The Influence of Historical Tax Law Developments on Anglo-American Laws and Politics

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Abstract

This article highlights the influence of historical Anglo-American tax law developments on the formation of new political institutions and laws. In critical periods of English and U.S. history, individuals rebelled against arbitrary royal taxes. In turn, they demanded new tax laws that became embedded in documents from the Magna Carta to the English Bill of Rights to the Declaration of Independence that promoted democratic constraints on the use of state power to assess and collect taxes. Over time, the idea that individuals are entitled to equal treatment under the law, and possess inalienable human rights, emerged in part as a result of these tax law developments. The discussion in this article supports the view that pragmatic concerns over property and taxation drove important English and American political and legal reforms.

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I. INTRODUCTION

This article shows how certain historical tax law developments shaped important Anglo-American political/legal institutions. In critical periods of English and U.S. history, individuals rebelled against arbitrary royal taxes.[1] In turn, they demanded new tax laws that became embedded in documents from the *Magna Carta* to the English *Bill of Rights* to the U.S. *Declaration of Independence* that promoted democratic constraints on the use of state power to assess and collect taxes. Pragmatic concerns over property and taxation hence drove important English and American political and legal reforms.[2] Under this article's account, the political struggle over, and implementation of, tax laws led to political views by early English and American peoples that they, not the Crown, were the true sovereigns of their destinies.[3]

The article is organized as follows. Part II discusses how the *Charter of Liberties* of 1100, the *Magna Carta* of 1215, and the *Confirmation of Charters* of 1297 in England provided the world's first "good" tax laws that restricted the ability of the king to tax his subjects as he saw fit, leading to the first tax disputes and the struggle to develop appropriate due process protections. Part III reviews how dissatisfaction with arbitrary royal taxation in 17th century England culminated in the *Petition of Right* of 1628, *The Three Resolutions* of 1629, the *Bill of Rights* of 1689 and the emergence of England as a constitutional monarchy. The era also witnessed renowned tax prosecutions (in the Bate, Cony, Five Knights and Hampden cases) that animated the productive bourgeoisie class against oppressive taxation measures. As a result of these disputes, this class of English

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[1] This article adopts a "big history" perspective by examining several discrete eras over a large time scale. For discussion of this approach, see David Christian, *The Case for "Big History"*, 2 J. WORLD HIST. 223, 225 (1991) (noting that "big history" encourages a search for larger meanings in the past and discussing pitfalls and critiques of the approach). For a discussion on the potentials and limits of comparative history that compares and contrasts different eras and/or countries, see William H. Sewell Jr., *Marc Bloch and the Logic of Comparative History*, 6 HIST. AND THEORY 208, 214–18 (1967).

[2] This account supports the view that important political and legal institutions were shaped to a significant extent by taxation concerns. For other views that emphasize how pragmatic concerns over taxation and debt, not theoretical philosophical concerns, shaped early American democratic institutions, see generally, NOAH FELDMAN, DIVIDED BY GOD: AMERICA'S CHURCH-STATE PROBLEM - AND WHAT WE SHOULD DO ABOUT IT (2005) (asserting that the doctrine of church/state separation within the U.S. Constitution was mainly attributable to religious groups', including Baptists and Quakers, opposition to compulsory religious taxation); CALVIN H. JOHNSON, RIGHTEOUS ANGER AT THE WICKED STATES: THE MEANING OF THE FOUNDERS' CONSTITUTION (2005) (claiming that taxation concerns played a decisive role in shaping the U.S. Constitution). Prior literature has explored and emphasized the influence of protections against arbitrary royal prerogative found in early law, but has generally downplayed or ignored the role of tax laws. *See, e.g.*, ANNE PALLISTER, MAGNA CARTA: THE HERITAGE OF LIBERTY (1971); FREDERIC JESUP STIMSON, THE LAW OF THE FEDERAL AND STATE CONSTITUTIONS OF THE UNITED STATES (1908) (comparing civil and criminal protections under U.S. law with those in the *Magna Carta*); Edward S. Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 HARV. L. REV. 149, 175–84 (1928) (emphasizing how theories concerning liberty and the king's role influenced U.S. constitutional law). Some historical accounts of tax matters focus on political developments without referencing in any detail the legal aspects of these developments. *See also* DAVID F. BURG, A WORLD HISTORY OF TAX REBELLIONS: AN ENCYCLOPEDIA OF TAX REBELS, REVOLTS, AND RIOTS FROM ANTIQUITY TO THE PRESENT (2004) (providing a comprehensive discussion of historical tax rebellions).

[3] The emphasis on how historical tax developments can shed light on modern political/legal institutions is drawn from the views of Joseph Schumpeter: "The fiscal history of a people is above all an essential part of its general history . . . In some historical periods the immediate formative influence of the fiscal needs and policy of the state on the development of the economy and with it on all forms of life and all aspects of culture explains practically all the major features of events . . . He who knows how to listen to its message here discerns the thunder of world history more clearly than anywhere else." JOSEPH A. SCHUMPETER, THE ECONOMICS AND SOCIOLOGY OF CAPITALISM 100–01 (Richard Swedberg ed., 1991).

people became increasingly convinced that representative and fair tax laws were a necessary prerequisite to achieving a just and free society.

Part IV traces the role of tax laws in the American Revolution and subsequent development of the Republic, emphasizing colonial anger against "bad", or unrepresentative English taxes without due process protections for tax disputes. These bad tax laws included the *Stamp Act*, the *Townsend Revenue Act*, and the *Tea Act*, which led to passage of "good" tax laws, including the *First Congressional Declaration*, the *Declaration of Independenc*e and the *Constitution*.

Part V outlines how these Anglo-American tax developments, which influenced political and legal institutions, encouraged English and American peoples to adopt norms amenable to liberal political philosophical theories, including the movement toward ever-greater equality and democracy. Part VI summarizes and concludes.

II. MAGNA CARTA AND THE CHARTER OF LIBERTIES: THE FIRST TAX LAWS

The roots of taxation go back to earliest recorded history, establishing the depressing truism that taxes and death are the only two certain things in life.[4] Taxes have always been interwoven with a nation's fabric because a state needs revenues and resources to pursue its goals. So any rules or customs that promoted or restricted taxation have historically played an important role in defining the relationship between an individual and her larger community or country.[5] As we shall see, something changed around the year 1100 when English kings began to be bound by laws that circumscribed their powers over taxation. These tax laws influenced the development of nascent governing councils and other political institutions as well as legal protections where individuals could challenge the legality of royal taxation through court hearings.

A. The Baronial Tax Uprising

Our story begins with angry barons in the 13th century in what we now call England, then ruled by cruel King John of Robin Hood fame. John may have been a cruel and unwise king by most historical accounts, but his kingdom was faced with numerous vexing problems.[6]

First, John's brother—King Richard the Lionheart—had embarked on an expensive crusade to regain the Holy Land from the Muslims. Richard's efforts had mixed results, at best.[7] He was defeated twice by King Saladin then kidnapped, forcing John to raise the necessary funds to pay the ransom.[8] Richard was a soldier, not a statesman, and the finances of his kingdom suffered for it.[9] In 1199 Richard died, and his brother John inherited the throne at about the age of 32, along with a financially mismanaged kingdom.

Second, there was an ongoing dispute between King John and the Pope.[10] With the death of the Archbishop of Canterbury in 1205, custom dictated that the king present

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[4] For discussion of the earliest Western account of Persian and Egyptian tax rules by the Ancient Greek historian Herodutus, see Arthur J. Cockfield, *Introduction: The Last Battleground of Globalization*, *in* GLOBALIZATION AND ITS TAX DISCONTENTS 3 (Arthur J. Cockfield ed., 2010).

[5] For a comprehensive discussion on the relationship between taxation and political institutions, see LIAM MURPHY & THOMAS NAGEL, THE MYTH OF OWNERSHIP: TAXES AND JUSTICE 3, 11 (2002) ("[Taxes] are also the most important instrument by which the political system puts into practice a conception of economic or distributive justice.").

[6] G.O. SAYLES, THE MEDIEVAL FOUNDATIONS OF ENGLAND 389–399 (1950).

[7] *Id.* at 381.

[8] *Id.* at 382.

[9] *Id.* at 381.

[10] *Id.* at 394.

the successor who would then, as a matter of formality, be confirmed by the church in Canterbury.[11] However, without waiting for John's chosen appointee, John De Gray, the monks elected their prior Reginald to act as the Archbishop to Rome.[12] King John eventually forced their hand and the church elected De Gray as Archbishop and sent him to Rome for investiture.[13] The papal authorities, however, had other ideas and Pope Innocent III decided to put his own man, Stephen Langton (who would later play a prominent role in the uprising against King John), in place.[14] The king's denouncement of this decision led to his excommunication in 1209;[15] the matter was ultimately settled when the King accepted Langton as Archbishop and agreed that England would become a vassal of the Vatican.[16] The cost, however, was steep: the Pope was now entitled to substantial and ongoing compensation.

The third and final nail in nation's fiscal coffin was that King John himself embarked on various failed military campaigns to regain his ancestral homelands in Normandy, which were taken away during his rule when Norman feudal lords backed his nephew, Arthur of Brittany.[17] The loss of Normandy resulted in an estimated reduction of one-third of King John's total income.[18] At the end of John's last campaign, the English armies were easily defeated at the Battle of Bouvines in what is now Northern France on July 27, 1214 and John had to now prepare for a civil war back home in England.[19]

All of this led to a rather distressing financial situation on the home front, which John tried to address through increased taxation. In particular, John resorted to the use of feudal taxes called scutage and other levies (such as arbitrary fines) to replenish the royal treasury.[20] With feudalism came a relationship between lord and vassal tied to the tenure of land. These feudal taxes could ordinarily be levied at the king's discretion but custom dictated that extraordinary exactions required the consent of the vassal.[21] Traditionally, the king could expect his barons to participate and supply manpower in times of war.[22] However, it was becoming more common for the barons to pay the king a fee in place of their services; this tax in place of a knight's service was called scutage.[23]

Mercenaries established themselves by the 12th century; kings frequently used them, rather than knights, to fight their wars.[24] Consequently, during his reign and particularly during his campaigns in Normandy, John levied a total of eleven scutages and even deviated from the custom of levying the tax at the end of the war by using tax

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[11] DAVID NICHOLAS, THE EVOLUTION OF THE MEDIEVAL WORLD: SOCIETY, GOVERNMENT AND THOUGHT IN EUROPE, 312–1500, at 230 (1992)

[12] *Id.*

[13] *Id.*

[14] *Id.* at 231.

[15] SAYLES, *supra* note 6 at 394.

[16] *Id.* at 395.

[17] NICHOLAS, supra note 11, at 228, 238.

[18] *Id.* at 229.

[19] J.C. HOLT, MAGNA CARTA 188–89, 221 (2d ed. 1992).

[20] J.C. Holt, THE MAKING OF MAGNA CARTA (1965).

[21] *See* WILLIAM SHARP MCKECHNIE, MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN 232 (1914).

[22] *Id.* at 233–34.

[23] *Id.*

[24] H.G. RICHARDSON & G.O. SAYLES, THE GOVERNANCE OF MEDIEVAL ENGLAND FROM THE CONQUEST TO MAGNA CARTA 375 (1963).

measures at the beginning of a war.[25] It has been contended that scutage was effectively converted into a general tax.[26]

On May 26, 1214, John issued writs for the collection of scutage at a rate of three marks, which was higher than any rate imposed over the last half century.[27] The northern barons, who would later be instrumental in forcing John to sign the *Magna Carta*, refused personal service and scutage in place of their service on the ground that they were not obligated to fight overseas.[28] Scutage was a driving force behind the creation of the *Magna Carta*, not only because of its amount, but also because of its frequency.[29]

John in effect used his feudal rights over taxation as a system of manipulation and as a means of controlling the barons.[30] John would issue writs for excessive taxes and, when certain barons could not pay, John used the baronial debts to enforce political discipline.[31] Those out of favour with the king would frequently be called upon to repay their debts quickly or suffer additional penalties or imprisonment.[32] In 1213 while preparing for his campaign in Poitou, John called on a number of debtors to provide the service of knights in lieu of payment or required the debtors to accept terms of payment.[33] In addition, John instituted new measures of taxation while also exercising his customary rights. He raised the amounts of feudal incidents, extended the forest law by assessing charges on newly cultivated land, and married heiresses to persons of his choice.[34]

The barons were understandably distressed by these developments and began to stir up a rebellion against the king. They were supported by Langton and the clergy, who had also become susceptible to John's heavy taxation. In 1207, for instance, the clergy were forced to contribute 60,000 pounds to the crown treasury.[35] Although the uprising which lead to the signing of the *Magna Carta* cannot be construed as the result of a unified cause among the varied classes of English society, it is important to note that the barons, while acting in their own interests, had the support of the clergy and, at least to a certain extent, the lower classes.[36]

B. The Signing of the Magna Carta and the Charter of Liberties

To the barons, the situation was unsustainable and they stormed and captured London, ultimately forcing John to capitulate and sign a document entitled the *Magna*

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[25] *See* HOLT, *supra* note 19 at 318–19. Two of his eleven scutages were levied despite no "full-scale campaign." *Id.* at 319.

[26] GOTTFRIED DIETZE, MAGNA CARTA AND PROPERTY 22 (1965).

[27] SHEPARD ASHMAN MORGAN, THE HISTORY OF PARLIAMENTARY TAXATION IN ENGLAND 58, 60 (1911).

[28] *Id.* at 60.

[29] *Id.* at 50.

[30] J.C. HOLT, MAGNA CARTA AND MEDIEVAL GOVERNMENT 134 (1985).

[31] *Id.* at 136.

[32] *Id.* at 136–37.

[33] HOLT, supra note 19 at 193–94.

[34] NICHOLAS, *supra* note 11, at 229–30.

[35] RICHARDSON & SAYLES, *supra* note 24, at 376.

[36] The clergy, as already mentioned, were not immune from ruthless taxation, and when the barons were heavily taxed, a great deal of the hardship was placed on the commoners. There were also practical reasons why the barons wanted to support the interests of their workers. The barons were land-holders who lived off subleases to a productive class of farm workers; increased taxation on the barons meant that they would be forced to increase charges to these workers. Unhappy commoners might even revolt against the members of the nobility—there were a number of peasant tax revolts throughout Medieval Europe—placing the lives of the barons and their families at risk.

Carta (Latin for "Great Charter") at Runnymede on June 15, 1215.[37] The *Magna Carta* is considered one of the first legal documents to impose clear restrictions on the king's powers: it established the principle that no one, including the king, is above the law and is often cited as one of the first steps in a historical process that eventually led to the rule of law within modern democracies.[38]

In fact, the less-mentioned *Charter of Liberties* (sometimes referred to as the *Coronation Charter*[39]) signed by Henry I in 1100 was likely the first document to bind the English royalty to tax laws.[40] The document was written a mere thirty four years after the Normans conquered Briton and slew the last truly English king, Harold, at the Battle of Hastings. Henry, perhaps seeking to quell ongoing rebellions against the new rulers, makes it clear in the first paragraph of his Charter that arbitrary taxation concerns also motivated its issuance: "And because the kingdom has been oppressed by unjust exactions, I, through fear of God and through the love that I have for you all"[41] grant a number of freedoms, including the abolishment of taxes such as the seigniorage, which was roughly equivalent to a modern day sales tax.

King Henry, unlike King John, enthusiastically embraced the idea of cutting back his power over taxation through tax laws. This is evidenced by his *Grant of Tax Liberties to London* in 1133 where he provided for sweeping exemptions from royal taxation so that London could assess and collect its own tax.[42] While Henry's rule might seem like a natural place to begin a discussion of restrictions on arbitrary taxation, his *Charters* apparently had far less precedential value, in both the common law and the collective memories of the English, than the *Magna Carta*. Nevertheless, the *Charter of Liberties* has been said to have influenced the subsequent baronial tax revolt against John and inspired the principles set out within the *Magna Carta*.[43]

Because the king was considered to be divine both the *Charter of Liberties* and the *Magna Carta* can be viewed as revolutionary documents: they were akin to putting hand-cuffs on God. The sixty-three Chapters of the *Magna Carta* read very much like a tax statute, filled with qualifiers and caveats, cross-references, definitions, appeals to broad generalities and special preferences; in short the sort of writing only a tax lawyer could love. Importantly, Chapter 12 illustrates the restrictions placed on the king in levying certain taxes on the barons:

> No scutage nor aid shall be imposed on our kingdom, unless by Common Council [sometimes translated as "common counsel"] of our kingdom, except for ransoming our person, for making our eldest son a knight, and for once marrying our eldest daughter; and for these there shall not be

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[37] MORGAN, *supra* note 27 at 61–62.

[38] *See, e.g.*, PALLISTER, *supra* note 2; DIETZE, *supra* note 26, at 3–7. See also H. D. Hazeltine, *The Influence of Magna Carta on American Constitutional Development*, 17 COLUM. L. REV. 1 (1917) (discussing the influence of the Magna Carta on the laws of the American colonies and the subsequent U.S. Constitution).

[39] DIETZE, *supra* note 26, at 8.

[40] *Charter of Liberties of Henry I, 1100*, INTERNET MEDIEVAL SOURCE BOOK – FORDHAM UNIVERSITY (Feb. 1996), http://www.fordham.edu/halsall/source/hcoronation.asp.

[41] *Id.* at ch. 1.

[42] *Henry I, King of England: Grant of Tax Liberties to London, 1133*, INTERNET MEDIEVAL SOURCE BOOK – FORDHAM UNIVERSITY (Oct. 1998), http://www.fordham.edu/halsall/source/1133Hank1tax.asp.

[43] *See* PALLISTER, *supra* note 2, at 2.

> levied more than a reasonable aid. In like manner it shall be done concerning the aids from the city of London.[44]

This provision and Chapter 14, which sets out the process by which Common Council will be derived, are particularly notable because they are the only provisions within the *Magna Carta* that require agreement by the Common Council and thus restrict the ability of the king to do what he pleases.[45] While the *Magna Carta* deals with a variety of other state issues,[46] there are no additional provisions that create a Council to scrutinize royal decision-making on an ongoing basis (although more general Chapters 52 and 61 provided for the creation of a body with twenty-five elected barons who would ensure that the king abided by his agreement to grant the listed freedoms if disputes arose).[47] This highlights the fact that concerns over arbitrary taxation were front and center in the barons' minds.

It is also important to take note of which taxes were included in the two chapters. A tallage, as opposed to an aid, means "a toll or exaction imposed on individuals who had no option of refusal."[48] Tallage could be imposed on town citizens by the king at his prerogative.[49] Tallage was omitted from the *Charter*, most likely because tallage had no great effect on the barons: the residents of cities were subjected directly to the tax whereas the barons predominantly resided in the countryside.[50] The absence of any mention of tallage supports the commonly-held view that the *Charter* was not a revolutionary document constructed with the purpose of furthering republican ideals of equality but rather was created to protect the barons from the king's prerogative to collect taxes at will:[51] "the 'barons had no suspicion that they would one day be called the founders of English liberty' and that the Charter simply embodied the immediate practical interests which had driven them into rebellion."[52] There is no indication that the barons were concerned with the rights of all classes against arbitrary taxation. Chapter 14, for instance, which stipulates who constitutes the Common Council—archbishops, bishops, abbots, earls, and greater barons—does not mention a representative of the common classes.[53]

Soon after signing the *Magna Carta*, King John rescinded his support for the document and promptly died of dysentery.[54] After John's death, his son Henry III was crowned King of England at the age of nine in 1216.[55] Henry could not immediately assume power due to his age so the government was in the hands of his regent.[56] The *Charter* was promptly reissued with, most notably, Chapters 12 and 14 omitted.[57] The

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[44] Magna Carta, ch.12.

[45] *See* Magna Carta chs. 12, 14.

[46] In fact, the *Magna Carta* and the *Charter of Liberties* contain more provisions that grant rights to women, mainly prohibitions against marrying women against their will, than tax provisions. *See, e.g.*, Magna Carta, ch. 8; Charter of Liberties ch. 3.

[47] Magna Carta, chs. 52,61.

[48] MCKECHNIE, *supra* note 21, at 235.

[49] *Id.*

[50] *Id.* at 236–38.

[51] *See* HOLT, *supra* note 19, at 267–68

[52] *Id.* at 268 (quoting CHARLES PETIT-DUTAILLIS, ETUDE SUR LA VIE ET LE REGNE DE LOUIS VIII 57–58 (1894).

[53] Magna Carta, ch. 14; *see also* Max Radin, *The Myth of Magna Carta*, 60 HARV. L. REV. 1060, 1060 (1947) (noting that only two clauses in the Magna Carta discuss aspects of political liberty).

[54] W. L. WARREN, KING JOHN 253 (3d ed. 1997).

[55] *Id.* at 254.

[56] MORGAN, *supra* note 27, at 73.

[57] *Id.*

barons were able to assume substantially more power with a young king on the throne.[58] With an end to John's tyranny, the Council did not favour restricting royal power especially in light of the fact that they were, at least indirectly, wielding the royal prerogative.[59] Chapter 44 of the reissued *Charter* states scutage "shall be taken as it was wont to be taken in the time of King Henry our uncle."[60] There is no mention of consent by Common Council and the only restriction is that scutage should not exceed the amount of 20 shillings.[61]

Despite the exclusion of Chapters 12 and 14, as we shall see, the reissued *Charter* did not expel their principles from English thought or the common law.[62] This did not prevent future rulers from levying taxes without consent. The difference would be that when the king found himself facing opposition for his tax policies, those opposing the exactions would claim legal rights under the *Magna Carta*. There is some evidence that the older version of the *Charter* was still followed. For example, in 1222, there is record of the Common Council granting an "aid for the Holy Land" of three marks for an earl, one mark for a baron, and twelve pence for a knight."[63]

In any event, similar provisions to the original *Magna Carta* were reintroduced, including provisions mandating the use of a Common Council in taxation matters, in the so-called *Confirmation of Charters* of 1297.[64] The barons once again rose up in armed rebellion against their king, Edward, due to his imposition of steep taxes on English wool as well as aids levied against the nobility.[65]

Legal historians have carefully scrutinized the role of the *Magna Carta* in subsequent legal developments: much of the literature, however, emphasizes the document's innovative civil and criminal procedural protections against arbitrary Crown power.[66] In fact, because the collection of tax often requires intrusive inquisition of a person or their property, the civil and criminal protections are very much related to the protections against arbitrary taxation. As we shall see, later English commentators emphasized the writ of habeas corpus as a protection against unlawful intrusions by tax collectors.

All of this led to what may have been one of the first tax law disputes. In 1217 Peter des Roches, in an apparent struggle against the growing baronial influence over the Crown, refused to pay an aid of two marks on the knight's fee on the grounds that he had not consented to the levy.[67] Des Roches paid the tax bill after the barons issued a writ imposing scutage on January 24, 1218, which was signed as being "assessed by the common council of our realm."[68]

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[58] *Id.*

[59] *Id.*

[60] *Id.* at 75.

[61] *Id.* Twenty shillings was the rate during the reign of King Henry II. *Id.*

[62] *See* HOLT, *supra* note 19, at 397–99.

[63] MCKECHNIE, *supra* note 21, at 233–34 (citing KATE NORGATE, THE MINORITY OF HENRY III 194 (1912).

[64] *Confirmation of the Charters, 1297*, INTERNET MEDIEVAL SOURCE BOOK – FORDHAM UNIVERSITY (Feb. 1996), http://www.fordham.edu/halsall/source/conf-charters.asp.

[65] MORGAN, *supra* note 27, at 141.

[66] *See supra* discussion in note 2.

[67] Holt, *supra* note 19, at 399.

[68] MORGAN, *supra* note 27, at 76-77.

Peter des Roches was later involved in another dispute regarding taxation without consent.[69] In 1220, des Roches along with the Earls of Chester and Salisbury led a "widespread resistance" to the assessment of a tax.[70] The knights of Yorkshire refused to execute the writ stating that the tax had not been conceded by the magnates (i.e., powerful nobles) and the king's faithful subjects.[71] The knights argued that the magnates of the county did not know of nor were consulted on the levy, and it was therefore not a valid exaction.[72] The barons repeated and furthered the same argument some thirty-five years later when Henry III demanded an aid.[73] This time the barons made direct reference to the fact that the aid was not raised in accordance to the terms of the *Charter*.[74]

Taxation disputes were hardly resolved with the *Great Charter*; it was merely the first step in a long, drawn-out dispute over the power of taxation. This battle would be fought between the monarchy and nobility for centuries to come. Yet the *Magna Carta* and its restrictions on the king's ability to levy exactions on the properties and persons of his realm can be portrayed as an important initial step in the long march towards the political philosophy of liberalism (see Part V). One of the next major shifts would not come until the reigns of Charles I and Cromwell, almost four hundred years later.

III. SEVENTEENTH CENTURY ENGLAND: THE RISE OF TAX LAW DISPUTES

Once the barons got a taste of freedom, more tax trouble lay ahead, including tax uprisings in the thirteenth through sixteenth century. Despite these troubles, there was very little progress in the development of tax laws until the seventeenth century, when the political climate would once again be ripe for the English aristocracy to gain more control over taxation.[75] This century witnessed the birth of what is easily recognizable as modern England. Again, turmoil and tax laws played a fundamental role in reshaping the relationship between the state and the individual, providing fertile ground for growing individual freedom that was extended for the first time to the non-elites of English society (although the struggle was primarily concerned with protecting the rights of a productive bourgeoisie class against the political power of the landed gentry).

A. King James Versus John Bate

Soon after the seventeenth century began, England became embroiled in a contentious tax dispute involving an unhappy merchant named John Bate. At the time, King James's kingdom was running an annual deficit of roughly 150,000 pounds.[76] James decided to raise revenues by way of an additional levy on merchants, in addition to the traditional "currants."[77] By harkening back to the *Magna Carta*, John Bate, a merchant for the Levant Company, challenged the right of the king to levy these additional amounts.[78] The barons presiding over the Court of Exchequer unanimously decided in favor of the King and against Bate.[79] The decision became a notorious example of the King's desire

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[69] HOLT, *supra* note 19, at 399.
[70] *Id.*
[71] *Id.*
[72] *Id.*
[73] *Id.* at 400.
[74] *Id.*
[75] *See, e.g.*, PALLISTER, *supra* note 2, at 2–3 (noting the decline of the Magna Carta in importance until the early 17th Century).
[76] MORGAN, *supra* note 27, at 240.
[77] *Id.* at 240–41.
[78] HOLT, *supra* note 19, at 14
[79] MORGAN, *supra* note 27, at 242–44.

for absolute authority over the nation's finance, leading many members of the emerging middle-class of artisans and entrepreneurs to question the absolutist rhetoric of baron Clarke who wrote in his judgment that "any subjects [cannot] contend with the King in his high point of prerogative . . . As it is not a kingdom without subjects and government, so he is not a king without revenue . . . ."[80]

As mentioned in the previous sections, the barons were increasingly perceived as being together with the King in their complacency with respect to arbitrary taxation.[81] The Bate case was widely publicized among the bourgeoisie class who were increasingly resentful of unproductive land-holders, including the barons and King James. To English people of this earlier era, the Bate case represented the tyrannical impulse of the English monarchy and nobility.[82] The Bate case would be subsequently used by King Charles as a precedent to argue for his own attempts to broaden taxation, which culminated in disastrous results for the English monarchy.[83]

King James died in 1625 and was followed by King Charles, then a young man of twenty-five.[84] Like John before him, Charles was obsessed with reclaiming lost territories through war and his disastrous foreign campaigns created an ever-growing need for more revenues.[85] Yet Parliament had grown in power since the time of the Common Council to a body with real power to constrain the King's revenue raising abilities. A Parliamentarian could now be a member of the merchant class, who felt that taxation stifled their productive activities. Much to Charles' dismay Parliament refused to consent to the additional subsidies needed for his proposed campaigns.[86]

On June 15, 1626, Charles dissolved Parliament in part to put a stop to the constant attacks by the House of Commons against his adviser and ally, the Duke of Buckingham.[87] Unfortunately, the dissolution of Parliament only worsened Charles's fiscal problems and frustrated his ability to finance Buckingham's ongoing foreign campaigns.[88] Buckingham's forays into France ended in defeat at the Isle of Rhe, which left Charles without a victory and, more importantly, without the spoils of war which he intended to use to rectify his kingdom's worsening financial situation.[89]

B. The Case of the Five Knights, the Petition of Right and the Three Resolutions

To finance additional campaigns, Charles instituted what would later be called "forced loans."[90] The "loans" were roughly equivalent to taxation as a subject who refused to pay was sentenced to prison without a formal hearing or due process, hence the "forced" aspect of the loan.[91] Since the time of the *Great Charter*, the need for consent to taxation, as previously discussed, was limited, if at all, to specific types of taxation; the King was hence ostensibly permitted to exact other taxes and loans without consent. Nevertheless,

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[80] *Id.* at 242.
[81] *See, e.g.*, *id.* at 242.
[82] *Id.* at 244–48.
[83] *See* BURG, *supra* note 2, at 195–96.
[84] MORGAN, *supra* note 27, at 261.
[85] *Id.* at 264–67.
[86] *Id.*, at 274–79.
[87] *Id.* at 264.
[88] *Id.*
[89] *See id.*
[90] *Id.* at 264.
[91] *See* D.H. PENNINGTON, EUROPE IN THE SEVENTEENTH CENTURY 459–60 (Denys Hay ed., 2d ed. 1989).

five of the knights detained for their opposition to the loans protested their imprisonment based on their denial of due process rights set out in previous Charters.[92] In the Case of the Five Knights, the courts again sided with the King, increasing public resentment among the nobility and the merchant class against the King's absolute authority in a court of law.[93]

Despite his failures in France and, later, Spain, Charles stubbornly persisted in his view that, with sufficient funding, he would eventually overcome his enemies. In 1628, Charles summoned another session of Parliament and called for its consent to increased levels of taxation.[94] But Parliament refused consent, in part over unhappiness surrounding the forced loans and the Case of the Five Knights.[95]

Before Parliament would agree to grant Charles additional revenue sources, a group within the House of Commons, led by Sir Edward Coke and Sir John Eliot, drew up the *Petition of Right*:

> [B]y which statutes before mentioned, and other the good laws and statutes of this realm, your subjects have inherited this freedom, that they should not be compelled to contribute to any tax, tallage, aid, or other like charge not set by common consent, in parliament.[96]

The *Magna Carta* clearly played a role in the development of this document. Coke and others argued that the *Magna Carta* reflected more ancient traditions dating back to Britain prior to the invasion and conquest by the Norman armies in 1066.[97]

King Charles initially refused to sign the *Petition of Right* but, desperate for more revenues, ultimately gave in and signed the document on June 7, 1628.[98] It has been said that Parliament's limited ability to exert control over taxation played a decisive role in forcing Charles to agree to limitations on his royal prerogative to issue forced loans.[99] Once the document was signed, Parliament granted Charles additional taxes that would raise 275,000 pounds.[100] The *Petition of Right* can be seen as an important expansion of Parliament's ability to control aspects of taxation because parliamentary consent was now required for taxes beyond "aids" and "scutages" to encompass "any tax, tallage, aid, or other like charge" (a non-exhaustive list familiar to readers of tax statutes).[101]

The link between due process protections against arbitrary imprisonment for failure to pay taxes and tax concerns is also evident within the *Petition of Right*:

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[92] Proceedings on the Habeas Corpus, brought by Sir Thomas Darnel, Sir John Corbet, Sir Walter Earl, Sir John Heveningham and Sir Edmund Hampden (1627), *in* 3 A COMPLETE COLLECTION OF STATE TRIALS 1–3 (T. B. Howell, ed., 1816).

[93] *Id.* at 1.

[94] MORGAN, *supra* note 27, at 265.

[95] *Id.* at 265–69.

[96] *Petition of Right 1628*, AMERICAN HISTORY: FROM REVOLUTION TO RECONSTRUCTION AND BEYOND, http://www.let.rug.nl/usa/documents/1600-1650/petition-of-right-1628.php (last visited Nov. 9, 2013).

[97] *See* PALLISTER, *supra* note 2, at 10. Under this so-called Cokean version of the *Magna Carta*, Anglo-Saxon England was essentially a more egalitarian and democratic state where the king was willing to share his powers with other nobility, including seeking their consent over taxation. The consensus view, however, among historians is that the early kings were no more democratic than their more recent counterparts.

[98] PENNINGTON, *supra* note 91, at 456-57.

[99] *See* J.S. Roskell, *Perspectives in English Parliamentary History*, *in* 2 HISTORICAL STUDIES OF THE ENGLISH PARLIAMENT 296, 318–19 (E. B. Fryde & Edward Miller eds., 1970).

[100] *See* BURG, *supra* note 2, at 196.

[101] *See* MORGAN, *supra* note 27, at 269–70.

> And whereas also by the statute called "The Great Charter of the Liberties of England," it is declared and enacted, that no freeman may be taken or imprisoned or be disseized of his freehold or liberties, or his free customs, or be outlawed or exiled, or in any manner destroyed, but by the lawful judgment of his peers, or by the law of the land.[102]

Like King John, Charles was eventually undone by his unquenchable thirst for for revenue sources. Despite the signing of the *Petition*, King Charles continued to issue taxes without parliamentary approval and continued to imprison those who refused to, or could not, pay.[103] When challenged, Charles sometimes relied on the previously-mentioned Bate case as the legal authority for these continued actions.[104]

In yet another effort to curtail the King's taxation policies, in 1629 Sir John Eliot drafted *The Three Resolutions*.[105] In stark contrast to the *Magna Carta* and the *Petition of Right*, Eliot addressed his document directly to the people and not to the King himself. The second and third resolutions called on the people of England to refuse payment of the King's latest taxes:

> [Resolution] 2. Whosoever shall counsel or advise the taking and levying of the subsidies of Tonnage and Poundage, not being granted by Parliament, or shall be an actor or instrument therein, shall be likewise reputed an innovator in the Government, and a capital enemy to the Kingdom and Commonwealth.
>
> [Resolution] 3. If any merchant or person whatsoever shall voluntarily yield, or pay the said subsidies of Tonnage and Poundage, not being granted by Parliament, he shall likewise be reputed a betrayer of the liberties of England, and an enemy to the same.[106]

Eliot's goal was to make the payment of the King's unapproved taxes an act of treason.[107] Because they directly appeal to all royal subjects, *The Three Resolutions* can be seen as a much more radical and revolutionary document than its predecessors. Yet *The Three Resolutions* has suffered from relative obscurity when compared to the *Magna Carta* or the *Petition of Right*. A plausible explanation for this may be found in the fact that the King had instructed his obedient Speaker of the Commons, Sir John Finch, to adjourn Parliament when *The Three Resolutions* were introduced.[108] Other members of the Commons protested this adjournment and Finch was physically held down by the protestors who shouted their approval of the *Resolutions*, although no formal vote was apparently taken to make it an official document.[109] Sir Eliot was arrested and imprisoned in the Tower of London where he died of illness.[110] Charles gave up in his attempts to

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[102] *Petition of Right 1628*, *supra* note 96.

[103] MORGAN, *supra* note 27, at 272–74.

[104] *Id.* at 274.

[105] *Id.* at 277–78. Resolution 1 was an anti-Catholic screed against the introduction of "Popery" into religious life. *The Three Resolutions* (Mar. 2, 1629), *in* THE STUART CONSTITUTION 1603-1688, 71 (J. P. Kenyon, ed., 2d ed. 1986).

[106] *The Three Resolutions*, *supra* note 105.

[107] MORGAN, *supra* note 27, at 277–78.

[108] *See* MORGAN, *supra* note 27, at 276–79.

[109] *Id.* at 277.

[110] *Id.* at 280.

sway the members of the Commons and dissolved Parliament, and so began his eleven year personal rule of England.[111]

C King Charles Versus John Hampden: The Ship-Money Case

To forestall financial ruin, King Charles implemented new tax initiatives, the most disastrous of which was the ship-money tax. The king had previously levied a tax on coastal towns to force these towns to construct ships for defense in the event of invasion and siege.[112] This form of taxation, however, had never caused much trouble until Charles renewed it with more vigor and ambition than ever before. On October 20, 1634, the first writ of ship-money was issued to several coastal towns, raising a little over 104,000 pounds.[113] The King appointed his crony, Sir John Finch, as the Chief Treasurer and Finch promptly issued a new writ on August 4, 1635 that, without precedent, extended the ship-money taxes inland.[114] Moreover, unlike the forced loans, the ship-money tax was levied on all classes of society: this expanded tax, it has been noted, influenced the formation of a broad coalition of discontent stretching to every town and class as more and more English men and women were swept into the tax net.[115]

The extension of the exaction of ship-money to all classes also helped to make the ship-money case of John Hampden into one of national interest as its outcome affected more than the nobility. Hampden, a lawyer and parliamentarian, had previously been incarcerated for a year in 1628 for refusing to pay the forced loans.[116] In 1637, Hampden refused to pay the assessment of ship-money tax (a mere twenty shillings) levied on his lands and his dispute came before the Court of the Exchequer.[117] The renowned and widely respected lawyer Sir Oliver St. John represented Hampden and delivered what has been called "the finest argument that had ever been heard in Westminster Hall."[118] His argument was also notable as it lasted "two whole days"![119] Looking back to ancient tax principles allegedly developed during the Saxon times, the *Magna Carta* and the *Petition of Right*, St. John argued that the King was prohibited from subjecting individuals to arbitrary taxation:

> For the first, that to the altering of the property of the subject's goods, though for the defence of the realm, that a parliamentary assistance is necessary . . . My Lords, the Parliament, as it is best qualified and fitted to make this supply for some of each rank, and that through all the parts of the kingdom being there met, His Majesty having declared the danger, they best knowing the estates of all men within the realm, are fittest, by comparing the danger and men's estates together, to proportion the aid accordingly.[120]

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[111] *Id.* at 278–80.
[112] BURG, *supra* note 2, at 199.
[113] *Id.* at 199.
[114] *See* MORGAN, *supra* note 27, at 282.
[115] *Id.*
[116] JOHN ERIC ADAIR, A LIFE OF JOHN HAMPDEN, THE PATRIOT 53–54 (1976).
[117] MORGAN, *supra* note 27, at 287.
[118] JOHN LORD CAMPBELL, THE LIVES OF THE CHIEF JUSTICES OF ENGLAND 453 (1849).
[119] *Id.* at 454.
[120] Extracts from the Speech of Oliver St. John in the Ship-money case, *in* THE CONSTITUTIONAL DOCUMENTS OF THE PURITAIN REVOLUTION 109, 113–14 (Samuel Rawson Gardiner ed., 3d ed. 1906).

St. John argued that, pursuant to the law, the ship-money tax and all other extraordinary levies required the consent of Parliament.[121] By restricting the King's power to tax, royal subjects increasingly viewed their income and properties as their own. St. John's argument appears to be closely-aligned with "the belief that the subject possessed property which was truly his own and could not be taken from him without his consent, [which] played a major part in shaping men's beliefs and in determining their policies and actions."[122]

In spite of St. John's spirited defense, the court ruled seven to five in favour of the Crown, agreeing that that the ship-money exaction was within the King's discretion to protect the country in times of imminent danger.[123] News of the court proceedings rapidly spread throughout the country by "means of coffee-houses, clubs, and news-letters."[124] As in the cases of Bate and the Five Knights, the court's judgment led to widespread resentment and disillusionment concerning King Charles's rule.[125] According to a contemporary, the court's decision provided a shock to those who thought the rule of law circumscribed the king's powers as the case was seen "to be a meere delusion and imposture, and doubtlesse it is but a picklock tricke, to overthrow all liberty and propriety of goods, and it is a great shame that so many Judges should be abetters to such fraudulent practice contrived against the State."[126] In the eyes of the English, the court system was revealed to be a mere puppet of royal prerogative that danced to an increasingly distressful tune:

> and all assuring themselves, that when they should be weary, or unwilling to continue the payment, they might resort to the law for relief and find it . . . and, instead of giving, were required to pay, and by a logic that left no man any thing which he might call his own . . . .[127]

The ship-money case, under the traditional view, was instrumental in the impending Civil War, the toppling of Charles, and the ascension of Cromwell, in part because the case united the classes of England against arbitrary royal rule.[128] While there are clearly other motivating factors, including Protestant-Catholic religious turmoil, Charles' tax laws and public reaction to these laws were decisive factors that led to the overthrow of his rule.[129]

Charles' personal rule ended in 1640 when civil war erupted throughout the land, culminating in his beheading for "high treason and other crimes," the first time that an

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[121] MORGAN, *supra* note 27, at 287–89.

[122] MARGARET ATWOOD JUDSON, THE CRISIS OF THE CONSTITUTION: AN ESSAY IN CONSTITUTIONAL AND POLITICAL THOUGHT IN ENGLAND, 1603-1645, at 43 (1949). *See also* Richard A. Epstein, *Liberty versus Property? Cracks in the Foundations of Copyright Law*, 42 SAN DIEGO L. REV. 1, 2–4 (2005) (noting that classical liberal tradition supports the view that private property is consistent with a regime of personal liberty).

[123] MORGAN, *supra* note 27, at 290–91.

[124] CAMPBELL, *supra* note 118, at 194.

[125] MORGAN, *supra* note 27, at 291.

[126] HENRY PARKER, THE CASE OF SHIPMONY BRIEFLY DISCOURSED, ACCORDING TO THE GROUNDS OF LAW, POLICIE, AND CONSCIENCE AND MOST HUMBLY PRESENTED TO THE CENSURE AND CORRECTION OF THE HIGH COURT OFOR PARLIAMENT, NOV. 3,1640, at 40 (1640).

[127] EDWARD EARL OF CLARENDON, THE HISTORY OF THE REBELLION AND CIVIL WARS IN ENGLAND 28 (1843).

[128] *See* BURG, *supra* note 2, 199-200.

[129] L. M. Hill, *County Government in Caroline England 1625-1640*, *in* THE ORIGINS OF THE ENGLISH CIVIL WAR 83-89 (Conrad Russell ed., 1973); Conrad Russell, *Parliament and the King's Finances*, *in* THE ORIGINS OF THE ENGLISH CIVIL WAR 116 (Conrad Russell ed., 1973).

English monarch had been put on trial.[130] In August 1641, members of the Commons met and declared ship-money and the proceedings against Hampden to be illegal:

> That the said charge imposed upon the Subject for the providing and furnishing of Ships commonly called Shipmoney . . . were and are contrary to and against the Laws and Statutes of this Realm the right of property the libertie of the Subjects former resolutions in Parliament and the Petition of Right made in the third yeare of the Reign of his Majestie that now is.[131]

This group, which came to be known as the Long Parliament, fomented the Great Rebellion that secured the paramountcy of Parliament over the Crown in English politics.[132] The ship-money protests are considered to have served as a pivotal event in English political history[133]: of course, like all historical events, these protests did not occur in a vacuum but can be related to other events centuries in the making. Nevertheless, the struggle surrounding the power to tax provided the necessary impetus to stir up revolution. Parliament would subsequently take a more active role in governing and sharing power with monarchy.

D. Cromwell Versus Cony the Elder: The Return to Arbitrary Taxation

After King Charles was overthrown, Cromwell assumed control over the country.[134] After years of costly civil wars and rebellion, Cromwell inherited a nation with a depleted treasury. Initially viewed as a man of the people, Cromwell appears not to have learned lessons from his predecessors concerning unwise tax policies. He turned, like the kings before him whom he had opposed, to taxation to resolve this problem. The Cony tax case helped to transform Cromwell from a man of the people into a despised despot like the tyrants of old. The event that led to the dispute, where Cony the Elder and his son George resisted what they viewed as illegal taxation, was recorded by a contemporary of Cony as follows:

> That the said Cony the elder and George Cony the younger and others did on the fourth day of this instant November, 1654 affront and abuse Theophilus Colcoke and others, Deputies for the Commissioners of the Customes in the execution of the trust to them committed, and particularly opposed, beat, or caused to be beaten some of the said Deputies when they peaceably entered the house of the said Cony, in which severall great quantities of silks, for which no Custome was payed, were lodged.[135]

When Cromwell summoned Cony to appear before him, Cony asserted, as did *The Three Resolutions*, that it was in fact treasonous to submit to Cromwell's illegal taxation:

> that all who submitted to them, and paid illegal taxes, were more to blame, and greater enemies to their country, than they who had imposed them;

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[130] C. V. WEDGWOOD, THE TRIAL OF CHARLES I 9 (1964).

[131] Ship-Writs, and Proceedings thereupon, contrary to Law, *in* 5 THE STATUTES OF THE REALM 116, 117 (Eng., 1640).

[132] BURG, *supra* note 2, at 200.

[133] *Id.* at 200.

[134] CLARENDON, *supra* note 127, at 794–95.

[135] SAMUEL SELWOOD, A NARRATIVE OF THE PROCEEDINGS OF THE COMMITTEE FOR PRESERVATION OF THE CUSTOMES, IN THE CASE OF MR. GEORGE CONY MERCHANT 10 (1655).

> and that the tyranny of princes could never be grievous, but by the tameness and stupidity of the people.[136]

Cromwell proved to be unsympathetic and sentenced Cony the Elder to prison for refusal to pay the tax.[137] Cony's counsel, Maynard, argued for his client's freedom on the basis that his client had been denied due process and that the tax amounted to an illegal exaction.[138] To the horror of many, Cromwell incarcerated Maynard in the Tower of London for having the audacity to question his authority.[139] This in turn led to the resignation of a presiding judge, Justice Rolle, at Cony's trial, belying Cromwell's earlier claims that he would support a more independent court through non-politicized appointments to the bench.[140]

Justice Rolle was a reputed independent thinker who resigned in opposition to Cromwell's continued use of arbitrary power to tax without proper approval from parliamentarians.[141] The judge apparently feared that Cromwell would imprison him if he ruled against the Crown.[142] Justice Rolle's concerns were reflected by an address by a Member of Parliament in 1656 that spoke to the arbitrary rule of Cromwell in the Cony case:

> Nor shall any man under these rigid tax Masters retayne any longer a property in his estate then this our Grand *Signeur* shall please to continue him in it . . . It was then little imagin'd that the time should come, when this [Cromwell,] great Champion of the Lawes, should stop the Lawes in theyr due course and imprison the most eminent of the long Robe for declaring the expresse letter of the Lawes . . . .[143]

The Cony case and subsequent resignation of Justice Rolle provided fuel for the growing royalist cause. Two years later in 1658 Cromwell succumbed to an infection; in 1661, his body was exhumed and he was posthumously beheaded with his severed head displayed on a pole outside Westminster Hall.[144] Before any royal restoration could take place,

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[136] *See* Clarendon, *supra* note 127, at 862.

[137] *Id,*

[138] *Id.*

[139] *Id.*; *see also* Stephen F. Black, Coram Protectore: *The Judges of Westminster Hall Under the Protectorate of Oliver Cromwell*, 20 AM. J. LEGAL HIST. 32, 56–57 (1976).

[140] *See Id.* at 57–58. Cromwell had hoped to gain favour by fostering a more independent court, thus placing justices on the bench regardless of their political persuasions. *Id.* at 58. Cromwell must have been greatly disheartened at his lack of control over those appointed by his good graces and when the judges invoked Magna Carta, "Cromwell told them 'their magna farta should not control his actions; which he knew were for the safety of the commonwealth.' He asked them, 'who made them judges? whether they had any authority to sit there, but what he gave them? and if his authority were at an end, they knew well enough what would become of themselves; and therefore advised them to be more tender of that which could only preserve them;' and so dismissed them with caution, 'that they should not suffer the lawyers to prate what it would not become them to hear." CLARENDON, *supra* note 127, at 862. The authors of this article note that, in a 19th century recording of this passage, "farta" has been excised to read magna fXXX, presumably to protect the delicate sensibilities of readers from that era, or possibly out of fear of state censorship. *See id.*; CAMPBELL, *supra* note 118, at 89.

[141] Black, *supra* note 139, at 57–58.

[142] *Id.* at 57–58.

[143] AN APPEALE FROM THE COURT TO THE COUNTRY MADE BY A MEMBER OF PARLIAMENT LAWFULLY CHOSEN, BUT SECLUDED ILLEGALLY BY MY L. PROTECTOR 2, 5 (1656).

[144] WEDGWOOD, *supra* note 130, at 216.

however, Parliament wanted to ensure that its ability to control taxation was protected under the *Bill of Rights*.[145]

E. The Glorious Revolution and the English Bill of Rights

The ongoing struggle over who should have the right to levy taxes again served to influence subsequent expansions of individual liberty. In the events leading up to the Glorious Revolution, a charged debate took place in 1689 within Parliament concerning the need to constrain the monarch's control over taxation:

> I think we ought to be cautious of the Revenue, which is the life of the Government, and consider the last two Reigns.[146]
>
> We may date our misery from our bounty here. If King Charles II had not had that bounty from you, he had never attempted what he had done.[147]

The members of the Commons recognized that the granting or withholding of revenue powers was their primary bargaining tool with the Crown.[148] Unhappy with the rule of King James II, they decided to take action and ousted the King who fled to France, to be replaced by two new co-rulers, William and Mary after they had agreed to accept a *Declaration of Right* drawn up by the parliamentarians.[149] The new King and Queen were forced to offer concessions that expanded individual rights against arbitrary taxation to an extent not seen within the Western world.

On December 16, 1689, the *Declaration of Right* was embodied in *An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown*, which is now known as the *Bill of Rights*.[150] For the first time, the *Bill of Rights* clearly set out the position that it was Parliament and not the Crown that had authority to enact a tax: "That levying money for or to the Use of the Crowne by pretence of Prerogative without Grant of Parlyament for longer time or in other manner than the same is or shall be granted is illegall."[151]

The new power over taxation forced Parliament to develop more systematic methods of governance. Unlike previous Parliaments which in many ways acted as a rubber stamp for proposed revenue measures passed by royal prerogative, the new Parliament became a functional and increasingly powerful institution within England. The members of the Commons were closer to the lives and needs of their constituents—at least when compared to the king—which bred a far more efficient means of taxation that, in turn, brought in more and more revenues. Miller suggests this enhanced efficiency and stability within tax administration led to a dramatic growth in England's ability to wage successful wars and English dominance of world affairs throughout the next two hundred years.[152]

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[145] CHARLES ADAMS, FOR GOOD AND EVIL: THE IMPACT OF TAXES ON THE COURSE OF CIVILIZATION 257–58 (1999).

[146] Statement by Sir Thomas Clarges in a Grand Committee on the King's Revenue, *in* 9 DEBATES OF THE HOUSE OF COMMONS, FROM THE YEAR 1667 TO THE YEAR 1694, at 123 (Hon. Anchitell Grey, Esq. ed., 1763).

[147] Statement by Sir Edward Seymour in a Grand Committee on the King's Revenue, *in* 9 DEBATES OF THE HOUSE OF COMMONS, FROM THE YEAR 1667 TO THE YEAR 1694, 123, 125 (Hon. Anchitell Grey, Esq. ed., 1763).

[148] *See, e.g.*, 9 DEBATES OF THE HOUSE OF COMMONS, *supra* note 146, at 123–128.

[149] PENNINGTON, *supra* note 91, at 485–86.

[150] MORGAN, *supra* note 27, at 306; Bill of Rights, 1688, 1 W. & M., c. 2.

[151] *See* Bill of Rights, *supra* note 150.

[152] *See* JOHN MILLER, THE GLORIOUS REVOLUTION 40 (2d ed. 1997).

The passage of the Bill of Rights is sometimes portrayed as a turning point in world history. With its passage, England became a constitutional monarchy and full-fledged member of the modern world.

IV. TAX DEVELOPMENTS IN THE FORMATION OF THE AMERICAN REPUBLIC

The final step toward the formation of a constitutional democracy with more representative democratic institutions for taxation was left to the Americans under their rallying cry of "No taxation without representation." The American innovation would have a profound political impact in shaping the modern world by influencing the subsequent push toward a parliamentary democracy in England and the development of other constitutional democracies.

A. The Stamp Act as a Unifying Source for Colonial Anger

The story of how the Boston Tea Party sparked the American Revolution is well known. While there is ongoing debate surrounding the role of taxes in sparking the American Revolution,[153] the historical record shows that taxation provided a significant motive for American anger at English rule: the riots, mobs and political debates circled mainly around taxation.[154] The source of this discontent may have been attributable to taxes promoted by an earlier *Stamp Act*, and not to the later and more notorious tea tax.[155]

The tax disputes once again find their origin in a financially over-stretched English monarchy: by 1763, England had successfully defeated France in the French and Indian War to gain dominion over most of North America.[156] Success had come at a steep price, and the country was left with a crippling debt. The English enacted a number of duties on certain articles such as rum and spirits, and continued to regulate trade through acts such as the *Navigation Acts* of 1760 and the *Sugar Act* of 1764.[157] In 1765, the English Parliament enacted the *Stamp Act*, which was the first direct tax on the American colonies.[158] The Act placed a tax on an array of goods including newspapers, almanacs, pamphlets, legal documents, insurance policies, licenses, playing cards and dice: these products had to carry a tax stamp, and non-payment could potentially result in fines or even incarceration through judgment of an admiralty court, which sat without juries.[159]

Colonial governments protested that the tax amounted to an illegal exaction passed without representation. Patrick Henry introduced "four or five" resolutions against the *Stamp Act* in the Virginia House of Burgesses; the resolutions were reprinted in newspapers and distributed throughout the colonies.[160] The colonial governments mobilized quickly in

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[153] *See* Joseph Thorndike, *Tax History: A Tax Revolt or Revolting Taxes?*, TAX NOTES, Dec. 19, 2005, at 1517. There is ongoing debate among historians surrounding whether it was unrepresentative taxation or an attempt by the British to promote a monopoly over the trade of tea that fomented the Tea Party. *Id.* Moreover, another view maintains that it was not an idealistic revolt against British oppressors but rather an attempt by the leaders of the Revolution to gain control themselves over taxation of the colonials that led to the uprising. *Id.*

[154] *See, e.g.*, ADAMS, *supra* note 145, at 297.

[155] *See id.* at 297.

[156] BURG, *supra* note 2, at 260.

[157] *Id.* at 73.

[158] CAROL BERKIN, ET AL., MAKING AMERICA: A HISTORY OF THE UNITED STATES, VOLUME 1: TO 1877, 111 (Ann West et al. eds., 6th ed. 2011).

[159] BURG, *supra* note 2, at 249–50.

[160] JOHN E. FINDLING & FRANK W. THACKERY, EVENTS THAT CHANGED AMERICA IN THE EIGHTEENTH CENTURY 72 (1998).

opposition to the tax; nine of the thirteen colonies sent delegates to New York to speak at the Stamp Act Congress, which issued a "Declaration of Rights and Grievances."[161]

The *Stamp Act* played an important role in unifying the colonies against arbitrary English rule. For instance, the Sons of Liberty—the individuals behind the Boston Tea Party—were formed as a result of this new tax.[162] The colonists organized a series of protests against the tax. Mobs appeared throughout the colonies, forcing stamp agents to resign and discouraging merchants from importing British goods.[163]

In 1766, Benjamin Franklin traveled to London to appear before Parliament. His answers to parliamentary queries show the visceral opposition to the tax felt by the colonists:[164]

> Q: Was it an opinion in America before 1763, that the parliament had no right to lay taxes and duties there?
>
> Franklin: I never heard any objection to the right of laying duties to regulate commerce; but a right to lay internal taxes was never supposed to be in parliament, as we are not represented there.
>
> . . . .
>
> Q: Is there no means of obliging [the colonists] to erase those resolutions [against the Stamp Act]?
>
> Franklin: None that I know of; they will never do it, unless compelled by force of arms.
>
> Q: Is there a power on earth that can force them to erase them?
>
> Franklin: No power, how great soever, can force men to change their opinions.[165]

Ironically, it would take an Englishman, William Pitt, the Earl of Chatham, former Prime Minister and famed orator, to offer what was arguably the most astute criticism of the Stamp Act. On January 14, 1766, Pitt, suffering from a cold, rose in Parliament to deliver a blistering attack on unrepresentative taxation:[166]

> It is my Opinion, that this Kingdom has no Right to lay a Tax on the Colonies; at the same time I assert the Authority of this Kingdom over the Colonies to be Sovereign and Supreme in every Circumstance of Government and Legislation whatsoever; they were Subjects of this Kingdom, equally intitled by your Laws to all the natural Rights of Manhood and the peculiar Privileges of Englishmen . . .
>
> We therefore, in this House [of Commons], give and grant, what is our own; but in an American Tax, what do we do? We, your Majesty's Commons of Great Britain, give and grant to your majesty, what? Our own Property? No; we give and grant to your Majesty, the Property of

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[161] *Id.* at 72–73.

[162] PAUL S. BOYER ET AL., THE ENDURING VISION: A HISTORY OF THE AMERICAN PEOPLE 100 (8th ed. 2012).

[163] *Id.*

[164] *See* Benjamin Franklin, Petitions against the American Stampe Act, *in* 16 THE PARLIAMENTARY HISTORY OF ENGLAND FROM THE EARLIEST PERIOD TO THE YEAR 1803, at 138–59 (1813).

[165] *Id.* at 142, 160.

[166] Transcript of statement by William Pitt, Jan. 14, 1766, *in* THE SPEECH OF MR. P---- AND SEVERAL OTHERS, IN A CERTAIN AUGUST ASSEMBLY, ON A LATE IMPORTANT DEBATE (1766).

> your Majesty's Commons in America, an Absurdity in Terms. *This Distinction between Legislation and Taxation, is essentially necessary to Liberty . . .*
>
> . . . .
>
> Upon the Whole, I will beg leave to tell the House what is my real Opinion: It is, that the Stamp Act be repealed absolutely, totally, and immediately.[167]

As Pitt's concluding line makes perfectly clear, he views direct taxation ("internal taxes") without representation to be unacceptable but, like Franklin, accepts certain taxes ("external taxes") such as import duties as they are mainly directed toward the regulation of international trade.[168] In light of the opposition by the colonists as well as Pitt and others, the *Stamp Act* was finally repealed in 1766.[169]

Historians sometimes credit the *Stamp Act* protests with bringing together the colonial governments for the first time to explore their common interests; they began to think of themselves as part of a potentially greater political union, to think of themselves as "Americans."[170] The cause that united these men—anger at unrepresentative taxation—provided an opportunity for these colonists to see that they were all opposed to arbitrary English rule and quite prepared to take action to stop it.

B. Tea Tax, Rebellions and Congressional Responses

After a brief period of rectitude, the English government responded with renewed enthusiasm for taxes and import duties on a variety of goods from paper, lead and glass to paint under the *Townsend Acts* of 1767.[171] The colonies answered back by organizing even more protests and by boycotting the purchase on certain English goods.[172] Moreover, this legislation created three new admiralty courts to try Americans who ignored the law (the existing court in Halifax, Nova Scotia, was thought to be too far away.)[173] Rising anger against the taxes also led to the Boston Massacre, a violent confrontation in March 1770 between a mob of Boston residents and English troops guarding a government building that housed customs agents.[174] Again, the English accommodated the American views and

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[167] Id. at 1, 9-10, 12, 13, 30, 33 (emphasis added).

[168] At the time, there seemed to a general acceptance among the colonists of English "external taxes" (e.g., duties) while "internal taxes" (e.g., direct income taxes or indirect consumption taxes) were considered unacceptable. However, a number of the external taxes acted more like excise taxes placed on specified goods, and not like duties placed on general imports. From an economic perspective, the external taxes and the internal taxes were often equivalent because they would place a similar incidence of the tax burden on the same taxpayers. For these reasons, the similarities between the two types of taxation may not justify the different ways they were viewed by English and American observers at the time. As the Revolution approached, the colonists began to feel that the external taxes, such as the duty placed on the import of tea, were also unacceptable.

[169] DENNIS BRINDELL FRADIN, THE STAMP ACT OF 1765, 33 (Deborah Grahame ed., 2010).

[170] *See, e.g.*, EDMUND S. MORGAN & HELEN M. MORGAN, THE STAMP ACT CRISIS: PROLOGUE TO REVOLUTION 4–5 (1995).

[171] *See* The New York Restraining Act, 1775, 7 Geo. 3, c. 59; The Revenue Act, 1767, 7 Geo. 3 c. 46, §1; The Comissioners of Customs Act, 1767, 7 Geo. 3, c. 41.

[172] NATALIE S. BOBER, ABIGAIL ADAMS: WITNESS TO A REVOLUTION 36 (1995).

[173] J. JACKSON OWENSBY, THE UNITED STATES DECLARATION OF INDEPENDENCE (REVISITED) 140 (2010).

[174] LOUISE MINKS & BENTON MINKS, REVOLUTIONARY WAR 22-23 (John S. Bowman ed., updated ed. 2003).

rescinded all of the taxes with the exception of a tax on tea in part to emphasize and symbolize English authority over the colonies.[175]

Parliament subsequently passed the *Tea Act* in 1773 to grant a monopoly on international trade to the East India Company by exempting this company from the normal duty on tea exported from England; this would enable the company to undercut the price charged for tea by other companies.[176] The Parliamentarians hoped that the use of duties instead of direct taxes would appease the colonists (taxes that regulated trade were deemed acceptable by many Americans at the time.)[177] On December 16, 1773, Samuel Adams and his group of patriots, the Sons of Liberty, swept onto a cargo ship filled with tea belonging to the East India Company, which they dumped into Boston Harbor, causing a loss of roughly 10,000 pounds.[178] More "tea parties" followed in other coastal ports.[179]

Angered at the colonial upstarts, the English passed legislation in 1774 to punish the colonists—named Intolerable Acts or Coercive Acts by the colonists—that sought to close ports such as the Boston Harbor until the tea losses were repaid, curtailed the powers of the Massachusetts assembly, and required colonists to provide housing and supplies to British soldiers.[180] These Acts in turn led to widespread anger and discontent with British rule.[181] They decided to form a congress with representatives from the different colonial governments. On October 14, 1774, the First Continental Congress passed a resolution called the *Declaration and Resolves of the First Continental Congress*, which denied the power of Parliament to tax the colonies and presented the king of England with a list of grievances. Notably, the first recital sets out opposition to unjust British taxes:

> Whereas, since the close of the last war, the British Parliament, claiming a power of right to bind the people of America, by statute, in all cases whatsoever, hath, in some Acts, expressly imposed taxes on them, and in others, under various pretences, but in fact for the purpose of raising a revenue, hath imposed rates and duties payable in these Colonies, established a Board of Commissioners, with unconstitutional powers, and extended the jurisdiction of Courts of Admiralty, not only for collecting the said duties, but for the trial of causes merely arising within the body of a County . . . .[182]

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[175] *See* Thorndike, *supra* note 153, at 1518. The legislation reads, "For every pound weight avoirdupois tea, three pence." *See* Revenue Act, *supra* note 171.

[176] Tea Act, 1773, 13 Geo. 3, c. 4.

[177] As mentioned, there is an ongoing debate whether the Boston Tea Party was sparked by the tea tax or the efforts to create a tea monopoly. Under one view, the tax and the monopoly are closely related: to dodge the tea tax, the colonists had begun to smuggle in tea from Holland, which led to reduced revenues for the East India Company and the need for Parliament to promote the tea monopoly to save the company from bankruptcy. *See* Thorndike, *supra* note 153 (noting a combination of factors that influenced colonial anger against the English).

[178] GEOFFREY TODD, CHRONICLES OF THE REVOLUTIONARY WAR 4 (2006).

[179] NANCY FURSTINGER, THE BOSTON TEA PARTY 30 (Rebecca Aldridge ed., 2002).

[180] HARRY J. P. HARMER, TOM PAINE: THE LIFE OF A REVOLUTIONARY 20 (2006).

[181] B. V. RAO, WORLD HISTORY FROM EARLY TIMES TO A.D. 2000, 213 (3d rev. ed. 2012).

[182] Declaration of Rights (Oct. 14, 1774), *in* 1 AMERICAN ARCHIVES: CONTAINING A DOCUMENTARY HISTORY OF THE ENGLISH COLONIES IN NORTH AMERICA FROM THE KING'S MESSAGE TO PARLIAMENT, OF MARCH 7, 1774 OF THE DECLARATION OF INDEPENDENCE BY THE UNITED STATES, at 910 (St. Clair Clarke & Peter Force eds., 4th ser. 1837).

The *Declaration* goes on to set out certain inalienable rights enjoyed by Americans, in part by harkening back to English principles of justice and references to the *Magna Carta* and its descendants:

> That the inhabitants of the English Colonies in North America, by the immutable laws of nature, the principles of the English Constitution, and the several Charters or Compacts, have the following Rights:
>
> . . .
>
> Resolved, 4: That the foundation of English Liberty, and of all free Government, is a right in the people to participate in their Legislative Council: and as the English Colonists are not represented, and from their local and other circumstances cannot be properly represented in the British Parliament, they are entitled to a free and exclusive power of legislation in their several Provincial Legislatures, where their right of Representation can alone be preserved, in all cases of taxation and internal polity, subject only to the negative of their Sovereign, in such manner as has been heretofore used and accustomed.[183]

Anger at British taxation continued until the Continental Congress adopted the Declaration of Independence on July 4, 1776, which included as one of its twenty-seven grievances against the King the imposition of "Taxes on us without our Consent . . . ."[184] These passages are consistent with constitutional law writings that emphasize control over taxation, not theoretical concerns surrounding individual liberty, as the principal unifying force for resisting English rule.[185]

C. Taxation and the New Republic

Rebellions against taxation did not end with the conclusion of the Revolution. Although the new American government was born out of a tax revolt, it could not function without levying its own taxes. Only a few years earlier not paying taxes was deemed patriotic but was now an act of treason.

Beginning in the summer of 1786, Daniel Shays, a former captain in the Continental Army led his followers (known as Shaysites) in an attack against tax collectors and shopkeepers out of anger over burdensome taxes and debt.[186] After the suppression of these actions in Massachusetts, fourteen of the participants were put on trial then convicted and sentenced to death for treason (although they were later pardoned from the death sentence).[187] The significance of Shays's Rebellion is twofold: firstly, it exemplifies how issues of taxation remained in the American consciousness despite the end of the Revolution; and secondly, there is reason to believe that Shays played an integral part in the formation of the Constitution.[188] Under a more recent view, the Federalists exaggerated the threat of the rebellion so as to increase national power.[189]

Even after the Constitution was ratified, in a similar series of events, in 1794 the federal government no longer trusted the Pennsylvanian government to suppress the

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[183] *Id.* at 911.

[184] *The Declaration of Independence*, para. 21 (1776).

[185] *See* discussion *supra* note 2.

[186] CAROL SUE HUMPHREY, THE REVOLUTIONARY ERA: PRIMARY DOCUMENTS ON EVENTS FROM 1776 TO 1800, at 119 (2003).

[187] Roger Foster, *Treason Trials in the United States*, 46 ALB. L. J. 345, 345 (1892).

[188] *See* JOHNSON, *supra* note 2, at 217–222.

[189] *Id.* at 216.

Whiskey Rebellions that were spreading throughout the state.[190] Many "inhabitants of Western Pennsylvania . . . derived their principal income from the manufacture and sale of whisky. . . ."[191] Outrage swept across the region as a levy of seven cents per gallon was issued by the U.S. government.[192] Of the original thirty-five insurgents who were indicted on charges of treason[193] only two men, John Mitchell and Philip Vigol, were convicted of high treason.[194] Both men were sentenced to death but were later pardoned by President Washington.[195]

While opposition to British taxation may have served as a unifying force during the Revolution, in constructing the Articles of Confederation taxation played a prominent role in dividing federalists and anti-federalists. According to one view, the most important fight in ratifying the constitution was over whether the federal government would have the power to exact taxes in time of war.[196] The debate and subsequent resolution over whether the federal government or individual states would have the power to tax the citizens played a prominent role in shaping the structure of the American political system. In a correspondence with Jefferson, Washington wrote that he was willing to accept any tolerable compromise except for the amendment preventing direct taxation.[197] It was imperative for the successful operations of the federal government to that it have taxation powers.

Without the power to tax, the Articles of Confederation lasted seven years. With the power to tax, the Constitution has lasted over 200 years.[198] The issue of taxation was a point of contention with both sides of the debate: "Tax connects with . . . almost all other powers, and [tax] at least will in process of time draw all other after it."[199] The power over taxation was seen as the foundation for all other governmental powers in the new union.

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[190] STEVEN R. BOYD, THE WHISKEY REBELLION: PAST AND PRESENT PERSPECTIVES 171 (1985).

[191] Hayes McKinney, *Treason Under the Constitution of the United States*, 3 VA. L. REG. NEW SER. 801, 810 (1918); JOHN PATRICK DIGGINS, JOHN ADAMS: THE AMERICAN PRESIDENTS SERIES, THE 2ND PRESIDENT 1797–1801, at 84 (Arthur M. Schlesinger, Jr., ed., 2003).

[192] McKinney, *supra* note 191.

[193] United States v. Insurgents, 26 F. Cas. 499 (Paterson, Circuit Justice, C.C.D. Pa. 1795) (No. 15,443).

[194] Of the 35 insurgents, the jury only indicted 24 of high treason. *See, e.g.*, United States v. Mitchell, 26 F. Cas. 1277 (Paterson, Circuit Justice, C.C.D. Pa. 1795) (No. 15,788); United States v. Vigol, 28 F. Cas. 376 (Paterson, Circuit Justice, C.C.D. Pa. 1795) (No. 16,621).

[195] *See* Dwight F. Henderson, *Treason, Sedition, and Fries' Rebellion*, 14 AM. J. LEGAL HIST. 308, 308–18 (1970). In 1798, John Fries led a small revolt protesting a direct tax in house (commonly referred to as the House Tax) in northern Pennsylvania. He threatened to harass the tax collectors and forced a U.S. Marshall to give up prisoners. He was tried and convicted for treason and once again was pardoned by President Adams of his death sentence. *Id.*

[196] *See* JOHNSON, *supra* note 2, at 151. The ratification debate was not about individual rights, nor about democracy or slavery. Such issues were important, but they did not bitterly divide the nationalists from the anti-federalists, nor did they affect the shape or adoption of the Constitution. *Id.* at 163, 277. As Johnson argues, "[T]he Constitution is first a tax document, a pro-tax document, written by nationalists to allow the federal government to tax people and things directly without going through the states." *Id.* at 276.

[197] *Id.* at 155 (citing Letter from Washington to Jefferson (Aug. 31, 1788), *in* 30 WRITINGS OF GEORGE WASHINGTON FROM THE ORIGINAL MANUSCRIPT SOURCES 1745-1799, at 79 (John C. Fitzpatrick, et al. eds., 1931-1944).

[198] *Id.* at 298.

[199] Brutus I (Oct. 18, 1787), reprinted in 23 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 408 (Merill Jensen et al., eds., 1976).

After Virginia rejected the Bill of Rights, Madison's source said that the opposition was reducible "to a single point, the power of direct tax."[200]

In 1789, the United States Constitution came into effect giving the federal government the power to directly tax individuals. The federal government, rather than acting as an agent of the states, became the representative of the people.[201] Consequently, "We the people" would be the sovereign, not the states.[202] This fundamental Western political ideology is the result of the relationship based on taxation between the federal government and its citizens. Had the states been granted the exclusive power of direct taxation, the political landscape in America would no doubt have a different history, present and future.

V. SHAPING ANGLO-AMERICAN POLITICS, LAWS AND NORMS

The previous Parts described how tax law expansions in England and the United States influenced the formation and development of certain political and legal institutions. We saw an iterative process whereby individuals in both countries rebelled against "bad" taxes (i.e., unrepresentative taxes without due process protections for tax disputes), which led to the passage of "good" tax laws that reduced arbitrary tax measures and promoted procedural protections against unfair taxation. This Part outlines how these developments influenced broader social change, including the eventual acceptance of liberalism as a guiding political philosophy.[203] No attempt is made to analyze the many other factors that promoted this acceptance; rather, the focus is directed at briefly underscoring the role played by historical tax developments in the Anglo-American world.

A. The Political/Legal Effect

As we have seen, the political struggle against "bad" tax laws shaped the development of certain political institutions.[204] For instance, the *Magna Carta* of 1215 and the *Confirmation of Charters* of 1297 provided for the creation of a Common Council to approve certain royal tax measures—this Council was likely the first "formal" proto-democratic body that exercised ongoing authority over a king's decision-making power.[205] By the 17th Century, systematic government institutions—tax agents, clerks, record managers, bookkeepers, tax prosecution offices—were needed to administrate increasingly complex tax laws controlled by the British Parliament. Finally, the Stamp Act Congress and the First Continental Congress, where representatives from the various colonial governments met to debate unfair English taxes, created legislative bodies that would be subsequently replicated in America and elsewhere.

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[200] *See* JOHNSON, *supra* note 2, at 173 (citing Letter from Madison to Washington (Dec. 5, 1789), in 12 THE PAPERS OF JAMES MADISON, CONGRESSIONAL SERIES (William T. Hutchinson & William M. E. Rachel eds., 1962-1991).

[201] *Id.* at 2, 4.

[202] *Id.* at 245–46.

[203] For a discussion of the interactive relationship between law and norms, see Lawrence M. Friedman, *The Law and Society Movement*, 38 STAN. L. REV. 763, 763–80 (1986).

[204] Because taxation is intensely political, it continues to shape modern political institutions. *See, e.g.*, ARTHUR J. COCKFIELD, NAFTA TAX LAW AND POLICY: RESOLVING THE CLASH BETWEEN ECONOMIC AND SOVEREIGNTY INTERESTS (2005) (relying on the views of economic historian Karl Polanyi to sustain a claim surrounding the need to respect national tax sovereignty).

[205] *See, e.g.*, C. H. McIlwain, *Due Process of Law in Magna Carta*, 14 COLUM. L. REV. 27, 40 (1914) (discussing how the Magna Carta was influenced by the barons' "quasi-constitutional" complaint seeking restrictions on the King's powers).

In addition to their impact on government bodies, early Anglo-American tax laws played a formative role in influencing the path of law and the development of legal institutions. As mentioned, legal historians sometimes emphasize how Western rule of law conceptions have been shaped by the criminal and civil procedural aspects of early law.[206] An alternative view provided by this article is that criminal and civil procedure protections were historically interwoven with taxation concerns.[207]

Concerns surrounding intrusive tax searches as well as incarceration for non-payment of taxes without due process were certainly warranted.[208] We reviewed efforts by King John to use scutage (i.e., payments in lieu of military service) to manipulate his noblemen and clergy in the 13th Century. Later on English kings would deploy forced loans, ship-money taxes and other means to collect revenues. In all cases, the uncooperative taxpayers could be jailed or worse without a fair hearing. Similarly, American colonists could be imprisoned by foreign-controlled admiralty courts for refusal to pay taxes. An early impetus for civil and criminal procedure protections was hence the need to inhibit abusive tax collection practices by agents of the state. These legal protections in turn required institutional support—lawyers, courts, judges, a properly-trained police force and so on—to gain practical effect.

B. Shaping Norms

The iterative process whereby individuals rebelled against bad taxes and demanded good tax laws also influenced the development of norms—the view that an individual's interests in his or her property and income (indeed his or her very personhood) should not be placed at the unfettered discretion of a king. How did tax laws shape normative beliefs? Early tax laws—the *Charter of Liberties*, the *Magna Carta* and the *Confirmation of Charters* in particular—showed pre-modern man that the king (at one time considered divine) could be bound to a set of human-devised rules that restricted his ability to tax their persons and properties. For the first time, wealthy noblemen saw that they could have

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[206] *See* discussion *supra* note 2.

[207] Under this view, bad tax laws can be seen as freedom-depriving but good tax laws (i.e., non-arbitrary representative taxes with due process protections for tax disputes) can be portrayed as securing and promoting individual liberty. After reviewing different tax systems in 18th Century Europe, Asia and North America, the Baron de Montesquieu noted, "It is a general rule that taxes may be heavier in proportion to the liberty of the subject, and that there is a necessity for reducing them in proportion to the increase of slavery. This has always been and always will be the case. It is a rule derived from nature that never varies." *See* BARON DE MONTESQUIEU, THE SPIRIT OF LAWS, at bk. 8 no. 12 (J. V. Prichard ed., Thomas Nugent trans., G. Bell & Sons 1914) (1748). These views reveal the complex interaction between tax laws and individual liberty: even good taxes arguably inhibit liberty by constraining an individual's choice to pursue productive activities, yet tax laws raise revenues that, within democracies, promote liberty by expanding choices and opportunities for other individuals. *See, e.g.*, Marjorie E. Kornhauser, *Equality, Liberty, and a Fair Income Tax*, 23 FORDHAM URB. L.J. 607, 609 (1996) (arguing "that the American sense of distributive justice and . . . taxation rests on the twin foundational principles of America—liberty and equality. These principles . . . under some definitions . . . are compatible, but most frequently they are in conflict.") *But see* ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 169 (1974) (claiming that income taxes are "on par with forced labor" because they involve an unjust theft by the state of an individual's property).

[208] For example, the link between property, privacy, and taxation is revealed by the well-known passage by William Pitt in a speech on the *Excise Bill* in the English Parliament. Pitt protested the use of government excise officers to enter homes to levy the tax: "[t]he poorest man may in his cottage bid defiance to the Crown. It may be frail; its roof may shake; the wind may enter; the rain may enter—but the King of England cannot enter—all his forces dare not cross the threshold of the ruined tenement!" William Pitt, *Speech on the Excise Bill,* House of Commons (Mar. 1763).

some control over their own properties regardless of the king's wishes. This influenced how they perceived themselves and their relationship with their ruler.[209]

Tax laws played an influential role in shaping how certain community members—beginning with powerful barons in the 13th Century, expanding to an elite English bourgeoisie in the 17th Century, and ending with American white male property owners in the 18th Century—situated themselves within their larger social universes. Over time, these individuals came to believe they had a moral entitlement to keep the fruits of their labors. These norms were internalized and later rationalized by the political philosophy of liberalism, which in turn served to reinforce the norms and the greater desire for "good" or "just" tax laws. In other words, tax laws themselves helped shape important political philosophical ideas within the Anglo-American world.[210]

Consider the relationship between these developments and the works of John Locke, one of the founders of the political philosophy of liberalism that has been so influential in the Anglo-American world.[211] The liberal tradition "is generally viewed as a relatively coherent set of principles centering on the defense of individual rights and liberties, the security of property, and the notion of limited government."[212] In particular, Chapter 5 of Locke's *Second Treatise on Government* sets out his views on the relationship between private property, representative taxation, and the state. [213] Near the end of the 17th Century in England, Locke offered the radical suggestion that all men were born equal to the King. Because all men are created equal, Locke reasoned, they enjoyed certain "natural rights" endowed by God.[214] In particular, because God put in each person the drive toward self-preservation then God must also have given this individual the right to secure survival.[215] Locke maintained that "every Man has Property in his own Person. This no Body has any Right to but himself. The Labour of his Body, and the Work of his Hands, we may say, are properly his."[216] To secure these natural rights to private property,

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[209] *See, e.g.*, McIlwain, supra note 205 (discussing how the Magna Carta influenced how the barons' viewed their relationship with the King).

[210] Schumpeter in particular urged the importance of studying fiscal history to illuminate present conditions: "Most important of all is the insight which the events of fiscal history provide into the laws of social being and becoming and into the driving forces of the fate of nations . . . The public finances are one of the best starting points for an investigation of society, especially though not exclusively of its political life." *See* SCHUMPETER, *supra* note 3, at 101.

[211] *See, e.g.*, JAMES TULLY, AN APPROACH TO POLITICAL PHILOSOPHY: LOCKE IN CONTEXTS 137 (1993) ("Three hundred years after its publication [Locke's] Two Treatises [of Government,that set out his views on the right to property] continues to present one of the major political philosophies of the modern world."); Richard A. Epstein, *Taxation in a Lockean World*, *in* 4 SOC. PHIL. AND POL'Y 49, 51 (1987) ("The American tradition of government has been heavily influenced by Lockean social contract theory.").

[212] *See* KIRSTIE M. MCCLURE, JUDGING RIGHTS: LOCKEAN POLITICS AND THE LIMITS OF CONSENT 3 (1996).

[213] For discussion, *see* Arthur Cockfield, *Income Taxes and Individual Liberty: A Lockean Perspective on Radical Consumption Tax Reform*, 46 S.D. L. REV. 8, 8 (2001).

[214] Philosophers have subsequently reconstructed Locke's and other natural rights theorists' arguments by using secular premises such as Rawls's "behind the veil" or originalist position analysis to derive essentially the same outcome as Locke: Locke's natural rights have been reconstructed as today's human rights. For a discussion of how natural rights theories developed into contemporary human rights theories, s*ee* CARL WELLMAN, AN APPROACH TO RIGHTS: STUDIES IN THE PHILOSOPHY OF LAW AND MORALS (1997).

[215] Note that Locke used the term "propriety" to mean an expanded notion of property, when compared to its contemporary meaning, to include notions of liberty and the right to security of person.

[216] *See* JOHN LOCKE, TWO TREATISES OF GOVERNMENT 287–88 (Peter Laslett ed., 1988).

individuals require a certain amount of freedom from state interference as well as the "arbitrary will" of other men.[217]

To Locke, the preservation of property was the "great and chief end" of government.[218] Locke accepted property regulation and taxation but, harkening back to the *Magna Carta*, only if consent is granted by the people's representatives.[219] Locke wrote that individuals have a moral duty to rebel against unjust rulers who do not respect private property rights, providing a moral foundation for the (English) Glorious Revolution and the subsequent American Revolution through the view that violent rebellion was the only answer to unrepresentative taxation.

We have seen several arguments against unjust tax laws that anticipated subsequent claims by Locke and others in the liberal tradition.[220] The earliest tax laws—the *Charter of Liberties* and the *Magna Carta*—placed limited constraints on royal taxation powers under the view that the king was not God-like and infallible (or at least the view that the king could be forced to provide limited political concessions to other powerful political figures). More cogently, arguments by 17th Century English lawyers frequently focused on the unfairness of arbitrary taxes imposed by royal fiat. Such tax measures were likened to slavery because they exposed a subject's property or person to the whim of the king. Some of these legal arguments deployed rhetoric similar to that used by Locke when setting out his famed labor theory of property (e.g., notions that "every man has property in his own person").[221] While the historical record is unclear, these legal arguments surrounding taxation, which were widely-published and circulated during the era, may have influenced Locke's views.

In any event, during critical eras of English and U.S. history, important legal documents such as the *Magna Carta*, the English *Bill of Rights*, and the American *Declaration of Independence* promoted democratic constraints on the use of state power to assess and collect taxes. These tax laws mediated the tension between the needs of the state—that requires revenues for various purposes—and the needs of its subjects/citizens—whose skills the state increasingly relied on for productive economic activities—and their desire for ongoing political freedoms. Over time, the idea that individuals are entitled to equal treatment under the law, and possess inalienable human rights, emerged in part as a result of these tax laws.

The perhaps obvious point here is that liberalism did not spring whole cloth from the ether, but was shaped by hundreds of years of practices and beliefs; the less obvious point is that liberalism was influenced in part by centuries' worth of tax law developments that enshrined protections against arbitrary exactions. In other words, without these developments it may have been the case that the English and Americans would not have been as amenable to internalize the values of liberalism (and republicanism).

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[217] For discussion on Locke's emphasis on providing relief from arbitrary actions of others, *see* ALBERT O. HIRSCHMAN, THE PASSIONS AND THE INTERESTS: POLITICAL ARGUMENTS FOR CAPITALISM BEFORE ITS TRIUMPH 53–54 (1977).

[218] *See* Locke, *supra* note 216, at 350–51.

[219] *Id.* at 362

[220] *See* discussion, *supra* related to notes 37–63. Writings about Locke and other liberal theorists at times emphasize how they were influenced by earlier natural rights theorists such as Grotius. *See* STEPHEN BUCKLE, NATURAL LAW AND THE THEORY OF PROPERTY: GROTIUS TO HUME 25–32 (1991).

[221] *See* Locke, *supra* note 216, at 285-302; *see also* Buckle, *supra* note 220, at 179–83.

VI. CONCLUSION

The stream of history flows with eddies, currents, cross-currents, rapids and riffles: it is always a dangerous exercise to isolate one influential factor without taking into account the broader context and the multitude of factors that influence the course of history. Recognizing these dangers, this article has strived to place tax law developments within their broader social and political context to show how early English and American tax laws played an influential role in developing and reinforcing increasingly progressive political and legal institutions.

Several centuries in particular—13th and 17th century England as well as 18th century United States—are notable for the ways that tax law developments were interwoven with important legal and political developments that witnessed the long march toward modern democracies. During these centuries, we see the rise of increasingly representative governments, and an emphasis on the need for the rule of law with due process protections against arbitrary state rule. While the historical processes that influenced these developments are complex, tax laws played an important role.

By securing rights against arbitrary taxation, individuals began to enjoy enhanced security and wealth, which led to even greater yearnings for freedom. Under this article's account, the political struggle against "bad" taxes (i.e., unrepresentative taxes without due process protections for tax disputes) led to the development of "good" tax laws (i.e., laws that promoted representative taxes along with procedural protections against arbitrary imprisonment for non-payment of taxes) that helped to create and shape Anglo-American legal and political institutions, as well as liberal beliefs.