corporations do not vote (although their employees, whose interests are sometimes aligned, do). Thus, when Rhode Island offers a Tennessee firm a sweetheart tax deal in order to induce it to relocate to Providence, Rhode Island's existing firms probably will not mobilize in opposition. Indeed, they may support the move, since they can obtain political leverage by pointing to the deal given the Tennessee company while trying to negotiate deals with the state government that would keep them in Rhode Island. For the individual income tax, however, groups of similarly situated taxpayers tend to be in political competition with other groups of similarly situated taxpayers. Thus, the political dynamic imposes a minimal constraint on the abilities of states to use tax packages to attract corporations but a more serious constraint on the abilities of states to use tax packages to attract residents from other states.

farmers in order to attract glamorous, glitzy entertainment executives. Rather, Florida may use the tax code to attract even more seniors, and Iowa's tax policies will make it even harder to resist for the agriculturally inclined. Existing aspects of the various states' cultures will be punctuated through the greater diversification of states' tax policies.

In an environment in which residents can exit jurisdictions that have inefficient tax and expenditure policies, something roughly approximating a competitive market among the states might emerge. Although not all states will be competing for the same residents, and the states will be constrained by a democratic and pragmatic reluctance to alienate current residents, some states will compete better than others. The resulting competition for these populations will, in turn, impose a degree of discipline on state governments. This competitive dynamic is almost nonexistent in the federal tax code because the costs of exiting the United States are so high.[301] In the personal income tax realm, the IRS is essentially a monopoly producer, with all the inefficiencies that accompany that market position.[302]

Requisitions finance would modestly increase the size of the playing field on which states could compete with each other. Because states would have much greater control over decisions about how to raise the revenue generated by state residents, and because requisitions finance should lead to a phasing out of federal grants,[303] increasing state autonomy over spending in the long run, state governments would have more potential tools at their disposal with which to meaningfully differentiate themselves from their peers.

Before leaving this topic, it is worth noting that, although the theoretical case for this kind of competition between the jurisdictions is fairly strong, empirical support is lacking, as attempts to measure the effect have produced widely divergent results.[304] It is unclear whether competition among states produces the same efficiency-enhancing benefits that compe-

---

301. In the last few years, a few cases of wealthy taxpayers renouncing their American citizenship in order to reduce their tax liability have been reported. *See generally* Kenneth D. Heath, *The Symmetries of Citizenship: Welfare, Expatriate Taxation, and Stakeholding*, 13 GEO. IMMIGR. L.J. 533 (1999); Emmanuelle Lee, Comment, *Will the Renunciation of U.S. Citizenship Still Be Worth Some Tax Savings? An Analysis of the Recent Reform on the Taxation of Expatriates*, 37 SANTA CLARA L. REV. 1063 (1997). The vast majority of Americans, however, do not see exit as a viable option.

302. *See generally* BREAK, *supra* note 296, at 147 (discussing the inefficiencies that result when the central government holds a monopoly on power in a policy arena).

303. *See supra* Part II.C (discussing this and requisitions finance's other effects on spending generally).

304. *See* William W. Bratton & Joseph A. McCahery, *The New Economics of Jurisdictional Competition: Devolutionary Federalism in a Second-Best World*, 86 GEO. L.J. 201, 239-43 (1997) (summarizing the empirical literature).

tition among firms creates in a free market.[305] Thus, the competitive benefits described herein, though plausible and intriguing, remain speculative.

D. *ELIMINATING THE DOUBLE-FILING REQUIREMENT*

American taxpayers spend a great deal of time complying with tax filing requirements. Much of this effort would be necessary under almost any income tax system: keeping receipts, monitoring deductions, filing forms in a safe place, etc. Indeed, some states have closely followed IRS income taxation and deduction rules so that, at the very least, taxpayers need not recalculate their figures repeatedly.[306] However, many states use definitions of income that diverge markedly from that used by the federal government.[307] Similarly, most states require that even if a taxpayer has already received an extension of time to file his tax forms, the taxpayer must request a separate extension from the state, with no guarantee that the state will grant the extension.[308] The resulting burden on taxpayers has resulted in "widespread annoyance, considerable expense, and much grumbling."[309]

Nevertheless, there does not appear to be a single study that estimates the costs imposed by these double-filing requirements. Indeed, reliable compliance cost studies in the tax realm are few and far between. The best available study is an extrapolation based on Minnesota's tax collection costs. That study estimated the compliance costs for federal and state individual income taxes in 1982 at approximately seventeen to twenty-seven billion dollars.[310] While determining what percentage of that figure is caused by double-filing is difficult, the number plausibly could be reduced by at least one billion dollars if the requirement of dual forms were eliminated. Moreover, it is likely that the costs of compliance have grown mark-

---

305. *See id.* at 261 ("[L]egal federalism questionably predicts that, assuming decentralized regulation subject to competitive influence, competition will produce a first-best outcome. The economics provide no basis for predicting stable, long-term equilibria in competitive lawmaking situations.").

306. *See* HELLERSTEIN & HELLERSTEIN, *supra* note 189, at 934.

307. *See* HY & WAUGH, *supra* note 65, at 62; SHAVIRO, *supra* note 58, at 34. Prior to the enactment of federal tax reform in 1986, 30 states linked their income tax base to the federal base, but many of the states abandoned this linkage after 1986. *See* Kenyon, *supra* note 69, at 244.

308. *See* SHAVIRO, *supra* note 58, at 35 (noting that 31 states require separate extension requests from federal requests).

309. HELLERSTEIN & HELLERSTEIN, *supra* note 189, at 933.

310. *See* Deborah L. Paul, *The Sources of Tax Complexity: How Much Simplicity Can Fundamental Tax Reform Achieve?*, 76 N.C. L. REV. 151, 216 (1995) (citing Joel Slemrod & Nikki Sorum, *The Compliance Cost of the U.S. Individual Income Tax System*, 37 NAT'L TAX J. 461, 461 (1984)).

edly since 1982.[311]

The requirement of filing tax forms with multiple jurisdictions imposes the heaviest costs on corporations, a problem that requisitions finance would not address. Although most corporations' federal income tax liability exceeds their state income tax liability, corporations spend more money complying with state corporate income tax requirements than with federal requirements.[312] That is not surprising, given the expansion of interstate commerce in recent decades and the divergence of state corporate taxation regimes. Though individual taxpayers face less onerous burdens because they generally must pay income taxes in only one state, this burden of double filing is far from negligible.

The multiple-filing problem could be addressed in one of two ways. Either the federal government could cease taxing personal income altogether, as is proposed here, or it could take exclusive jurisdiction over personal income taxation. States may even be willing to relinquish their inherent authority to tax personal incomes in a manner that would pass constitutional muster.[313] But while eliminating state taxes on individual income has at least one advantage of requisitions finance,[314] it would also eviscerate the communitarian advantages discussed throughout Part III.

E. Undermining Network Externalities and Economies of Scale

By design, a requisitions structure would eliminate much of the uniformity characteristic of the current tax system as well as the many benefits that flow from having a uniform system. It would also erase the economies of scale that currently result from having a single federal agency monitor most of the nation's tax compliance. One should not mince words here: The efficiency costs of abandoning these benefits of the current tax regimes would be substantial.

Economists use the term "network externalities" to apply to gains generated by uniformity.[315] The federal tax system prompts a number of net-

---

311. *Cf.* Paul, *supra* note 310, at 216 (noting that even the 1986 federal tax reform law did not lower compliance costs for individual taxpayers).

312. *See* SHAVIRO, *supra* note 58, at 32.

313. For example, the federal government could provide the states with extremely compelling fiscal incentives to abandon their state income taxes.

314. Indeed, administrative efficiency would favor the centralized, uniform tax system over the devolved one. For instance, taxpayers who move from one state to another may benefit from not having to "re-learn" a new tax system with each move. And having a single uniform tax system would allow even greater information sharing among tax professionals—accountants, tax lawyers, etc.—about how to help taxpayers understand the code.

315. The widespread use of a single Windows-based computer operating system creates benefits for users, who can easily swap software, files, and know-how. The Windows example is an apt one because, like the uniform tax system, its dominance creates a dead weight loss to

work externalities. Among these are the ability of friends and relatives to share tax information across state lines, the widespread awareness of a uniform April 15 tax filing deadline, the low costs incurred by those who move from one state to another in learning how to comply with the tax laws of their new state, the ability of tax advisers to master a single code and assist distant clients, the availability of a large body of (ostensibly consistent) case law to govern disputes between taxpayers and the government, and the inability of tax evaders to escape punishment simply by moving from one state to another.

Some of these benefits might persist under a requisitions finance system. For example, if states believe that the benefits of keeping the April 15 filing deadline exceed any benefits from changing the date,[316] they likely would leave that aspect of the status quo unchanged. The states could arrange for reciprocal enforcement compacts, so as to assist each other in collecting from those who flee a jurisdiction to avoid paying taxes. Nor need the costs to citizens of learning a new tax system be overwhelming. Commercial tax preparers like H & R Block already handle a significant portion of the nation's personal income tax returns[317] and could facilitate the compliance of a new resident in exchange for a small fee. Moreover, it is important to recall that the baseline is a federal income tax system that is riddled with complexity. As a result, the administrative complexities encountered by a first-time state income tax filer in New York may well be dwarfed by the annual headaches encountered by those filling out the federal forms.[318] On the other hand, some network externality losses, such as the significant costs that would accompany any effort to develop new state-specific case law or the inability of tax professionals to assist out-of-state clients, may be unavoidable.

A related inefficiency would result from the elimination of the signifi-

---

society, caused by the lack of competitive market discipline. *See generally* John E. Lopatka & William H. Page, *Microsoft, Monopolization, and Network Externalities: Some Uses and Abuses of Economic Theory in Antitrust Decision Making*, 40 ANTITRUST BULL. 317 (1995).

316. For example, a state might decide that it has an interest in attracting "early bird" (or "eager beaver") residents; perhaps because state government officials predicted that early filers are also the kind of people who are more likely to seek preventive medical care, thereby lowering the burden on the state's medical insurance programs. To further this goal, the state could establish a March 15 deadline and lower taxes by some amount as an inducement to get early birds to move there.

317. *See* H & R Block, Inc., *Information and Services* (visited Nov. 28, 1998) <http://www.handrblock.com> (noting that H & R Block alone filed one out of every seven regular income tax returns filed with the IRS during the last year and 51% of all electronic returns).

318. Again, commercial preparers dramatically reduce these burdens in the status quo and would be expected to continue to do so under requisitions finance.

cant economies of scale that currently exist at the federal level. While federalism proponents are quick to point out that the advantages of economies of scale are often overestimated,[319] tax collection seems to be one area in which the economies of scale are real. The IRS acts as a central clearinghouse to enforce the tax laws, collect tax information, and answer taxpayers' questions. It has a significant presence in every state as well as an international enforcement presence. While populous states could probably derive many of these benefits from their own sizable tax enforcement regimes, albeit to a lesser degree, smaller states would be unable to do so. As a result, small states would have particularly strong incentives to adopt tax systems that are more easily administered. Unfortunately, regressive taxes are often the easiest to administer, so they might become increasingly popular in smaller states.[320]

Under the current system, the states administer their tax systems with an impressive degree of efficiency. State income tax collection costs range from 0.2 to 1.5 cents per dollar of tax revenue collected.[321] Once the costs of taxpayer compliance are included, the administrative cost of state collection is estimated to equal approximately five cents on the dollar.[322] That ratio compares favorably to estimates of compliance with the federal income tax.[323] But the low compliance costs incurred by the states result more from their revenue stream than from the quality of enforcement. The states rely largely on sales taxes, the compliance costs of which are generally lower than those of income taxes.[324] Under a requisitions finance system, it is likely that the states would rely more on income taxation and less on sales

---

319. *See* LeBoeuf, *supra* note 20, at 566 (arguing that most governmental activities are characterized by gross diseconomies of scale).

320. *See* HY & WAUGH, *supra* note 65, at 82 (noting that the sales tax has both these characteristics); Robert Eisner, *The Proposed Sales and Wage Tax–Fair, Flat, or Foolish?*, *in* FAIRNESS AND EFFICIENCY IN THE FLAT TAX 42, 68 (Robert E. Hall et al. eds., 1996) (noting the regressivity of a flat tax on consumption).

321. *See* Fox, *supra* note 56, at 1092 (surveying 26 states and quantifying their tax collection costs).

322. *See* Daniel Shaviro, *An Economic and Political Look at Federalism in Taxation*, 90 MICH. L. REV. 895, 920 (1992).

323. *See* M. Bernard Aidinoff et al., *Report and Recommendations on Taxpayer Compliance*, 41 TAX LAW. 329, 335 (1988); Walter T. Henderson, Jr., Comment, *Criminal Liability Under the Internal Revenue Code: A Proposal To Make the "Voluntary" Compliance System a Little Less "Voluntary,"* 140 U. PA. L. REV. 1429, 1430 (1992).

324. *See* JOHN F. DUE & JOHN L. MIKESELL, SALES TAXATION: STATE AND LOCAL STRUCTURE AND ADMINISTRATION 323-25 (1983) (estimating administrative costs to equal 0.73% of revenues collected and taxpayer compliance costs to account for 3.93%); WASHINGTON STATE DEP'T OF REVENUE, PROGRAM ADMIN. SECTION, TAX ADMINISTRATION SURVEY 20 (1988) (estimating administrative costs of .93%).

taxation,[325] resulting in higher compliance costs, but also more equitable bases for state taxation.

In addition, state compliance costs are artificially depressed because state governments are able to piggy-back on the IRS's enforcement efforts in income tax collection.[326] As a result, "state enforcement levels are quite low in comparison with federal enforcement levels, especially in regard to the individual income tax."[327] While some states, such as Oregon, have implemented significant, and profitable,[328] enforcement efforts, and experience higher levels of compliance as a result, other states "undertake no independent audit efforts,"[329] preferring to rely entirely on information

325. The idea here is that state governments tax sales heavily because the federal government has largely crowded them out of taxing income. *See* James M. Buchanan, *Financing a Viable Federalism*, *in* STATE AND LOCAL TAX PROBLEMS 3, 11 (Henry L. Johnson ed., 1969) (discussing the inherent tradeoff between the ability of the state and federal governments to collect tax revenues); Liner, *supra* note 40, at 13 ("One of the central tenets of devolution is that the tax-paying capacity that once went to federal income taxes has now been released for states and localities to absorb."); *cf.* HY & WAUGH, *supra* note 65, at 31 (arguing that the reason local governments rely so heavily on property taxes is not because of their inherent appeal, but rather because federal and state taxing authorities have left property as a largely untapped source of revenue); Metcalf, *supra* note 205, at 60-61 (noting that during the 1980s [a period in which federal taxes on individual incomes were reduced] the states increasingly came to rely on personal income taxes for revenues); Werner W. Pommerehne, *Quantitative Aspects of Federalism: A Study of Six Countries*, *in* THE POLITICAL ECONOMY OF FISCAL FEDERALISM, *supra* note 85, at 275, 283 ("[In Canada o]ver the last decade, the federal government has substantially reduced its personal income tax and corporation income tax in order to make room for corresponding provincial taxes."). Here it is also worth recalling, as a caveat, the earlier discussion of the potential for a requisitions-induced shift away from income taxes and toward property taxes. *See supra* text accompanying notes 298-300 (noting that states have incentives to tax unmovable property, but that owners of that property may have equally strong incentives to challenge such taxation through the democratic process).

326. *See* David Brunori, *State Personal Income Taxation in the Twenty-First Century*, *in* THE FUTURE OF STATE TAXATION, *supra* note 61, at 191, 197, 203; Michael Mazerov et al., *Federal Tax Restructuring and State and Local Governments: An Introduction to the Issues and the Literature*, 33 SAN DIEGO L. REV. 1459, 1470 (1996) ("[S]tates rely extensively on federal audit and compliance programs for their own purposes and are reliant as well on federal information reporting and withholding rules for their own administration."). State tax enforcement authorities also share information with the federal government, *see* BREAK, *supra* note 144, at 36, thus lowering federal compliance costs somewhat. It is likely, however, that this relationship involves far more "take" than "give" for the states.

327. James Alm et al., *The Relationship Between State and Federal Tax Audits*, *in* EMPIRICAL FOUNDATIONS OF HOUSEHOLD TAXATION 235, 236 (Martin Feldstein & James M. Poterba eds., 1996).

328. *See* Harley T. Duncan, *State Legislators and Tax Administrators: Can We Talk?*, *in* THE UNFINISHED AGENDA FOR STATE TAX REFORM, *supra* note 63, at 83, 93 (describing the successes of various state programs).

329. Alm et al., *supra* note 327, at 237.

obtained from the IRS.[330] Compared to the current system, the prospect of fifty different tax collection authorities presents the prospect of much duplicated work, significant skill redundancy, and an accountant's full employment act.

F. *EXACERBATING TAX EXPORTING PROBLEMS*

Much tax litigation arises because of state efforts to raise revenues by taxing out-of-state residents.[331] Such activity presents a classic challenge to democracy. States can fund the activities of insiders by taxing those whose status as outsiders precludes them from voting to protect their economic interests. If State *A* taxes *B*'s residents, *B* can always enact similar policies to burden *A*'s residents. Such a war of escalating taxation would undoubtedly engender an undesirably high level of taxation on interstate economic activity in both states, and result in political problems for governments on both sides of the border. This potential dynamic helps make cooperation among states the prevailing norm in this context. But because some states have stronger economic positions than their neighbors, there is sometimes an imbalance of power between the states on the issue of interstate taxation.[332] Thus, the incentive for states to cooperate on tax matters is strong, but not overwhelming.

At least two harms can result when one state taxes another state's residents. First, the taxation of non-voters is troubling because the usual check against "excessive" taxation—citizen revolt at the ballot box—is eliminated. In response to State *A*'s tax exporting, people who work in State *A*, but live in State *B*, essentially have three options: They can expend financial resources to try to influence State *A*'s elected officials or voters; they can de-

330. *See id.* at 236 ("[T]he states rely extensively on information provided by the IRS through its revenue agent reports (RARs) on federal audits and its CP2000 notices on federal reporting discrepancies identified through the Information Returns Program.").

331. *See* HELLERSTEIN & HELLERSTEIN, *supra* note 189, at 941-60.

332. *See* SHAVIRO, *supra* note 58, at 73. Some states simply have more non-residents who want to work in their states than residents who want to work in neighboring states. For example, New York state's labor pool draws heavily from New Jersey. By instituting a payroll or sales tax, New York could legitimately tax out-of-state residents. As long as in-state residents paid the same tax, the scheme would certainly withstand constitutional muster. *See* Commonwealth Edison Co. v. Montana, 453 U.S. 609, 617-18 (1981). New Jersey would have a more difficult time retaliating by using a seemingly neutral taxing mechanism because few New York residents work in New Jersey. *See In re* Speno, 319 N.E.2d 180 (N.Y. 1974) (discussing and adjudicating one such scheme). This effect could be self-reinforcing if the following scenario occurs: New York raises its payroll tax while lowering its income tax by a corresponding amount. The net result is a shift of the tax burden from residents to non-residents. That results in some New Jersey residents moving to New York in order to benefit from this burden shifting. This influx would, in turn, raise New York property values, providing a further economic benefit to New Yorkers.

mand higher wages if they are to work in State *A*; or they can relocate to State *A*. The first option represents a rather inefficient use of societal resources, and may well prove unsuccessful even if much money is spent. The second option can have one of two consequences: Either employers can coalesce, and raise wages for out-of-state workers,[333] or they can refuse to do so, which might prompt out-of-state workers to leave jobs that they would otherwise keep if they lived in-state. The third option would have positive effects on property values (and hence property tax revenues) in State *A*. In that respect, it could reinforce an already powerful incentive to tax "those fellows behind the tree," with the tree representing the state border in this case.[334]

A second, related, undesirable aspect of a regime in which state governments have an incentive to tax out-of-state residents concerns the potential for inequitable double taxation. For example, assume that State *D* earns most of its revenue through a sales tax, and because many residents of State *E* work and shop in State *D*, this taxation scheme represents a significant shifting of the tax burden to out-of-state residents. Assume also that State *E* finances its government almost entirely through an income tax. Someone who lives in State *D*, but works and shops in State *E*, will escape a great deal of taxation, while someone who lives in State *E*, but works and shops in State *D*, will be relatively overburdened by taxes.[335]

Opponents of state autonomy over taxation observe that this double taxation creates inequities among similarly situated taxpayers and causes distortions in the marketplace. Obviously, some people, particularly the wealthy, will have financial incentives to reside in State *D*, even if, in the absence of a tax regime, they would prefer to live in State *E*.[336] That said, this is exactly the type of behavioral distortion praised by advocates of the Tiebout hypothesis.[337] Yet in this instance, because of the government's invidious purpose in establishing a tax regime that treats commuters unfairly, the state's innovative approach to taxation hardly seems laudable.

The empirical evidence indicates that tax exporting is already a problem, although not a particularly serious one. An exhaustive study of tax

333. In-state residents might complain that they too deserve pay raises commensurate with those of their out-of-state colleagues. Employers could disguise the out-of-state workers' pay raises as a "commuter subsidy," but then it would need to be paid to residents who commute from New York's far northern suburbs as well.

334. *See supra* note 332.

335. *Cf.* SELIGMAN, *supra* note 14, at 647 (addressing double-taxation problems under such circumstances); SHAVIRO, *supra* note 58, at 20, 21, 74 (discussing the potential for such double taxation).

336. *See* SHAVIRO, *supra* note 58, at 9 (discussing this possibility).

337. Of course, that may say more about the uneasy normative case for a Tiebout world than anything else.

exporting revealed that "exported taxes accounted for about 21 percent of all state-local tax receipts."[338] For individual income taxes, this figure may reach as high as 27.1%.[339] That is a misleading figure, however, because most of the tax exporting so described consists of the various states exporting taxes to the federal tax base through offsets for state income tax liability.[340] Indeed, Donald Phares concludes that state income tax shifting by one state to another accounted for only $300 million of $5.5 billion collected (an export rate of approximately 5.5%).[341] Moreover, state corporate income taxes, not individual income taxes, present the greatest challenge to foes of tax exporting.[342] Admittedly, though, requisitions finance would increase the states' financial incentives to try to export an increasing percentage of their taxes to outsiders. For that reason, if requisitions finance were adopted, Congress might wish to consider imposing a limit on tax exporting.[343]

G. *Raising the Stakes of Income Apportionment Disputes*

There is currently a great deal of debate over how best to apportion income for state taxation purposes.[344] Put simply, if an Ohio resident works in Kentucky, has an interest-bearing bank account in Indiana, owns a stake in a valuable commercial development in Missouri, and receives a pension from her earlier service in the U.S. military, paying state taxes is a complex affair.

The states have the power to tax all personal income earned by their residents.[345] The states also have the power to tax the income of nonresidents if earned from sources within the state.[346] These two bases of taxation obviously overlap, and the potential for double-taxation exists. In order to guard against that risk, the states have cooperated substantially. Each state that has a broad-based personal income tax allows its residents to claim tax

---

338. DONALD PHARES, WHO PAYS STATE AND LOCAL TAXES? 63 (1980).

339. *See id.* at 67 tbl.4-3.

340. *See id.* at 72.

341. *See id.* at 72 n.h.

342. *See id.* at 72 ("The greatest propensity for exportability is manifest by the corporation net income tax at an average of 43.7 percent; the high and low is between New York and Rhode Island at 51 percent and Pennsylvania at 38 percent.").

343. *See infra* notes 364-366 and accompanying text (describing how Congress could limit tax exporting using its Commerce Clause authority or financial incentives).

344. *See* RAIMONDO, *supra* note 102, at 190-92 (providing an overview on some of the debates).

345. *See* New York ex rel. Cohn v. Graves, 300 U.S. 308, 315 (1937).

346. *See* Travis v. Yale & Towne Mfg. Co., 252 U.S. 60, 80 (1920).

credits for taxes paid to other states.[347] Nevertheless, some complexity remains because the states do not implement their rules in exactly the same manner.[348]

Many other complexities arise because of a lack of uniformity. It seems likely that the law would be made even more complex if the states were responsible for raising a much greater amount of tax revenue than they currently do. State experimentation in the policy realm would prompt the creation of a greater multiplicity of innovative laws, necessitating equally innovative apportionment solutions. Furthermore, each state would have a great incentive to tax all income to which it could plausibly claim some tie. The most efficient administrative rules, which would involve taxing all income either in the state earned,[349] or in the state of the taxpayer's domicile,[350] regardless of where it was earned, have never been completely adopted. Most likely, the states have not agreed on a uniform system for apportioning tax revenue among themselves[351] because of vested interests. Assuming that states are acting rationally, those states that feel they have more leverage than their counterparts in over-reaching to collect revenues will not ratify a uniformity agreement unless the efficiency losses to the state government from the lack of uniform rules exceed the revenue they would lose under a uniformity agreement. Again, this problem might lend itself to federal intervention if a requisitions finance scheme were adopted.[352]

---

347. *See* Kathryn L. Moore, *State and Local Taxation: When Will Congress Intervene?*, 23 J. LEGIS. 171, 174 (1997).

348. *See id.* (comparing the Kentucky and California rules).

349. *See* Walter Hellerstein, *Some Reflections on the State Taxation of a Nonresident's Personal Income*, 72 MICH. L. REV. 1309, 1310 (1972).

350. *See* HELLERSTEIN & HELLERSTEIN, *supra* note 189, at 965-68 (discussing the fact that most states tax all income of residents, even if that requires double taxation of some income, and explaining the complex rules for determining a taxpayer's place of residence).

351. Daniel Shaviro notes that only half of all states have substantially enacted the Uniform Division of Income for Tax Purposes Act. *See* SHAVIRO, *supra* note 58, at 72 n.13.

352. An interesting related question, which might well prompt federal action in the future, is how to apportion income by "telecommuters," who live in one state, but are "employed" in another, perhaps quite distant, state. As the United States enters an information-based economy, and the percentage of people so employed increases exponentially, some apportionment rule will have to be developed. Exclusive taxing authority for the state of residence seems like the rational answer, but vested interests could well defeat its enactment. After all, such a rule would likely benefit states such as Hawaii, California, Colorado, and Florida, at the expense of Northeastern and Rust Belt states. For a preliminary discussion, see Walter Hellerstein, *Electronic Commerce and the Future of State Taxation*, *in* THE FUTURE OF STATE TAXATION, *supra* note 61, at 207.

V. IMPLEMENTATION AND INSTITUTIONAL VARIATIONS

Those readers wishing to see a detailed framework exhaustively setting forth how a requisitions finance program should be implemented are likely to be disappointed by the Part that follows. This Article's ambition is to demonstrate why requisitions finance is an idea worth considering. For that purpose, a broad outline and theoretical defense will suffice. Still, some consideration of practicalities to be confronted in a requisitions world will no doubt prove provocative, as will a discussion of possible modifications to the program that would mitigate some of the utilitarian disadvantages mentioned above while still leaving the program's basic principles intact.

A. How Do You Get There from Here?

Returning to requisitions finance would entail enormous alterations in the existing system of revenue collection. Accordingly, it raises logistical complexities of an almost unprecedented dimension. Accurately estimating the costs of such a fundamental shift in federal tax policy is impossible, given the uncertainty involved and complexity of the underlying calculations. This section identifies some of the more important transition costs and challenges.

An entire generation of tax collectors, accountants, financial advisers, lawyers, and taxpayers are trained to enforce (and circumvent) the existing Internal Revenue Code. Requisitions finance would force them to spend a great deal of time learning about the tax codes of their respective states or else face the prospect of finding gainful employment in another industry. Moreover, state governments would be forced to make a series of new decisions, craft new laws, hire new professionals, and devote significant resources to adapting to life in a requisitions world. Some states would choose to overlay their existing tax structure with higher rates, so that requisition payments could be made to the federal government. But many states might (and should) see the adoption of requisitions finance as an opportunity to experiment, and develop new revenue streams (especially in the personal income tax arena, which will have been abandoned by the federal government). These policy changes will require significant legislative and administrative costs at the state level.

Analysts who have studied the costs of transitioning from the current income tax to a flat tax have suggested that the costs would be very significant in the short run.[353] Not surprisingly, advocates of a flat tax argue that,

---

353. *See* Eisner, *supra* note 320, at 82-83 (discussing the problems of dislocations associated with such a transition); Alan Schenk, *The Plethora of Consumption Tax Proposals: Putting the Value Added Tax, Flat Tax, Retail Sales Tax, and USA Tax into Perspective*, 33 SAN DIEGO L. REV. 1281, 1317-26 (1996) (discussing the complexities involved in switching an economy from an in-

in the long run, these costs will be dwarfed by the efficiency gains produced by such a shift.[354] The same dynamic exists with respect to a transition to requisitions finance. The costs of a transition are likely to be quite high in the short term, although perhaps lower than they would be under a flat tax transition, because requisitions finance would build upon pre-existing state tax-compliance infrastructures. Ultimately, however, the utilitarian benefits described in the previous sections should carry the day. That said, since the cost-benefit comparisons made therein do not lead to the inexorable conclusion that the benefits will necessarily outweigh the costs, the uncertainty of the transition costs should make a prudent policymaker nervous about adopting a requisitions finance approach.

A second important issue that requires clarification concerns the federal government's method of apportioning the federal tax bill among the states. A few years ago, when Congress considered changes in the Medicaid program that benefited some states at the expense of others, the political debate proved quite acrimonious.[355] Obviously, the stakes in Congress would be enormous when this issue arose.[356] The seemingly neutral, and thus the least contentious, solution would require requisition payments in proportion to taxable income of each states' residents under the old Internal Revenue Code. But the battle over which payment periods should constitute the baseline will be hard-fought. Choosing the year of enactment, or an average of the previous 3, 5, 10 or 20 years—all defensible options for the baseline period according to which past tax payments are calculated—will each create winners and losers among the states. States having experienced recent growth would demand a longer period, while states in a recession would fight for a shorter one. The debate over whether the current baseline should be tweaked to favor poorer states more than the current system does, on the grounds that requisitions finance will prompt less redistribution than the status quo, will also be lively.[357] Representatives from

---

come-tax based system to a consumption-tax based system).

354. *See* Richard L. Doernberg, *A Workable Flat Tax Consumption Tax*, 70 IOWA L. REV. 425, 482-84 (1985); Robert E. Hall & Alvin Rabushka, *Putting the Flat Tax into Action*, *in* FAIRNESS AND EFFICIENCY IN THE FLAT TAX, *supra* note 320, at 3, 23-26.

355. For an overview of the debate and its presumptive winners and losers, see Colette Fraley, *States Guard Their Borders as Medicaid Talks Begin*, CONG. Q. WKLY. REP., June 13, 1995, at 1637.

356. The battle's intensity might be stemmed somewhat if states do not act like pure rent seekers in trying to negotiate a formula. Public-spirited negotiations are not outside the realm of possibility, since public opinion polls have, in the past, shown broad support for federal redistribution from rich to poor states. *See* ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, CHANGING PUBLIC ATTITUDES ON GOVERNMENTS AND TAXES tbl.12-1 (1983).

357. The Article assumes here that the Musgrave theory, not the Pauly counter-theory, remains the conventional wisdom.

richer states will argue that the poorer states should be favored on the federal spending side, but that the basis for tax apportionment should be neutral. Representatives from poorer states will note the inherently contingent nature of federal governmental spending in a requisitions era and will claim that grandfathering some level of redistribution into the system via the initial baseline for apportionment provides the only solid protection for their interests. Congress will have to compromise with respect to these and other interstate disputes, and it is likely that the compromises themselves will be littered with distortions of a pure requisitions system. In any event, once Congress has agreed upon a baseline, developing a formula by which to adjust each state's annual bill to reflect changing economic conditions will prove a relatively simple task.

This brief discussion of the formula shows how to address lingering concerns that a requisitions finance system would be less progressive than the current tax system. Requisitions finance would replace a system in which wealth is redistributed from richer taxpayers to poorer taxpayers with one in which income is redistributed from richer states to poorer states. Those who value the present degree of progressivity in the current system can take steps to ensure that the federal taxing scheme retains its general progressivity by adjusting the requisition quotas to favor poorer states to a greater degree. Admittedly, there is nothing in a requisitions arrangement on its face that prevents poorer states from using this bounty to provide tax reductions that primarily benefit wealthier residents. But poorer states are precisely those likely to have a large block of poorer voters who will have an incentive to organize against such regressive measures.[358] The states that would lose from such redistribution will, *ceteris paribus*, have fewer poor residents who will be burdened by such a shift.[359] Thus, tax benefits to poor states may be nearly as effective in helping out the poorest Americans as direct tax breaks for poor Americans granted by the federal government.

A third transition challenge concerns the speed with which the states would be able to strengthen enforcement efforts. As was noted in an earlier

358. This analysis by no means ignores the reality that a wealthy citizen has more clout and more access to government that a poor citizen.

359. Of course, this line of analysis depends on an assumption that income is normally distributed around each state's mean. If a rich state has a small number of extremely wealthy residents and a large number of poor residents, i.e. if there is a bipolar distribution of wealth, it could conceivably have a higher per capita income than a largely middle class state with few residents below the poverty line. But this complication can be essentially ignored since American states tend not to have bipolar wealth distributions. Louisiana has 26.4% of its residents living below the poverty line, which is the highest in the United States. The national average in 1993 was 15.1%. *See* U.S. DEP'T OF COMMERCE, *supra* note 51, at 482. Regional variations in wealth distribution are also minor. *See id.* at 476.

discussion, state tax authorities largely piggy-back upon existing federal collection efforts.[360] In order to collect revenues in a world without IRS collection of personal individual taxes, the states would need to step up their enforcement quickly. The short-term challenges for state governments in administering state income tax systems on their own would be enormous.[361] This factor suggests that the shift to requisitions finance should be phased in. This would give states enough time to develop more rigorous collection schemes. It is likely that many current IRS employees would seek jobs at the state level—a fact that would lessen the administrative burdens of the transition.

B. INSTITUTIONAL VARIATIONS

In addition to phasing in requisitions finance arrangement so as to ease the transitional burdens, several other institutional arrangements might help a requisitions system function more efficiently.

As argued in Part IV.A, an effort by the federal government, or another central entity, to collect data on the effectiveness of various state experiments in the tax policy realm would further the goal of allowing states to learn from each other's successes and failures. In order to maximize the generalizability of such data, it would be important to ensure that the data collection occurred in a uniform manner, using the same methodology. Centralized data collection would also remove economic analysis from the state government apparatus, thereby minimizing pressure to manipulate the data so as to bolster the reelection prospects of an innovative plan's proponents.[362] It also would facilitate greater "technology transfer" as economists from the Office of Management and Budget, Congressional Budget Office, and Treasury Department could develop ways to alter their current practices to account for the unique challenges that state-level data collection poses.

Part IV.E pointed to the dangers of unrestrained tax exporting under a requisitions finance scheme. With states responsible for collecting the bulk of the nation's taxes, the temptation to collect as much revenue as possible from residents of another state would be particularly strong. This

360. *See supra* text accompanying note 326.

361. *See* Steven Sheffrin, *Should the Federal Income Tax Be Replaced with a National Sales Tax?*, STATE TAX NOTES, Oct. 21, 1996, at 1147 (discussing the difficulties the states will encounter in collecting their income taxes if the federal income tax is replaced by a national sales tax).

362. The underlying assumption here is not that analysis will be more accurate when performed at the federal level, but that the analysis will be more accurate when performed by analysts working for politicians who have little or no vested interest in a favorable assessment of a given program.

dynamic might cause current state-to-state tax exporting, which currently accounts for only 5.5% of all taxes collected by the states,[363] to mushroom into a much more significant problem. Even if the percentage of taxes that are exported remained unchanged, the magnitude of the problem would change simply because the amount of revenue at issue would be much greater. There are two lines of attack on state tax exporting that might be implemented under a requisitions finance regime.

The first approach would employ judicially enforceable limits on tax exporting. The Supreme Court has interpreted the Constitution to establish few limits on one state's power to tax another state's residents.[364] In order to prompt judicial intervention, Congress would need to act under its statutory authority to limit state taxes that primarily burden out-of-state residents. For example, Congress might give one state a cause of action in the federal courts when its residents are burdened disproportionately by taxes imposed by another state.[365] A prevailing state could recover the revenues collected from its residents, in addition to a penalty, so as to deter future tax exporting. Congress would be permitted to enact such legislation under its Commerce Clause authority. After all, a plausible argument could be made that the double-taxation that often results from state tax exporting hinders interstate commerce by making individuals more reluctant to engage in out-of-state transactions.

In the alternative, Congress could enforce such constraints on tax exporting without court intervention. Every year Congress could survey the extent to which each state exported taxes to its neighbors. Although the exact formula by which such calculations should be made would be open to some debate, Donald Phares's methodology presents an excellent starting

---

363. *See supra* text accompanying note 341.

364. *See generally* Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981) (holding that a Montana coal tax that imposes 90% of its burden on out-of-state consumers of coal is not invalid under either the Commerce or Supremacy Clauses); Walter Hellerstein, *Complementary Taxes as a Defense to Unconstitutional State Tax Discrimination*, 39 TAX LAW. 405 (1986) (noting that the Supreme Court's expansive interpretation of the complementary tax doctrine has prevented the invalidation of many taxes that impose discriminatory burdens on out-of-state firms); Ferdinand P. Schoettle, *Commerce Clause Challenges to State Taxes*, 75 MINN. L. REV. 907 (1991) (arguing for more strenuous review under the Commerce Clause, based on the economic effects of the tax at issue).

365. The Supreme Court's recent Eleventh Amendment sovereign immunity jurisprudence, which began with *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), has not re-considered whether Congress can abrogate one state's sovereign immunity against suits by another state. The Supreme Court has held that when they ratified the Constitution, the states waived their sovereign immunity in suits instituted by other states. *See* Virginia v. West Virginia, 206 U.S. 290, 319 (1907). But even if the Court continues its current trend toward expanding Eleventh Amendment protections by overruling *Virginia*, Congress could require any state seeking to participate in a requisitions program to waive its sovereign immunity in such suits.

point.[366] Congress could then adjust each state's quota due under a requisitions finance scheme to account for the previous year's net gains or losses resulting from tax exporting. Such an arrangement would ensure that states had no incentive to innovate outside their own borders. Given the heightened temptation to engage in tax exporting that would result from a switch to requisitions, the implementation of an anti-exporting regime is both logical and necessary.

A different kind of institutional variation would be a scaled-back form of requisitions finance. The requisitions finance approach presented here is nearly revolutionary in character. But requisitions finance is reasonably well-suited to incrementalism, which distinguishes it from a flat tax, for example, which is more of an all-or-nothing fiscal reform. Requisitions finance could be designed to replace merely half of the federal individual income tax's revenues. The federal government could then either eliminate the individual income tax and raise other federal taxes accordingly or retain the federal income tax while cutting rates or raising exemptions substantially. A partial requisitions finance package might allay the fears of the faint-hearted about the instability that would result from radical change. At the same time, shifting the balance so that the federal government no longer collected the majority of the tax dollars in the United States could reinvigorate the states as fiscal communities.

Part II.D described the importance of mobility as a means of ensuring that citizens can benefit from the differentiation among communities in the different states. If a citizen cannot afford to leave his current state of residence, then the fact that there is another state offering a package of goods, services, and social environments better suited to his preferences does him no good. In order to make citizens better able to enjoy the advantages of living in the community that feels most like "home," Congress may wish to enact a mobility subsidy in order to make it easier for residents to relocate in a new state.[367] By directly subsidizing one of the activities that is to be encouraged, mobility advocates could ensure that the financial benefits that some states would use to entice certain residents would not be dwarfed by the costs of moving from one state to another.

In conclusion, one nuance is worth noting. The mix of communitarian

---

366. *See* PHARES, *supra* note 338.

367. While intrastate mobility subsidies have been considered as a means of decreasing residential segregation by race, *see* Richard H. Sander, Comment, *Individual Rights and Demographic Realities: The Problem of Fair Housing*, 82 NW U. L. REV. 874, 928-30 (1988), they have not been considered in the interstate context as a means of allowing U.S. citizens to find their way to their preferred states. Such a proposal is, in and of itself, adequate fodder for another law review article. This Article shall only note the extent to which a federally funded program might help foster many of the communitarian benefits discussed *supra* Part III.

and utilitarian benefits will not be uniform among the states. Rather, the communitarian benefits—heightened identity, greater cohesion, and increased affinity for local redistribution, for example—will be greatest in those states that most closely resemble communities, i.e., the smaller states. Yet these same states will have the greatest difficulty dealing with utilitarian problems such as income exporting and lost economies of scale. Larger states, by contrast, will be better able to cope with some of these utilitarian difficulties, but will also reap the fewest communitarian benefits, since their sheer size and heterogeneity of residents may well preclude a much greater sense of cohesion than currently exists in the nation as a whole. Thus, what one thinks of requisitions finance may depend not only on one's worldview, but on where one has chosen to live.

This dynamic suggests a final institutional variation on requisitions finance: a sub-requisitions scheme. If certain states are simply too large to claim requisitions' communitarian benefits, then state governments might themselves employ requisitions finance. State governments could require every county or parish, every metropolitan area or rural community, or perhaps even every neighborhood to send a predetermined amount of revenue to the state capital. Such an arrangement would raise real Musgravian concerns about the possibilities for wealthier taxpayers to avoid progressive taxes, and essentially eliminate economies of scale in revenue collection. But it would truly bring communities together every year to answer the question of who should bear the burden of providing the government with its revenues. In the process, communities would gain an annual opportunity to redefine themselves.

VI. CONCLUSION

It may well be time to restore the requisitions concept to the mainstream of American political discourse after two-hundred years of exile. This Article has argued that the communitarian case for requisitions finance in the modern American state is strong. A return to requisitions should strengthen the state governments, boost political participation, curtail political alienation, and restore state loyalty as a primary basis for citizen identity. Requisitions would likely allow states to better differentiate themselves from each other, giving citizens greater choice to determine the types of communities in which they wish to live. Finally, it would increase support for redistribution, and may, in the aggregate, prompt higher levels of income redistribution than currently exist by tapping into taxpayers' desires for charity to begin at home.

At the same time, a utilitarian analysis brings to light several uncertainties with respect to a desirability of requisitions finance. On the one hand, requisitions finance may foster valuable experimentation by states that can lead to the adoption of well-tested and efficient revenue-raising mechanisms, permit better tailoring of tax code stimulus measures that coincide with local conditions, prompt efficiency-enhancing competition among the states, and save taxpayers time and money by eliminating the double-filing requirement for individuals. On the other hand, requisitions finance would likely exacerbate the inefficiencies that result from tax exporting and income apportionment ambiguity. The transition costs of moving to a requisitions system would be significant, and, most importantly, major efficiencies that currently result from economies of scale under a centralized system of revenue collection would dissipate. Many of these utilitarian drawbacks can be addressed through creative implementation mechanisms. But given the high degree of uncertainty involved, the utilitarian should treat requisitions finance as an intriguing proposal worthy of study, not immediate enactment.

Whether one is ready to support a modern requisitions system may boil down to whether one subscribes to a utilitarian or communitarian world view. In the tax policy realm, the former camp clearly dominates, which perhaps helps explain why requisitions finance has been neglected for so long. But in political philosophy circles, communitarianism appears to be ascending, which suggests that requisitions finance may meet with an increasingly warm reception in the decades ahead.

In the past decade or so, the Supreme Court has handed down a series of decisions that expand the power of state governments at the expense of the federal government's authority.[368] These decisions have not been popular within the legal academy, to put it mildly.[369] Indeed, the legal

368. *See, e.g.*, Kimel v. Florida Bd. of Regents, 120 S. Ct. 631 (2000) (holding that Congress's purported abrogation of state sovereign immunity in the ADEA exceeded its authority under § 5 of the Fourteenth Amendment); Alden v. Maine, 527 U.S. 706 (1999) (holding that Congress cannot abrogate states' sovereign immunity pursuant to its Article I power); College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999) (holding that constructive waiver of sovereign immunity by states is not valid); Printz v. United States, 521 U.S. 898 (1997) (holding the Brady Act provision requiring local police chiefs to conduct background checks on proposed handgun transfers unconstitutional); *Seminole Tribe*, 517 U.S. at 44 (holding that Congress has no power under the Indian Commerce Clause to abrogate state sovereign immunity); United States v. Lopez, 514 U.S. 549 (1995) (holding that the Gun Free School Zones Act of 1990, 18 U.S.C.S. 922(g)(1)(A), exceeds Congress's Commerce Clause authority).

369. *See generally* Herbert Hovenkamp, *Judicial Restraint and Constitutional Federalism: The Supreme Court's* Lopez *and* Seminole Tribe *Decisions*, 96 COLUM. L. REV. 2213 (1996); Vicki C. Jackson, Seminole Tribe, *The Eleventh Amendment, and the Potential Evisceration of* Ex Parte Young, 72 N.Y.U. L. REV. 495 (1997); Henry Paul Monaghan, Comment, *The Sovereign Immunity "Exception,"* 110 HARV. L. REV. 102 (1996); *see also Seminole Tribe*, 517 U.S. at 100, 110 n.8 (Souter, J., dissenting) (pointing to the clear consensus in pre-*Seminole Tribe* scholarship that

academy is dominated by members who came of age during an era when some state governments were engaged in systematic efforts to violate the rights of African Americans, and, thus, such disdain is perfectly understandable. Moreover, some of the same Justices who are receptive to reasserting the role of the states in the federal system sometimes recognize that, even today, states can be agents of oppression.[370] Nevertheless, a sympathetic reader of the recent jurisprudence envisions a majority normatively drawn to an optimistic assessment of what modern states can accomplish. The Court's federalism decisions will certainly alter the behavior of states governments, and only time will tell whether the states prudently exercise the power with which the Court has entrusted them.

Requisitions finance can be understood as another experiment to give the states enhanced authority and to see whether they use it wisely. But while the federalism cases can be overturned only by a constitutional amendment or by a change in the composition of the Court,[371] requisitions can be enacted or repealed by democratic decision-makers. And while the federalism cases will probably do little to reinvigorate participatory government or a sense of community at the state level, requisitions would do much. Like the federalism cases, however, requisitions finance entails placing a great deal of trust in the state governments. In the pre-Constitutional era, such trust was misplaced, as evidenced by the states' failure to meet their requisition obligations. But as the states have matured, they seem to have earned a second chance. Today's challenge in assessing requisitions is a familiar one: Envision the states, not as they are or were, but as they might be.

---

had rejected the views the Court's majority was now embracing).

370. *See* Romer v. Evans, 517 U.S. 620, 634 (1996) (striking down a discriminatory state constitutional provision that raised an "inevitable inference that the disadvantage imposed is born of animosity toward" homosexuals). Justice Kennedy wrote the majority opinion in *Romer* that was joined by five Justices, including Justice O'Connor.

371. The dissenters in the *Seminole Tribe* line of cases have essentially made it clear that they will overturn that precedent if and when they obtain the fifth vote necessary to do so. In his dissent in *Kimel*, for example, Justice Stevens noted:

> Despite my respect for stare decisis, I am unwilling to accept *Seminole Tribe* as controlling precedent. First and foremost, the reasoning of that opinion is so profoundly mistaken and so fundamentally inconsistent with the Framers' conception of the constitutional order that it has forsaken any claim to the usual deference or respect owed to decisions of this Court. . . . The kind of judicial activism manifested in cases like *Seminole Tribe* . . . represents such a radical departure from the proper role of this Court that it should be opposed whenever the opportunity arises.

Kimel, 120 S. Ct. at 650, 653-54 (Stevens, J., dissenting).