

TAX LEGISLATION AND DEMOCRATIC DISCOURSE: THE RHETORIC OF REVENUE AND POLITICS

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I. INTRODUCTION

In *Guinn v. Legislature of Nevada*,¹ decided on September 17, 2003, the Nevada Supreme Court issued what may be among the most widely-read dismissals of a petition for rehearing. The case involved a clash of state constitutional provisions. On the one hand, the Nevada Constitution provides that revenue and tax bills must pass by a two-thirds majority of the State Senate and the State Assembly.² On the other hand, the Nevada Constitution requires both a balanced budget and full funding of education.³ *Guinn* arose when the Nevada Legislature was able to pass, by a simple majority, a balanced budget to fund education but was unable to clear the supermajority hurdle imposed on the associated revenue bill necessary to pay for majority-approved expenditures.

The impasse was resolved when the Nevada Supreme Court held that the “procedure” of the supermajority requirement would have to yield to the “substance” of the balanced budget requirement.⁴ Armed with this opinion, the Nevada Legislature passed, by a simple majority, a revenue bill that balanced the budget. The September 2003 *Guinn* case was the result of action following the Legislature’s passage of the bill and essentially was an attempt to rehear the matter. Given the Legislature’s passage of the revenue bill, the Nevada Supreme Court took the expedient route and declared the petition moot.⁵

The case is intriguing from a variety of perspectives. At the outset, it bears mention that legislation and law-making are not always pretty. To my constitutional law colleagues, it is both grist for the tie-breaking mechanisms

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¹ 76 P.3d 22 (Nev. 2003).

² NEV. CONST. art. IV, § 18, cl. 2; *Guinn*, 76 P.3d at 25-26.

³ *Id.* at 29.

⁴ More specifically, the Nevada Supreme Court in *Guinn* draws “a distinction between substantive requirements of the government and procedural requirements of the legislative process.” Robert Ward Shaw, *The States, Balanced Budgets, and Fundamental Shifts in Federalism*, 82 N.C. L. REV. 1195, 1226 (2004).

⁵ *Guinn*, 76 P.3d at 33.

that constitutional law provides and the stuff of high theory.⁶ For these scholars, it is instructive that *Guinn* harkens to the roots of the Republic by its reference to *Marbury v. Madison*⁷ as guidance for resolution of the impasse.

The case is also intriguing because it showcases the clash between revenue and politics. This clash is not new. Indeed, in the early days of the nation, Chief Justice Marshall recognized that the power to tax depended on the populace's confidence that it would not be abused.⁸ The enduring relevance of Marshall's assessment is borne out by the observation of presidential biographer and syndicated columnist Richard Reeves that "No one remembers whether Lincoln balanced the budget."⁹ Reeves' statement is a remarkable insight into the legacy of governments, presidencies, and presidents.

Reeves actually makes two separate points. First, he makes the almost obvious observation that Presidents and political leaders are remembered not for their fiscal prowess but for their leadership under crisis. Lincoln, thus, is remembered for his extraordinary leadership at a key juncture of the Nation's history.¹⁰ Second, the corollary observation is that, Franklin Delano Roosevelt notwithstanding, fiscal adeptness does not constitute a mark of lasting leadership.

Though Reeves' observation is also a remarkable insight into the tension illustrated by *Guinn*, as it turns out, the laboratory of political reality has shown that Reeves' formulation both proves too much and not enough. That is, while Reeves is right in stating that fiscal accomplishments can be overshadowed by other events, he underestimates the modern trend among government leaders to politicize fiscal matters that affect us and our future.

In the course of this Essay, I begin with a broad-brush description of the politics and rhetoric of taxation and then address the limitations that arise from general ignorance of tax policy when placed in this political and rhetorical context. I conclude that citizens and legislators have no choice but to become more responsible in fiscal matters. My aim is not to be exhaustive in this discussion, though surely there is a wealth of material and data to support my thesis. Rather, it is my goal to make a small contribution to a dialogue that has not yet gained currency among either the taxed or the taxers. As Professor Nancy Staudt has stated, the debate over responsibility is missing.¹¹ My hope,

⁶ See, e.g., *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) (expressing a preference for later enacted constitutional provisions); *South Dakota v. Dole*, 483 U.S. 203 (1987) (establishing that, despite the "independent constitutional bar" limitation, Congress may use its spending power to indirectly achieve objectives that it does not have the power to achieve directly). Because I cannot be described as a close student of constitutional law, my explorations in this respect depend on those of my colleagues whom I acknowledge above.

⁷ 5 U.S. (1 Cranch) 137 (1803).

⁸ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819).

⁹ Richard Reeves, *Down and Out in the Global Workplace*, *BALT. SUN*, Oct. 15, 1996, at 7A. The full quote is "No one remembers whether Abraham Lincoln balanced the budget in fiscal year 1862." *Id.*

¹⁰ Lincoln did, in fact, balance the budget. It appears that for the fiscal year ending June 20, 1861, there existed a surplus of over \$2 million. 5 *THE COLLECTED WORKS OF ABRAHAM LINCOLN* 39 (Roy P. Basler ed., 1953).

¹¹ Nancy C. Staudt, *The Hidden Costs of the Progressivity Debate*, 50 *VAND. L. REV.* 919, 979 (1997).

as Professor Jeff Stempel has also expressed, is that the focus on *Guinn* will foster an ongoing conversation.¹²

II. POLITICS

The 1996 Republican Presidential hopeful Steve Forbes, labeled a lackluster campaigner by his supporters and detractors alike, made tax criticism a centerpiece of his campaign.¹³ Despite his charismatic failings, Forbes managed to excite his audiences with variations of his stump speech refrain, “[y]ou can’t tinker with the tax code. You can’t reform it. You must kill it, drive a stake through its heart, bury it and hope that it never rises again.”¹⁴ Forbes’ assertion that the present tax system is intolerably complicated, burdensome, and unfair never failed to get a rousing response.¹⁵

The rhetoric that gave life to the Forbes campaign was not new. Professor Marvin Chirelstein noted that President Reagan based a successful political career on campaigning against taxes.¹⁶ According to Chirelstein, President Reagan began railing against the progressive income tax in the early 1960s and maintained a consistent level of rhetoric against the system of taxation throughout his presidency.¹⁷ President Reagan’s success came in part from his direct attack on an unpopular foe, the progressive tax.

In the same way, the experience of the first President Bush is also instructive. As many will recall, at the 1988 Republican National Convention, President Bush made his now signature pledge, “Read my lips,” a part of his resolute position against raising taxes.¹⁸ The same President Bush later was forced by the economy to stand by and let Congress raise taxes to reduce potential budget deficits – effectively recanting his pledge.¹⁹ While the recantation may have been for sound reasons, it contributed to his subsequent defeat by a then obscure Arkansas governor, William Jefferson Clinton.²⁰ For President Bush,

¹² Jeffrey W. Stempel, *The Most Rational Branch: Guinn v. Legislature and the Judiciary’s Role as Helpful Arbiter of Conflict*, 4 NEV. L.J. 518 (2004).

¹³ Elizabeth Kolbert, *Forbes’ Silver Bullet for the Nations Malaise*, N.Y. TIMES, Jan. 1, 1996, at 1; Neil A. Lewis, *Flat Tax, Once Obscure Idea, Is Set to Enter Campaign Debate*, N.Y. TIMES, Jan. 9, 1996, at 7.

¹⁴ Thomas B. Edsall, *GOP’s Tax Code Termination Act Hits Snag; Poll Shows Majority Swayed by Democratic Criticism that Plan Is Reckless*, WASH. POST, Mar. 15, 1998, at A4.

¹⁵ Edward Walsh, *Republican Presidential Hopefuls Gang Up on Forbes; Wealthy Challenger’s Flat Tax Proposal Attacked as Costly, “Nutty” in Iowa Debate*, WASH. POST, Jan. 14, 1996, at A1; Howard Kurtz, *GOP Candidates Field Ads Attacking Forbes Tax Plan; Wealthy Publisher’s Spot Urges Voters to Join ‘Crusade’*, WASH. POST, Jan. 24, 1996, at A2; Randy Kennedy, *No Endorsement, But Scorn for Flat Tax*, N.Y. TIMES, Mar. 4, 1996, at B6.

¹⁶ Marvin A. Chirelstein, *The Flat Tax Proposal – Will Voters Understand the Issues?*, 2 GREEN BAG 2d 147 (1999).

¹⁷ *Id.* at 148-49.

¹⁸ Paul Taylor, *Bush’s Vivid Self-Portrait; Caring, Practical Everyman Depicted*, WASH. POST, Aug. 19, 1988, at A1.

¹⁹ George Will, *Deficit Goes Up, Bush Goes Down*, SEATTLE POST-INTELLIGENCER, Oct. 14, 1990, at D2.

²⁰ Ann Devroy, *Domestic Perils Sink President in Last Campaign*, WASH. POST, Nov. 4, 1992, at A21; Charles Krauthammer, *Trapped by Campaign Rhetoric*, WASH. POST, Feb. 26, 1993, at A23.

the reversal of his position was fatal to his presidential aspirations.²¹ To the extent that revenue-raising is a proxy for budget balancing, President Bush's fate illustrates that the voters' memories were very much occupied with the budget.²²

Professor Marjorie Kornhauser has covered some of this same ground.²³ Her perspective, one that accounts primarily for taxpayers' reactions to being taxed, is neither a surprising nor an unusual take on the situation. For example, one of the leading treatises on tax policy states that "tax law is always a compromise among the view of powerful individuals and groups."²⁴ Still, it proceeds on the tacit assumption that government desires to tax and that its efforts will be thwarted by the taxed. Similarly, another leading treatise on tax policy recognizes that "the prevalence of government may reflect the presence of political and social ideologies which depart from the premises of consumer choice and decentralized decisions."²⁵ It recognizes that, in the real world, there may very well be a disconnect between the system of taxation and the expectations of the populace. At the same time, it does not deal with situations described by *Guinn*, in which government efforts to tax are thwarted internally, essentially by the taxers themselves.

This phenomenon is more insidious. The creation of a supermajority requirement to pass revenue legislation, whether by legislative fiat or by the initiative process, allows a minority extraordinary control over government fiscal policy.²⁶ As Max Minzner explains, "Tax supermajority requirements not only prevent action; they endorse a particular set of policy decisions. They privilege the existing tax structure. Depending on the extent to which they can be waived . . . supermajority requirements allow a current majority to lock in the status quo, inflating their power with respect to future majorities."²⁷

Until *Guinn*, judicial bias favored a large degree of deference to law-making. The philosophy is explained by the view that "even improvident decisions will eventually be rectified by the democratic process and that judicial interven-

²¹ It seems that the younger President Bush is following in his father's footsteps by taking on the tax policies of his opponent. Richard W. Stevenson, *At Rally in Vital State, Bush Attacks Kerry on Economy*, N.Y. TIMES, MAR. 21, 2004, at 18. Though the current President Bush's attack is not as pure as President Reagan's, the subtext of the message is the same: taxes are inherently evil.

²² Jeffrey Schmalz, *Words on Bush's Lips in '88 Now Stick in Voter's Craw*, N.Y. TIMES, June 14, 1992, at 1.

²³ Marjorie E. Kornhauser, *Legitimacy and the Right of Revolution: The Role of Tax Protests and Anti-Tax Rhetoric in America*, 50 BUFF. L. REV. 819 (2002).

²⁴ JOSEPH A. PECHMAN, *FEDERAL TAX POLICY* 38 (5th ed. 1987).

²⁵ RICHARD A. MUSGRAVE & PEGGY B. MUSGRAVE, *PUBLIC FINANCE IN THEORY AND PRACTICE* 5 (5th ed. 1973).

²⁶ Since 1996, the U.S. House of Representatives has rejected on an almost annual basis a proposal to create a constitutional amendment requiring a supermajority for tax hikes. As Rep. Martin Frost (D-Tex.) noted, if this constitutional amendment were passed, "it would allow a relatively small minority, one-third plus one, to stop widely supported, meaningful legislation." *House Debates, Rejects Tax Limitation Amendment*, 96 TAX NOTES 93 (2002).

²⁷ Max Minzner, *Entrenching Interests: State Supermajority Requirements to Raise Taxes*, 14 AKRON TAX J. 43, 49 (1999). See also David Brunori, *Supermajority Remains a Bad Idea*, 30 ST. TAX NOTES 39 (2003): "[T]he very notion of supermajorities has an undemocratic flavor. Requiring two-thirds of the legislature to approve tax increases actually provides an advantage to the minority."

tion is generally unwarranted no matter how unwisely [a court] might think a political branch has acted.”²⁸ The difficulty, as *Guinn* illustrates, is that the democratic process is not necessarily up to this task. The resulting impasse wrought by the supermajority requirement brings about an irreversible harm.²⁹ Or, as Professor David Brunori succinctly cautions, “what was intended to protect the citizen’s pocketbook from the rapacious government could end up preventing the enactment of programs supported by a majority of those citizens.”³⁰

III. PUBLIC PERCEPTION

The advent of supermajority requirements seems to have flourished in the crucible of public ignorance about taxes and the taxing system. While the ideas of paying taxes and paying for benefits have always been uncomfortably juxtaposed, there is no great mystery to the smooth fiscal functioning of government. Reduced to the simplest components, fiscal responsibility in government, like any household budget, requires that revenue be adequate to pay for expenditures.³¹ Though this Essay focuses on the adequacy of the revenue generation mechanism, I am grateful that my colleague Professor Steve Johnson has ably emphasized the need to control expenditures.³²

Empirical studies of the public’s perceptions of tax systems demonstrate that the popular concept of taxation diverges significantly from reality. It is nothing short of surprising to observe the extent to which otherwise well-informed people misperceive taxes and the system of taxation.³³ In one prominent study, Michael Roberts and Peggy Hite discovered that, though the public may believe current taxation to be unfair, when asked to specify what income-based rate structure *would* be fair, respondents tended to choose rates remarkably similar to those actually in place.³⁴ Specifically, when asked an open-ended question regarding the level of taxation that would be “fair” for nine income levels, ranging from \$5,000 to \$100,000, respondents, on average, chose rates that were the same or higher than those that were in place at the time.³⁵ As the authors note, this conclusion is striking given the widely held view that tax burdens are too high.

²⁸ Nordlinger v. Hahn, 505 U.S. 1, 17-18 (1992) (quoting Vance v. Bradley, 440 U.S. 93, 97 (1979)).

²⁹ Indeed, one Nevada legislator noted that the supermajority provision “was actually empowering a smaller group of people not to fund the budget.” *Guinn v. Legislature*, 76 P.3d 22, 26 (Nev. 2003) (quoting *Hearing on A.J.R. 21 Before the Assembly Comm. on Taxation*, 67th Leg. (Nev. 1993)).

³⁰ David Brunori, *Supermajority Remains a Bad Idea*, 30 ST. TAX NOTES 39 (2003).

³¹ Professor Steve Johnson points out that this simple formula is expressed in the Nevada Constitution: “The legislature shall provide by law for an annual tax sufficient to defray the estimated expenses of the state.” NEV. CONST. art. 9, § 2, cited in Steve R. Johnson, *Supermajority Provisions*, *Guinn v. Legislature*, and *a Flawed Constitutional Structure*, 4 NEV. L.J. 491, 497 (2004).

³² *Id.* at 305.

³³ See Chirelstein, *supra* note 16, at 147-48.

³⁴ Michael L. Roberts & Peggy Hite, *Progressive Taxation, Fairness, and Compliance*, 16 LAW & POL’Y 27, 32 (1994).

³⁵ *Id.* at 32.

Part of the problem is that taxpayers appear unaware of actual tax rates, even when they unwittingly are endorsing those rates. These estimates consistently have been found to be low outside of the respondent's immediate bracket. For instance, the public is generally in favor of progression and believes the rich are not paying their "fair share." When asked to estimate what a high-income family pays, however, respondents underestimate real rates by almost two-thirds.³⁶ The individual perception seems to be "I am paying my share, others are not."³⁷

Though respondents in the Roberts and Hite study could generally be broken down into three relatively equal groups regarding their tax allocation preferences – flat raters, mild progressives, and steep progressives³⁸ – the majority of these respondents preferred a graduated to a flat-tax rate.³⁹ Perhaps this explains why fairness is such a tough nut to crack when it comes to determining an equitable allocation of tax burdens. With the nation split fairly evenly into thirds among those favoring various rate structures, cries of unfairness will arise no matter what rate structure is imposed.

A further question then arises in regard to perception. Are real rates reflective of public preference or is public preference reflective of real rates? Is it simply a coincidence that a majority of the public tends to prefer the current rate structure, even if they apparently are unaware of it? Analysts in various fields have noted that psychological evidence shows preferences are context dependent.⁴⁰ For example, one Swedish study found that, over a period of actual rate decline in Swedish taxes, individuals' expressed preferences for rates fell at a one to one ratio with their expressed perceptions of actual rates.⁴¹

³⁶ JOEL SLEMROD & JON BAKIJA, *TAXING OURSELVES: A CITIZEN'S GUIDE TO THE GREAT DEBATE OVER TAX REFORM* 61-62 (2d ed. 2000):

For example, a June 1996 Roper poll asked the public to estimate how much personal income tax was actually paid by families of four with various income levels. The respondents' median estimate of the tax bill for a hypothetical family making \$50,000 was \$7,000, or 14 percent of income, not far from the actual 12 percent rate. But the median estimate of the tax bill for a family with \$200,000 in income was only \$15,000, or 7.5 percent compared to the actual rate of 21 percent, nearly three times as high! . . . In a 1989 survey, on average, respondents believed that 45 percent of millionaires paid no income tax at all. IRS statistics showed the actual figure was less than 2 percent. Thus, the professed desire for *more* progressivity may in part stem from a lack of understanding of how progressive the system is now.

³⁷ One is reminded of the Russell Long aphorism, "Don't tax you, don't tax me, tax that fellow behind the tree." ROBERT MANN, *LEGACY TO POWER: SENATOR RUSSELL LONG OF LOUISIANA* 333 (1992).

³⁸ SLEMROD & BAKIJA, *supra* note 36, at 36. In the study, 34% of those polled preferred a flat 20% tax rate as the most fair option, 28% chose the mildly progressive 1987-1991 rate schedule, and 33% preferred the more steeply progressive 1981-1986 rate schedule as the most fair.

³⁹ *Id.* at 35 (citations omitted). In the study, 60% of the people polled agreed that graduated tax rates are most fair, while 33% preferred a flat rate, and 7% were indifferent between the two.

⁴⁰ See, e.g., Steven M. Sheffrin, *What Does the Public Believe About Tax Fairness?*, 46 *NAT'L TAX J.* 301, 303 (1993); Edward J. McCaffery, *Cognitive Theory and Tax*, 41 *UCLA L. REV.* 1861 (1994).

⁴¹ Sheffrin, *supra* note 40, at 302, citing Richard Wahlund, *Perception & Judgment of Marginal Tax Rates After a Tax Reduction*, in *UNDERSTANDING ECONOMIC BEHAVIOR* 135 (K.G. Grunert & F. Olander eds., 1989). Interestingly, Swedish taxpayers not only underestimated

In other words, when taxes were very high, the public preferred higher rates (although not quite as high as the actual rates). When rates fell, people preferred slightly lower rates, in exact proportion to the amount of perceived real decline.

What does this mean for those seeking to create a tax system that is both fair and capable of raising revenue? Roberts and Hite conclude that “the general public is not knowledgeable about effective tax rates,” and that perceptions of the inherent unfairness of the tax system may have more to do with hyping of marginal rates by the media and amongst politicians, than with the rate structure itself.⁴²

Professor Steven Sheffrin has suggested that rather than despair over the public’s misperceptions and biases, politicians should seek to spin sound tax policy in such a way that it conforms to these biases.⁴³ Some might call this trickery, others might call it paternalism: if the child does not understand what is good for her, it might be necessary to dress the truth up a little.⁴⁴

Other tax policy experts, recognizing the challenge posed by the desire both to minimize tax burdens and to provide needed government benefits, have taken a similar path. In a keynote address at the 2003 Annual Meeting of the California Tax Bar and the California Tax Policy Conference, Thomas F. Field, the founder of Tax Analysts,⁴⁵ advocated the enactment of tax legislation aimed at those taxes that do not draw public attention; sales taxes and consumption taxes are prime examples.⁴⁶

The trouble with these approaches is that they depend on an assumption that politicians, executives, and legislators are in fact interested in sound tax policy and a fiscal system that is capable of responsibly raising revenue. When the taxers are instead interested in subverting the tax system, the “spinning” that occurs seems to take public misperception in the direction to which it is naturally inclined: that of mistrust of the taxers and disdain for their tax system. Moreover, the resort to taxes that are not on the public’s radar screen, assuming legislators can be persuaded to go along, can only delay what will inevitably be a rebellion against these heretofore “silent taxes.”

The majority of the voting public remains, for the most part, ignorant of various important details of the tax system; the above-described difference between marginal and effective rates or between tax burden and tax incidence are examples. If less media attention and punditry were devoted to decrying the evils of the Internal Revenue Code, and more to educating taxpayers on just

actual marginal tax rates before and after the decline in rates, but also underestimated the decrease in marginal rates.

⁴² See Roberts & Hite, *supra* note 34, at 40.

⁴³ Sheffrin, *supra* note 40, at 306-07.

⁴⁴ One is reminded of the aphorism that “[t]he art of taxation consists in so plucking the goose as to get the most feathers with the least hissing.” JEAN BAPTIST COLBERT, *THE HARPER BOOK OF QUOTATIONS* 434 (Robert I. Fitzhenry ed., 3d ed. 1993), cited in Brian G Ritz, *Nexus on the Net: A Taxing Question*, 36 DUQ. L. REV. 921 (1998).

⁴⁵ Tax Analysts is a nonprofit corporation with the self-described mission of “helping the country tax its citizens fairly, simply, and efficiently” and to “stir up great tax policy debate.” The organization’s website is <http://www.taxanalysts.com> (last visited June 13, 2004).

⁴⁶ Thomas F. Field, *The Emperor Has No Clothes*, 101 TAX NOTES 1125 (2003).

how the Code works, perhaps this Essay would be unnecessary. Again, if more attention were given to the many benefits and necessities of daily life (for rich, poor, and everyone in between) that depend on tax revenue (including roads, schools, police and fire services), the job of legislators implementing taxes could be easier. My central point is simply this: absent the persistent frothing over “government sponsored theft” and the pillaging of the American public by out-of-control government, most taxpayers probably would be hard-pressed to squawk about or even to identify a tax injustice.

Unfortunately, as demonstrated by *Guinn v. Legislature of Nevada*, the apparent ease by which supermajority requirements have been implemented to impede the enactment of necessary tax legislation is an appalling phenomenon. The public is complicit in its ignorance. Having said this, I understand the frustrations involved. To create supermajority tax provisions is not an irrational response to spending that sometimes seems uncontrolled. Fiscal responsibility and accountability are worthy aims. However, the creation of supermajority provisions addresses the problem with a tool that is too crude. Perhaps, with more understanding of the ramifications of the supermajority phenomenon, the public would not be so susceptible to the rhetoric of revenue and politics and would be less willing to embrace supermajority requirements.

IV. CONCLUSION

Justices Holmes and Brandeis observed that “[t]axes are what we pay for civilized society.”⁴⁷ Their altruistic view is the approach we must embrace. If taxes are indispensable to government, it follows that taxation is a responsibility of citizenship.⁴⁸ More to the point, however, it is the responsibility of legislators, citizens acting as legislators, and executives not to undermine the role that taxes play in our system of government.

With this background, my belief is that *Guinn* has a utility. It provides a vehicle for discussion and, even with the crisis that precipitated, it serves to heighten awareness of taxes and the system of taxation. In the end, I agree with Professor Kornhauser’s astute view that legislators must lead and not merely mirror uncritical and unreflective public anti-tax sentiment.⁴⁹

⁴⁷ *Compania Gen. de Tabacos de Filipinas v. Collector*, 275 U.S. 87, 100 (1927) (Holmes & Brandeis, JJ., dissenting).

⁴⁸ Staudt, *supra* note 11, at 979-91.

⁴⁹ Kornhauser, *supra* note 23, at 929.