Taxation of Illegal Narcotics: A Violation of the Fifth Amendment Rights or an Innovative Tool in the War Against Drugs?

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NOTES

TAXATION OF ILLEGAL NARCOTICS: A VIOLATION OF FIFTH AMENDMENT RIGHTS OR AN INNOVATIVE TOOL IN THE WAR AGAINST DRUGS?

One sure way to determine the social conscience of a Government is to examine the way taxes are collected and how they are spent. . . . Taxes, after all, are the dues that we pay for the privileges of living in an organized society.2

The nation's drug problem has had a sweeping impact politically, socially and economically.3 While the American taxpayer

1 U.S. Const. amend. V. The Fifth Amendment to the United States Constitution protects against compelled self-incrimination. Id. It reads, in pertinent part: "[No person] shall be compelled in any criminal case to be a witness against himself . . . ." Id. The Fifth Amendment also protects against a second prosecution or punishment for the same offense. Id. The Amendment states: "No person shall be . . . subject for the same offence to be twice put in jeopardy of life or limb." Id.


has been burdened with the economic cost of fighting this escalating war against illegal narcotics, the drug industry has generated billions of untaxed dollars each year. During the last decade, drugs as “preeminent problem of criminal justice in the United States”); Lionel Barber, *Bush Strategy for Bringing the Drug Problem Under Control*, FIN TIMES, Sept. 7, 1989, § I, at 6 (reporting fear of drugs and attendant crime at all time high); Ross M. LaRoe & John Charles Pool, *Drug Problem Includes More Than Economics*, COLUMBUS DISPATCH, June 5, 1993, at B2 (stating that federal government would spend $13 billion on drug enforcement in upcoming fiscal year, with approximately $8 billion aimed at reducing supply of drugs and $5 billion geared towards reducing demand); Mark Ridley-Thomass, *Drugs: The Problems Will Be Compounded If We Fail to See Substance Abuse as An Unprecedented Health Crises*, L.A. TIMES, Feb. 23, 1990, at B7 (asserting that demand for illegal drugs is public health problem, thus public policy must be refocused on education, treatment, early intervention and research); David Warsh, *Neither War Nor Peace Will Solve Drug Problem*, CHI. TIMES, July 19, 1992, at 6 (stating drug problem to be “at the very heart of urban despair”).


5 *See, e.g., John Caher, Greenberg Says Tax Increase Needed to Fund Assault on Drugs*, TIMES UNION (Albany, N.Y.), Sept. 19, 1989, at B2 (indicating that drug industry grosses $150 billion per year); Chi Chi Sileo, *Addiction to Change: Supporters of Drug-Law Reform Split on Method*, WASH. TIMES, Feb. 16, 1994, at A7 (noting that drug trade is flourishing with annual profit of $50 billion to $100 billion); Jann S. Wenner, *Drug War: A New Vietnam?*, N.Y. TIMES, June 23, 1990, at A23 (reporting that black market in illegal drugs nets approximately $50 to $60 billion per year in profits from organized crime); Martin Wolf,
state legislatures have recognized this apparent inequity.\(^6\) As a result, a growing number of states have enacted statutes imposing various forms of taxes on those who unlawfully possess or deal in controlled substances.\(^7\)

Taxing unlawful gains reflects legislative attempts to hold accountable those who perpetuate and benefit from the drug trade.\(^8\)

While taxation of illegal narcotics may seem an obvious and practical method to fund the war on drugs, the need to comport with constitutional limitations has impeded state legislation.\(^9\)

This Note examines contemporary drug tax statutes and the constitutional challenges they have sparked. Part I discusses the historical background of the government's power to tax unlawful

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\(^6\) See, e.g., infra note 60 (listing enacted drug tax statutes); Rehg v. Illinois Dep't of Revenue, 605 N.E.2d 525, 531 (Ill. 1992) (upholding Illinois' drug tax statute because tax imposed is rationally related to legislative intent requiring reimbursement to State by those who benefit from illegal drug use); Ann L. Iijima, The War on Drugs: The Privilege Against Self-Incrimination Falls Victim to State Taxation of Controlled Substances, 29 HARV. C.R.-C.L. L. REV. 101, 101 (1994) (explaining that recent enactment of drug tax statutes indicates legislative response to increasing public concern regarding illegal drug use); Patricia Morgan, Money Laundering, The Internal Revenue Service and Enforcement Priorities, 43 FLA. L. REV. 939, 940-41 (1991) (highlighting tension between policy goal of controlling criminal conduct and cost); Robert E. Tomasson, 21 States Imposing Drug Tax and Then Fining the Evaders, N.Y. TIMES, Dec. 23, 1990, at A1 (reporting that growing number of states are tapping vast proceeds gained from drug sales through use of tax code to impose liability on drug traffickers).

\(^7\) See Iijima, supra note 6, at 101-02 & 102 n.1 (noting that in 1986 Minnesota became one of first states to enact drug tax statute and by 1994 twenty-four states had enacted similar statutes); see also infra part II (describing provisions of state drug tax statutes).

\(^8\) See Ala. CODE § 40-17A-16 (1993) (noting intent of drug tax statute is "to levy this tax upon illegal drugs in an effort to compensate for the lost revenue from a section of the economy that has not heretofore borne its fair share of the tax burden"); James v. United States, 366 U.S. 213, 221 (1961) (recognizing injustice of relieving embezzlers of paying income taxes on embezzled funds while requiring that honest people pay taxes on every conceivable type of income); Briney v. State Dep't of Revenue, 594 So. 2d 120, 124 (Ala. Civ. App. 1991) (finding Alabama's drug tax serves remedial purpose of assessing taxes upon those who previously escaped taxation), cert. denied, Ex parte Briney, 1992 Ala. LEXIS 171 (Ala. 1992); see also HARRY G. BALTER, TAX FRAUD & EVASION § 1.02[1] (5th ed. 1983) (explaining that appropriateness of taxing illegally produced income is based on premise that failure to do so would unfairly shift tax burden to law-abiding taxpayers); James M. Curley, Comment, Expanding Double Jeopardy: Department of Revenue v. Kurth Ranch, 75 B.U. L. REV. 505, 508 (1995) (describing Supreme Court's decision in Kurth Ranch as restrictive on states' ability to transfer costs associated with illegal-drug trade onto those who engender them); Tomasson, supra note 6, at A1 (acknowledging economic appropriateness of drug tax statutes despite constitutional issues).

\(^9\) See Marchetti v. United States, 390 U.S. 39, 58 (1968). In this case, the Supreme Court recognized that an interrelationship exists between the government's power to tax and the concomitant constitutional limitations on that power. Id. The Court noted that the Constitution requires full recognition of Congressional taxing powers and of measures reasonably incidental to their exercise. Id. The Court, however, is equally obliged to adhere to constitutional restrictions which permit the exercise of those powers. Id.; see also infra part III (discussing constitutional challenges against state taxation of illegal narcotics).
activities, including illegal drugs. While early cases were inconsistent, it eventually became firmly established that the government may constitutionally impose a tax on unlawful gains. Part II scrutinizes current provisions of drug tax statutes and their constitutional implications. The statutes most likely to invoke constitutional challenges are those that do not provide for taxpayers' confidentiality or those that impose an unreasonably high tax. Part III analyzes possible constitutional challenges to drug tax laws and evaluates their ability to withstand such challenges. While most challenges stem from claims of self-incrimination or double jeopardy, these concerns can be addressed via confidentiality provisions and appropriate levels of taxation. Finally, Part IV recommends specific statutory characteristics which will satisfy the goal of producing effective legislation within the boundaries of the United States Constitution. This Note will conclude that drug tax statutes can be effectively drafted to comport with taxpayers' constitutional rights and still achieve the goal of raising revenue to help fight the war on drugs.

I. HISTORICAL BACKGROUND

As early as 1864, Congress exercised its power to tax by levying license taxes on individuals who profited from illegal activities. One statute which imposed a tax on those dealing in lottery tickets or liquor resulted in taxpayer challenges alleging that Congress did not have the power to tax ill-gotten gains. The

10 See U.S. Const. art. I, § 8, cl. 1. Article I provides in part: "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States . . . ." Id.
12 See License Tax Cases, 72 U.S. 462, 463 (1866). The License Tax Cases represented a consolidation of nine cases which were brought before the Court, and arising under internal revenue acts relating to licenses for selling liquor and to taxes on dealing in lotteries. Id. The defendants essentially argued that the federal license and tax statutes were in direct conflict with state legislation which prohibited the very acts which Congress sought to tax, thus implying condonation of the activity. Id. at 467. They challenged as contradictory state power to deter and to punish crime, and federal power to levy a tax from revenue from the same crime, arguing that the two could not coexist; that is, the taxing power must yield to the objective to deter and punish. Id. The statute provided that anyone engaged in the business of selling lottery tickets or dealing in liquor must obtain a license (later amended to "special tax") from the federal government. Id. at 463. The act further stipulated that any license granted or tax paid could not be construed to authorize any activity prohibited by the statute, so as to prevent the taxation of that very activity. Id. The Court essentially stated that taxes may be imposed on revenue derived from illegal conduct, and furthermore, such tax does not in any way validate or authorize the activity taxed. Id.
Supreme Court ruled, in the *License Tax Cases*, that Congress was within its right to impose taxes on revenue from conduct deemed illegal by state legislation. The Court reasoned that where state statutes prohibited certain conduct and congressional measures imposed taxes on that same conduct, the two lines of legislation were aimed at achieving the same goal — discouraging socially undesirable behavior.

Governmental power to tax illegal conduct remained unquestioned until the enactment of the federal income tax in 1913 and the Revenue Act of 1921. For three decades following these enactments, the Supreme Court grappled with the question of whether gains from illegal conduct were "gross income" for purposes of income taxation. Finally, in 1961 the Supreme Court appeared to settle the issue in *James v. United States*. Upholding the reasoning in the *License Tax Cases*, the *James* Court pro-

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13 72 U.S. 462 (1866).
14 *Id.* at 473 (stating that no contradiction exists by allowing Congress to tax certain activities which also are prohibited by State law because what state prohibits, federal government discourages by taxation).
15 *Id.*
18 Compare *United States v. Sullivan*, 274 U.S. 259, 259 (1927) and *Commissioner v. Wilcox*, 327 U.S. 404 (1946), overruled by *James v. United States*, 366 U.S. 213 (1961), with *Rutkin v. United States*, 343 U.S. 130 (1952). In *Sullivan*, the Court held that profits derived from illegal liquor sales were subject to income tax. *Sullivan*, 274 U.S. at 259. In its decision, the Court considered whether gains from illegal sales of liquor were subject to the recently enacted income tax. *Id.* at 263. Answering in the affirmative, Justice Holmes wrote: "We see no reason... why the fact that a business is unlawful should exempt it from paying the taxes that it lawfully would have to pay." *Id.* Nearly two decades later, the *Wilcox* Court concluded that embezzled money did not constitute income subject to taxation. *Wilcox*, 327 U.S. at 408. The Court, analogizing an embezzler to a bankrupt debtor, reasoned that because Wilcox obtained the funds without any bona fide claim of right and remained under a duty to repay, the embezzled funds did not constitute taxable income under the provisions of the Internal Revenue Code which defined "gross income." *Id.* Further perpetuating the inconsistency, six years after *Wilcox*, the Court in *Rutkin* held that money obtained by extortion was taxable income under the Internal Revenue Code. *Rutkin*, 343 U.S. at 139. The Court construed the same provision of the Internal Revenue Code as that subject to interpretation in the *Wilcox* case. *Id.* at 130-31. While acknowledging its holding in *Wilcox*, the *Rutkin* court distinguished the two cases, stating that the taxability of embezzled funds differed from that of extorted funds. *Id.* at 138. Justice Burton explained that an extortionist secures money from a victim with his consent, solely by harassing demands and threats of violence. *Id.* The wrongdoer, therefore, exercises such control over the funds that, as a practical matter, he derives "readily realizable economic value." *Id.* at 137. As a result of the *Rutkin* decision, the Court left open the question of whether illegally procured income is subject to taxation.
19 366 U.S. 213 (1961). Similar to *Wilcox* and *Rutkin*, the defendant in this case was convicted of tax evasion for failure to report as gross income unlawfully obtained funds. *Id.* at 214. The Supreme Court granted certiorari, noting that the *Wilcox* and *James* facts were "concededly the same." *Id.*
claimed that the term “gross income” had long been interpreted to include gains from unlawful, as well as lawful, activities.\textsuperscript{20} The James Court noted that there had been widespread and settled administrative and judicial recognition of the taxability of many types of unlawful gains.\textsuperscript{21} The Internal Revenue Service formally adopted the James holding by amending its income tax regulations to comport with the decision.\textsuperscript{22}

Although the James opinion sought to establish firmly the doctrine that taxation of income derived from criminal activity is constitutional,\textsuperscript{23} taxpayers continued to challenge measures that taxed specific criminal conduct such as gambling,\textsuperscript{24} illegal possession of firearms\textsuperscript{25} and the possession of controlled substances.\textsuperscript{26} In these leading cases, the Supreme Court recognized the government’s power to tax criminal conduct providing that any such measure adheres to constitutional limitations.\textsuperscript{27}

In Marchetti v. United States,\textsuperscript{28} the petitioner challenged federal wagering tax statutes\textsuperscript{29} which imposed excise and occupational taxes, as well as a registration requirement, on those engaged in the business of accepting wagers.\textsuperscript{30} While the Supreme Court found the statute was unconstitutional on self-incrimination.

\begin{itemize}
\item \textsuperscript{20} Id. at 218.
\item \textsuperscript{21} Id. (quoting Rutkin v. United States, 343 U.S. 130, 137 (1952)).
\item \textsuperscript{22} See Treas. Reg. § 1.61-14 (as amended in 1965) (stating that illegal gains constitute gross income).
\item \textsuperscript{23} James, 366 U.S. at 218 (“It had been a well-established principle, long before either Rutkin or Wilcox, that unlawful, as well as lawful, gains are contemplated within the term ‘gross income.’”) (citation omitted); see supra note 18 (describing Rutkin and Wilcox opinions).
\item \textsuperscript{24} See Marchetti v. United States, 390 U.S. 39, 40 (1968) (challenging federal wagering tax statutes which imposed occupational tax on those accepting illegal wagers).
\item \textsuperscript{25} See Haynes v. United States, 390 U.S. 85, 90 (1968) (challenging National Firearms Act which required registration and taxation of certain firearms).
\item \textsuperscript{26} See Leary v. United States, 395 U.S. 6, 12 (1969) (challenging Marihuana Tax Act which imposed transfer tax on marihuana illegally imported or brought into United States).
\item \textsuperscript{27} See Marchetti v. United States, 390 U.S. 39, 58 (1968) (stating that the “Constitution ... obligates this Court to give full recognition to the taxing powers ... [b]ut we are equally obligated to give full effect to the constitutional restrictions which attend the exercise of those powers”).
\item \textsuperscript{28} 390 U.S. at 39.
\item \textsuperscript{29} 29 U.S.C. §§ 4401-4424 (1988).
\item \textsuperscript{30} Id.; 26 U.S.C. § 4401 imposed a ten percent excise tax on the gross amount of wagers accepted by bookmakers. Id. at 42. Additionally, § 4411 imposed a fifty dollar annual occupational tax on persons subject to taxation under § 4401. Id. Furthermore, § 4412 required those liable for the occupational tax under § 4411 to register with the director of their local internal revenue district. Id. These registrants were further required to submit to the Internal Revenue Service a form indicating, \textit{inter alia}, their name, address, place of business and whether they were engaged in the practice of accepting wagers. Id.
\end{itemize}
tion grounds due to the registration provisions,\textsuperscript{31} the Court carefully noted the established rule which states that the unlawfulness of an activity does not prevent its taxation.\textsuperscript{32} Moreover, the Court indicated that nothing in its decision would diminish the vitality of that doctrine.\textsuperscript{33}

The same day the Supreme Court decided \textit{Marchetti}, the Court rejected similar taxing and registration provisions in \textit{Haynes v. United States}.\textsuperscript{34} In \textit{Haynes}, the petitioner challenged section 5851 of the National Firearms Act\textsuperscript{35} which imposes taxes on certain classes of illegal firearms.\textsuperscript{36} As in \textit{Marchetti}, the Court upheld the petitioner's claim that certain registration provisions of the Act violated the right against self-incrimination.\textsuperscript{37} More importantly, however, the Court emphasized the need to give deference to Congress' taxing powers, while remaining mindful of the limitations placed upon those powers by the Constitution's other commands.\textsuperscript{38}

\textsuperscript{31} \textit{Marchetti}, 390 U.S. at 48. The crux of the petitioner's challenge was that the registration provisions of the federal wagering tax statutes violated his Fifth Amendment privilege against self-incrimination. \textit{Id.} at 41. The Court acknowledged that the obligation to register under the statute created a "real and appreciable" risk of self-incrimination. \textit{Id.} at 48.

\textsuperscript{32} \textit{Marchetti} v. United States, 390 U.S. 39, 44 (1968). The Court relied on the \textit{License Tax Cases}, a consolidation of cases decided more than a century prior to the \textit{Marchetti} case; see supra notes 12-14 and accompanying text (describing background and holding of \textit{License Tax Cases}).

\textsuperscript{33} \textit{Marchetti}, 390 U.S. at 44.

\textsuperscript{34} 390 U.S. 85, 87 (1968); see 26 U.S.C. § 5845 (1994). This statute, questioned in \textit{Haynes}, applies only to shotguns with barrels less than 18 inches long, rifles with barrels less than 16 inches long, or other weapons made from shotguns or rifles which are less than 26 inches long. \textit{Id.}; 26 U.S.C. §§ 5812, 5822. Further, an individual who "transfers" or "makes" firearms is required to file with the Secretary a written application, indicating identity of the maker or transferor and transferee, including fingerprints and photographs. \textit{Id.}

\textsuperscript{35} 26 U.S.C. §§ 5801-5872.

\textsuperscript{36} 26 U.S.C. §§ 5801(a), 5802. Under the Act, importers, manufacturers, and dealers in specified classes of firearms were required to pay an annual occupational tax and to register with the Secretary of the Treasury or his delegate. \textit{Id.} Failure to comply with any of the Act's requirements were punishable by fines and imprisonment. \textit{Id.}

\textsuperscript{37} \textit{Haynes}, 390 U.S. at 100. The Court found that the constitutional privilege against self-incrimination provided a complete defense to prosecutions for failure to comply with the Act's registration requirement. \textit{Id.}

Interestingly, Congress responded to the \textit{Haynes} decision by amending the National Firearms Act ("NFA"). See 26 U.S.C. 5812(a) (1988). The NFA now provides that no information obtained through compliance with the registration requirements shall be used in a criminal proceeding against the person whose compliance is required. \textit{Id.}; see also United States v. Dalton, 960 F.2d 121, 123 n.3 (10th Cir. 1992) (applying \textit{Haynes} rationale to similar self-incrimination claim and noting changes to statute subsequent to \textit{Haynes} decision).

\textsuperscript{38} \textit{Haynes}, 390 U.S. at 98 (explaining that courts "must give deference to Congress' taxing powers, and to measures reasonably incidental to their exercise"); see also \textit{Marchetti} v. United States, 390 U.S. 39, 58 (1968) (noting Court's recognition that congressional imposition of taxes is subject to other constitutional restraints); Sonzinsky v. United States, 300 U.S. 506, 512 (1937) (citing Flint v. Stone Tracy Co., 220 U.S. 107, 158 (1911)) (stating that
Nearly three decades following Marchetti and Haynes, the Supreme Court continues to view the taxing of unlawful activities as constitutional. Specifically, in the 1993 case of Department of Revenue v. Kurth Ranch, the Court reaffirmed this position in the context of taxing illegal narcotics. Furthermore, at least one state has expressly recognized this principle when reviewing its own drug tax statute. In State v. Durrant, the Supreme Court

"[i]n the exercise of its Constitutional Power to lay taxes, Congress may select the subjects of taxation, choosing some, omitting others.").

See Leary v. United States, 395 U.S. 6 (1969). Immediately following Haynes and Marchetti, the Supreme Court decided Leary. In this case customs officials at an American inspection station stopped a United States citizen, Dr. Timothy Leary, while traveling across the International Bridge between the United States and Mexico. Id. at 9-10. He was found to be in possession of marihuana and was subsequently convicted of illegally importing the drug in violation of the Federal Marihuana Tax Act. Id. at 11. Leary successfully argued that compliance with that Act would require him to incriminate himself by admitting that he possessed contraband. Id. at 16-18. Dr. Leary asserted that by its terms, the Marihuana Tax Act compelled him to subject himself to a "real and appreciable risk of self-incrimination." Id. at 16. (citations omitted). Certain provisions of the act required Leary to identify himself as a transferee who had not registered or paid the tax required under the statute. Id. A related statutory section mandated that such information be conveyed by the Internal Revenue Service to state and local law enforcement officials upon request. Id. Transmittal of this incriminating evidence "would surely prove a significant 'link in a chain' of evidence tending to establish [Leary's] guilt." Id. (citing Marchetti, 390 U.S. at 48).

While the Leary decision did not directly address the right of government to tax illegal drug possession, the Court substantially relied on the Marchetti reasoning. Id. at 27. The Court characterized Marchetti as involving an identical self-incrimination claim. Id.

Leary apparently was interpreted to indicate that taxation of illegal drugs is, in and of itself, constitutionally permissible. See, e.g., United States v. Alvero, 470 F.2d 981 (5th Cir. 1975). In this post-Leary case, the Fifth Circuit evaluated the Supreme Court's decision, finding that the Court deemed taxation of illegal drugs constitutionally valid. Id. at 983. In Alvero, the appellant was convicted of evasion of federal marijuana taxes. Id. at 982. On appeal, he asserted several grounds, one of which was that Leary invalidated the tax in question. Id. The Court of Appeals flatly refused such a claim, stating: "We do not agree with appellant's contention that [Leary] . . . held collection of the marijuana tax unconstitutional or relieved taxpayers against whom it was properly assessed of the duty to pay it." Id. at 983.

of Kansas upheld its drug tax law by adhering to the United States Supreme Court’s position that unlawful activities may be taxed under federal as well as state law.

Based on the established precedent that Congress is within its right to tax unlawful activities, it appears that states may confidently apply this doctrine to the taxation of illegal drugs. In drafting drug tax statutes, however, states must work within the bounds of other constitutional restraints. As the leading cases have articulated, deference to Congress’ taxing power does not allow infringement on basic constitutional rights. It is instructive to examine first the various statutory provisions common to many state drug tax acts prior to analyzing the possible constitutional challenges they may face.

II. Statutory Provisions

A. Methods of Taxation

Currently, over half of all states have some form of a drug tax law in place. These legislative measures have generated contro-

43 Durrant, 769 P.2d at 1183. The Durrant case was quite similar to Leary v. United States, 395 U.S. 6 (1969). Id. Durrant involved the Kansas drug tax act which imposed a tax and registration requirement on dealers of controlled substances. Id. at 1177. Just as in Leary, the petitioner in Durrant challenged the statute on the basis that the act violated his Fifth Amendment right against compelled self-incrimination. Id. Finding that the confidentiality provisions contained in the Kansas drug tax act were sufficient to protect the defendant from self-incrimination, the court upheld the act. Id. at 1183.

44 Durrant, 769 P.2d at 1179. The Durrant court stated: "While some have questioned the propriety of a governmental entity imposing a tax upon an illegal act, the United States Supreme Court has held that a tax may be imposed on an activity that is wholly or partially unlawful under state or federal statutes." Id. at 1183 (citing Marchetti v. United States, 390 U.S. 39, 58 (1968)).

45 See supra part I (describing evolving case law which led to Supreme Court precedent validating taxation of illegal activities); see also Department of Revenue v. Kurth Ranch, 114 S. Ct. 1937, 1945 (1994) (indicating government has power to tax possession of illegal drugs).

46 See supra note 39 and accompanying text (describing Supreme Court’s acceptance of this principle).

47 See supra note 39 (quoting Supreme Court decisions spanning over half of century).
versy among courts and commentators. Such statutes typically require monetary payments by individuals found in possession of controlled substances.\(^49\) The most common means of collecting these payments is through the use of drug tax stamps.\(^50\) These statutes require taxpayers to purchase stamps from the state's department of revenue and affix them to the controlled substance prior to sale, as evidence of tax payment.\(^51\) A handful of states


\(^{50}\) See Frank A. Racaniello, Note, State Drug Taxes: A Tax We Can't Afford, 23 RUTGERS L.J. 657, 663-64 (1992) (describing types of state drug taxes and noting that most popular method of taxation is requiring purchase of drug stamps by individuals dealing in illegal drugs).

\(^{51}\) See, e.g., ALA. CODE § 40-17A-4 (requiring stamp on controlled substance as evidence of payment of tax); COLO. REV. STAT. § 39-28.7-103 (same).
levy their assessment in the form of an excise tax and two states impose a licensing fee. Additionally, some drug tax statutes have provisions wherein tax payments vary depending upon the quantities and/or types of controlled substances possessed.

B. Sanctions for Nonpayment of Tax

Many states charge substantial penalties for nonpayment of the initial tax. Most of the drug tax statutes impose a penalty of 100% of the initial tax on those who fail to pay the original assessment. Colorado and Illinois impose a penalty of 300% and 400%, respectively, and Utah's penalty is significantly higher, at 1000%. In addition, several states provide that violation of the civil drug tax statute is punishable as a crime.

See, e.g., Ga. Code Ann. § 48-15-7. "[T]ax imposed . . . shall be due and payable at the time of each use, possession, consumption, storage, or transfer . . . '" Id.; Excise taxes do not provide means for payment before the tax is due or before the deficiency is assessed. Id.; see Black's Law Dictionary 563 (6th ed. 1990). An excise tax has been defined as a tax on the "carrying on of an occupation or activity." Id.


See Iijima, supra note 6, app. Professor Iijima summarized 23 enacted statutes, all of which were shown to impose drug taxes based on the amounts and types of drugs possessed by the obligor. Id. In determining the amount to be assessed, the states typically will tax the drugs at a different rate, based upon whether the drug is marihuana, a controlled substance sold by weight, or a controlled substance not sold by weight. Id. Marihuana generally is taxed at a rate of $3.50 per gram. Id. The survey indicated that 15 of the 23 statutes tax marijuana at this rate; the remaining rates are either based on ounces or a percentage of the retail price. Id. Other controlled substances, such as cocaine, are typically taxed at a rate of $200 per gram. Id. Most statutes provide that controlled substances not sold by weight shall be measured based on the number of dosage units. Id.

See Iijima, supra note 6, app. (indicating that all statutes surveyed provide for some form of nonpayment penalty).


Iijima, supra note 6, at app. In Alabama, Illinois, Iowa, Nebraska, North Carolina, Texas and Utah, violation of the statute is classified as a felony under state law. Id. In,
C. Confidentiality Provisions

Compliance with drug tax statutes, such as revealing possession of specified types and amounts of drugs prior to paying the tax, may require taxpayers to disclose information which could be used against them in subsequent proceedings. Further, by requiring drug dealers to affix stamps to their drugs, possession of the stamp alone could evidence possession of illegal substances.

Since compliance with statutory requirements and payments may cause taxpayers to incriminate themselves, nearly all drug tax statutes provide confidentiality provisions. These provisions generally prohibit tax return information from being used against the taxpayer in subsequent criminal proceedings. To ensure Connecticut, Kansas, Louisiana, Minnesota, Oklahoma and Rhode Island, violation results in an additional fine and/or imprisonment. See Iijima, supra note 6, at 123-24. In licensing states, those subject to the statute must reveal their status as sellers of drugs in order to obtain a license. See Racaniello, supra note 50, at 663-64 (describing use of stamps to assess drug taxes).

See, e.g., State v. Garza, 496 N.W.2d 448, 452 (Neb. 1993). Arguing that Nebraska's drug tax statute violated his privilege against self-incrimination, Garza asserted that compliance with the act — i.e., receiving the stamps by self-presentation or by having them mailed to him — would force him to disclose, and thereby incriminate, himself as a possessor of illegal substances. See also Iijima, supra note 6 at 124 (describing how possession of tax stamp exposes obligor to risk of self-incrimination).


Seventh, e.g., Kan. Stat. Ann. § 79-5210 (prohibiting public employees from disclosing information required by act and prohibiting use of such information in criminal proceeding, except to enforce tax itself); State v. Durrant, 769 P.2d 1174, 1180 (Kan.) (interpreting confidentiality provision of statute and finding it provides sufficient protection against self-incrimination), cert. denied, 492 U.S. 923 (1989); see also, Minn. Stat. § 297D.13 (Supp. 1991). Illustrative of a typical confidentiality provision, the Minnesota statute provides:
compliance, several statutes provide criminal penalties for those who breach the confidentiality provisions.\(^6\)

III. CONSTITUTIONAL CHALLENGES

State drug tax statutes have faced several constitutional challenges,\(^6\) including charges that they infringe on the Fifth Amendment right against self-incrimination and its prohibition against double jeopardy.\(^6\) To date, these statutes have withstood most challenges on these grounds.\(^6\) The analyses performed by courts,

Subdivision 1. Disclosure prohibited. Notwithstanding any law to the contrary, neither the commissioner nor a public employee may reveal facts contained in a report or return required by this chapter or any information obtained from a tax obligor; nor can any information contained in such a report or return obtained from a tax obligor be used against the tax obligor making the return . . . .

Subdivision 4. Possession of Stamps. A stamp denoting payment of the tax imposed under this chapter must not be used against the taxpayer in connection with the administration or civil or criminal enforcement of the tax imposed under this chapter or any similar tax imposed by another state or local unit of government.

Id.


\(^{67}\) See Claudia G. Catalano, Annotation, Validity, Construction, and Application of State Laws Imposing Tax or License Fee on Possession, Sale, or the Like, of Illegal Narcotics, 12 A.L.R.5th 89, 103 (1993 & Supp. 1995). This survey of recent state drug tax decisions reveals that such statutes have been challenged as violating constitutional protections of self-incrimination, due process rights, illegal seizures, double jeopardy, cruel and unusual punishment, and equal protection. Id.

\(^{68}\) U.S. Const. amend. V. The Fifth Amendment privilege against self-incrimination provides that in a criminal case, the defendant shall not be required to testify against himself. Id. The Double Jeopardy Clause of the Fifth Amendment protects against multiple punishments for the same offense. Id.; see also Ind. Const. art. I, § 14 (containing similar privilege against self-incrimination); Ind. Const. art. I, § 14 (containing similar provision prohibiting double jeopardy). This Note, while confined to analysis of constitutional challenges based on the Federal Constitution, recognizes that most state constitutions have similar provisions.

\(^{69}\) See Catalano, supra note 67, at 103 (observing that most courts considering taxation of illegal drugs have upheld state drug tax acts); Racaniello, supra note 50, at 666-67 (noting that only constitutional challenges sustained by courts thus far have been those based on self-incrimination and double jeopardy); see also F. Anthony Paganelli, Constitutional Analysis of Indiana’s Controlled Substances Excise Tax, 70 Ind. L.J. 1301, 1303 (1995) (describing constitutional challenges based on self-incrimination and double jeopardy as “strongest challenges” to Indiana’s drug tax statute).
however, have focused largely on confidentiality provisions\textsuperscript{70} and whether the taxes are a disguised form of punishment.\textsuperscript{71}

A. The Right Against Self-Incrimination

The Fifth Amendment to the United States Constitution provides that a criminal defendant may not be compelled to incriminate him/herself.\textsuperscript{72} Under the Incorporation Clause of the Fourteenth Amendment, this right applies to state action.\textsuperscript{73} This right has been interpreted and refined by the Supreme Court in determining whether certain taxing schemes may require divulgence of self-incriminating evidence.\textsuperscript{74}

In United States v. Kahriger\textsuperscript{75} and Lewis v. United States,\textsuperscript{76} the Court upheld the constitutionality of the Revenue Act of 1951,\textsuperscript{77} determining the Act did not compel taxpayers to incriminate

\textsuperscript{70} See, e.g., State v. Gallup, 500 N.W.2d 437, 444 (Iowa 1993). The court held that the state's drug tax act did not violate defendant's Fifth Amendment right against self-incrimination because the statute assured anonymity to dealers buying drug stamps. \textit{Id. But see}, e.g., Herre v. Dept of Revenue, 617 So.2d 390, 393-94 (Fla. Dist. Ct. App. 1993). The court found that a provision in the state's drug tax statute which required filing of a sales and use tax return was unconstitutional as creating a real and appreciable risk of self-incrimination because the return contained identifying information and could be released to state and federal law enforcement officers. \textit{Id. See generally Alan Daniel Gould, Criminal Law and the Fifth Amendment: Taxation of Illegal Drugs, 1989 ANN. SURV. AM. L. 541, 550. The author asserts that "[c]onfidentiality is . . . the key to ensuring the constitutionality of drug taxation statutes." \textit{Id.}

\textsuperscript{71} See, e.g., Ward v. State, 870 S.W.2d 659 (Tex. Ct. App. 1994). The court held that the defendant, who had been assessed taxes and penalties on the drugs he possessed, was not subject to double jeopardy by prosecution for the underlying offense of drug possession, because the tax assessment did not result from the previous criminal judgment. \textit{Id. at} 662. \textit{But cf.} Department of Revenue v. Kurth Ranch, 114 S. Ct. 1937 (1994). The Court determined that the state's assessment of tax on taxpayer's possession and storage of dangerous drugs violated the double jeopardy clause. \textit{Id. at} 1940. The court specifically pointed out, \textit{inter alia}, that the tax hinged on commission of a crime and applied only after the taxpayer had been arrested for the precise conduct that gave rise to the crime. \textit{Id. at} 1947.

\textsuperscript{72} U.S. CONST. amend. V (mandating that "[n]o person shall be compelled in any criminal case to be a witness against himself . . . "). See generally Mary M. Cheh, Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction, 42 HASTINGS L.J. 1325, 1384-85 (1991) (analyzing Court's expansion of Fifth Amendment protections); Charles E. Moylan, Jr. & John Sonsteng, The Privilege Against Compelled Self-Incrimination, 16 WM. MITCHELL L. REV. 249, 301 (1990) (discussing history of Fifth Amendment privilege).

\textsuperscript{73} See Malloy v. Hogan, 378 U.S. 1, 6 (1964) (extending right against self-incrimination via Fourteenth Amendment to apply to state actions).

\textsuperscript{74} See \textit{infra} notes 75-108 and accompanying text (examining development of self-incrimination analysis in federal cases involving issue of confidentiality in tax and registration statutes).

\textsuperscript{75} 345 U.S. 22 (1953), \textit{overruled by} Marchetti v. United States, 390 U.S. 39 (1968).

\textsuperscript{76} 348 U.S. 419 (1955), \textit{overruled by} Marchetti v. United States, 390 U.S. 39 (1968).

\textsuperscript{77} Pub. L. No. 82-183, 65 Stat. 452 (1951).
themselves for past illegal behavior. The Act prohibited wagerers from accepting bets without first registering with the government and paying both an excise and an occupational tax. Since registration and tax information obtained by the government was available to law enforcement officials, the Court was faced with the issue of whether a wagerer’s compliance with the Act risked self-incrimination. Reasoning that the registration and payment of taxes pursuant to the Act were merely conditions precedent to wagering, the Court held the Act did not violate the right against self-incrimination because that right applies only to past acts, not to future acts that may or may not be committed.

In Marchetti, the Court, after re-examining its holdings in Kahriger and Lewis, expanded its view of the protections afforded by the Fifth Amendment. The Marchetti court addressed the ques-


79 26 U.S.C. § 3285 (a) (Supp. V 1946). The Act provided, in relevant part that “[t]here shall be imposed on wagers, as defined in subsection (b), an excise tax equal to 10 per centum of the amount thereof.” Id.; 26 U.S.C. § 3290 (Supp. V 1946). The Act further provided that “[a] special tax of $50 per year shall be paid by each person who is liable for tax under subchapter A or who is engaged in receiving wagers for or on behalf of any person so liable.” Id.; 29 U.S.C. § 3291 (a) (Supp. V 1946). In addition, the Act provided that:

1. Each person required to pay a special tax under this subchapter shall register with the collector of the district-
   1. his name and place of residence;
   2. if he is liable for tax under Subchapter A, each place of business where the activity which makes him so liable is carried on, and the name and place of residence of each person who is engaged in receiving wagers for him or on his behalf; and
   3. if he is engaged in receiving wagers for or on behalf of any person liable for tax under subchapter A, the name and place of residence of each such person.

Id.

80 See Marchetti, 390 U.S. at 47 (noting availability of information obtained as consequence of federal wagering tax laws to assist enforcement of penalties).

81 See United States v. Kahriger, 345 U.S. 22, 23-24 (1953) (stating issue on appeal to be, inter alia, whether registration provisions of federal wagering tax violate privilege against self-incrimination); Lewis, 348 U.S. at 420 (same).

82 See Kahriger, 345 U.S. at 32-33. "Under the registration provisions of the wagering tax, appellee is not compelled to confess to acts already committed, he is merely informed by the statute that in order to engage in the business of wagering in the future he must fulfill certain conditions." Id. (footnote omitted); Lewis v. United States, 348 U.S. 419, 422 (1955). "If petitioners desires to engage in an unlawful business, he does so only on his own volition. The fact that he may elect to pay the tax and make the prescribed disclosures required by the Act is a matter of his choice." Id.

83 See Kahriger, 345 U.S. at 36 (Black and Douglas, JJ., dissenting) (arguing that taxing schemes in question compelled the production of evidence that would be useful in convicting registrants for conspiracy to violate federal and state laws); Lewis, 348 U.S. at 423-25 (Black and Douglas, JJ., dissenting) (same).

84 See Marchetti v. United States, 390 U.S. 39, 41 (1968) (indicating certiorari granted in order to “reconsider whether Kahriger and Lewis still have vitality”) (footnote omitted).

85 Compare Marchetti, 390 U.S. at 51 (adopting standard that right against self-incrimination was designed to protect guilty as well as innocent persons), with Lewis, 348 U.S. at
tion of whether a federal wagering statute requiring disclosure of
tax and registration information violated the right against self-
incrimination. The Court held that requiring such information
by law violated this right of wagerers subject to the statute.

Justice Harlan, writing for the majority in *Marchetti*, explained
the Court's three-part test to determine whether obtaining infor-
mation pursuant to a tax statute violates the constitutional right
against self-incrimination. A taxpayer may successfully assert
that his right against self-incrimination has been violated by the
statute only upon a showing that all three criteria have been met.
The first prong involves two inquiries — whether the tax is
aimed at individuals typically suspected of criminal activities and
whether the taxed activity is in an area permeated with criminal
statutes. The second consideration is whether an individual is
required, upon threat of criminal prosecution, to provide informa-
tion he or she might reasonably believe would be made available
to prosecuting authorities. The final inquiry is whether such in-
formation would prove a significant link in a chain of evidence
tending to establish the individual's guilt.

The *Marchetti* Court imposed two additional conditions neces-
sary to apply the three-part test. First, the standard needed to
trigger the self-incrimination right is whether the defendant is
confronted by a substantial and real hazard of incrimination.

422 (stating that persons can protect themselves from incrimination by ceasing illegal
activity).

86 See *Marchetti*, 390 U.S. at 47-52. The Court questioned the constitutionality of the
federal wagering tax statute. *Id.*; *Grosso v. United States*, 390 U.S. 62, 63-64 (1968). In
*Grosso*, the Court addressed the constitutionality of the excise tax imposed by the same
wagering act at issue in *Marchetti*. *Id.* The Court's holding paralleled that in *Marchetti*. *Id.*
at 64-69; *Haynes v. United States*, 390 U.S. 85, 86-87 (1968). In *Haynes*, the Court ad-
dressed whether the National Firearms Act violated self-incrimination by virtue of its re-
minder provisions. *Id.* The Court held that the statute's provision for prosecution for
failure to register under the statute violated the constitutional right against self-incrimina-
tion. *Id.* at 100.

87 *Marchetti*, 390 U.S. at 47-48.
88 *Id.* at 47-48.
90 *Id.* at 47.
91 *Id.* at 48. The Court pointed out that Internal Revenue Service officials made available
to law enforcement agencies the names and addresses of those who had paid the wagering
tax. *Id.*
92 *Id.*
93 *Id.* at 53 (citing *Rogers v. United States*, 340 U.S. 367, 374 (1951); *Brown v. Walker*,
161 U.S. 591, 600 (1896)). The Court pointed out that mere "trifling or imaginary" hazards
of incrimination are not "real" for purposes of this standard. *Id.* (citing *Rogers*, 340 U.S. at
374; *Brown*, 161 U.S. at 600).
Second, when other safeguards are available that are broad enough to encompass the same protection as afforded by the Fifth Amendment, a successful claim of self-incrimination will be precluded.94

Based on these factors and standards, the Marchetti Court refused to adopt the government's interpretation that the statute implied restrictions on use of information obtained as a result of compliance with the statute.95 The Court therefore concluded that the wagering tax statute and attendant registration requirements, as they stood,96 violated the self-incrimination right provided under the Fifth Amendment.97

The impact of the Marchetti decision, in the context of self-incrimination challenges, is evident in subsequent Supreme Court rulings such as Grosso v. United States98 and Haynes v. United

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94 Marchetti v. United States, 390 U.S. 39, 58 (1968) (citation omitted); see State v. Davis, 787 P.2d 517 (Utah Ct. App. 1990). This is an illustrative case in which a state court determined alternative protections to be "broad enough" to preclude assertions of self-incrimination. Id. In Davis, the court upheld its state's drug tax act without relying on the anonymity provision contained in the act. Id. at 522-23. Instead, the court interpreted an amended version of the act, which explicitly prohibited disclosure and provided confidentiality, as indicative of the legislature's intent to protect against self-incrimination. Id. at 522. The court reasoned that this judicial grant of immunity was as broad as the Fifth Amendment right against self-incrimination. Id. at 523; see also State v. Hall, 540 N.W.2d 219, 227 (Wis. Ct. App. 1995). The Hall court interpreted Wisconsin's drug tax statute to prevent use by prosecutors of any information acquired as a result of any drug tax stamp purchase and stated that "the resulting immunity is broad enough to satisfy the requirements of the Fifth Amendment." Id.

95 Marchetti, 390 U.S. at 58-60. The Court refused to read the statute as precluding prosecutors from using any information gained as a result of registrants' compliance with the occupational tax provisions. Id. Such an interpretation would be at odds with legislative history evincing Congress' intent that the information be made available to law enforcement authorities. Id. at 59-60, 59 nn.15,16.

96 Id. at 60. "[U]nder the wagering tax system as presently written . . . petitioner properly asserted the privilege against self-incrimination." Id. Subsequent to the Marchetti decision, the United States Court of Appeals twice upheld an amended version of the wagering tax statute against claims of self-incrimination. See United States v. Sahadi, 555 F.2d 23, 23-24 (2d Cir. 1977). Sahadi held that the amendments to the wagering statute to be constitutional based on confidentiality protections they encompassed. Id.; United States v. Jeffers, 621 F.2d 221, 223 (5th Cir. 1980). In Jeffers, the Fifth Circuit upheld the amended version of the statute against a wagerer's claims of self-incrimination. Id. The amendments deleted the requirement that registrants under the statute conspicuously display their tax stamp and IRS officials were no longer required to provide tax information to law enforcement authorities. Id. at 225. The Jeffers court noted that the confidentiality provisions in the amendments were reinforced by a separate statute that penalized government employees who "leaked" confidential information. Id. at 226. The court recognized that "18 U.S.C. § 1905 provides for fines and/or imprisonment and loss of employment for persons making unauthorized disclosure of confidential governmental information." Id.

97 Marchetti, 390 U.S. at 48-49. The Court upheld petitioner's challenge to the wagering tax statute, concluding that the taxpayer's asserted privilege against self-incrimination was infringed upon by his compliance with the registration requirements of the wagering tax provisions. Id. at 61.

Both cases were decided immediately following *Marchetti* and relied on the *Marchetti* rationale to strike down registration statutes as violative of registrants' constitutional right against self-incrimination.\(^9\)

In addition, state courts have relied on *Marchetti*'s three-part test to determine the validity of individual drug tax statutes. In *State v. Garza*,\(^10\) for example, the Nebraska Supreme Court held that its state's drug tax act did not violate the Fifth Amendment.\(^11\) Applying the *Marchetti* rationale, the Nebraska court found the first part of the test to be satisfied because the tax was aimed at individuals suspected of criminal activities\(^12\) in an area permeated with criminal statutes.\(^13\) The court decided, however, that the second and third parts of the test were not met, thereby defeating the taxpayer's self-incrimination challenge.\(^14\) The court explained that the defendant did not have reason to believe the information he provided would be available to prosecutors\(^15\) because the statute effectively limited dissemination of information to prosecuting authorities.\(^16\) Similarly, the supreme courts in Iowa, Utah, and Minnesota, upholding their state's drug tax laws,

\(^10\) *Grosso*, 390 U.S. at 69; *Haynes*, 390 U.S. at 95.
\(^11\) 496 N.W.2d 448 (Neb. 1993).
\(^12\) Id. at 459.
\(^13\) Id. at 453. Those who engage in the possession, manufacture, and delivery of controlled substances are "inherently suspect of criminality." *Id.*
\(^14\) *Id.* "The possession, manufacture, and delivery of controlled substances is an area replete with criminal statutes." *Id.*
\(^15\) Id. at 453. Quoting the Nebraska statute, the court stated: "Information contained in any report required by the Tax Commission shall not be used against the dealer in any criminal proceeding, unless independently obtained, except in connection with a proceeding involving taxes due from the taxpayer making the report." *Id.*
\(^16\) *Garza*, 496 N.W.2d at 453. The court explained that the statute's confidentiality provisions were effective because taxpayers were not required to receive tax stamps either in person or by mail. *Id.* at 454. Furthermore, mailing addresses that were provided in order to comply with the act were kept confidential. *Id.* The court continued that the statute disallowed the use of "leaked" confidential information in a criminal proceeding against the taxpayer. *Id.* Finally, the court noted that since the confidentiality provisions of the act provided "protection as broad in scope and effect as the [self-incrimination] privilege itself" the taxpayer could not refuse to comply with the act by claiming it violated his Fifth Amendment privilege. *Id.* at 455. *But cf.* Michael A. LeMay, Case Note, *Nebraska's Marijuana and Controlled Substance Tax Stamp Act and Self-Incrimination: State v. Garza*, 27 CREIGHTON L. REV. 313, 359 (1993). The author agreed with the *Garza* decision, but argued that it offered no guidance to lower courts because it "hastily resort[ed] to use restrictions ... and fail[ed] to engage in a critical constitutional analysis of the Fifth Amendment privilege against self-incrimination ... ." *Id.*
have applied Marchetti's three-part test and have concluded their statutes contain adequate confidentiality provisions.  

B. The Protection from Double Jeopardy

In addition to the right against self-incrimination, the Fifth Amendment provides that no person shall be subjected to prosecution or punishment twice for the same offense. The United States Supreme Court has determined that the Double Jeopardy clause protects against three distinct actions beyond the express language of the Fifth Amendment. These actions include a second prosecution for the same offense after conviction, a second prosecution for the same offense after acquittal, and multiple punishments for the same offense. In drug tax cases, emphasis is placed on the multiple punishments prong because the issue arises whether the tax levied constitutes a form of "punishment." The Court has concluded that these protections also apply to the states through the Incorporation Clause of the Fourteenth Amendment.

Double jeopardy jurisprudence has long been criticized as lacking in clarity. The multiple punishments doctrine, in particular,

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108 See Sisson v. Triplett, 428 N.W.2d 565, 857 (Minn. 1988) (upholding Utah's drug stamp tax by construing statute to preclude prosecutorial use of information gained as result of compliance with statute; citing Marchetti); State v. Godbersen, 493 N.W.2d 852, 856-57 (Iowa 1992) (upholding Iowa's drug tax act on basis that statute assured anonymity to dealers who purchased drug tax stamps; referring in its analysis to Marchetti's three part test and "Marchetti line of cases"); Zissi v. State Tax Comm., 842 P.2d 848, 571-74 (Utah 1992) (concluding that state's drug tax statute contained sufficient confidentiality provisions to withstand claim of self-incrimination; focusing on criteria identified in Marchetti).

109 U.S. CONST. amend. V.


111 U.S. CONST. amend. V.

112 See Department of Revenue v. Kurth Ranch, 114 S. Ct. 1937, 1941 (1994). The Court prefaced its opinion with the statement that the issue to be decided was whether a tax on the possession of illegal drugs assessed after the State had imposed a criminal penalty for the same conduct may violated the multiple punishments prong of the Double Jeopardy Clause. Id. Elaborating on that point, the Court explained that the answer to that question was based on whether Montana's tax constituted a "punishment." Id.

113 See Benton v. Maryland, 395 U.S. 784, 794 (1969) "[T]he double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our constitutional heritage, and . . . should apply to the States through the Fourteenth Amendment." Id.

114 See, e.g., Albernaz v. United States, 450 U.S. 333, 343 (1981) (observing that "the decisional law in the [double jeopardy] area is a veritable Sargasso Sea which could not fail to challenge the most intrepid judicial navigator"); see also Monroe G. McKay, Double Jeopardy: Are the Pieces the Puzzle?, 23 WASHBURN L.J. 1, 16 (1983) (stating that double jeopardy jurisprudence is "in a state of disarray"); The Supreme Court, 1992 Term: Leading Cases, 107 HARV. L. REV. 129, 144, 149 (1993) (asserting that Double Jeopardy Clause is still "one of the most volatile areas of constitutional criminal law" despite judicial attempts
has received differing treatment by the Supreme Court. In the context of legislatively imposed sanctions, including taxes, double jeopardy analysis is applicable depending upon how punishment is defined by the deciding court.

In *Helvering v. Mitchell*, the Supreme Court determined the proper test for determining whether Congress intended a civil or a criminal penalty is one of statutory construction. According to the Court, Congress may impose both a criminal and a civil sanction with respect to the same act or omission. To support this proposition, the Court reasoned that the Double Jeopardy Clause does not prohibit all second sanctions, only those deemed to be a second criminal punishment for the same offense. Over time, the Court refined this statutory construction test to require a determination of whether Congress expressly or impliedly indicated a preference for a civil or a criminal sanction. If a court determined express congressional preference for a civil sanction, it then had to determine whether the statutory scheme was so punitive in either purpose or effect as to negate that intention.

at clarification); George C. Thomas III, *An Elegant Theory of Double Jeopardy*, 1988 U. ILL. L. Rev. 827, 828 (pointing out that “proliferation” of case law and commentary has failed to establish coherent double jeopardy theory); Peter Westen & Richard Drubel, *Toward a General Theory of Double Jeopardy*, 1978 SUP. CT. REV. 81, 82 (noting that Supreme Court had come to recognize its double jeopardy decisions could “hardly be characterized as models of consistency and clarity” (quoting Burks v. United States, 437 U.S. 1, 9 (1978)).


*Compare* Helvering, 303 U.S. at 399-400 (describing legislation as punishment if its punitive effect outweighs Congress’ expressed or implied preference for civil sanction), with Halper, 490 U.S. at 448-49 (defining sanctions as punishment only where their purpose is solely punitive).

*Id.* at 406. The case involved a criminal defendant charged with income tax evasion who was subsequently acquitted. *Id.* at 396. The Supreme Court held that the Double Jeopardy Clause did not bar a civil penalty imposed after the acquittal because the bar applies only to subsequent criminal proceedings. *Id.* at 398-99. The Court concluded that the sanction was civil in nature because Congress provided a distinctly civil procedure for imposing the penalty. *Id.* at 406.

*Id.* at 399.

*Id.*


See *id.*: see also Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963). In *Mendoza-Martinez*, the Court enumerated several factors with which to evaluate the potential punitive purpose or effect of legislative sanctions. *Id.* at 68-70. These factors include whether the sanction is traditionally regarded as punishment, whether it promotes the traditional aims of punishment — retribution and deterrence — and whether it appears excessive. *Id.*
The Supreme Court departed from the statutory construction test when it decided *United States v. Halper*\(^{123}\) in 1989. One issue in *Halper* was whether a civil penalty may constitute punishment for purposes of double jeopardy analysis.\(^{124}\) The Court looked at whether the purpose of the sanction was solely punitive.\(^{126}\) The Court determined that the Double Jeopardy Clause protects a defendant who has been punished in a criminal prosecution from an additional civil sanction when that sanction may not fairly be characterized as remedial.\(^{126}\) The Court explained that a civil sanction constitutes punishment when it is not rationally related to the goal of compensating the government for costs resulting from the defendant's illegal conduct.\(^{127}\)

The standard applied by the *Halper* Court expanded double jeopardy application to apply in civil proceedings.\(^{128}\) Furthermore, the Court, by replacing the statutory construction test with the rational relationship test, disregarded congressional intent.\(^{129}\) The Court limited its holding to the "rare case" in which the sanction imposed upon the offender is overwhelmingly disproportionate to the damages he or she caused.\(^{130}\) The Court's narrow hold-

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\(^{123}\) 490 U.S. 435 (1989). The *Halper* case involved prosecution of Dr. Irwin Halper for Medicare fraud. *Id.* at 437. The government first brought criminal charges against Dr. Halper for violations of the criminal false claims statute. *Id.* at 438. Halper was convicted and sentenced to two years in prison. *Id.* at 437. The government subsequently filed a civil action against Halper for violating the False Claims Act pursuant to 31 U.S.C. § 3729(a)(2) (1988). *Id.*

\(^{124}\) *Id.* at 436.

\(^{125}\) *Id.* at 448-49 (stating that civil sanction constitutes punishment when it serves goals of retribution or deterrence).

\(^{126}\) *Id.* at 448-49. The Court's reference to the characterization that the sanction was "only" a deterrent or retribution indicates that a sanction functioning in part to deter does not necessarily make that sanction punitive.

\(^{127}\) *Id.* at 451.

\(^{128}\) See Department of Revenue v. Kurth Ranch, 114 S. Ct. 1937, 1944-45 (1994) (Scalia and Thomas, JJ., dissenting) (noting that *Halper* extended prohibition against multiple punishments to apply to civil penalties); see also Ravazzini, supra note 40, at 333-39 (observing that *Halper* marked first time Supreme Court found statutory "civil penalty as violative of the Double Jeopardy Clause"); *The Supreme Court, 1993 Term: Leading Cases*, 108 Harv. L. Rev. 139, 172 (1994) [hereinafter *1993 Leading Cases*] (describing *Halper* decision as "significantly expand[ing] the constitutional protections available to defendants by broadening the scope of the multiple-punishments prong of the Double Jeopardy Clause").

\(^{129}\) See *United States v. Halper*, 490 U.S. 435, 447 (1989). The Court stated that the statutory construction test is "not well suited to the context of the 'humane interests' safeguarded by the Double Jeopardy Clause's proscription of multiple punishments." *Id.* (quoting *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 554 (1943) (Frankfurter, J., concurring)).

\(^{130}\) *Id.* at 449. Under the Court's rationale, the statute in question provided for a fixed penalty, thus subjecting a "prolific but small-gauge offender" to a sanction disproportionate to the harm resulting from his actions. *Id.*
The recent Supreme Court decision in *Department of Revenue v. Kurth Ranch* represents the first time the Court has scrutinized a tax under the multiple punishments prong of the Double Jeopardy Clause. In *Kurth Ranch*, the Court held that Montana's tax on the possession of illegal drugs, assessed after the state had imposed a criminal penalty for the same conduct, violated the Fifth Amendment prohibition against successive punishments for the same offense. The Court stated that the Montana Dangerous Drug Tax was not the kind of civil sanction that may follow the punishment of a criminal offense. The Court opined that the sanction was motivated by punitive rather than revenue-raising purposes. The Court further held that the state's civil proceeding to collect the tax was the functional equivalent of a subsequent criminal prosecution placing the Kurths in jeopardy a second time for the same offense.

131 See id. at 449-50 (stating that judgment as to whether government's damages are "overwhelmingly disproportionate" to harm caused by defendant "often may amount to no more than an approximation" by trial court); see also Peter J. Henning, Precedents in a Vacuum: The Supreme Court Continues to Tinker with Double Jeopardy, 31 AM. CRIM. L. REV. 1, 45 (1993) (arguing that vagueness of Halper's double jeopardy rationale demonstrates Court may not adequately have assessed effect its decision would have on future cases).


133 See id. The *Kurth Ranch* court stated that: "Although we have never held that a tax violated the Double Jeopardy Clause, we have assumed that one might." Id. Clarifying its assumption, the Court explained:

In *Helvering v. Mitchell*, 303 U.S. 391 (1938), for example, this Court considered a Revenue Act provision requiring the taxpayer to pay an additional 50 percent of the total amount of any deficiency due to fraud with an intent to evade the tax. The Court assumed such a penalty could trigger double jeopardy protection if it were intended for punishment, but it nevertheless held that the statute was constitutional because the 50 percent addition to the tax was remedial, not punitive. Id. at 398-405. Although the penalty at issue in *Mitchell* is arguably better characterized as a sanction for fraud than a tax, the Court it interchangeably as a "sanction," id. at 405, 406, and "addition," id. at 405, and "assessment," id. at 396, and a "tax," id. at 398, making nothing of the potential import of the distinction.

*Id.* at 1945-46 n.16 (citation omitted).

134 *Id.* at 1948.


138 *Id.* at 1948.
The *Kurth Ranch* decision was met with three vigorous dis-sents, and similar to *Halper*, has failed to provide clear gui-
dance for lower courts and legislatures regarding which tax
schemes may violate the multiple punishments prong of the
Double Jeopardy Clause. The Court did state, however, that it
would uphold the imposition of a drug tax assessed prior to crimi-
nal punishment for the same offense or during the same criminal
proceeding that resulted in a conviction.

Certain statutory characteristics may affect whether a drug tax
statute violates the multiple punishments prong of the Double
Jeopardy Clause. Alabama’s drug tax act, for instance, was up-
held because it was deemed to serve an expressly stated remedial
purpose. More recently, the Court of Appeals of Ohio found its
drug tax statute did not impose multiple punishments because the
defendant was convicted in a single proceeding for both drug traf-
ficking and for failure to obtain a tax stamp. Additionally, a
Wisconsin court looked to the amount of penalties imposed and

139 See id. at 1949-60 (setting forth separate dissenting opinions). Chief Justice Rehn-
quist dissented, criticizing the Court’s application of a “hodgepodge of criteria” that “drasti-
cally alters existing law.” Id. at 1949 (Rehnquist, C.J., dissenting). The Chief Justice re-
ferred to a long line of cases establishing that a tax that “regulates, discourages or even
definitely deters the activity taxed” is not necessarily invalid. Id. at 1950 (quoting United
States v. Sanchez, 340 U.S. 42, 44 (1950)).

Justice O’Connor, also dissenting, argued that the *Halper* analysis should have been ap-
plied to Montana’s drug tax to determine whether it is punitive. Id. at 1953 (O’Connor, J.,
dissenting). Applying *Halper*, Justice O’Connor determined the statute in question served a
“legitimate nonpunitive interest.” Id. She referred to the majority opinion as an “unwar-
ranted expansion” of the Double Jeopardy Clause and concluded that the case should have
been remanded to the Court of Appeals for a proper application of *Halper*. Id. at 1955.

In a separate dissent, Justice Scalia, joined by Justice Thomas, argued that the Double
Jeopardy Clause does not prohibit multiple punishments, but rather multiple prosecutions.
Id. at 1955 (Scalia, J., dissenting). Justice Scalia called on the Court to severely limit and
then concluded that Montana’s tax proceeding did not constitute an impermissible second
prosecution. Id. at 1959.

140 See id. at 1946-47 (relying on “unusual features” of Montana’s tax; noting high tax
rate, deterrent purpose and provision conditioning tax on commission of crime); see also
1993 Leading Cases, supra note 128, at 172. (describing *Kurth Ranch* decision as providing
“deeply flawed subjective test that offers little guidance to lower courts or to state
legislatures”).

141 Kurth Ranch, 114 S. Ct. at 1945.

142 See State v. Wengren, 889 P.2d 96, 103 (Idaho Ct. App. 1995); State v. Riley, 479
N.W.2d 234, 235-36 (Wis. Ct. App. 1991); Briney v. State Dep’t of Revenue, 594 So.2d 120

143 See Briney v. State Dep’t of Revenue, 594 So. 2d 120, cert. denied, without op., 1992
Ala. LEXIS 171 (Ala. Jan. 31, 1992). The Alabama Court of Appeals upheld its drug tax act,
determining that the statute served its expressly stated remedial purpose. Id. at 124. The
court cited section 40-17A-16 of Alabama’s Drugs and Controlled Substances Excise Tax
Act and pointed out that nonpayment penalties are imposed on drug dealers just as they
are on all others who fail to pay their taxes. Id.

144 See Wengren, 889 P.2d at 103.
ruled the nonpayment penalty assessed against the defendant under the state's drug tax act was not a punishment within the meaning of the Double Jeopardy Clause.  

IV. Analysis and Recommendations

Based on the developing case law in Fifth Amendment jurisprudence, a statutory framework may be designed that will promote the twin aims of state drug tax laws — *i.e.*, extracting otherwise untaxed gains from drug traffickers while simultaneously protecting their constitutionally guaranteed freedom from self-incrimination and from double jeopardy.

A. Confidentiality Provisions

The cases discussed in Part III reveal that a clear precedent has been established by the United States Supreme Court and has been followed by state courts. Confidentiality provisions in drug tax statutes are a critical component required to protect taxpayers' rights against self-incrimination. The existence of confidentiality provisions alone, however, is not sufficient to safeguard against the release of taxpayers' information to law enforcement officials for purposes of obtaining drug convictions.

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146 Compare *Balter*, *supra* note 8, at § 1.02[1] (explaining that appropriateness of taxing illegally procured income is based on premise that failure to do so would unfairly shift tax burden to law-abiding taxpayers), with *Catalano, supra* note 67, at 103 (describing numerous judicial opinions in which state drug tax statutes have been challenged on constitutional grounds such as self-incrimination, due process, double jeopardy, cruel and unusual punishment, and equal protection).


148 See, e.g., *State v. Garza*, 496 N.W.2d 448, 453 (Neb. 1993) (mandating that information in reports required by Tax Commission shall not be used against drug dealers in any criminal proceeding unless independently obtained).

149 See *Marchetti v. United States*, 390 U.S. 39, 58 (1968). The *Marchetti* Court firmly stated that the privilege against self-incrimination may not properly be asserted if other protection is granted which is so broad as to have the same extent in scope and effect as the privilege itself. *Id.*

150 See, e.g., *State v. Smith*, 813 P.2d 888 (Idaho 1991). In *Smith*, the court vacated the defendant's conviction under the 1989 version of the state's Illegal Drug Stamp Tax Act, finding it violative of the right against self-incrimination. *Id.* at 890. The court, however, concluded that the 1990 version of the act rectified the asserted deficiencies. *Id.* Both ver-
stand challenges under the Fifth Amendment right against self-incrimination, confidentiality provisions of a drug tax statute should provide for imposition of penalties upon anyone who violates the statute's nondisclosure provisions. This added dimension will deter misuse of confidential information and, therefore, provide protection essentially equivalent in scope and effect as that provided by the Self-Incrimination Clause of the Fifth Amendment.

B. Penalties for Noncompliance

Drug taxes may deter illegal drug activity, as well as raise revenue, without being invalidated as a form of punishment. Imposing excessive nonpayment penalties in addition to the tax, how-

151 Compare State v. Durrant, 769 P.2d 1174, 1183 (Kan. 1989) (upholding state's drug tax statute since it prohibited disclosure of any information obtained under the act and prescribed use of such information in unrelated criminal proceedings), and Sisson v. Triplett, 428 N.W.2d 565, 574 (Minn. 1988) (upholding state's drug tax act because it sufficiently protected taxpayer's confidentiality), and Lopez v. State, 837 S.W.2d 863, 867 (Tex. Ct. App. 1992) (upholding statute because it required information obtained to be kept confidential and because act forbade disclosure for any purpose other than related tax proceeding), with Leary v. United States, 395 U.S. 6, 15-16 (1969) (holding federal Marihuana Tax Act unconstitutional as violative of Marchetti because it required taxpayer to identify himself and information was available to authorities on request), and State v. Smith, 813 P.2d 888, 890 (Idaho 1991) (holding version of state's tax stamp act unconstitutional that did not provide confidentiality for taxpayer, but also noting that amended version, which did afford confidentiality, was constitutional), and State v. Roberts, 384 N.W.2d 688, 690-91 (S.D. 1986) (holding unconstitutional controlled substances tax act that allowed release of taxpayer information to law enforcement officials on request), and Grosso v. United States, 390 U.S. 62, 66-69 (1968) (holding federal wagering tax act unconstitutional because act did not impose explicit restrictions on use of information obtained through payment of tax).

152 See Marchetti v. United States, 390 U.S. 39, 58 (1968). The Marchetti court firmly stated that the privilege against self-incrimination may not properly be asserted if other protection is granted which is so broad as to have the same extent in scope and effect as the privilege itself. Id.

153 See Department of Revenue v. Kurth Ranch, 114 S. Ct. 1937, 1946 (1994) (recognizing that "neither a high rate of taxation nor an obvious deterrent purpose" necessarily characterized Montana's drug tax as form of punishment); United States v. Sanchez, 340 U.S. 42, 44-45 (1950) (upholding federal tax on marijuana despite its regulatory effect); Sonzinsky v. United States, 300 U.S. 506, 513-14 (1934) (stating that tax does not cease to be valid merely because it regulates, discourages or deters activities taxed).
ever, may be viewed as solely punitive rather than as primarily revenue-raising. To avoid this result, drug tax laws must not be designed in a manner which imposes unreasonably high financial penalties.

C. Method and Time of Assessment

The Kurth Ranch decision may have established several means by which drug tax laws can be formulated to comport with double jeopardy limitations. For example, a drug tax proven to reimburse for the cost of prosecution and enforcement will likely be viewed as serving a remedial purpose. The Kurth Ranch opinion, supported by years of precedent, also indicated that double jeopardy will not be implicated where a tax and criminal punishment based on the same conduct are imposed during a single proceeding. Thus, to meet the standards of this framework, states must consider the magnitude of the taxes imposed as well as whether criminal acts by taxpayers will trigger imposition of the tax. The Supreme Court’s willingness to strike down drug taxes as punitive, if they are conditioned on criminal conduct, supports

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154 See, e.g., United States v. Halper, 490 U.S. 435, 452 (1989) (finding statutory penalty of $130,000 relative to defendant’s fraud costing government roughly $16,000 so disproportionate as to constitute “punishment”).

155 See supra note 153 (describing several opinions in which taxes were deemed remedial because amounts imposed were not considered excessive).


157 See In re Kurth Ranch, 986 F.2d 1308, 1312 (9th Cir. 1993); In re Kurth Ranch, No. CV-90-084-GF, 1991 U.S. Dist. LEXIS 21133, at *13 (D. Mont. Apr. 23, 1991); In re Kurth Ranch, 145 B.R. 61, 75-76 (Bankr. D. Mont. 1990). The procedural history of the Kurth Ranch case indicates that the United States Court of Appeals for the Ninth Circuit, the federal district court and the bankruptcy court, all found that the Minnesota’s failure to present evidence that the tax on the Kurths’ drugs compensated the state for its costs in prosecuting and enforcing the tax against the Kurths, made the tax constitutionally defective. But see Sorensen v. Department of Revenue, 836 P.2d 29, 33 (Mont. 1992). The Montana Supreme Court, while Kurth Ranch was pending certiorari to the United States Supreme Court, held that the imposition of Montana’s drug tax required no proof of the State’s remedial intent because a tax is not a civil sanction to which a Halper analysis would apply. Id.

158 See, e.g., Ohio v. Johnson, 467 U.S. 493, 500 (1984) (explaining that Double Jeopardy Clause’s prohibition against multiple punishments is not applicable where State prosecutes defendant for multiple offenses in one trial); Missouri v. Hunter, 459 U.S. 359, 368 (1983) (holding that Double Jeopardy Clause does not preclude, “in a single trial,” imposition of two separate punishments pursuant to two statutes prescribing same offense); Albernaz v. United States, 450 U.S. 333, 344 (1981) (finding that imposition of consecutive sentences did not violate Double Jeopardy Clause); United States v. 18755 N. Bay Rd., 13 F.3d 1493, 1499 (11th Cir. 1994) (holding that government’s contemporaneous pursuit of criminal and civil sanctions did not come “within the contours of a single, coordinated prosecution”).

the proposition that tax statutes must have a primarily revenue raising-purpose.160

CONCLUSION

Our nation’s illegal drug problem has risen to a level that warrants legislative attention. Recently, this focus has resulted in a revival of taxing illegal drugs. While a certain sense of economic fairness does seem served by such measures, states must be careful that their drug tax statutes are well-researched and thoughtfully planned.

Since the latter half of the nineteenth century, the Supreme Court has endorsed the position that the government may constitutionally impose a tax on illegal activities. After the inception of the income tax in the early part of the twentieth century, the question arose whether gains from unlawful conduct constituted “income” for purposes of taxation. The Supreme Court firmly established the principle that the unlawfulness of an activity does not prevent its taxation.

State courts, when evaluating their drug tax laws, have been concerned with statutes that may not adequately protect the identity of taxpayers or that may impose an unduly steep penalty for noncompliance. In light of the judicial concentration on these statutory characteristics, legislatures considering enactment of a drug tax statute should consider the impact of these attributes, such as subjecting taxpayers to self-incrimination and possibly transforming a purely regulatory measure into a form of punishment.161

Current drug tax statutes have the potential for generating revenues to help fight the war against drugs by assessing those who have directly contributed to the drug problem. Taken too far, however, some drug tax acts may be viewed as criminal penalties merely disguised as civil sanctions and thus at odds with the tax-

160 See Kurth Ranch, 114 S. Ct. at 1947. The Court explained that conditioning tax assessments on the commission of a crime evidences “penal and prohibitory intent” rather than an intention to raise revenue. Id. (citing United States v. Constantine, 296 U.S. 287, 295 (1935) (holding tax intended as penal sanction, in part because such was assessed based on illegal conduct)). However, the absence of such a condition is an indication that the tax was intended as a civil rather than a criminal sanction. Id. (citing United States v. Sanchez, 340 U.S. 42, 45 (1950) (finding federal marihuana tax to be civil rather than criminal sanction because tax was not conditioned on crime)).

161 See supra part III (illustrating courts’ application of self-incrimination and double jeopardy analyses to drug tax statutes).
payers' constitutional rights. To avoid this conflict, drafters should include effective confidentiality provisions to ensure that taxpayer information is not used for purposes of prosecuting drug offenders. Moreover, drafters of drug tax acts should consider whether the rate of tax assessment satisfies a primarily revenue-raising purpose or effectively serves as a form of monetary punishment. A properly drafted drug tax act will allow states their traditional latitude in raising revenues and will comport with taxpayers' constitutional rights.\(^{162}\)

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\(^{162}\) See supra part III (discussing self-incrimination and double jeopardy doctrines). Challenges based on other than Fifth Amendment rights have been brought against some state's drug tax laws; Catalano, supra note 67, at 103 (noting challenges based on due process, illegal seizure, cruel and unusual punishment, and equal protection). So far, however, the only challenges upheld have been based on self-incrimination and double jeopardy. See also Racaniello, supra note 50, at 666-67 (stating that only self-incrimination and double jeopardy challenges have thus far been upheld). Accordingly, those other constitutional issues are beyond the scope of this Note.