



2022

Crack Taxes and the Dangers of Insidious Regulatory Taxes

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Hayes Holderness, *Crack Taxes and the Dangers of Insidious Regulatory Taxes*, 95 Southern California Law Review 483 (2022).

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Crack Taxes and the Dangers of Insidious Regulatory Taxes

Hayes R. Holderness*

An unheralded weapon in the War on Drugs can be found in state tax codes: many states impose targeted taxes on individuals for the possession and sale of controlled substances. These “crack taxes” provide state officials with a powerful means of sanctioning individuals without providing those individuals the protections of the criminal law. Further, these taxes largely escape public scrutiny, which can contribute to overregulation and uneven enforcement.

The controlled substance taxes highlight the allure to lawmakers of using tax law to regulate behavior, but also the potential dangers of doing so. Surprisingly, the judiciary has an underappreciated role in creating the allure of regulatory taxes. Because courts apply less scrutiny to taxes than to other types of laws, regulatory taxes get a blank check when challenged, incentivizing their use. Courts must reconfigure the way they approach regulatory taxes to remove the judicially-created incentive for insidious regulatory taxes like controlled substance taxes.

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INTRODUCTION

“It was going through the mail and the mail lady smelled it and called the police. . . . I’m not ever gonna get out from underneath this, ever, not unless I win the lottery and become a millionaire.”¹ The North Carolina woman offering these statements was troubled not by her arrest and charge with attempted drug trafficking but by the \$20,000 tax assessment she received for possessing controlled substances (i.e., illegal drugs). North Carolina brings in millions of dollars from its so-called “crack tax”² or “Al Capone law”³ each year,⁴ and several other states use similar taxes on the possession and sale of controlled substances to further regulate already criminalized activities.⁵

The idea of taxes as a weapon in the War on Drugs may seem surprising, but perhaps it is predictable that lawmakers wanting to look tough on drugs would coopt tax law in this way. More surprising though is the underappreciated role courts have in incentivizing lawmakers to enact controlled substance taxes and other regulatory taxes to achieve their goals.

* Associate Professor, University of Richmond School of Law. For their helpful thoughts and comments, I would like to thank my outstanding colleagues at the University of Richmond and the participants in the 2019 Junior Tax Scholars Workshop, the 2019 Junior Faculty Forum, and the 2021 AALS New Voices in Taxation program. I owe specific thanks to Beth Colgan, Jim Gibson, Ari Glogower, Mary Heen, Dick Kaplan, Ariel Jurow Kleiman, Corinna Lain, Sarah Lawsky, Ruth Mason, Lukely Norris, Tracey Roberts, Erin Scharff, and Allison Tait. I am indebted to Chris Marple, Tyler Moses, and Whitney Nelson for their excellent assistance with research.

¹ Michael Hennessey, *Inside the North Carolina Law Requiring Drug Dealers To Pay Taxes*, myfox8.com (May 10, 2019), available at <https://myfox8.com/news/inside-the-north-carolina-law-requiring-drug-dealers-to-pay-taxes/>.

² See Jeremy M. Vaida, *The Altered State of American Drug Taxes*, 68 TAX LAW. 761, 787 (2015).

³ See Ann Barnard, *In Taxing Illegal Drugs, the Trouble Comes in Collecting*, N.Y. Times (Jan. 24, 2008) (quoting an associate of the Federation of Tax Administrators describing the taxes as hearkening to “the Al Capone model”); Christopher Paul Sorrow, *The New Al Capone Laws and the Double Jeopardy Implications of Taxing Illegal Drugs*, 4 S. CAL. INTERDISC. L. J. 323, 323 (1995); Christina Joyce, *Expanding the War Against Drugs: Taxing Marijuana and Controlled Substances*, 12 HAMLIN J. PUB. L. & POL’Y 231, 239 (1991).

⁴ See North Carolina Dep’t of Revenue, *Statistical Abstract of North Carolina Taxes 2019*, Table 15 (showing tax revenues ranging from approximately \$6.5 million to approximately \$11.5 million for FYs 2005 through FY 2019 from the state’s controlled substance tax, which includes taxes on illicit liquors in addition to illicit drugs), available at https://files.nc.gov/ncdor/documents/reports/advanceabstract_2019.pdf.

⁵ See *infra* note 35.

How do courts incentivize the enactment of regulatory taxes? At its core, the answer to this question is a story of veiled consequences of elevating form over substance. Courts have habitually treated tax laws with the utmost respect,⁶ resulting in a privileged regime of relaxed judicial scrutiny for taxes.⁷ Governments must raise revenue, and taxation is a powerful tool to raise that revenue from whatever members of society lawmakers see fit. Unelected judges, the line of thinking goes, should be hesitant to upset these fundamentally political decisions.⁸ This hesitancy has pushed courts to be exceedingly cautious when examining laws labeled “taxes”.

In addition to their revenue-raising role, taxes have also long been recognized as legitimate and powerful tools to regulate behavior.⁹ One might expect courts to heighten their scrutiny of taxes with intentional regulatory goals (as opposed to mere revenue-raising taxes) to ensure that the interests of regulated individuals are appropriately considered. However, this is rarely the case, even when the taxes’ revenue goals are insignificant compared to their regulatory goals.¹⁰

In short, as critics of “tax exceptionalism”—the idea that tax law is categorically different from other areas of law and should be treated so—have long observed and frequently lamented, courts often employ a unique approach to analyzing tax laws.¹¹ Once a court determines that laws are tax

⁶ See *infra* Part I.B.

⁷ See, e.g., Eric Kades, *Drawing the Line Between Taxes and Takings: The Continuous Burdens Principle, and its Broader Application*, 97 NW. U. L. REV. 189, 192 (2002) (“At times, judges and legal commentators have declared that Congress’ power to tax is beyond constitutional review.”).

⁸ See *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 531-32 (2012) (hereinafter, “NFIB”) (“We do not consider whether the Act embodies sound policies. That judgment is entrusted to the Nation’s elected leaders.”). As Justice Felix Frankfurter articulated,

[Governments] need the amplest scope for energy and individuality in dealing with the myriad problems created by our complex industrial civilization. They need wide latitude in devising ways and means for paying the bills of society and in using taxation as an instrument of social policy. Taxation is never palatable, and its exercise should not be subjected to finicky or pedantic arguments based on abstractions.

FELIX FRANKFURTER, *THE PUBLIC AND ITS GOVERNMENT* 48-49 (1930).

⁹ See *infra* note 31.

¹⁰ See *infra* Part I.B.

¹¹ See, e.g., Alice G. Abreu & Richard K. Greenstein, *Tax: Different, Not Exceptional*, 71 ADMIN L. REV. 663 (2019) (surveying tax exceptionalism scholarship and arguing that tax is not different in kind from other types of law and should not be analyzed as though it were); Paul L. Caron, *Tax Myopia, or Mamas Don’t Let Your Babies Grow Up to be Tax Lawyers*, 13 VA. TAX REV. 517 (1994) (highlighting and criticizing the perception that tax law is different from other areas of law).

laws, those laws become privileged before the judiciary, even when the laws have intentional regulatory effects.¹² This subtle elevation of form (tax law) over substance (regulatory effects) results in the judicially-created incentive for lawmakers to pursue their regulatory goals through taxation rather than through direct regulation: taxes will not face as much scrutiny from courts.¹³

Lawmakers have noticed and responded, using taxes to achieve regulatory goals where other laws might receive more scrutiny from courts.¹⁴ Though this phenomenon may appear benign, it can generate serious harms for individuals, as controlled substance taxes illustrate.¹⁵ By adopting the taxes rather than increasing existing criminal sanctions, lawmakers impose punishment on those possessing and selling controlled substances without running up against legal protections for criminal defendants.¹⁶ Even those people who would be acquitted under the criminal law can still be sanctioned for their behavior through these insidious regulatory taxes.¹⁷ Thus, controlled

¹² See, e.g., Gillian E. Metzger, *To Tax, To Spend, To Regulate*, 126 HARV. L. REV. 83, 90 (2012). Part of the opinion from *Department of Revenue of Montana v. Kurth Ranch* illuminates this claim. While observing that taxes are subject to constitutional constraints, as are criminal fines and civil penalties, the Court notes demanding constraints for criminal sanctions and relatively trivial constraints for taxes, even if those taxes fall on the same criminal activities as the criminal sanctions do. *Dep 't of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, 778 (1994).

¹³ See *infra* Part I.B.

¹⁴ See Michael S. Kirsch, *Alternative Sanctions and the Federal Tax Law: Symbols, Shaming, and Social Norm Management as a Substitute for Effective Tax Policy*, 89 IOWA L. REV. 863, 865 (2004) (describing how federal tax laws are used for regulatory goals); Stanley S. Surrey & Paul R. McDaniel, *The Tax Expenditure Concept: Current Developments and Emerging Issues*, 20 B.C.L. REV. 225, 246 (1979) (describing how taxes have been used when direct regulations might be unconstitutional or difficult to enact).

See generally R.A. LEE, A HISTORY OF REGULATORY TAXATION (1973). Lee examines a number of federal taxes with regulatory effects in his work. In describing the historical context and creation of each tax, Lee uncovers the statements of many members of Congress demonstrating their understanding that they could achieve their goals in a less constitutionally suspect manner by using the taxes instead of direct regulations. For example, in detailing a proposed federal tax on grain futures in 1921, Lee describes a discussion in which Congressman Marvin Jones opined that “if that approach [of direct regulation] were used . . . ‘a constitutional question might arise’ but the Supreme Court had ‘allowed us to go a long ways in the taxing power,’ so he believed this was the ‘wiser method.’” *Id.* at 73. In a later passage, Lee describes a 1937 House Ways and Means Committee Report as finding that “‘the law is well settled’ that a regulatory tax, although controlling a subject reserved to state jurisdiction, would be valid ‘if it appears on its face to be a revenue measure.’” *Id.* at 182.

¹⁵ See *infra* Part II.

¹⁶ See *infra* notes 119-124 and accompanying text.

¹⁷ See, e.g., Barnard, *supra* note 3 (reporting comments of a tax administrator recognizing the potential for the taxes to impose punishment when criminal sanctions

substance taxes are a potentially powerful and unchecked weapon in the War on Drugs. Given the biased manner in which the War on Drugs has been carried out,¹⁸ skirting protections for individuals is particularly concerning, as tax law becomes a tool of state oppression of overpoliced communities.¹⁹

The harms of these taxes do not stop with those cavalierly imposed on individuals. Regulatory taxes like controlled substance taxes also impose stealth costs on society because they are less effective than their direct regulation alternatives.²⁰ For example, controlled substance taxes are often burdensome laws for tax authorities to administer, making the taxes a costly alternative to laws directly regulating controlled substances which are enforced by those more familiar with the substances.²¹ Further highlighting the insidious nature of these taxes, they also obscure the total amount of regulation an activity is subject to by remaining out of public view, leading to harmful overregulation that is difficult to address.²²

Despite the dangers of regulatory taxes like controlled substance taxes, these insidious taxes have gone largely unnoticed in the tax literature. Rather, tax scholars have focused on the relative substantive strengths of taxation versus direct regulation when analyzing the best options for achieving regulatory goals.²³ Literature regarding the related phenomena of fines and civil forfeiture laws has not considered the unique situation of tax laws before the courts.²⁴ In short, the role of judicial deference regimes in tilting the scales

cannot); Robert E. Tomasson, *21 States Imposing Drug Tax and Then Fining the Evaders*, New York Times (Dec. 23, 1990) (reporting on controlled substance taxes as effective tools in the combatting illegal drug sales because of their ability to avoid the protections afforded to criminal defendants).

¹⁸ See *infra* note 124.

¹⁹ Indeed, the taxes are often enforced only against individuals charged with violations of criminal controlled substance laws. See *infra* note 56.

²⁰ See *infra* Part II.B.

²¹ See *infra* Part III.A.2.

²² See *infra* Part II.C.

²³ See, e.g., STANLEY S. SURREY, *PATHWAYS TO TAX REFORM: THE CONCEPT OF TAX EXPENDITURES* (Harvard University Press 1973) (discussing tax expenditures and the choice between taxation and spending programs); Surrey & McDaniel, *supra* note 14, at 242-43 (same); David A. Weisbach & Jacob Nussim, *The Integration of Tax and Spending Programs*, 113 YALE L.J. 955 (2004) (same); Eric J. Todor, *Tax Cuts or Spending—Does It Make a Difference?*, 53 NAT'L TAX J. 361 (2000) (same); Edward A. Zelinsky, *James Madison and Public Choice at Gucci Gulch: A Procedural Defense of Tax Expenditures and Tax Institutions*, 102 YALE L. J. 1165 (1993) (same); Eric M. Zolt, *Deterrence via Taxation: A Critical Analysis of Tax Penalty Provisions*, 37 UCLA L. REV. 343, 348 (1989) (same).

²⁴ See, e.g., Ariel Jurow Kleiman, *Nonmarket Criminal Justice Fees*, 71 HASTINGS L. J. ___, at *4 (forthcoming) (detailing similar issues surrounding criminal fees); Beth A. Colgan, *Fines, Fees, and Forfeitures*, in REFORMING CRIMINAL JUSTICE: A REPORT BY THE

towards regulatory taxes and the resulting consequences for individuals and society are underappreciated. This Article is the first to hone in on these issues,²⁵ analyzing them and demonstrating how courts should take them into account to correct for the inadvertent judicial incentive for lawmakers to enact insidious regulatory taxes.

Courts can remove this incentive and head off future insidious regulatory taxes by recognizing the potential for these taxes to exist and placing such taxes under more scrutiny when exposed.²⁶ This Article builds on scholarly developments in modern tax expenditure analysis—which explores the role of taxes as a tool for achieving regulatory goals²⁷—to propose an analytical framework for uncovering insidious regulatory taxes. A comparatively weak tax law passed to take advantage of the privileged judicial scrutiny regime for

ACADEMY FOR JUSTICE 205, 221 (Arizona State University), *available at* https://law.asu.edu/sites/default/files/pdf/academy_for_justice/11_Criminal_Justice_Reform_Vol_4_Fines-Fees-and-Forfeitures.pdf (detailing the use of fines, fees, and forfeitures as sanctions for criminalized activities); Swellen M. Wolfe, *Recovery from Halper: The Pain from Additions to Tax is not the Sting of Punishment*, 25 HOFSTRA L. REV. 161, 197 (1996) (detailing similar issues surrounding civil forfeiture laws); Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 YALE L. J. 1795, 1799-1800, 1802, 1870 (1992) (observing the harms of failing to provide protections for individuals subject to civil state sanctions); Marc B. Stahl, *Asset Forfeiture, Burdens of Proof and the War on Drugs*, 83 J. CRIM. L. & CRIMINOLOGY 274 (1992) (critiquing civil forfeiture laws).

²⁵ As far back as 1979, Stanley Surrey, former Assistant Secretary of the Treasury for Tax Policy, predicted that “Congress, by inserting spending programs in the tax law, essentially has forced the courts to apply to tax law the legal provisions hitherto imposed on direct spending.” Stanley S. Surrey, *Tax Expenditure Analysis: The Concept and Its Uses*, 1 CAN. TAX’N 3, 9 (1979); *see also* SURREY, *supra* note 23, at 46-47; Surrey & McDaniel, *supra* note 14, at 246. Though this prediction seemed based on Surrey’s conclusion that “tax expenditures”—the normatively-unnecessary provisions of tax law designed to achieve regulatory results—should not be entitled to the privilege given to revenue-raising tax provisions, Surrey and others since have not fully analyzed the issue of judicial scrutiny of regulatory taxes and its implications. This Article fills that void.

As an aside, Surrey’s prediction may have come true in some cases regarding special tax breaks offered in lieu of direct spending. *See, e.g., Espinoza v. Mont. Dep’t of Revenue*, 207 L. Ed. 2d 679, 696-97 (U.S. 2020) (holding tax credits for education to the same level of scrutiny under the Free Exercise Clause as direct spending measures); *Mueller v. Allen*, 463 U.S. 388, 393-404 (1983) (holding tax breaks to the same level of scrutiny under the Establishment Clause as direct spending measures). However, surely Surrey would be surprised to find that his prediction has largely failed to materialize in the case of tax laws used in lieu of direct regulations. Rather, courts have continued to privilege tax laws regardless of the regulatory effects those taxes might have.

²⁶ *See infra* Part III.A.4.

²⁷ *See generally* Weisbach & Nussim, *supra* note 23 (laying the foundation for modern tax expenditure analysis, which focuses on the comparative institutional competencies of taxes and direct spending measures); *see also infra* notes 152-163 and accompanying text.

taxes is an insidious regulatory tax, and, once that tax is uncovered through the proposed analysis, a court should scrutinize the tax as it would a similar direct regulation.

Controlled substance taxes offer a prime example of insidious regulatory taxes and their dangers, but not all regulatory taxes are insidious. Regulatory taxes like carbon taxes that are more effective than their direct regulation counterparts are substantively justified and do not raise the concerns associated with insidious regulatory taxes.²⁸ However, as regulatory taxes continue to become more prevalent,²⁹ the proposed framework will become more crucial to aid courts in separating the insidious regulatory taxes in need of heightened scrutiny from the unobjectionable ones.

The Article proceeds in three parts. Part I provides background on controlled substance taxes and the judicial privilege granted to all types of taxes. The resulting allure of regulatory taxes can be too much for lawmakers to ignore, resulting in the enactment of insidious regulatory taxes like controlled substance taxes. Part II then details the dangers of insidious regulatory taxes in more depth, exposing the problems created by the judiciary's current approach to taxes. Finally, Part III fleshes out the proposed framework for analyzing tax laws to remove the judicially-created incentive for insidious regulatory taxes, using the controlled substance taxes as a case study to illustrate the framework's operation.

²⁸ See SHI-LING HSU, *THE CASE FOR A CARBON TAX: GETTING PAST OUR HANG-UPS TO EFFECTIVE CLIMATE POLICY* (2011) (comparing economic, social, administrative, and political merits of carbon taxes versus direct regulations and concluding that a tax would be the most effective policy); Reuven S. Avi-Yonah & David M. Uhlmann, *Combating Global Climate Change: Why a Carbon Tax Is a Better Response to Global Warming than Cap and Trade*, 28 STAN. ENVTL. L.J. 3 (2009) (similar).

²⁹ See, e.g., Lucy Dadayan, *Are States Betting on Sin? The Murky Future of State Taxation*, at *3-4 (Tax Policy Center, October 2019) (reporting upward trends in the imposition of "sin taxes" on unwanted behaviors); Rachele Holmes Perkins, *Saliency and Sin: Designing Taxes in the New Sin Era*, 2014 BYU L. REV. 143, 145 (2014) (describing increasing use of sin taxes).

I. CONTROLLED SUBSTANCE TAXES AND THE ALLURE OF TAX LAW

Across the United States, taxes accomplish many goals.³⁰ They raise revenue, redistribute income, and—central to this Article—regulate behavior.³¹ Regulatory taxes are those designed with intentional effects on taxpayer behavior, and they exist at all levels of government. For example, the federal government imposes excise taxes on alcohol, states have an array of “sin taxes” targeted at behaviors deemed socially harmful like smoking cigarettes, and localities have begun to tax sugar-sweetened beverages.³² The allure of regulatory taxes is powerful and can result in surprising taxes; for example, over the course of time, the federal government and many states have enacted controlled substance taxes—colloquially referred to as “crack taxes” or “Al Capone laws”³³—designed to regulate the sale of illegal drugs.³⁴

This Part first unearths these controlled substance taxes, which have operated largely out of public view. With the details of the taxes laid out, the discussion then turns to a puzzle: why would lawmakers enact controlled substance taxes instead of criminal laws? The answer is perhaps as surprising and hidden as the taxes themselves. In their efforts to respect the tax power, courts have inadvertently incentivized the use of regulatory taxes like controlled substance taxes.

³⁰ Generally speaking, taxation refers to a government’s authority to extract money from members of society. *See, e.g., United States v. Reorganized CF&I Fabricators of Utah, Inc.*, 518 U.S. 213, 224 (1996) (“[A] tax is an enforced contribution to provide for the support of government . . .”).

³¹ *See, e.g., Dep’t of Revenue v. Kurth Ranch*, 511 U.S. 767, 787 (1994) (Rehnquist, C.J., dissenting) (“Taxes are customarily enacted to raise revenue to support the costs of government. It is also firmly established that taxes may be enacted to deter or even suppress the taxed activity.”).

³² *See* Dadayan, *supra* note 29; Billy Hamilton, *Hate the Sin, Love the Sin Tax: A Brief History*, 94 TAX NOTES STATE 649 (2019); Perkins, *supra* note 29, at 174-84; Erin Adele Scharff, *Taxes as Regulatory Tools: An Argument for Expanding New York City’s Taxing Authority*, 86 N.Y.U. L. REV. 1556, 1565-66 (2011); Ruth Mason, *Federalism and the Taxing Power*, 99 CAL. L. REV. 975, 992 (2011).

³³ *See supra* notes 2-3.

³⁴ *See* Paul Messino, *Taxing Illegal Drugs: How States Dabble in Drugs and Why They Shouldn’t*, at *1-2 (Reason Foundation, Feb. 2007) (describing the controlled substance taxes); Joyce, *supra* note 3, at 231 (same). The Article later uses these taxes as a case study to illustrate the application of the proposed framework for analyzing taxes. *See infra* Part III.

A. “Crack Taxes”: Tax Law in the War on Drugs

Eighteen states currently impose controlled substance taxes.³⁵ These are interesting taxes, perhaps primarily because they target criminalized activities,³⁶ the possession or sale of controlled substances, and do not cover the possession or sale of legal substances.³⁷ Therefore, the controlled substance taxes potentially apply to different substances over time, as substances are criminalized and decriminalized.³⁸

This choice to levy targeted taxes on illegal activities, though perhaps puzzling, was intentional and serves many purposes.³⁹ Available legislative history and statements of purpose indicate that the controlled substance taxes were intended to raise revenue,⁴⁰ to increase tax equity between those in the

³⁵ Code of Ala. § 40-17A-1 *et seq.*; Conn. Gen. Stat. § 12-651 *et seq.*; O.C.G.A. § 48-15-1 *et seq.*; Idaho Code § 63-4201 *et seq.*; Ind. Code Ann. § 6-7-3-1 *et seq.*; Iowa Code § 453B.1 *et seq.*; K.S.A. § 79-5201 *et seq.*; KRS § 138.870 *et seq.*; La. R.S. § 47:2601 *et seq.*; ALM GL ch. 64K, § 1 *et seq.*; Minn. Stat. § 297D.01 *et seq.*; R.R.S. Neb. § 77-4301 *et seq.*; Nev. Rev. Stat. Ann. § 372A.060 *et seq.*; N.C. Gen. Stat. § 105-113.105 *et seq.*; 68 Okl. St. § 450.1 *et seq.*; R.I. Gen. Laws § 44-49-1 *et seq.*; S.C. Code Ann. § 12-21-5010 *et seq.*; Tenn. Code Ann. § 67-4-2801 *et seq.*. For a historical overview of these taxes, see Frank A. Racaniello, *State Drug Taxes: A Tax We Can't Afford*, 23 RUTGERS L.J. 657, 661-65 (1992). The federal government has also imposed taxes on illegal drugs at various points in history; for a discussion of the history of those taxes, see LEE, *supra* note 14, at 105-24, 181-93.

³⁶ See authorities cited *supra* note 35.

³⁷ See, e.g., Iowa Code § 453B.6 (specifically exempting legal substances from the tax); R.I. Gen. Laws § 44-49-7 (same). The taxes often achieve this result by referencing a schedule of controlled substances. That schedule may be the federal controlled substances list or a specific state list or both. See, e.g., Ind. Code § 6-7-3-5 (referring to both federal and state controlled substance lists).

³⁸ Because the controlled substance taxes are imposed in this way, they do not apply to the possession or sale of marijuana in those states that have decriminalized the substance.

³⁹ See Lorne H. Seidman, *Taxing Controlled Substances*, 6 J. ST. TAX'N 257, 257 (1987) (noting that the taxes may seem “unrealistic and inconsequential” before describing their intended purposes).

⁴⁰ E.g. Tenn. Code Ann. § 67-4-2801 (noting the revenue-raising purposes of the tax and denying that it is a criminal statute); N.C. Gen. Stat. § 105-113.105 (noting the revenue-raising purposes of the tax); see also Charles Traughber, *Taxing the War on Drugs: Tennessee's Unauthorized Substance Tax*, 3 TENN. J. L. POL'Y 157, 163 (2007) (describing the sentiments of the sponsor of Tennessee's controlled substance tax as focusing on revenue raising); Michael A. LeMay, *Nebraska's Marijuana and Controlled Substances Tax Stamp Act and Self-Incrimination: State v. Garza*, 27 CREIGHTON L. REV. 313, 344-45 (1993) (discussing floor debates in the Nebraska legislature regarding Nebraska's controlled substance tax); Joyce, *supra* note 3, at 232-33 (describing revenue-raising purposes behind the Minnesota controlled substance tax); Seidman, *supra* note 39, at 257 (noting the revenue-raising potential of the taxes).

business of selling controlled substances and those in other businesses,⁴¹ and to disincentivize the possession and sale of controlled substances.⁴² As a result, the taxes were viewed by many state lawmakers as a weapon in the War on Drugs, offering law enforcement another means of sanctioning people involved in the illegal drug trade.⁴³

The controlled substance taxes almost uniformly take the form of stamp taxes.⁴⁴ This means that the taxpayer must purchase stamps from the state and affix those stamps to the controlled substance to indicate that the tax has been paid.⁴⁵ Sample images of the states' controlled substance tax stamps can be found in the Appendix. Noncompliance often results in steep civil penalties and can also result in criminal liability in certain cases.⁴⁶

In addition to steep penalties for noncompliance, the controlled substance taxes are imposed at high rates (compared to general sales taxes) and apply

⁴¹ *E.g.* Ala. Code § 40-17A-16 (describing equity goals of the tax); Kansas Department of Revenue, *Kansas Tax on Marijuana and Controlled Substances*, at *2 (Feb. 23, 2016) (describing equity goals of the tax); Tomasson, *supra* note 17 (describing concerns about gains from drug businesses going untaxed); Joyce, *supra* note 3, at 232-33 (describing Minnesota legislators' equity concerns about illegal drug sales going untaxed); Seidman, *supra* note 39, at 257 (noting the equity arguments for imposing the taxes on dealers in illegal drugs).

⁴² *See, e.g.*, Dep't of Revenue of Montana v. Kurth Ranch, 511 U.S. 767, 789 n.3 (1994) (Rehnquist, C.J., dissenting) (quoting the preamble to the 1987 Montana Dangerous Drug Tax Act); LeMay, *supra* note 40, at 344-45 (discussing floor debates in the Nebraska legislature regarding Nebraska's controlled substance tax); Seidman, *supra* note 39, at 257 (“[T]his tax will serve as a deterrent to illegal transfers and use [of drugs].”).

⁴³ *See, e.g.*, State v. Hall, 557 N.W.2d 778, 790 (Wisc. 1997) (discussing the enactment of the state's now-repealed controlled substance tax as a tool in the War on Drugs); Christian D. Stewart, *Double Jeopardy - State Drug Tax Statutes Go Up in Smoke: Department of Revenue v. Kurth Ranch*, 114 S. Ct. 1937 (1994), 74 NEB. L. REV. 221, 227 (1995) (describing the taxes as “an additional weapon in the war on drugs”); 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, 102 (1994) (observing the enthusiasm with which states greeted the taxes in the context of the War on Drugs); LeMay, *supra* note 40, at 344-45 (discussing floor debates in the Nebraska legislature regarding Nebraska's controlled substance tax); Joyce, *supra* note 3, at 231 (describing the taxes as expanding the battlefield in the War on Drugs); Tomasson, *supra* note 17 (reporting on controlled substance taxes as a tool in the combatting illegal drug sales).

⁴⁴ *See* authorities cited *supra* note 35. Georgia and Indiana are the only states whose controlled substance taxes do not take the form of stamp taxes. *See* O.C.G.A. § 48-15-3; Ind. Code Ann. § 6-7-3-10. *See also* Amy Bucci, *Taxation of Illegal Narcotics: A Violation of Fifth Amendment Rights or an Innovative Tool in the War against Drugs?*, 11 ST. JOHN'S J. LEGAL COMMENT. 747, 756 (1996).

⁴⁵ *See, e.g.*, Idaho Code § 63-4205.

⁴⁶ *E.g.* Idaho Code § 63-4207 (imposing civil penalties of 100% of the tax owed in addition to criminal penalties); *see also* Bucci, *supra* note 44, at 757.

to activities involving relatively low amounts of controlled substances. For instance, a tax rate of two hundred dollars per gram of controlled substance is not abnormal.⁴⁷ A controlled substance tax might apply to a taxpayer possessing as little as seven grams of a controlled substance.⁴⁸ None of the taxes are measured by the potency or dangerousness of the controlled substance.⁴⁹

The states' controlled substance taxes have another interesting characteristic: they are sporadically enforced.⁵⁰ This sporadic enforcement contributes to high degrees of variability in the revenue collected though the taxes. In any given year, a state's controlled substance tax could bring in zero or millions of dollars.⁵¹ For instance, for 2019, the Idaho State Tax Commission reported

⁴⁷ See, e.g., N.C. Gen. Stat. § 105-113.107(a)(3).

⁴⁸ See, e.g., Conn. Gen. Stat. § 12-650(3).

⁴⁹ See, e.g., Minn. Stat. § 297D.07; Ind. Code § 6-7-3-6(a).

⁵⁰ Cf. Richard L. Holcomb & James A. H. Bell, *The Controlled Substance Tax: Analysis, Argument & Attack*, 30-Mar CHAMPION 28, 31 (2006) ("Some states have not even developed a stamp or an application for a stamp.").

⁵¹ See, e.g., Ala. Dep't of Revenue 2018 Annual Report at 13 (showing consolidated \$421,328 in tax revenue for FY 2018 from miscellaneous taxes including the state's controlled substance tax), available at <https://revenue.alabama.gov/wp-content/uploads/2020/01/2019-Annual-Report.pdf>; Conn. Dep't of Revenue 2018 Annual Report at 18 (showing \$71,097 in tax revenue for FY 2018, \$53,141 for FY 2017, and \$27,815 for FY 2016 from the state's controlled substance tax), available at <https://portal.ct.gov/-/media/DRS/Research/annualreport/DRS-FY18-Annual-Report.pdf?la=en>; Idaho State Tax Comm'n 2019 Annual Report at 7 (showing \$334 in tax revenue for FY 2019 and \$489 for FY 2018 from the state's controlled substance tax), available at https://tax.idaho.gov/reports/EPB00033_12-16-2019.pdf; Ind. Dep't of Revenue 2019 Annual Report at 25 (showing tax revenues ranging from \$0 to \$400 for FYs 2012 through FY 2019 from the state's controlled substance tax), available at <https://www.in.gov/dor/files/2019-annual-report.pdf>; Kansas Dep't of Revenue 2019 Annual Report at 18 (showing consolidated \$335,992,443 in tax revenue for FY 2019 and \$318,437,295 for FY 2018 from miscellaneous taxes including the state's controlled substance tax), available at <https://www.ksrevenue.org/pdf/ar19complete.pdf>; Mass. Dep't of Revenue 2018 Annual Report at 9 (showing tax revenues of \$0 for FYs 2014 through FY 2018 from the state's controlled substance tax), available at <https://www.mass.gov/doc/fy18-annual-report/download>; Minn. Dep't of Rev. 2018 Minnesota Tax Handbook at 32 (showing tax revenues of \$0 for FYs 2015 and 2016 from the state's controlled substance tax), available at https://www.revenue.state.mn.us/sites/default/files/2019-02/2018_handbook_links.pdf; North Carolina Dep't of Revenue, Statistical Abstract of North Carolina Taxes 2019, Table 15 (showing tax revenues ranging from approximately \$6.5 million to approximately \$11.5 million for FYs 2005 through FY 2019 from the state's controlled substance tax, which includes taxes on illicit liquors in addition to illicit drugs), available at https://files.nc.gov/ncdor/documents/reports/advanceabstract_2019.pdf; Rhode Island Dep't of Revenue, Special Report on Preliminary FY 2019 Revenues, at 3 (showing \$6,714 in tax revenue for FY 2019 and \$15,466 for FY 2018 from the state's controlled substance tax),

\$334 in tax revenue from its state's tax, whereas the North Carolina Department of Revenue reported approximately \$8,000,000 in net tax revenue from the North Carolina tax.⁵²

Perhaps the most obvious reason for sporadic enforcement is that voluntary compliance with the controlled substance taxes is virtually non-existent,⁵³ which places the full onus on the states to collect the taxes. Those who would possess or sell controlled substances simply do not purchase the tax stamps as required, likely due to ignorance of the taxes, cost of the stamps, fear of exposing their illegal activities, or knowledge of low levels of enforcement.

Recognizing the difficulties inherent in enforcing controlled substance taxes, some states have transferred enforcement responsibility to their state

available at <http://www.dor.ri.gov/documents/RevenueAnalysisState/FY2019/201906MonthlyAndYTDRevenueAssessment.pdf>; South Carolina Dep't of Revenue 2017-2018 Annual Report at 52 (showing \$238 in tax revenue for FY 2018 from the state's controlled substance tax), available at https://dor.sc.gov/resources-site/publications/Publications/2017-2018_AnnualReport.pdf; Tenn. Dep't of Revenue, December 2019 Revenue Collections at 5 (showing \$25,603.94 in tax revenue for FY2020 and \$0 for FY2019 from the state's controlled substance tax); see also Lee Hedgepeth, *AL Earned over \$4,000 Last Year From Marijuana Tax, Though Practice May Soon End*, Alabama Political Reporter (Jan. 20, 2014), available at <https://www.alreporter.com/2014/01/20/al-earned-over-4-000-last-year-from-marijuana-tax-though-practice-may-soon-end/>; Vaida, *supra* note 2, at 783 (describing revenues from controlled substance taxes); Messino, *supra* note 34, at *9 (same); Donald Chewing, *The Wisconsin Drug Tax Stamp Law, the Fifth Amendment, and the Realities of Taxing Controlled Substances*, 83 MARQ. L. REV. 659, 680 (2000) (same); F. Anthony Paganelli, *Constitutional Analysis of Indiana's Controlled Substance Excise Tax*, 70 IND. L.J. 1301, 1311-12 (1995) (detailing difficulties of collecting controlled substance taxes); Racaniello, *supra* note 35, at 665-66 (detailing collection efforts in the early years of the controlled substance taxes).

Nominal amounts of revenue from the taxes are presumed to be raised by sales of the tax stamps to collectors, not taxpayers acting in compliance with the law. *E.g.* William Weir, *Tax Stamps, Drug Deals Don't Stick*, Hartford Courant (July 7, 2006) ("State officials assume that most of the [Connecticut controlled substance tax] stamps have gone to collectors and curiosity seekers."); Stewart, *supra* note 43, at 225 ("Those who buy the stamps are thought to be stamp collectors or those in search of a novelty item."); Racaniello, *supra* note 35, at 665 ("It is believed that most of the stamps were sold to collectors or bought as gag gifts.").

⁵² See *supra* note 51.

⁵³ Chewing, *supra* note 51, at 678-80 (detailing the sparsity of voluntary compliance with the Wisconsin controlled substance tax); Sorrow, *supra* note 3, at 328 ("In practice, drug dealers never pay these taxes voluntarily."); Stewart, *supra* note 43, at 249 ("Drug dealers are not paying the tax voluntarily."); *cf.* Tomasson, *supra* note 17 ("The states do not expect the dealers to pay the tax. Rather, the idea is to fine them much greater amounts for not paying the taxes if they are ever caught possessing or selling drugs.").

attorneys general and police.⁵⁴ In addition, these law enforcement officers often become the *de facto* enforcement agents for the taxes in those states that do not explicitly transfer enforcement responsibility to them. In these states, revenue departments wait on referrals from law enforcement officers who have located non-compliant taxpayers.⁵⁵ Commentators have observed that the taxes are mostly enforced against individuals that have been brought into the criminal justice system on charges of possession or dealing in controlled substances.⁵⁶ As a result, law enforcement officers are largely responsible for deciding whether or not to make state revenue agencies aware of delinquent taxpayers.

Controlled substance taxes also might not be consistently enforced because of concerns about their legality. However, the Supreme Court has held taxes on controlled substances constitutional,⁵⁷ though not when the taxes infringe

⁵⁴ See, e.g., KRS § 138.880 (passing enforcement authority for the taxes to Commonwealth's attorneys); Nev. Rev. Stat. Ann. § 372A.120(2) (requiring law enforcement agencies to notify the state tax agency when they discover people in possession of a controlled substance).

⁵⁵ See, e.g., Neb. Dep't of Revenue, *Nebraska Marijuana and Controlled Substances Tax Information Guide* (July 15, 2014) (encouraging cooperation between law enforcement and the state tax agency in enforcing the taxes); Conn. Dep't of Revenue Services, *Connecticut Marijuana and Controlled Substances Tax Questions and Answers for Criminal Justice and Law Enforcement Agencies*, IP 99(20.1) (Aug. 6, 1999) (allowing law enforcement to refer suspected cases of tax delinquency to the state tax agency); see also Barnard, *supra* note 3 ("The vast majority of revenues from the tax are collected after law enforcement officials seize the drugs . . ."); Holcomb & Bell, *supra* note 50, at 28-29 (recognizing that in practice the taxes are assessed against people who are the subject of drug prosecutions); The National Criminal Justice Association, *A Guide to State Controlled Substances Acts*, at *12 (1999) (noting the link between law enforcement and state tax agencies in enforcing the taxes).

The Wyoming legislature codified its recognition of this point in its now-repealed controlled substance tax. See 1984 Wyo. Sess. Laws Ch.13 § 2 ("It is anticipated [that the] collection of the tax provided under this act shall result from the efforts of law enforcement agencies rather than independent action by the department of revenue and taxation.").

⁵⁶ Holcomb & Bell, *supra* note 50, at 31 ("Enforcement of most of the states' tax is 'invariably limited to individuals who have been arrested for drug crimes.');" Sorrow, *supra* note 3, at 328 ("Revenue from these taxes has come almost entirely through tax assessments against dealers caught with unstamped drugs.);" Chewing, *supra* note 51, at 680 ("[T]he tax is collected primarily through imposition of the tax and penalties subsequent to arrest for possession of the drugs.);" Stewart, *supra* note 43, at 249 ("As a matter of practical circumstances, the only persons who will be held liable for the tax are persons who have been arrested.").

⁵⁷ *United States v. Sanchez*, 340 U.S. 42 (1950). In *Sanchez*, the Court considered whether the federal government had the authority to impose an excise tax on the illegal possession or sale of marijuana. In upholding the tax, the Court noted that "[i]t is beyond serious question that a tax does not cease to be valid because it regulates, discourages, or

individuals' rights against self-incrimination.⁵⁸ The most recent Supreme Court case regarding a controlled substance tax, 1994's *United States v. Kurth Ranch*,⁵⁹ focused on whether double jeopardy protections applied to controlled substance taxpayers also convicted of crimes for possessing the controlled substances.⁶⁰ According to a somewhat murky line of U.S. Supreme Court cases, the Double Jeopardy Clause prohibits multiple punishments for the same offense.⁶¹ The extraordinary characteristics of the controlled substance tax at issue in *Kurth Ranch*—that it was imposed on the taxpayer after her arrest and on property the taxpayer did not possess—caused the Court to characterize it as a punishment and strike it down as violating the Double Jeopardy Clause, but the Court did not question the basic constitutionality of controlled substance taxes.⁶²

State courts' experiences with the taxes have tracked the Supreme Court's, focusing primarily on self-incrimination and double jeopardy issues.⁶³ State

even definitely deters the activity taxed . . . [and that] the principle applies even though the revenue obtained is obviously negligible." *Id.* at 44.

⁵⁸ *Leary v. United States*, 395 U.S. 6 (1969). In *Leary*, the Court struck down the federal Marijuana Tax Act because it violated the defendant's constitutional right against self-incrimination because the Act required the taxpayer to identify himself as a member of a group inherently suspect of criminal activity. *Id.* at 29. Though *Leary* ended up dealing a fatal blow to the federal controlled substance tax, states picked up where the federal government left off. See LeMay, *supra* note 40, at 314 (describing state efforts to restructure the federal tax).

⁵⁹ 511 U.S. 767 (1994).

⁶⁰ *Kurth Ranch*, 511 U.S. at 776-78 (discussing the prohibition of multiple punishments for the same offense as articulated in *United States v. Halper*, 490 U.S. 435, 440 (1989)).

⁶¹ See Anthony M. Sileo, *Double Jeopardy Clause - Imposition of Montana Drug Penalty Tax Constitutes Double Jeopardy*, 5 SETON HALL CONST. L.J. 1231, 1231-32 (1995) (describing confusion in the jurisprudence over the scope of the Double Jeopardy Clause).

⁶² The Court found that the Montana controlled substance tax was not a legitimate tax not because of its "high rate of taxation [or] obvious deterrent purpose" but because it was "conditioned on the commission of a crime . . . [and] is exacted only after the taxpayer has been arrested for the precise conduct that gives rise to the tax obligation." *Kurth Ranch*, 511 U.S. at 780-81. Under Montana Department of Revenue regulations, the taxpayer had "no obligation to file a return or to pay any tax unless and until he is arrested [for the illegal possession of controlled substances]." *Id.* at 771.

Notably, Chief Justice Rehnquist dissented on the grounds that the Montana tax should be considered a legitimate tax because of its "nonpenal purpose of raising revenue, as well as the legitimate purpose of deterring conduct . . ." *Id.* at 785-91 (Rehnquist, C.J., dissenting). Justice O'Connor also dissented but on the grounds that the Montana tax satisfied the double jeopardy analysis because it was only remedial in nature. *Id.* at 792-98.

⁶³ Unsurprisingly, most of the commentary on controlled substance taxes has also focused on those two issues. See generally, e.g., Chewing, *supra* note 51; Bucci, *supra* note 44; Traugher, *supra* note 40; Sorrow, *supra* note 3; Sileo, *supra* note 61; Paganelli, *supra*

courts have affirmed that controlled substance taxes, if they require the taxpayer to identify herself without sufficient privacy protections, violate the taxpayer's right against self-incrimination because purchasing the tax stamps could be used as evidence of the crime of possessing or selling those substances.⁶⁴ Thus, the states have ensured that their laws permit anonymous purchasing of the tax stamps and have prohibited the use of the stamps as evidence in a trial regarding the possession or sale of the taxed substances.⁶⁵

When state courts determine that a controlled substance tax too closely mirrors the one considered in *Kurth Ranch*, the tax is called into question as violating the taxpayer's rights against double jeopardy.⁶⁶ However, many state courts have recognized the extraordinary aspects of the Montana controlled substance tax at issue in *Kurth Ranch* and have distinguished their states' more typical controlled substance taxes as legitimate taxes.⁶⁷ Finally, some state courts have considered, at least in passing, other challenges to the controlled substance taxes, such as that they violate exclusionary rules of evidence, that they constitute cruel and unusual punishment, and that they

note 51; Stewart, *supra* note 43; Iijima, *supra* note 43; LeMay, *supra* note 40; Racaniello, *supra* note 35.

⁶⁴ See, e.g., State v. Hall, 557 N.W.2d 778, 783 (Wis. 1997); Fla. Dep't of Revenue v. Herre, 634 So. 2d 618, 621 (Fla. 1994); State v. Smith, 813 P.2d 888, 890 (Idaho 1991); Briney v. State Dep't of Revenue, 593 So. 2d 120, 123 (Ala. Civ. App. 1991); State v. Durrant, 769 P.2d 1174, 1180, 1182-83 (Kan. 1989); Sisson v. Triplett, 428 N.W.2d 565 (Minn. 1988); see also Bucci, *supra* note 44, at 760-65 (discussing cases regarding the impact of constitutional protections against self-incrimination on controlled substance taxes).

⁶⁵ See, e.g. S.C. Code Ann. §§ 12-21-5030, 12-21-5040(A); see also Bucci, *supra* note 44, at 758-59.

⁶⁶ See, e.g., Desimone v. State, 996 P.2d 405 (Nev. 2000); Comm'r of Revenue v. Mullins, 702 N.E.2d 1 (Mass. 1998); Brunner v. Collection Div. of Tax Com'n, 945 P.2d 687 (Utah 1997); Wilson v. Dep't of Revenue, 662 N.E.2d 415 (Ill. 1996); Bailey v. Ind. Dep't of State Revenue, 660 N.E.2d 322 (Ind. 1995); Bucci, *supra* note 44, at 765-70 (discussing cases regarding the impact of constitutional protections against double jeopardy on controlled substance taxes).

⁶⁷ See, e.g., Waters v. Farr, 291 S.W.3d 873 (Tenn. 2009) (finding that a former version of the Tennessee controlled substance tax did not raise the double jeopardy concerns, but was unconstitutional under a Tennessee state constitution provision prohibiting certain types of taxes); Garcia v. State Tax Comm'n, 38 P.3d 1266 (Idaho 2002); State v. Sage, 596 N.W.2d 503 (Iowa 1999); Comm'rv. Bird, 979 S.W.2d 915 (Ky. 1998); State v. Stubblefield, 543 N.W.2d 743 (Neb. 1996); State v. Ballenger, 472 S.E.2d 572 (N.C. Ct. App. 1996); McMullin v. South Carolina Dep't of Revenue and Taxation, 469 S.E.2d 600 (S.C. 1996); Covelli v. Comm'r of Revenue Servs., 668 A.2d 699 (Conn. 1995); State v. Gulledge, 896 P.2d 378 (Kan. 1995); Hill v. State, 898 P.2d 155 (Ok. Ct. Crim. App. 1995); Milner v. State, 658 So.2d 500 (Ala. Civ. App. 1994).

violate due process of law, but the courts have not struck down the taxes on those grounds.⁶⁸

B. Tax Exceptionalism and Treating Crack Taxes as Taxes

After understanding how controlled substance taxes operate and their legality, one might ask why the taxes exist at all. Though the boundaries between regulatory taxes and direct regulations⁶⁹ are often blurry because taxes can affect behavior and direct regulations can impose monetary costs,⁷⁰

⁶⁸ See, e.g., *State v. Buechler*, 2018 WL 6069732 (Neb. App. 2018) (addressing standards of evidence for controlled substance tax penalties); *State v. Hughlette*, 901 N.W.2d 839 (Iowa Ct. App. 2017) (addressing knowledge requirement of Iowa's controlled substance tax law); *S.H.J. v. State Dep't of Revenue*, 682 So.2d 1354 (Ala. Civ. App. 1995) (addressing whether the Alabama controlled substance tax was unconstitutionally arbitrary and irrational to the extent it lacked a specific knowledge requirement and whether it implicated the Eighth Amendment prohibition against excessive fines); *Sims v. Collection Div. of the Utah State Tax Comm'n*, 841 P.2d 6 (Utah 1992) (addressing Utah's exclusionary rule); *Zissi v. State Tax Com'n of Utah*, 842 P.2d 848, 855-59 (Utah 1992) (addressing equal protection and cruel and unusual punishment claims); *Hyatt v. State Dep't of Revenue*, 597 So. 2d 716 (Ala. Civ. App. 1992) (discussing due process claims); *Rehg v. Illinois Dep't of Revenue*, 605 N.E.2d 525 (Ill. 1992) (same); *State v. Berberich*, 811 P.2d 1192 (Kan. 1991) (same); see also *Stewart*, *supra* note 43, at 227-28 ("The courts have rejected constitutional arguments based upon self-incrimination, substantive and procedural due process, equal protection, vagueness and overbreadth."); *Holcomb & Bell*, *supra* note 50, at 39 (describing due process challenges to controlled substance taxes).

⁶⁹ Direct regulation refers to a government's authority to directly control certain behaviors. See, e.g., *NFIB*, 567 U.S. 519, 567 (2012) (distinguishing taxes from regulatory penalties); see also Anthony Ogus, *Corrective Taxes and Financial Impositions as Regulatory Instruments*, 61 MODERN L. REV. 767, 771-73 (1998) (discussing deterrence model laws, which align with direct regulations).

⁷⁰ Indeed, properly designed regulatory taxes can affect people's behavior to the same degree as direct regulations, and vice versa. See generally, e.g., *LEE*, *supra* note 14; see also, e.g., *Scharff*, *supra* note 32, at 1559 ("In theory, taxation, regulatory policy, user fees, and spending can advance the same policy goal."); *Weisbach & Nussim*, *supra* note 23, at 972. David Bradford provides a popular illustration of this equivalence of taxes and direct spending with his hypothetical "Weapons Supply Tax Credit". In his example, Congress could cut all spending on weapons and simultaneously enact the Weapons Supply Tax Credit, which would grant a tax credit to anyone who delivered weapons to the government pursuant to a contract. In this hypothetical, the federal government's ability to acquire weapons could be secured equally by spending or through the tax credits. See David Bradford, *Reforming Budgetary Language*, in *PUBLIC FINANCE & PUBLIC POLICY IN THE NEW CENTURY* 93-116 (Sijbren Cnossen & Hans-Werner Sinn eds., 2003).

The distinction between the two tools might also be characterized as being based on whether the tool seeks to attach a price to the consequences of the activity (taxation) or to deter the activity (direct regulation). See Ogus, *supra* note 69, at 769-71; cf. Robert Cooter, *Prices and Sanctions*, 84 COLUM. L. REV. 1523 (1984) (discussing the differences between a price or a sanction for regulating activities). As Ogus observes, the distinction is of doubtful importance. Ogus, *supra* note 69, at 770.

a more conventional path to regulating the possession and sale of controlled substances than taxation would have been increasing criminal sanctions on those activities.⁷¹ However, a subtle form of tax exceptionalism has caused the judiciary to incentivize the use of taxes instead of direct regulations to regulate behavior, even to be used as a weapon in the War on Drugs. This unexpected influence from the courts thus provides an answer to the puzzle of controlled substance taxes.

“Tax exceptionalism” refers to the idea that tax is a unique area of law entitled to special treatment.⁷² The idea has come under fire as a means of elevating form over substance; there is no reason to categorically treat tax laws differently than other laws.⁷³ Rather, tax laws should be treated according to their substance, not their labels.⁷⁴ Because tax laws can achieve the same policy goals as direct regulations and vice versa,⁷⁵ embracing tax exceptionalism can lead to questionable jurisprudence and harmful results.

The subtle form of tax exceptionalism that helps explain the existence of controlled substance taxes treats taxes as unique because they fund the government. The ability to raise revenue through taxation is fundamental to sovereign governments,⁷⁶ and decisions about which members of society bear the burden of funding the government are highly political in nature.⁷⁷ These

⁷¹ *E.g.*, *State v. Roberts*, 384 N.W.2d 688, 691 (S.D. 1986), “If the legislature wishes to more harshly punish drug dealers, let them do so in a more conventional manner, such as increasing the penalties for violations of already existing narcotics laws.”

⁷² *See, e.g.*, Alice G. Abreu & Richard K. Greenstein, *Tax: Different, Not Exceptional*, 71 ADMIN L. REV. 663, 672-85 (2019) (surveying tax exceptionalism scholarship and detailing the sources of tax exceptionalism); Paul L. Caron, *Tax Myopia, or Mamas Don't Let Your Babies Grow Up to be Tax Lawyers*, 13 VA. TAX REV. 517 (1994) (highlighting and criticizing the perception that tax law is different from other areas of law).

⁷³ *E.g.* Abreu & Greenstein, *supra* note 72, at 685-703 (highlighting that tax has differences from other areas of law, but that it is not exceptional in the sense that tax deserves categorically different treatment).

⁷⁴ *E.g.* NFIB, 567 U.S. at 564-66 (describing a substance over form approach to analyzing tax laws); *United States v. U.S. Shoe Corp.*, 523 U.S. 360, 367 (1998) (imploping courts to examine substance, rather than labels, in analyzing tax laws).

⁷⁵ *See supra* note 70.

⁷⁶ *See, e.g.*, Hayes R. Holderness, *Taking Tax Due Process Seriously: The Give and Take of State Taxation*, 20 FLA. TAX REV. 371, 385-86 (2017) (noting that the power to tax has been considered “‘fundamental,’ ‘essential,’ and ‘basic’”); Leo P. Martinez, *Tax Collection and Populist Rhetoric: Shifting the Burden of Proof in Tax Cases*, 39 HASTINGS L.J. 239, 239 (1988) (“The power to tax is among the most fundamental and wide-reaching powers of government.”).

⁷⁷ *See, e.g.*, Kleiman, *supra* note 24, at *40 (highlighting that taxes escape restraint because of they are the result of the political process); LEE, *supra* note 14, at 4 (describing Thomas Cooley’s work on the tax power, which casts it as a highly political area of law that

institutional interests counsel in favor of a permissive legal regime for tax laws.⁷⁸

However, not all taxes are driven solely, or even primarily, by revenue-raising goals. Taxes can also have regulatory goals that can have harmful impacts on individuals.⁷⁹ Those individuals may need to rely on the courts to protect their interests. In these cases where taxes function similarly to direct regulations, courts arguably should be less focused on the institutional interest in taxation and more concerned about protections for individuals.⁸⁰ This is not the current case.

Elevating the form of taxation, the judiciary has come to privilege taxes over direct regulations. Once a court determines that a law is actually a tax law (as opposed to a direct regulation), the court will apply a one-size-fits-all deferential level of scrutiny to the law, regardless of its regulatory goals. Thus, when regulatory taxes are determined to be taxes (as they almost always are), they receive less judicial scrutiny than a comparable direct regulation would and individuals are unprotected from the taxes' potential harms.

Tax law's privileged regime expresses itself primarily in the constitutional leeway given to tax laws and the allocation of burdens of proof in tax cases.⁸¹ Tax laws are unlikely to be found unconstitutional by the Supreme Court even if regulating things outside of the direct regulatory power of the government.⁸² Lower federal courts and state courts have also proven

the judiciary should not disrupt); Robert E. Cushman, *Social and Economic Control through Federal Taxation*, 18 MINN. L. REV. 759, 763 (1934) ("No one but the legislature can measure the fiscal needs of the nation.").

⁷⁸ See *supra* note 8; see also, e.g., *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 589-90 (1983) (noting that courts are relatively "poorly equipped" to evaluate appropriate economic burdens for members of society as imposed through taxes).

⁷⁹ See generally, e.g., *LEE*, *supra* note 14.

⁸⁰ See *Child Labor Tax Case*, 259 U.S. 20, 37-38 (1922) (expressing concerns about the overreach of federal power through a regulatory tax); see also *Kleiman*, *supra* note 24, at *40 (recognizing that government extractions may harm payors if "meaningful political and procedural protections" are not available); *Colgan*, *supra* note 24 (noting that courts have recognized that revenue-raising actions may raise due process concerns for payors); *Mann*, *supra* note 24, at 1799-1800 (observing the need for procedural doctrines to protect people from government "overreach and unreasonableness").

⁸¹ E.g. *Metzger*, *supra* note 12, at 90 (describing the "breadth" the Supreme Court has offered tax laws); *LEE*, *supra* note 14, at 4 ("In exercising their power to tax, therefore, legislators are answerable only to a few constitutional limitations and to voters.").

⁸² E.g. *NFIB*, 567 U.S. 519, 537 (2012) ("Put simply, Congress may tax and spend. This grant gives the Federal Government considerable influence even in areas where it cannot directly regulate. The Federal Government may enact a tax on an activity that it cannot

reluctant to strike down duly-enacted tax provisions, deferring instead to the enacting government.⁸³

Beyond questions of the scope of the tax power, courts subject tax laws to specialized canons of interpretation, which might impact the analysis of a challenge to the substantive results of the tax.⁸⁴ Most importantly among these, tax authorities often enjoy a presumption of correctness in the assessments they make,⁸⁵ placing a heavy burden on aggrieved taxpayers.⁸⁶

authorize, forbid, or otherwise control.”); *Dep’t of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, 779 (1994) (“We have cautioned against invalidating a tax simply because its enforcement might be oppressive or because the legislature’s motive was somehow suspect.”); *see also* Mason, *supra* note 32, at 995 (noting the scope of the tax power under modern jurisprudence); LEE, *supra* note 14, at 4-10 (discussing judicial deference to exercises of tax power).

⁸³ *See, e.g.*, *United States v. Cox*, 906 F.3d 1170, 1179-83 (10th Cir. 2018); *Dye v. Frank*, 355 F.3d 1102, 1107 (7th Cir. 2004); *Rockwell v. Commissioner*, 512 F.2d 882, 887 (9th Cir. 1975); *United States v. Ross*, 458 F.2d 1144, 1145 (5th Cir. 1972); *Lohr v. Saratoga Partners, L.P.*, 238 A.3d 1198 (Pa. 2020); *Zhao v. Montoya*, 329 P.3d 676, 682 (N.M. 2014); *Waters v. Farr*, 291 S.W.3d 873, 903 (Tenn. 2009); *Kottel v. State*, 60 P.3d 403, 416 (Mont. 2002); *Bosworth v. Pledger*, 810 S.W.2d 918, 921 (Ark. 1991); *Berry v. Costello*, 341 N.E.2d 709, 710 (Ill. 1976); *see also* Stephen W. Mazza & Tracy A. Kaye, *Restricting the Legislative Power to Tax in the United States*, 54 AM. J. COMPARATIVE L. 641, 647 (2006) (discussing how “case law reveals that courts still generally defer to the will of the legislature” when tax laws are at issue).

⁸⁴ *See* Jonathan H. Choi, *The Substantive Canons of Tax Law*, 72 STAN. L. REV. 195, 247-60 (2020) (cataloging major interpretive canons of federal tax law). In a comprehensive study of decades of Supreme Court decisions, James Brudney and Corey Ditslear found significant differences in the use of legislative history and judicial canons of interpretation in the analysis of tax laws and of workplace laws. *See* James J. Brudney & Corey Ditslear, *The Warp and Woof of Statutory Interpretation: Comparing Supreme Court Approaches in Tax Law and Workplace Law*, 58 DUKE L. J. 1231 (2009). Brudney and Ditslear posit that these differences result from the arcane and less-politicized nature of the federal tax law, *id.* at 1235, though much of the “expertise borrowing” that the authors observe the Court engaging in during tax law decisions could be characterized as judicial deference to the legislative branch, *see, e.g., id.* at 1269 (discussing tax-based canons and policy norms that are pro-government and anti-taxpayer).

⁸⁵ *See, e.g.*, *Welch v. Helvering*, 290 U.S. 111, 115 (1933) (“[The Commissioner of Internal Revenue’s] ruling has the support of a presumption of correctness, and the petitioner has the burden of proving it to be wrong.”); *see also* Leandra Lederman, “Civil”izing Tax Procedure: Applying General Federal Learning to Statutory Notices of Deficiency, 30 U.C. DAVIS L. REV. 183, 201-03 (1996) (discussing the presumption of correctness in federal tax cases); Martinez, *supra* note 76, at 257-58 (same).

⁸⁶ *See, e.g.*, *United States v. Janis*, 428 U.S. 433, 440-43 (1976) (discussing burdens of proof in federal tax cases); *Targa Resources Partners LP v. Director, Division of Taxation*, No. 010749-2015 (N.J. Tax Ct. 2018) (discussing burdens of proof in tax cases); Roxanne Bland, *The Burden of Burden of Proof*, 98 TAX NOTES STATE 1191 (2020) (“Whether an issue is one of liability or one of constitutionality, the taxpayer carries burden of proving his case before a tribunal, whether administrative or a court. Indeed, perhaps the most oft-seen phrases in an administrative law judge’s opinion is ‘the taxpayer failed to carry meet its

Further, taxes can be assessed without a hearing, whereas civil and criminal sanctions may require a hearing before they are imposed.⁸⁷

In short, “the dominant view seems to be that Congress may use taxes to achieve regulatory goals that fall outside its other enumerated powers,”⁸⁸ and “[having the taxpayer bear the burdens of production and persuasion in tax cases] contrasts sharply with general civil litigation, in which the plaintiff bears the burdens of production and persuasion on all amounts sought.”⁸⁹ As the Ninth Circuit put it, “[i]n tax matters, the Congress can condition the taxpayer’s right to contest the validity of a tax assessment pretty much as it sees fit.”⁹⁰ The tax power is simultaneously treated as more expansive and subject to less legal hurdles than the regulatory power.

The claim here is not that taxes are not subject to judicial scrutiny; they are.⁹¹ However, protections for individuals and burdens of proof that may apply in challenges to direct regulations often do not apply in the same degree in challenges to taxes.⁹² The judicial scrutiny applied to taxes and direct regulations may converge in some aspects, such as the analysis of the deference to which agency regulations are entitled.⁹³ But judicial scrutiny of taxes rarely focuses on the expansive scope of the tax power or of the burdens of proof in tax cases, highlighting the privilege for taxes.

A recent example of this comparison between taxation and direct regulation can be found within the *NFIB* Court’s analysis of the Affordable Care Act’s

burden of proof.”); Choi, *supra* note 84, at 255-56 (discussing burdens of proof in federal tax cases); Lederman, *supra* note 85, at 194 (comparing the heavier burdens for taxpayers in tax litigation to individuals in civil litigation); *see generally* Martinez, *supra* note 76.

⁸⁷ See J. Morris Clark, *Civil and Criminal Penalties and Forfeitures: A Framework for Constitutional Analysis*, 60 MINN. L. REV. 379, 420-21 (1975).

⁸⁸ Mason, *supra* note 32, at 1006.

⁸⁹ Lederman, *supra* note 85, at 203.

⁹⁰ *Rockwell v. Commissioner*, 512 F.2d 882, 887 (9th Cir. 1975).

⁹¹ See, e.g., *supra* note 7; *Dep’t of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, 779 (1994) (noting that taxes are examined for constitutional validity); *Marchetti v. United States*, 390 U.S. 39, 58 (1968) (recognizing an obligation to “give full effect to the constitutional restrictions which attend the exercise” of the tax power); *Haynes v. United States*, 390 U.S. 85, 98 (1968) (recognizing the competing needs to give deference to tax laws and to heed constitutional limitations on the tax power); *see also* Choi, *supra* note 84, at 206-10 (describing the impact of the textualist approaches to statutory interpretation on tax challenges, which can cut against governmental interests); Mason, *supra* note 32, at 1033 (“Like direct spending, tax expenditures and tax penalties must not violate other constitutional provisions, such as taxpayers’ civil liberties.”).

⁹² See Lederman, *supra* note 85, at 203.

⁹³ See *Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 56 (2011) (applying the same *Chevron* deference to tax regulations as to other regulations).

individual mandate.⁹⁴ In the same breath, the Court denied that Congress had the authority to directly regulate individuals by requiring them to purchase health insurance but found that Congress did have the authority to achieve that same goal by imposing a tax.⁹⁵ The form of the law—taxation or direct regulation—controlled the analysis, and taxation was given more leeway by the Court despite its regulatory effects.⁹⁶

So what makes a law a tax? The courts' current approach to answering this question is straightforward. The most important consideration is whether the "tax" has a revenue-raising purpose. Once a court uncovers any revenue-raising purpose behind a law labeled a "tax"⁹⁷ it is likely that the court will respect the provision as a tax, *even if the law is ineffective in raising revenue or if the law's non-revenue goals are more prominent*.⁹⁸ The revenue-raising aspect of a regulatory tax trumps its regulatory aspect.⁹⁹

⁹⁴ NFIB, 567 U.S. 519 (2012).

⁹⁵ *Id.* at 575.

⁹⁶ The Court admitted to these regulatory effects but dismissed them as unimportant. *Id.* at 574.

⁹⁷ Though the tax label might set the stage for this analysis, courts have characterized laws as tax laws despite the labels Congress provides when a revenue-raising purpose is discovered. *See NFIB*, 567 U.S. at 563-574 (describing such actions taken by the Supreme Court before determining that the individual mandate of the Affordable Care Act was a tax).

⁹⁸ *See, e.g., Pittsburgh v. Alco Parking Corp.*, 417 U.S. 369, 374-75 (1974) (finding a law to be a tax even if the revenue-raising purpose was weak); *Minor v. United States*, 396 U.S. 87, 98 n. 13 (1969) ("A statute does not cease to be a valid tax measure because it deters the activity taxed, because the revenue obtained is negligible, or because the activity is otherwise illegal."); *United States v. Sanchez*, 340 U.S. 42, 44 (1950) ("It is beyond serious question that a tax does not cease to be valid because it regulates, discourages, or even definitely deters the activity taxed. . . [and that] the principle applies even though the revenue obtained is obviously negligible."); *Covelli v. Comm'r of Revenue Servs.*, 668 A.2d 699, 706 (Conn. 1995) (observing that nonrevenue goals do not affect the nature of a tax); *Rehg v. Illinois Dep't of Revenue*, 605 N.E.2d 525, 529-33 (Ill. 1992) (following federal precedent to determine the nature of Illinois' controlled substance tax); *Resolution Trust Corp. v. Tarrant County Appraisal Dist.*, 926 S.W.2d 797, 804-805 (Tex. App. 1996) (observing that nonrevenue goals do not affect the nature of a tax); *State v. Heredia*, 493 N.W.2d 404, 408 (Wis. App. 1992) ("The mere fact that the occupational tax is designed to aid law enforcement rather than raise revenue does not make it invalid."); *State v. Matson*, 798 P.2d 488, 495 (Kan. App. 1990) (upholding a regulatory tax because of its revenue-raising purpose).

⁹⁹ *See, e.g.,* authorities cited *supra* note 98; Mason, *supra* note 32, at 998 ("[T]he Supreme Court has repeatedly concluded that, as long as a tax raises general revenue, the Court will not closely examine regulatory goals Congress may have had in imposing it."); John Barker Waite, *May Congress Levy Money Extractions Designated "Taxes," Solely for the Purpose of Destruction?*, 6 MICH. L. REV. 277, 279 (1908) ("The definitions of a tax, formulated by jurists and others, support the distinction, as the purpose of revenue is emphasized, regulation ignored and tacitly excluded.").

A line of jurisprudence covers the extraordinary instances where purported tax laws are not respected as such.¹⁰⁰ In those cases, courts distinguish the provisions from other tax laws, often by characterizing the provision as a direct regulation masquerading as a tax law, without clear analytical guidance.¹⁰¹ For instance, in this context the Supreme Court has considered things like whether a purported tax is “exceedingly high”¹⁰² or has an “obvious deterrent purpose,”¹⁰³ leading to subjective judgements and confusion.¹⁰⁴ Practically speaking, the cases where purported taxes are found not to be taxes involve “taxes” that push the boundaries of common sense to the extreme, giving the courts no choice but to claim that the “taxes” are really direct regulations.¹⁰⁵

Such a rebrand is not appropriate for many taxes with meaningful regulatory effects. Those taxes fall in a middle ground between revenue-raising

¹⁰⁰ See, e.g., *NFIB*, 567 U.S. at 519; *Dep’t of Revenue v. Kurth Ranch*, 511 U.S. 767 (1994); *United States v. Butler*, 297 U.S. 1, 61 (1936); *Child Labor Tax Case*, 259 U.S. 20, 38 (1922).

¹⁰¹ See Jeremy M. Vaida, *Tax and Punishment: 20 Years After Kurth Ranch*, 74 ST. TAX NOTES 151, 151-53 (2014) (discussing the development of the Supreme Court’s approach to regulatory taxes characterized as regulations instead of taxes); Metzger, *supra* note 12, at 90 (observing decisions finding that “taxes” were really “penalties in disguise”); Cushman, *supra* note 77, at 778-82 (detailing cases where the Supreme Court found that laws labeled taxes were found to be “not taxes at all”).

¹⁰² *NFIB*, 567 U.S. at 565-566. In *NFIB*, the Court described a “functional approach” to the question of whether a law is a tax or a regulation, highlighting three factors: 1) whether the burden of the law was “exceedingly high”; 2) whether the law had a scienter requirement; and 3) who was tasked with enforcement of the law. The *NFIB* court described the 1922 *Child Labor Tax Case* as finding that a “tax” on employing child laborers was actually a penalty because the tax was unrelated to the amount of child labor used, it only applied to individuals who knowingly employed child labor, and it was administered by the Department of Labor. The *NFIB* Court distinguished the Affordable Care Act’s individual mandate penalty from the child labor “tax” by finding that the Affordable Care Act’s provision did not contain any of these unusual features. *Id.* at 566.

¹⁰³ *Kurth Ranch*, 511 U.S. at 779-83. The challenged tax in *Kurth Ranch* was a state controlled substance tax. After noting that “neither a high rate of taxation nor an obvious deterrent purpose automatically marks [a] tax as a form of punishment,” the Court determined that the tax in question was a punishment because of other “unusual” features—it was imposed after arrest for a crime and on property the taxpayer did not possess at the time of assessment. *Kurth Ranch*, 511 U.S. at 780-83.

¹⁰⁴ See Vaida, *supra* note 101, at 157-61.

¹⁰⁵ See, e.g., *Child Labor Tax Case*, 259 U.S. at 37 (“In the light of these features of the act, a court must be blind not to see that the so-called tax is imposed to stop the employment of children within the age limits prescribed. Its prohibitory and regulatory effect and purpose are palpable. All others can see and understand this. How can we properly shut our minds to it?”); *Kurth Ranch*, 511 U.S. at 783 (referring to the law as a “concoction of anomalies” could not escape characterization as punishment).

measures and direct regulations masquerading as taxes.¹⁰⁶ However, under the current framework, the regulatory effects of those taxes are immaterial; they are taxes and will be afforded the privileged scrutiny regime for taxes regardless of how comparable direct regulations would be treated.¹⁰⁷ As many state courts have recognized, run-of-the-mill controlled substance taxes fit in this middle ground and thus are not heavily scrutinized by the courts.¹⁰⁸

In sum, when comparing taxes to direct regulations, form usually beats out substance. All lawmakers must do is label a revenue-raising regulatory measure a tax to ensure that it will be privileged by the courts, and lawmakers have done just that.¹⁰⁹ This phenomenon helps explain the existence of controlled substance taxes; officials admit that the taxes were passed to avoid the scrutiny that would be applied to increased criminal sanctions on the possession and sale of controlled substances.¹¹⁰

Rachelle Holmes Perkins observes that “in this new sin tax era legislators are rapidly expanding both the scope and magnitude of their taxing powers” through the use of regulatory taxes,¹¹¹ further highlighting that lawmakers have responded to the incentive to use tax law to achieve their regulatory goals. This result may seem benign, but it should be concerning; as the example of controlled substance taxes shows, some dangerous regulatory taxes generate insidious harms.

¹⁰⁶ Part III argues that courts can and should address that middle ground by adopting a new framework for determining the judicial scrutiny applied to taxes.

¹⁰⁷ See, e.g., Metzger, *supra* note 12, at 90. Part of the opinion from *Department of Revenue of Montana v. Kurth Ranch* illuminates this claim. While observing that taxes are subject to constitutional constraints, as are criminal fines and civil penalties, the Court notes demanding constraints for criminal sanctions and relatively trivial constraints for taxes, even if those taxes fall on the same criminal activities as the criminal sanctions do. *Kurth Ranch*, 511 U.S. at 778.

¹⁰⁸ See *supra* note 67. The fact that courts have examined whether controlled substance taxes violate various constitutional rights of taxpayers does not undermine the claim that tax laws are privileged compared to direct regulations. Courts have only struck down the taxes when the taxpayer must expose her criminal activities and when the taxes have been found to be punishments, not taxes. Cf. Clark, *supra* note 87, at 414-20 (indicating that the Supreme Court has typically treated the right against self-incrimination differently from other rights in the context of civil sanctions). If anything, the lack of decisions against the controlled substance taxes on other grounds indicates that these taxes, once found to be taxes, are privileged before the courts.

¹⁰⁹ See *supra* note 14.

¹¹⁰ See *supra* note 17.

¹¹¹ Perkins, *supra* note 29, at 145.

II. THE DANGERS OF INSIDIOUS REGULATORY TAXES

Controlled substance taxes are an example of what can be labeled “insidious regulatory taxes.”¹¹² Simply put, insidious regulatory taxes are regulatory taxes enacted to avoid the judicial scrutiny regime applied to direct regulations. Importantly, insidious regulatory taxes are those taxes that would not be enacted but for the privilege available to tax laws.

Not all regulatory taxes are insidious. Because taxation and direct regulation are both tools able to achieve the same goals, lawmakers must choose which tool to use—or how much of each tool to use—to enact their policies.¹¹³ When lawmakers enact a tax because it is the substantively better tool to achieve the regulatory goal, the tax is not an insidious regulatory tax. For example, carbon taxes are often promoted as the best means for controlling carbon emissions;¹¹⁴ it is unlikely that a properly-designed carbon tax would be insidious.

But those regulatory taxes that are insidious present many dangers. As the following sections detail, insidious regulatory taxes result in stealth harms by taking advantage of the privileged scrutiny regime for taxes. They sacrifice the rights of individuals that come under their reach and are economically wasteful. The taxes also provide cover for harmful overregulation. It is not clear that courts realize these consequences of the privilege they have provided for tax laws, further demonstrating the insidious nature of these taxes.

A. The Individual Harms of Insidious Regulatory Taxes

Where the judicial scrutiny of direct regulations achieving the same goals as insidious regulatory taxes is meaningful, losing that scrutiny because of the form of the law is harmful. Often the scrutiny applied to direct regulations ensures that individuals are protected from harmful applications of the law.¹¹⁵ In fact, given that many of these legal protections are countermajoritarian, courts arguably bear the main responsibility for enforcing them, as elected

¹¹² Part III provides a full analysis of controlled substance taxes as insidious regulatory taxes.

¹¹³ Weisbach & Nussim, *supra* note 23, at 972.

¹¹⁴ *See supra* note 28.

¹¹⁵ *See supra* note 80; *see also* District of Columbia v. Heller, 554 U.S. 570, 628 n.27 (2008) (describing the need for different levels of scrutiny for particular rights).

officials may not have the power or desire to do so.¹¹⁶ The current deferential regime of judicial scrutiny for taxes sacrifices these protections for vulnerable parts of society in the case of insidious regulatory taxes,¹¹⁷ and the harms of doing so may be heightened by predatory and discriminatory enforcement of the laws.¹¹⁸

For instance, controlled substance taxes impose taxes on criminal activity. High burdens of proof are required for criminal convictions, but under the tax law, a defendant might be sanctioned even if the criminal burden of proof is not met.¹¹⁹ The tax might be assessed without a prior hearing, whereas even

¹¹⁶ The idea of courts as champions of countermajoritarian protections finds its watershed in footnote four of *United States v. Carolene Products, Co.* *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938) (suggesting that “prejudice against discrete and insular minorities” might trigger “more searching judicial inquiry” but not decreeing so). This idea has fallen into some disrepute, but it is not clear what branch of government would be better suited for providing such protections. *See* Joy Milligan, *Protecting Disfavored Minorities: Towards Institutional Realism*, 63 UCLA L. REV. 894, 896-99 (2016) (summarizing arguments for and against treating courts as “countermajoritarian heroes” and arguing that all the branches of government have flaws when it comes to protecting minority groups such that no branch’s ability to do so should be romanticized); Keith E. Whittington, *Extrajudicial Constitutional Interpretation: Three Objections and Responses*, 80 N.C.L. REV. 773, 827-44 (2002) (critiquing the argument that courts should be the primary interpreters of constitutional meaning based on countermajoritarian principles but conceding the role for courts as enforcers of countermajoritarian protections); In any event, the argument that courts are not the “countermajoritarian heroes” some would prefer should not abdicate the courts of any responsibility to enforce existing protections for individuals, which is what this Article urges courts to do.

¹¹⁷ *See* Iijima, *supra* note 43, at 121 (recognizing the sacrificing of legal protections for individuals in the context of controlled substance taxes); Jonathan I. Charney, *The Need for Constitutional Protections for Defendants in Civil Penalty Cases*, 59 CORNELL L. REV. 478, 483-91 (1974) (detailing the denial of protections normally afforded to criminal defendants in cases involving civil sanctions, many of which are tax cases). Criminal fees and civil forfeiture actions may be utilized in a similar fashion to avoid the protections of other areas of law. *See supra* note 24.

¹¹⁸ *Cf.* Kleiman, *supra* note 24, at *36-38 (detailing how politically powerless populations are targeted for the enforcement of revenue-raising measures by government officials); Bernadette Atuahene, *Predatory Cities*, 108 CAL. L. REV. 107, 173-74 (2020) (discussing the factors that lead city executive and legislative officials to prey on vulnerable citizens for revenue, often in a way that contravenes legal protections). The example of controlled substance taxes highlights how taxes can be enforced in a discriminatory manner, even unintentionally. *See infra* notes 254-258 and accompanying text.

¹¹⁹ *See* Iijima, *supra* note 43, at 108-21 (analyzing the availability of constitutional rights in controlled substance tax cases); Zolt, *supra* note 23, at 378 (recognizing the tax system as a potential “second-best alternative” to increasing criminal sanctions for those convinced those criminal sanctions are too low); Sorrow, *supra* note 3, at 339 (recognizing the potential for the state to impose taxes on illegal activity when it cannot meet the burden to impose criminal sanctions); Racaniello, *supra* note 35, at 680 (painting controlled substance taxes as

civil penalties typically require the opportunity for a hearing.¹²⁰ And taxpayers typically carry the burdens of proof and persuasion when challenging decisions by tax administrators, further placing those taxpayers under the weight of the enforcement decisions of government officials.¹²¹ Even civil forfeiture laws, which may be viewed as similar in effect to insidious regulatory taxes,¹²² put some initial burden of proof on the government.¹²³ In the case of insidious regulatory taxes such as controlled substance taxes, when government officials target already vulnerable minority populations for enforcement, as happens in the case of drug offenses,¹²⁴ individuals lose their last line of defense against such abusive

“clandestine means to punish drug dealers when there is insufficient evidence to pursue criminal prosecution”); Tomasson, *supra* note 17 (reporting on controlled substance taxes as effective tools in the combatting illegal drug sales because of their ability to avoid the protections afforded to criminal defendants); cf. 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, 1329 (1991) (noting the embrace of civil sanctions by law enforcement because such sanctions are “unencumbered by the rigorous constitutional protections associated with criminal trials”).

¹²⁰ See *supra* note 87.

¹²¹ See *supra* notes 85-86.

¹²² See Charney, *supra* note 117, at 480 (describing how legislators and prosecutors use “civil” statutes to avoid the obstacles created by legal protections for criminal defendants); Colgan, *supra* note 24, at 221; Mann, *supra* note 24, at 1844-61.

¹²³ See Stahl, *supra* note 24, at 285-86 (detailing probable cause burdens of proof in civil forfeiture cases).

¹²⁴ See generally ACLU, *A Tale of Two Countries: Racially Targeted Arrests in the Era of Marijuana Reform* (July 1, 2020) (detailing racial disparities in arrests relating to marijuana across the United States); see also Joseph E. Kennedy, Isaac Unah, & Kasi Wahlers, *Sharks and Minnows in the War on Drugs: A Study of Quantity, Race and Drug Type in Drug Arrests*, 52 U.C. DAVIS L. REV. 729, 745-59 (2018) (detailing racial disparities in arrests relating to hard drugs and marijuana); Cassia Spohn, *Race and Sentencing Disparity*, in REFORMING CRIMINAL JUSTICE: A REPORT BY THE ACADEMY FOR JUSTICE 169, 173-74 (Arizona State University), available at https://law.asu.edu/sites/default/files/pdf/academy_for_justice/9_Criminal_Justice_Reform_Vol_4_Race-and-Sentencing-Disparity.pdf (dismissing racial differences in offending patterns as a reason for racial differences in enforcement of drug laws).

In addition to being disproportionately targeted, racial minority populations receive less favorable outcomes in criminal adjudication, including longer sentences for drug offenses. See Paul Butler, *Race and Adjudication*, in REFORMING CRIMINAL JUSTICE: A REPORT BY THE ACADEMY FOR JUSTICE 211 (Arizona State University), available at https://law.asu.edu/sites/default/files/pdf/academy_for_justice/10_Reforming-Criminal-Justice_Vol_3_Race-and-Adjudication.pdf; Spohn, *supra*; Cody Tuttle, *Racial Disparities in Federal Sentencing: Evidence from Drug Mandatory Minimums*, (Oct. 19, 2019), manuscript available at http://econweb.umd.edu/~tuttle/files/tuttle_mandatory_minimums.pdf; The Criminal Justice Policy Program, Harvard Law School, *Racial Disparities in the Massachusetts Criminal System*, (Sept. 2020), available at

governmental actions—the courts’ enforcement of countermajoritarian rights.

The Supreme Court highlighted such concerns in *NFIB* but dismissed them because it viewed “the taxing power [as] limited to requiring an individual to pay money into the Federal Treasury, no more.”¹²⁵ As a result, “imposition of a tax nonetheless leaves an individual with a lawful choice to do or not do a certain act, so long as he is willing to pay a tax levied on that choice.”¹²⁶ This argument forgets that procedure matters when imposing sanctions, and ignores the differences in procedure applied in tax cases and other cases. The form of a state sanction is not relevant to the choice a person faces, except if that form changes the process for proving whether or not the person made the choice to engage in the regulated activity.¹²⁷ In either case of taxation or direct regulation, the government presents people with choices by regulating behavior, but under the current state of affairs when the government does so through taxes, those who are regulated may lose important legal protections because of the privilege afforded tax laws.¹²⁸ Insidious regulatory taxes sacrifice individual interests for less judicial scrutiny.¹²⁹

B. The Inefficiency of Insidious Regulatory Taxes

The cost of the privilege in court for insidious regulatory taxes is not limited to the individual harms to the taxpayers. Insidious regulatory taxes also generate larger economic harms because they are not the most efficient means

<https://web.archive.org/web/20200909134940/http://cjpp.law.harvard.edu/assets/Massachusetts-Racial-Disparity-Report-FINAL.pdf>. It can be inferred that law enforcement and prosecutors refer white people who violate controlled substance taxes to tax authorities at a lower rate than Black and Hispanic people engaged in the same tax violations. *See Tuttle, supra*, at *5 (suggesting federal prosecutors use their discretion in drug cases in a biased manner); M. Marit Rehavi & Sonja B. Starr, *Racial Disparity in Federal Criminal Sentence*, 122 J. OF POLITICAL ECONOMY 1320 (2014) (finding evidence that prosecutorial discretion contributes to racial disparities in sentencing).

¹²⁵ *NFIB*, 567 U.S. 519, 574 (2012).

¹²⁶ *Id.*

¹²⁷ I am grateful to Ariel Jurow Kleiman for this point.

¹²⁸ *See Metzger, supra* note 12, at 111 (arguing that a shift to monetary sanctions risks granting legislatures a “de facto capacity to compel” if courts are unwilling to restrict such sanctions in the same manner as direct regulations); Vaida, *supra* note 101, at 151 (“While the line [between tax and punishment] is not easily crossed, once traversed, it bestows a panoply of constitutionally enshrined protections on the taxpayer.”); Cheh, *supra* note 119, at 1330 (“If [“criminal case”] is defined too narrowly, then the values that underlie various constitutional provisions will be sacrificed simply because they arise in a proceeding denominated as civil.”).

¹²⁹ *See Cheh, supra* note 119, at 1353 (highlighting concerns for individual interests when tax laws are used to regulate behavior).

of achieving their regulatory goals; direct regulations would be a better choice.

Commentators have described the types of costs accompanying taxation and direct regulation that lawmakers should consider when deciding which tool to use.¹³⁰ Because either tool can be used to achieve the same substantive goal,¹³¹ the lines of comparison between taxation and direct regulation focus on practical costs. Broadly speaking, the prominent lines of comparison focus on three issues: 1) where expertise is built in, 2) the effects of existing legal structures, and 3) how people react to the tools.¹³² The commentary has not focused on the different judicial scrutiny regimes facing taxes and direct regulations.

When a comparison along these lines would counsel in favor of direct regulations, but lawmakers enact regulatory taxes instead to take advantage of the judicial deference for tax laws, insidious regulatory taxes result. This result imposes unnecessary costs on society; a substantively better way to achieve the legislative goal exists but is forgone. For instance, as Part III further details, controlled substances taxes do not appear as capable of regulating those substances as criminal sanctions are; by adopting the taxes in lieu of criminal sanctions, states increase the costs of regulation unnecessarily by opting for the less efficient route.

One might counter that insidious regulatory taxes do not fail this efficiency analysis because the privilege afforded those taxes makes it more likely that the legislative goal will be achieved. Thus, the argument goes, lawmakers should take the judicial scrutiny regimes into account when deciding between regulatory taxes and direct regulations and favor the regime that favors them. However, this argument overlooks costs associated with insidious regulatory taxes, particularly those of the individual harms (discussed above) and of obscuring the amount of regulation from the public (discussed below).

¹³⁰ See generally Todor, *supra* note 23 (providing an overview of the comparison of tax expenditures and direct spending). Weisbach and Nussim provided high-level conclusions for when integrating spending programs into the tax code is justified which focused on the practical benefits arising from coordination between and specialization of different agencies on different subject matters; for example, the Internal Revenue Service would be much better at administering programs relying on tax return data for eligibility. See Weisbach & Nussim, *supra* note 23, at 996.

¹³¹ *Supra* note 70.

¹³² See *infra* Part III.A. for a deeper discussion of tax expenditure analysis, which is the source of these lines of comparison.

C. Hidden Overregulation through Insidious Regulatory Taxes

Insidious regulatory taxes can obscure how much an activity is regulated, allowing for overregulation to creep in. Overregulation by itself is harmful, in that it does not reflect society's preferences. In addition, once overregulation is discovered, people's faith in government may falter.

While taxes generally tend to command political awareness and opposition,¹³³ scholars observe that some types of taxes—particularly targeted regulatory taxes—draw less public attention, as people do not expect to be payors of the taxes.¹³⁴ For example, controlled substance taxes likely exist on the fringes of public attention because few people expect to be subject to them.¹³⁵ These hidden taxes can obscure the ultimate cost and scope of government regulation of the taxed activity, inhibiting the public's ability to evaluate and weigh in on the amount of regulation.¹³⁶ As a result, lawmakers might use the taxes to achieve a legislative result that is not in line

¹³³ See, e.g., Ariel Jurow Kleiman, *Tax Limits and the Future of Local Democracy*, 133 HARV. L. REV. 1884, 1893-99 (2020) (describing the widely-advanced anti-tax sentiments driving the Tax Revolt movement); Perkins, *supra* note 29, at 152-53 (describing anti-tax sentiment among voters); Mason, *supra* note 32, at 1031 (noting that tax increases are highly politically salient); Zelinsky, *supra* note 23, at 1184 (describing evidence that general newspapers report the tax institutions of the federal government to a greater degree than the direct expenditure system).

¹³⁴ See Perkins, *supra* note 29, at 152-53 (noting the political popularity of sin taxes due to their not applying to a majority of taxpayers and because they promote some "opposition-resistant social good").

¹³⁵ Indicating the general lack of public awareness of the taxes, they have been referred to as "weird" and "wacky" in popular discussion. See Audrey Dutton, *Here's One Weird Tax that Idaho Drug Dealers and Users Ignore*, Idaho Statesman (July 22, 2016) (leading with "[m]ost people don't know about it"); Gail Cole, *Illegal Drugs Are Subject to Tax. Wacky Tax Wednesday*, Avalara.com Blog (Sept. 3, 2014) ("That's wacky."), available at <https://www.avalara.com/us/en/blog/2014/09/illegal-drugs-subject-tax-wacky-tax-wednesday.html>; see also Brenee Goforth, *No Kidding, North Carolina Taxes Illegal Drugs*, Carolina Journal (Aug. 8, 2019), available at <https://www.carolinajournal.com/opinion-article/no-kidding-north-carolina-taxes-illegal-drugs/>.

¹³⁶ Weisbach & Nussim, *supra* note 23, at 970-71 (observing that tax expenditures are generally less visible than direct spending programs); Zolt, *supra* note 23, at 360 (questioning whether the effects of tax penalty provisions would be acceptable if made more explicit).

with their constituents' preferences,¹³⁷ undermining principles of representative democracy.¹³⁸

Insidious regulatory taxes are particularly suspect in this context because lawmakers need not act nefariously to overregulate by insidious regulatory taxes. The harms that can result from taking advantage of the privilege afforded taxes in order to achieve a regulatory goal are likely easy for lawmakers to overlook. For one, the harms can be hard to measure monetarily as they result from the denial of legal protections, making the harms difficult to incorporate into cost-benefit analyses. The harms also may fall on minority populations,¹³⁹ as in the case of controlled substance taxes.¹⁴⁰ If lawmakers are acting to be re-elected, they are likely to try to appeal to a majority of voters or to powerful interest groups and not overly concern themselves with the interests of politically-weak minority groups.¹⁴¹

Overregulation, once uncovered, also can undermine people's morale and willingness to comply with the law.¹⁴² Insidious regulatory taxes' coopting

¹³⁷ See Joshua D. Blank, *Collateral Compliance*, 162 U. PENN. L. REV. 719, 758 (2014) (observing how collateral tax sanctions can be used to increase sanctions past a politically-acceptable level); Stanley S. Surrey, *Tax Incentives as a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures*, 83 HARV. L. REV. 705, 733-34 (1970) (opining on how tax law might be used by lawmakers to avoid scrutiny for unpopular initiatives). Using multiple tools to approach a problem might also serve to shift political responsibility in a self-serving manner for lawmakers by making it more difficult to detect and assign blame for unpopular or faulty programs. See Nancy Staudt, *Redundant Tax and Spending Programs*, 100 NW. U. L. REV. 1197, 1198 (2006).

¹³⁸ See Mason, *supra* note 32, at 1019 (considering political accountability problems of grants and tax subsidies); R.A. Musgrave, *In Defense of an Income Concept*, 81 HARV. L. REV. 44, 52 (1967) (outlining the argument that policy goals should be achieved in a manner understandable to the public to respect the democratic process).

¹³⁹ See *supra* note 116.

¹⁴⁰ See *supra* Part II.A.

¹⁴¹ See generally Daniel Shaviro, *Beyond Public Choice and Public Interest: A Study of Legislative Process as Illustrated by Tax Legislation in the 1980s*, 139 U. PA. L. REV. 1 (1990) (detailing the intricacies of the public interest and public choice theories of legislative process, including the role of political power in shaping lawmakers' actions); Daniel A. Farber & Philip P. Frickey, *Jurisprudence of Public Choice*, 65 TEX. L. REV. 873 (1987) (discussing the role of interest groups in the development of public law); cf. Kleiman, *supra* note 24, at *25 (observing that a revenue-seeking agency might target politically powerless or unpopular groups to mask the burdens of the agency's actions).

¹⁴² See, e.g., Kirsch, *supra* note 14, at 913-16 (discussing expressive theories of law which describe why people may not comply with laws they disagree with). On the expressive function of law more generally, see Alex Geisinger, *A Belief Change Theory of Expressive Law*, 88 IOWA L. REV. 35 (2002); Richard H. McAdams, *A Focal Point Theory of Expressive Law*, 86 VA. L. REV. 1649 (2000); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996).

of the tax law for overregulation can be particularly harmful. Though taxation and direct regulation can both express societal values which can affect people's morale and faith in government,¹⁴³ the revenue-raising aspect of taxation may signal governmental complicity in certain activities—like the controlled substances trade—framing the activities as permissible if only one is willing to pay.¹⁴⁴ If the values being expressed by the tax law are perceived as unfair or inappropriate, people's morale and faith in government may falter,¹⁴⁵ which could lead to a failure to comply with the laws.¹⁴⁶

Thus, insidious regulatory taxes like controlled substance taxes are particularly dangerous because they are a relatively clandestine method for governments to overregulate, sacrificing legal protections for individuals and economically efficient laws for the preferences of individual legislators. Courts should not incentivize lawmakers to use such taxes.

Thankfully, as the courts give, they can take away. The next Part argues that courts should remove the artificial incentive for tax laws by refusing to provide insidious regulatory taxes with the privilege now granted. Judges can do this by using the tools of tax expenditure analysis to locate insidious regulatory taxes and by providing those taxes with the same level of scrutiny as their direct regulation counterparts. Abandoning the current tax

¹⁴³ See *supra* note 142.

¹⁴⁴ See, e.g., Kitty Richards, *An Expressive Theory of Tax*, 27 CORNELL J. L. & PUB. POL'Y 301, 311-15 (2017) (examining the legitimization of prostitution that taxing prostitution can bring); Jonathan S. Masur & Eric A. Posner, *Toward a Pigouvian State*, 164 U. PA. L. REV. 93, 142 (2015) (“If pollution is a moral wrong, in that the polluter is imposing harm upon an unconnected victim, then it strikes some commentators as immoral to permit a firm to continue to pollute on the condition that it pays a fee.”); H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 7 n. 8 (Oxford: Clarendon Press, 1968) (“[F]ines payable for some criminal offences . . . become so small that they are cheerfully paid and offences are frequent. They are then felt to be mere taxes because the sense is lost that the rule is meant to be taken seriously as a standard of behaviour.”).

¹⁴⁵ See Kleiman, *supra* note 24, at *38 (observing the deleterious effects of exploitative fees on the faith in the legal system of those in the criminal justice system); Surrey, *supra* note 25, at 11 (highlighting the “aura of unfairness [of] the tax system” created by the use of tax expenditures); Blank, *supra* note 137, at 769 (“Another possible harmful effect of collateral tax sanctions is that taxpayers may view some of these measures as illegitimate acts of brute deterrence by the government.”); Excerpts from the Treasury Report on Tax Simplification for Reform, 1-11 (1986) (detailing the importance of “taxpayer morale” and the centrality of the belief that taxes are fair to voluntary compliance with the law).

¹⁴⁶ See Edward Yorio, *Equity, Efficiency, and the Tax reform Act of 1986*, 55 FORDHAM L. REV. 395, 425-26 (1987) (describing concerns about taxpayer disaffection); Richard D. Schwartz & Sonya Orleans, *On Legal Sanctions*, 34 U. CHI. L. REV. 274, 295 (1967) (finding appeals to conscience have greater influence on tax compliance than deterrence factors).

exceptionalism approach to regulatory taxes would ensure that courts no longer push lawmakers to enact insidious regulatory taxes.

III. JUST SAY NO: ROOTING OUT INSIDIOUS REGULATORY TAXES

That insidious regulatory taxes generate problems begs the question of how to address them. The short answer is to deny insidious regulatory taxes the privilege generally provided to tax laws and scrutinize them as their direct regulation counterparts would be scrutinized. Doing so would remove the judicially-created incentive for lawmakers to enact regulatory taxes instead of direct regulations that is the source of insidious regulatory taxes.

In a way, courts have already taken small steps towards this solution. In extraordinary cases various courts have recognized that the language of tax is sometimes used to mask a direct regulation.¹⁴⁷ Once these courts uncover the true nature of the law, it receives the appropriate judicial scrutiny.¹⁴⁸ However, these small steps are not enough; the existing judicial approach grants too much leeway to certain taxes because it fails to balance the institutional interest in revenue raising with individual interests in resisting harmful regulatory actions.¹⁴⁹

To root out insidious regulatory taxes, courts should engage in that balancing when a challenged tax has a regulatory purpose rather than conclusively privileging the tax once a revenue-raising purpose is uncovered. The tools of modern tax expenditure analysis can form the foundation for this undertaking.¹⁵⁰ Litigants can use tax expenditure analysis to highlight when tax laws are adopted to achieve a regulatory goal despite their inferiority to direct regulations. In such a case, courts can presume that lawmakers opted for the challenged tax because of the privileged regime for taxes and can scrutinize the tax as they would a direct regulation. This approach would not deny that regulatory taxes are taxes; rather, it would address when the regulatory purpose of a tax chips away at the privilege for taxes that is based on the revenue-raising purpose of taxes. In function, the framework would single out insidious regulatory taxes for more scrutiny than other taxes.

¹⁴⁷ See *supra* notes 100-105.

¹⁴⁸ See *supra* note 100.

¹⁴⁹ See *supra* Part I.B.

¹⁵⁰ Surrey hinted at such a use for tax expenditure analysis in his writings, at least in the context of tax expenditures (as opposed to tax penalty provisions or regulatory taxes themselves). See SURREY, *supra* note 23, at 46-47.

The following Section demonstrates how tax expenditure analysis can be used in this way, relying on the example of states' controlled substance taxes to illustrate the proposal.¹⁵¹ This Part concludes by examining potential concerns surrounding the proposal.

A. A More Complete Framework for Scrutinizing Taxes

The choice between using taxes or direct regulations to achieve a legislative goal is a choice in institutional competence, as modern tax expenditure analysis recognizes.¹⁵² Tax expenditure analysis has grown from the work of Stanley Surrey, perhaps the most influential scholar to grapple with the idea of using tax laws to advance regulatory goals.¹⁵³ Surrey labeled tax laws “tax expenditures” when the laws were used to advance goals not appropriate to the tax system.¹⁵⁴ Though his ideas faced criticism, primarily around the difficulty of defining a normatively-proper tax base against which to measure the appropriateness of a tax provision,¹⁵⁵ Surrey succeeded in shining light on the “hidden” government spending happening through the use of tax

¹⁵¹ Other potential examples include the tax reporting requirements and accompanying penalties designed to combat money laundering and tax evasion, including the Foreign Bank Account Report (“FBAR”) and Foreign Account Tax Compliance Act (FATCA) regimes. *See* 31 U.S. Code §§ 5314, 5321(a)(5) (imposing FBAR reporting obligations and penalties); 26 U.S. Code § 1471-1474, (imposing FATCA reporting obligations and penalties); *see also* Patricia T. Morgan, *Money Laundering, the Internal Revenue Service, and Enforcement Priorities*, 43 FLA. L. REV. 939, 941 (1991) (detailing reporting requirements and penalties to combat money laundering).

¹⁵² *See* Weisbach & Nussim, *supra* note 23, at 957.

¹⁵³ *See* Erwin N. Griswold, *A True Public Servant*, 98 HARV. L. REV. 329, 331 (1984) (describing Surrey as “the greatest tax scholar of his generation”).

¹⁵⁴ SURREY, *supra* note 23, at 6-7. Surrey and his co-author McDaniel labeled tax laws that subsidized activities “tax expenditures” and tax laws that penalizing activities “tax penalty provisions”. Surrey & McDaniel, *supra* note 14, at 242-43 (defining tax expenditures and tax penalty provisions).

¹⁵⁵ *See* Mason, *supra* note 32, at 984 (discussing these critiques); Zelinsky, *supra* note 23, at 1165-66 (noting the difficulty of classifying tax provisions as normative or not); Boris I. Bittker, *Accounting for Federal “Tax Subsidies” in the National Budget*, 22 NAT’L TAX J. 244 (1969) (criticizing the tax expenditure concept for lacking a normative basis to actually identify tax expenditures). Tax penalty provisions are subject to the same criticism. *See* Zolt, *supra* note 23, at 348; Mason, *supra* note 32, at 989.

expenditures.¹⁵⁶ Even with this exposure, tax expenditures were not curbed as Surrey had hoped; in fact, they have grown over time.¹⁵⁷

Others, particularly David Weisbach and Jacob Nussim, supplemented Surrey's work by incorporating the tax expenditure concept into a larger world.¹⁵⁸ Weisbach and Nussim did not take direct issue with Surrey's analysis, except to note that Surrey's detailing of tax expenditures was too narrow. By focusing on the effect of tax expenditures on the tax system,¹⁵⁹

¹⁵⁶ See Zelinsky, *supra* note 23, at 1165 (noting the “intellectual and political success” of Surrey's analysis). Surrey's success is exemplified by the fact that the U.S. Treasury Department and the Joint Committee on Taxation both publish tax expenditure budgets that highlight the major provisions of the federal income tax code that represent foregone revenues. Congressional Budget and Impoundment Control Act of 1974 (Public Law 93–344); Joint Committee on Taxation, *Estimates of Federal Tax Expenditures for Fiscal Years 2019-2023* (JCX-55-19) (Dec. 18, 2019). Most states also prepare tax expenditure budgets. See, e.g., California Tax Expenditure Report 2018–19, Department of Finance; Commonwealth of Massachusetts Tax Expenditure Budget Fiscal Year 2020, Executive Office for Administration and Finance (Jan. 2019); State of Minnesota Tax Expenditure Budget Fiscal Years 2018-2021, Minnesota Department of Revenue, Tax Research Division (Feb. 2018).

¹⁵⁷ E.g. Conor Clarke & Edward Fox, *Perceptions of Taxing and Spending: A Survey Experiment*, 124 YALE L. J. 1252, 1255 (2015) (noting the “paradox” of the growth of tax expenditures in light of their increased publicization); Edward A. Zelinsky, *The Counterproductive Nature of Tax Expenditure Budgets*, 137 TAX NOTES 1317 (Dec. 17, 2012) (“As tax expenditure budgets have proliferated, so too have tax expenditures.”).

¹⁵⁸ See generally Weisbach & Nussim, *supra* note 23.

¹⁵⁹ See David A. Weisbach, *Tax Expenditures, Principal-Agent Problems, and Redundancy*, 84 WASH. U. L. REV. 1823, 1824 (2006) (concluding that Surrey's reasons for arguing that tax expenditures should be eliminated largely relied on view that tax expenditures were “bad tax policy”). Some of Surrey's primary arguments in this regard were that tax expenditures (1) increased the complexity of the tax code, (2) often worked as “upside-down subsidies” that provided more benefits to high-income individuals than low-income individuals, and (3) deteriorated the quality of tax administration. Tax expenditures increased the complexity of the tax code by deviating from the normatively proper considerations of the tax code. In this way, taxpayers and tax authorities had to work through more provisions to determine tax liabilities, sacrificing resources that could be used more efficiently elsewhere. SURREY, *supra* note 23, at 146. Upside-down subsidies raised serious equity questions for the tax system by advantaging high-income taxpayers over low-income taxpayers. These upside-down subsidies were the natural effect of providing tax expenditures through deductions from income: those with higher income—and thus higher tax rates—would lower their taxes by more absolute dollars than those with lower incomes and lower tax rates for engaging in the exact same activities. Surrey viewed this natural advantage as likely unintended and therefore a harmful and an ineffective use of government dollars. See, e.g., *id.* at 36-37 (offering the federal mortgage interest deduction as an example of an upside-down subsidy). By requiring tax administrators to develop expertise in policies unrelated to the normative operation of the tax—tax administration presumably being something that tax administrators are expert in, tax expenditures diverted resources from securing a properly functioning tax code to enacting policies better suited to others' expertise. *Id.* at 141-46.

Surrey paid too little attention to the fact that tax expenditures might still be better than direct regulations if such regulations were even costlier to society.¹⁶⁰

As Weisbach and Nussim detailed, once a government decides to support or discourage a certain activity, the most important question should not be whether that decision represents good tax policy.¹⁶¹ Instead, the most important question is how the government could provide those incentives at the lowest cost to society.¹⁶² Some incentives might be most effectively provided through taxes, others through direct regulation programs or some combination of the two approaches. Lawmakers must compare the costs associated with each approach to design the appropriate program.¹⁶³ Weisbach and Nussim's insights offer a potential explanation for the growth of tax expenditures if taxation is the more efficient means of enacting government policies.

The modern tax expenditure analysis highlighted in Weisbach and Nussim's work can form the foundation of a more complete framework for determining the judicial scrutiny owed to tax laws. This framework can uncover insidious regulatory taxes by demonstrating when the privilege granted to tax laws elevates less effective taxes over better direct regulations. Under the proposed framework, a challenged tax should receive the same scrutiny as a comparable direct regulation when litigants demonstrate the following:

1. What a direct regulation designed to achieve the same regulatory goal as the tax would be;

¹⁶⁰ Weisbach & Nussim, *supra* note 23, at 982 (explaining the shortcomings in Surrey's analysis of tax expenditures). In fairness, Surrey did contemplate that the ultimate question should be between the merit of using the tax code or direct programs to achieve a legislative goal, but his analysis focused on existing tax expenditures and on government spending rather than all types of regulatory programs. See SURREY, *supra* note 23, at 38-39.

¹⁶¹ Weisbach & Nussim, *supra* note 23, at 958-59.

¹⁶² *Id.*

¹⁶³ *Id.* at 981 ("We should compare programs that are best designed for each institutional structure and choose the best from among these."). Weisbach later supplemented this analysis by considering how principal-agent problems and redundancy might affect the decision to use tax expenditures or direct spending programs. Weisbach, *supra* note 159. In short, Weisbach concluded that "adding principal-agent considerations can change the expertise/coordination story if principal-agent concerns prevent Congress from making full use of an agency's expertise" and that the "redundancy [of implementing tax expenditures on top of direct spending programs] might be likely as a diversification strategy" to ensure that Congressional programs do not fail. *Id.* at 1859.

2. That the tax is a comparatively less effective tool for achieving the goal than the direct regulation, apart from the impact of the judicial scrutiny regimes applicable to the approaches; and
3. That the judicial scrutiny regime for the tax is more favorable to the government than that for the direct regulation.

These steps are discussed in turn while relying on controlled substance taxes for a stylized example of how the analysis might proceed. Note that the framework assumes that the challenged tax has a revenue-raising purpose and thus is likely to be respected as a tax in the first instance; the goal is to determine when the tax should receive more scrutiny due to its regulatory goals.

1. Determining a Comparable Direct Regulation

Under typical tax expenditure analysis, a tax provision is compared against the normative tax base to determine if it is a tax expenditure or not.¹⁶⁴ Regulatory taxes fit awkwardly within this mode of analysis because their normative bases account for the regulatory goals of the tax.¹⁶⁵ Even so, modern tax expenditure analysis' focus on institutional competencies removes doubt that the tax expenditure scholarship can be used to engage in meaningful analysis of regulatory taxes.¹⁶⁶ Instead of comparing regulatory taxes to a normative tax base, they can be compared to a direct regulation designed to achieve the same goal.

Many direct regulation alternatives to a regulatory tax likely exist. In an ideal world, the most effective direct regulations and tax provisions would be considered. This approach would ensure that lawmakers' choices are measured against the least burdensome tools for society. In reality, courts must rely on the alternatives presented by litigants or amici, which may not

¹⁶⁴ See Ruth Mason, *Identifying Illegal Subsidies*, 69 AM. U. L. REV. 479, 497 (2019) (observing the need for a baseline for comparison under tax expenditure analysis). Mason questions courts' competency to locate a reasonable normative tax base when engaging in tax expenditure analysis, creating a trap for the courts. *Id.* at 525-33. By asking courts to instead engage in statutory analysis of the policy goal of a challenged regulatory tax, the proposed framework plays to courts' strengths and avoids asking courts to generate normative tax bases.

¹⁶⁵ Indeed, Surrey initially may have had misgivings about whether regulatory taxes could be subjected to the same analysis as tax expenditures for this reason. See SURREY, *supra* note 23, at 27-28.

¹⁶⁶ Surrey used the foundations of his tax expenditure analysis to discuss the choice between regulatory taxes and direct regulation in the context of government efforts to curb pollution. See SURREY, *supra* note 23, at 155-74.

be the most effective, though litigants should be expected to present alternatives with a plausible chance of surviving the comparison under the second step of the framework. As a result, the presentation of alternatives may track arguments in cases where the government is required to use the least burdensome approach to achieve a goal that infringes on some right.¹⁶⁷

In any event, courts should be called on to use their judgment and tools of statutory interpretation to determine the regulatory goal of the challenged tax¹⁶⁸ and generally what a direct regulation designed to achieve that goal would look like. Because the framework is concerned with the judicial scrutiny regime applied to direct regulations, the court need only flesh out the direct regulation enough to uncover that regime; there should be little need for granular details. Where the court finds no regulatory goal or direct regulation alternative for the tax, the tax should remain in the default privileged regime for tax laws.

In the case of the controlled substance taxes (which should be respected as taxes given their revenue-raising goals¹⁶⁹), the general regulatory goal is to reduce the amount of the substances in society.¹⁷⁰ These substances are deemed harmful enough that their possession and sale should be meaningfully discouraged, subject to some limited exceptions. The taxes deter the possession and sale of controlled substances by increasing the costs of engaging in those activities.¹⁷¹

¹⁶⁷ See, e.g., *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (imposing a balancing test for state burdens on interstate commerce that asks whether the state goal could be achieved “with a lesser impact on interstate activities”). I am grateful to Ruth Mason for this point.

¹⁶⁸ Revenue goals are not relevant because they are already respected in acknowledging that the purported tax is a tax and entitled to the privileged regime of judicial scrutiny as the default.

¹⁶⁹ See *supra* note 40.

¹⁷⁰ See *supra* notes 42 & 43.

¹⁷¹ Bucci, *supra* note 44, at 748. Controlled substance taxes arguably fit the mold of Pigouvian taxation, whereby people are made to internalize the societal costs of their harmful activities. See Masur & Posner, *supra* note 144, at 95. Many methods of pushing externalities back onto the original actor exist, but Pigou made the case for taxation as a particularly elegant method. Direct regulation demands a lot of information; the regulator must understand the cost of the harmful activity and the benefit of the proposed action in order to enact an effective regulation. See SURREY, *supra* note 23, at 160–61. In contrast, Pigouvian taxation only requires the regulator to know one thing: the cost of the harmful activity. *Id.* This is not to say that accurately determining that cost is an easy task, but the task is certainly simpler than determining that cost as well as the benefit of a proposed action. Once the cost of the harmful activity is determined, the regulator can tax that activity an appropriate amount so that anyone who engages in the activity is forced to bear its total costs. See Masur &

A comparable direct regulation could take many forms, but the analysis can be guided by the experience of the states with controlled substance regulations. In order to discourage the possession and sale of the substances, states have criminalized those activities, imposing costs on people who would engage in the activities.¹⁷² For example, Connecticut criminalizes the possession or sale of controlled substances,¹⁷³ which carries the potential of imprisonment of up to 15 years and fines of up to \$50,000 for a first offense relating to selling narcotics or hallucinogens,¹⁷⁴ imprisonment of at least 5 years and potentially life for offenses relating to selling dependency-producing drugs,¹⁷⁵ and imprisonment of up to 1 year and fines of up to \$2,000 for simple possession of controlled substances,¹⁷⁶ not to mention the collateral consequences of criminal convictions.¹⁷⁷

These deterrence goals could also be accomplished through civil sanctions, though such sanctions might be treated as criminal sanctions if they are punitive—if they track too closely to criminal sanctions—which seems likely in the controlled substance context.¹⁷⁸ Lawmakers might also turn to tort laws assigning liability for the harms of possessing and selling controlled substances to those who engage in the activities.¹⁷⁹ However, as Jonathan Masur and Eric Posner observe generally, and which is likely to be true in the case of the regulation of controlled substances, “the problem with using the

Posner, *supra* note 144, at 95. Though the controlled substance taxes reflect the basic tenets of Pigouvian taxation, taxes might also be used to regulate behavior beyond the placing of the costs of externalities on the actors engaged in the taxed activity. *See* Scharff, *supra* note 32, at 1588 (“Taxes also often serve as a policy tool to curb undesirable behaviors that are not purely externality problems.”). Thus, it is inconsequential to the analysis if the controlled substance taxes do not function as pure Pigouvian taxes.

¹⁷² *See generally* Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POLITICAL ECONOMY 169 (1974) (describing a basic economic model of deterrence, under which actors consider the size of the sanction and the risk of being sanctioned to determine the expected cost for engaging in the activity).

¹⁷³ Conn. Gen. Stat. §§ 21a-277 to 21a-279.

¹⁷⁴ Conn. Gen. Stat. §§ 21a-277.

¹⁷⁵ Conn. Gen. Stat. §§ 21a-278.

¹⁷⁶ Conn. Gen. Stat. §§ 21a-279 (classifying the possession of controlled substances as a class A misdemeanor, the penalties for which are proscribed in Conn. Gen. Stat. §§ 53a-36, 53a-42).

¹⁷⁷ *See generally* Gabriel J. Chin, *Collateral Consequences*, in REFORMING CRIMINAL JUSTICE: A REPORT BY THE ACADEMY FOR JUSTICE 371 (Arizona State University) (detailing the collateral consequences of criminal convictions), *available at* https://law.asu.edu/sites/default/files/pdf/academy_for_justice/17_Criminal_Justice_Reform_Vol_4_Collateral-Consequences.pdf.

¹⁷⁸ *See infra* notes 299-300 and accompanying text (discussing the treatment of punitive civil sanctions).

¹⁷⁹ *See* Masur & Posner, note 144, at 102-03.

liability system is that payment to the victims will create perverse incentives on the part of the victims to engage in excessive activity.”¹⁸⁰ People might buy more controlled substances if dealers bear the costs of the harms. Additionally, the tort system is “beset by numerous procedural and practical limitations, including the difficulty of aggregating many small claims when the activity imposes small losses on a large number of people.”¹⁸¹

This analysis thus focuses on criminal law as the direct regulation approach to the possession and sale of controlled substances. Because lawmakers could reach their desired level of deterrence by specifically tailoring criminal sanctions on the possession and sale of controlled substances or by imposing controlled substance taxes, the costs and benefits of each approach must be compared to uncover the better approach.

2. Comparing the Costs and Benefits of Taxation and Direct Regulation

The question for the second step of the proposed framework is whether taxation or direct regulation is a better suited tool to achieve the regulatory goal.¹⁸²

Tax expenditure analysis provides the means for this comparison, focusing primarily on three issues: 1) where expertise lies, 2) the influence of existing legal structures, and 3) people’s reactions to the tools.¹⁸³ Because either tool could theoretically be designed to achieve the same goal,¹⁸⁴ this comparative analysis focuses on practical considerations, which can overlap somewhat.

¹⁸⁰ *Id.* at 102.

¹⁸¹ *Id.* at 102-03.

¹⁸² For ease of discussion, the analysis in this Article focuses primarily on a binary comparison between taxes and direct regulations, though the analysis carries over to a combined approach in a straightforward manner. *Cf.* Cheh, *supra* note 119, at 1326 (discussing the blending of civil remedies with criminal sanctions in drug forfeiture cases). In particular, when lawmakers are adding programs on top of existing ones, a binary comparison to determine what the best additional program will be is appropriate. However, the interaction of the various programs may change the comparative values of the potential new programs, as the Article highlights when appropriate. For a thorough analysis of the value of adopting a combination of programs to ensure that legislative goals are achieved, *see* Staudt, *supra* note 137.

¹⁸³ Surrey & McDaniel, *supra* note 14, at 290-91 (discussing the factors that must be considered when choosing between a tax program and a direct spending program); *cf.* Cooter, *supra* note 70 (discussing the different considerations when deciding whether to impose a price or a sanction on activities). The discussion here focuses on major points of comparison between taxation and direct regulation noted in the tax expenditure literature. It is not meant as a conclusive list of the possible points of comparison.

¹⁸⁴ *See supra* note 70.

As the following subsections demonstrate, under tax expenditure analysis, controlled substance taxes are the less effective tool for reducing the amount controlled substances in society. While the taxes might generate some better public reactions than controlled substance regulations (though at considerable risk of signaling governmental complicity in the controlled substance trade), the direct regulations better tap into existing expertise and existing legal structures and generate beneficial reactions of their own.

a) Expertise

Built-in expertise is an important point of comparison because relying on that expertise is likely to be less costly than creating new expertise. Commentators have focused on two loci of expertise—drafting and administration of the law.¹⁸⁵ The costs related to drafters and administrators arise from the resources these actors require to complete their tasks and from the risk of the actors failing to fulfill the legislative goal.¹⁸⁶ Weighing the costs of delegation, lawmakers might sacrifice expertise for control, driving up resource costs.¹⁸⁷

Drafting Expertise. Having drafters with the appropriate expertise in the relevant subject matter can lead to more effective laws.¹⁸⁸ Legislative drafters without such expertise may be unable craft statutes that effectively target the regulated activity, increasing the burdens on the drafters to create the statute correctly or the burden on administrators to apply the inexpertly-crafted law correctly.¹⁸⁹ To address principle-agent concerns, lawmakers must also consider which drafting committee is best able to reflect their wishes and not

¹⁸⁵ Zolt, *supra* note 23, at 375 (“The congressional tax-writing committees and the IRS may lack the expertise to design a program to achieve the necessary objectives.”); Edward Yorio, *supra* note 146, at 425 (describing concerns about expertise in drafting and administering tax laws versus direct expenditures).

¹⁸⁶ See Weisbach, *supra* note 159, at 1837-39; Ogus, *supra* note 69, at 785-87; Zelinsky, *supra* note 23, at 1166.

¹⁸⁷ Weisbach, *supra* note 159, at 1837-39; Staudt, *supra* note 137, at 1225; Ogus, *supra* note 69, at 785.

¹⁸⁸ See Staudt, *supra* note 137, at 1205-06 (describing the benefits of allocating drafting responsibilities to legislative committees based on expertise).

¹⁸⁹ Surrey, *supra* note 25, at 9 (advocating for spending programs to be considered by the legislative committees having jurisdiction over the implementing agency, not to the tax committees, to ensure the “rational use of legislative expertise and oversight”); Zolt, *supra* note 23, at 352 (describing problems that have arisen in the drafting of tax penalty provisions); Cooter, *supra* note 70, at 1532 (noting potential complications for the law arising from the lack of expertise in legislative drafters); Yorio, *supra* note 146, at 425 (detailing how the processes behind tax expenditures’ enactment and administration increase the risk that the tax expenditures would fail a cost-benefit analysis”).

be led astray by interest groups. Some commentators posit that tax drafting committees are better suited to resist the pull of interest groups, though the point is debated.¹⁹⁰

Returning to the case study, existing controlled substance tax laws demonstrate a lack of understanding of the nature of controlled substances, indicating that tax law drafters lack the expertise to regulate controlled substances. For example, the controlled substance tax laws often require taxpayers to affix tax stamps to the controlled substance, but it is not clear how one would do that.¹⁹¹ Must the tax stamp be affixed to the actual substance? To the container? What if the controlled substance is not sold in a container—how does one affix a stamp to tabs of LSD? Further, the controlled substance tax laws apply inconsistent tax rates to different types of substances, depending only on the delivery mechanism and failing to take potency into account.¹⁹² This focus on delivery mechanisms indicates a lack of understanding of what the controlled substances are and what they do. As a final example, the tax laws initially failed to protect taxpayers' identities under anti-self-incrimination principles, doing so only after court decisions required it.¹⁹³ These failures demonstrate that tax law drafters often lack the expertise to draft effective laws respecting individual rights not normally implicated in the tax realm.

Criminal law drafters, on the other hand, have significant expertise in drafting laws to regulate controlled substances. While not beyond reproach,¹⁹⁴ these laws are clear, typically demonstrate an understanding of the nature of controlled substances, and respect legal protections for those engaged in criminal activities. Returning to the example from above, Connecticut criminalizes the simple possession or sale of controlled substances,¹⁹⁵ makes clear the potential imprisonment and fines which vary depending on the type

¹⁹⁰ See Zelinsky, *supra* note 23, at 1166 (arguing that tax committees are less susceptible to capture by interest groups than other committees because of they are more competitive and visible); Staudt, *supra* note 137, at 1212 (“[S]cholars and policy analysts have identified the tax-writing committees as among the least political and most independent of those in Congress.”); *but see* Ogus, *supra* note 69, at 786 (offering counterarguments).

¹⁹¹ See *supra* note 45.

¹⁹² See *supra* note 49.

¹⁹³ See *supra* note 65.

¹⁹⁴ See *United States v. Marshall*, 908 F.2d 1312, 1333-34 (7th Cir. 1990) (Posner, J., dissenting) (observing the absurd results of mandatory sentencing requirements based on weight for violations of controlled substance laws).

¹⁹⁵ Conn. Gen. Stat. §§ 21a-277 to 21a-279.

of substance,¹⁹⁶ and does not require registration or other potentially self-incriminating activities to be undertaken by individuals.

Finally, with respect to the controlled substance taxes, tax drafting committees do not appear to have served as a significant bulwark against the pull of interest groups. The taxes were supported by individuals from many groups, though it is not clear how much pull the groups were exercising.¹⁹⁷ The fact that these sanctions were not enacted as criminal laws might indicate that the criminal law drafters better resisted self-interested groups,¹⁹⁸ if the groups were promoting excessive or unpopular punishments.

Administrative Expertise. On the administrative side, training administrators to navigate new types of laws can generate significant costs. Expanding the scope of taxes to cover activities traditionally regulated by non-tax administrators burdens tax administrators as they must develop the skills to apply the law to new activities.¹⁹⁹ Similarly, there are costs associated with having non-tax administrators administer revenue-raising provisions.²⁰⁰

¹⁹⁶ *Id.*

¹⁹⁷ See, e.g., Tomasson, *supra* note 17 (describing support from individuals affiliate dwith different groups such as the United States Advisory Commission on Intergovernmental Relations).

¹⁹⁸ As the controlled substance tax were viewed as additional tools in the War on Drugs and often revenues from the taxes are earmarked for law enforcement, *see supra* note 43, law enforcement groups might be inclined to support the taxes in a self-interested way, *cf.* Kleiman, *supra* note 24, at *34-36 (describing the temptation for government officials to bring in revenue at the expense of others).

¹⁹⁹ See Ray A. Knight & Lee G. Knight, *Criminal Tax Fraud: An Analytical Review*, 57 MO. L. REV. 175, 176-77 (1992) (describing the expertise of tax agents and how expanding tax agents' responsibilities affects their ability to enforce the tax laws); Zolt, *supra* note 23, at 376 (discussing the limitations of the IRS' enforcement priorities and expertise); Surrey & McDaniel, *supra* note 14, at 278-79 (observing the comments of Commissioner of Internal Revenue Jerome Kurtz that "[b]ecause of these provisions I find myself, a Commissioner of Internal Revenue, administering programs of many other agencies. . . . [T]he administrative problems which result from [the complexities created by tax expenditures] are formidable." and noting that "[w]hat is clear is that every Revenue Agent cannot possibly be an expert in the intricacies of the normative income tax and in the details of over 85 spending programs encompassing every area in which government operates."); Surrey, *supra* note 25, at 8 (highlighting the burdens tax expenditures place on the Commissioner of Revenue, effectively making the Commissioner adopt the role of multiple cabinet-level officials); Morgan, *supra* note 151, at 940-41 ("[T]he Service has permitted its role in combatting money laundering to overwhelm and undermine its traditional role in collection of tax revenues, which in turn may result in the unnecessary erosion of our voluntary tax compliance system.").

²⁰⁰ See generally Kirsch, *supra* note 14 (exploring the use of non-tax provisions to enforce the tax law); Blank, *supra* note 137, at 777 (describing limitations non-tax officials might have in applying the tax law); Staudt, *supra* note 137, at 1211 ("Empirical data strongly

Those non-tax administrators must also develop their ability to administer tax laws, which may demand broader application with less discretion than direct regulations.²⁰¹ Non-tax administrators may find themselves unable to resist the urge to collect more revenue despite equity concerns and at the expense of their other duties.²⁰²

Though narrow delegations of authority to administrators may address lawmakers' principle-agent concerns, lawmakers may instead introduce redundant laws to protect against the risk of their goals going unfulfilled.²⁰³ Relying on the expertise of multiple agencies can serve as such a failsafe if the expertises exercised are subject to independent risks of failure.²⁰⁴ Thus, lawmakers may opt for both tax laws and direct regulations, despite the additional cost, if the relevant expertise of tax administrators and regulatory administrators is meaningfully different.²⁰⁵

Particularly relevant to the administration of laws is the cost of collecting information to monitor the results of the law.²⁰⁶ Depending on what is targeted for taxation or regulation, either taxation or direct regulation may have lower informational costs than the other.²⁰⁷ However, regulatory taxes potentially require less information than direct regulations because policymakers need only decide how harmful the activity is to set the appropriate level of taxation such that the harms from the activity are accounted for.²⁰⁸ Anyone then willing to engage in the activity presumably

suggest that the IRS is significantly less prone to error and a far cheaper means for implementing government subsidies than the various other federal agencies, such as the Department of Agriculture, which takes responsibility for food stamps.”).

²⁰¹ See Blank, *supra* note 137, at 771 (noting that tax policymakers aim to have the tax law apply similarly across all taxpayers); Weisbach, *supra* note 159, at 1830-31 (noting narrower delegations of authority in tax law compared to other law); SURREY, *supra* note 23, at 169 (“[T]here is likely to be less discretion built into the mechanics of imposition of the pollution tax [than direct regulation].”).

²⁰² See Kleiman, *supra* note 24, at *34-36 (describing the pressure on non-tax administrators tasked with enforcing revenue-raising measures to inappropriately chase revenue).

²⁰³ Weisbach, *supra* note 159, at 1839-43; Staudt, *supra* note 137, at 1200. Some commentators whether Congress actually takes such considerations into account, at least in the case of tax laws. See Zolt, *supra* note 23, at 357.

²⁰⁴ Staudt, *supra* note 137, at 1219-20.

²⁰⁵ Weisbach, *supra* note 159, at 1839-43.

²⁰⁶ See Ogus, *supra* note 69, at 776-83 (detailing information costs related to taxation and direct regulation).

²⁰⁷ See Cooter, *supra* note 70, at 1550-51 (discussing informational requirements to draft effective sanctions and prices).

²⁰⁸ See Masur & Posner, *supra* note 144, at 95; but see Steven Shavell, *Corrective Taxation Versus Liability as a Solution to the Problem of Harmful Externalities*, 54 J. L. &

benefits from it more than the rest of society is harmed by it, leading to a net societal benefit. In contrast, direct regulation requires knowledge of both the harm of the activity and the effectiveness of the solution imposed through regulation. The government must ensure that its regulation is able to address the harms of the activity, which demands more information.

These insights rely on an assumption of a high level of compliance; without compliance, taxes and regulations become ineffective.²⁰⁹ As imperfect compliance can be expected, the government must also collect information on who is engaging in the regulated activity in order to enforce the law. If the regulated activity is something that might be reported on or inferred from tax returns—financial transactions, say—then taxation may be the more cost-effective tool.²¹⁰ On the other hand, if the activity is related to the jurisdiction of another agency—pollution, say—then perhaps direct regulation through that agency with the information would be less costly than taxation. Of course, administrators with more direct access to information could share their data with other officials, but such sharing involves at least marginal transaction costs.

Returning to the case study, tax administrators have demonstrated their lack of expertise with respect to regulating controlled substances.²¹¹ Though regulatory taxes in theory require less information than direct regulations to be effective, controlled substance taxes suffer from low compliance rates, forcing administrators to expend resources to enforce them. Given that there are few legitimate markets for controlled substances that tax authorities might otherwise be monitoring,²¹² enforcement of controlled substance taxes

ECON. S246, S253-58 (2011) (discussing difficulties in using corrective taxes to incentivize corrections in harmful behaviors).

²⁰⁹ See Perkins, *supra* note 29, at 180; Shavell, *supra* note 208, at S257.

²¹⁰ See *supra* note 130.

²¹¹ See Raymond Friel & Shane Kilcommins, *Taxing Crime: A New Power to Control*, THE PALGRAVE HANDBOOK OF CRIMINAL AND TERRORISM FINANCING LAW at *19 (C King, C Walker, and J Gurule (eds) London: Palgrave 2017) (observing the difficulties tax administrators face from lacking expertise in working with criminal actors). An anecdote related by an attorney in North Carolina who sought to purchase controlled substance tax stamps reflects the difficulties tax agencies have in administering the taxes. See Jonathan Holbrook, *It's Tax Season . . . For Drugs*, North Carolina Criminal Law, A UNC School of Government Blog (Feb. 12, 2019), available at <https://nccriminallaw.sog.unc.edu/its-tax-season-for-drugs/>. See also Holcomb & Bell, *supra* note 50, at 31 (2006) (“Some states have not even developed a stamp or an application for a stamp.”).

²¹² Stamp taxes in general can encourage the development of underground markets where the taxes are avoided. See Perkins, *supra* note 29, at 179 (observing the potential for sin taxes to “trigger rampant smuggling and black markets”). Cigarette stamp taxes are an iconic example of a stamp tax, and they have spurred underground markets for untaxed

depends on resource-intensive operations. Tax administrators tasked with enforcing the controlled substance taxes would likely need specialized training and equipment. Those administrators might also be placed in situations that are potentially more dangerous than situations faced by agents enforcing other types of taxes.²¹³ As a result, those administrators might demand more compensation for their activities.

Most telling of their relative lack of expertise, tax administrators rarely enforce the taxes without the assistance of law enforcement officials.²¹⁴ Some statutes even task law enforcement with administration of the taxes in the first place.²¹⁵ In addition, these actions decrease the benefit of the redundancy of the taxes on top of criminal regulations as a failsafe to protect lawmakers' goals because the tax administrators bring no independent expertise to bear on achieving the goals.²¹⁶

These enforcement responsibilities indicate that law enforcement officers have the better existing capacity to track down those engaged in the possession and sale of controlled substances.²¹⁷ Further, law enforcement officers are conditioned to believe that their jobs are dangerous,²¹⁸ therefore there may be less marginal expense to tasking them with the enforcement of regulations of controlled substances. Thus, the existing expertise of law enforcement favors the use of direct regulations instead of taxation to regulate controlled substances. The states' experiences with controlled substance taxes support this conclusion.

cigarettes. *See* Dadayan, *supra* note 29, at *21-22 (estimating smuggling rates in jurisdictions with cigarette taxes).

²¹³ *See* Jeffrey A. Miron, *Drug Prohibition and Violence*, in REFORMING CRIMINAL JUSTICE: A REPORT BY THE ACADEMY FOR JUSTICE 108-12 (Arizona State University) (detailing the correlation between violence and enforcement of laws regulating illegal drug use and trafficking), available at https://law.asu.edu/sites/default/files/pdf/academy_for_justice/6_Reforming-Criminal-Justice_Vol_1_Drug-Prohibition-and-Violence.pdf.

²¹⁴ *See supra* notes 54-56.

²¹⁵ *See supra* note 54.

²¹⁶ *See supra* note 204.

²¹⁷ *See* Seth W. Stoughton, *Principled Policing: Warrior Cops and Guardian Officers*, 51 WAKE FOREST L. REV. 611, 646-47 (2015) (describing expectations for police role in the War on Drugs).

²¹⁸ *See id.* at 641-51 (describing the evolution of the Warrior model of policing that incorporates perceptions of dangerousness of police work).

b) Existing Legal Structures

Another major point of comparison between taxation and direct regulation is the effects of existing legal structures. The structure of existing laws can introduce hurdles to using those laws to regulate behavior effectively or can smooth the adoption of new laws. Major differences in this context do not appear between controlled substance taxes and controlled substance regulations.

The most noted illustration of the effects of existing legal structures is the “upside-down subsidy” created by tax expenditures that take the form of deductions under the federal income tax.²¹⁹ Because the federal income tax contains a progressive rate structure,²²⁰ higher-income individuals receive a higher dollar amount of tax relief from a deduction than lower-income individuals do. As a result, unless higher-income individuals are disproportionately engaged in the targeted activity, it is unlikely that the tax deduction achieves the legislative goals in an efficient manner.²²¹ As a result, tax measures must be complicated to increase their precision or risk the wrong people being drawn in; either way the costs of taxation for society are increased.²²²

In contrast, direct regulations often can be written to more specifically target regulated activities and actors. Because direct regulations are not made against the backdrop of the structural features of tax codes, they often do not require the same level of complexity, and thus costliness, of tax provisions. Further, existing direct regulations may cover the subject of the regulatory goal, offering a smooth path to new regulations.

Of course, some direct regulations may encounter other constitutional and legal provisions that inhibit their ability to target the regulated activities and actors. Those constitutional and legal provisions include the judicial scrutiny regimes for direct regulations that taxes do not face and that are the source of insidious regulatory taxes. However, the differences in judicial scrutiny

²¹⁹ Surrey & McDaniel, *supra* note 14, at 288-89; Surrey, *supra* note 25, at 11.

²²⁰ See IRC § 1.

²²¹ Eric Zolt highlights similar difficulties in using progressive rate structures to disincentivize activities with tax penalty provisions—the disincentives will change based on income rather than the amount of activity engaged in. Zolt, *supra* note 23, at 345.

²²² *Id.* at 358-59, 376 (1989) (discussing how tax penalty provisions may fail to target the correct people); Joy Sabino Mullane, *The Unlearning Curve: Tax-Based Congressional Regulation of Executive Compensation*, 60 CATH. U. L. REV. 1045, 1049 (2011) (detailing the complexity of tax penalty provisions in the context of executive compensation).

regimes should not be considered at this stage of the proposed framework, so as to highlight cases where those differences have impacted lawmakers' actions.

Returning to the case study, a comparison of the effects of existing legal structures yields little insight. The problems of this nature observed with respect to tax expenditures arise because the provisions are worked into existing tax structures and those existing tax structures skew the effectiveness of the provisions. Controlled substance taxes are stand-alone taxes that do not work within the confines of existing tax codes, so there are no structural concerns of note.

Similarly, direct regulations of controlled substances suffer very little from the effects of existing legal structures. Though the regulations are implemented by adding to existing criminal codes, those criminal codes exert little influence on the way the regulations target controlled substances. True, the regulations must work within the existing framework for criminal penalties—i.e., being defined as misdemeanor or a felony—but that framework offers lawmakers ample flexibility in achieving their goal.

Though either tool might be used on its own, controlled substance taxes have all been adopted on top of existing controlled substance criminal regulations. Given the existence of controlled substance criminal regulations, one might have expected the states to increase their existing criminal sanctions to achieve the desired level of deterrence of controlled substances instead of adopting controlled substance taxes.²²³ This action would have taken advantage of existing laws rather than creating new ones, smoothing the adoption of increased sanctions.

In sum, the effects of existing legal structures on the effectiveness of controlled substance taxes and controlled substance direct regulations appear minor when comparing the two individually, but the existence of criminal laws on point weighs in favor of expanding sanctions under those laws rather than creating sanctions through new tax laws.

²²³ As the South Dakota Supreme Court put it in *State v. Roberts*, 384 N.W.2d 688, 691 (S.D. 1986), “If the legislature wishes to more harshly punish drug dealers, let them do so in a more conventional manner, such as increasing the penalties for violations of already existing narcotics laws.” See also *Dep’t of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, 782 (1994) (“[T]he legitimate revenue-raising purpose that might support such a tax could be equally well served by increasing the fine imposed upon conviction.”).

c) People's Reactions

The costs to society of people's reactions to the law can be significant. A range of different types of reactions exists: those who are regulated might change their behavior, voters' political preferences might change with the tool used, and people's faith in government might be affected.

A comparison of people's reactions to the taxation of and the direct regulation of controlled substances offers mixed results. Controlled substance taxes provide those who possess and sell controlled substances somewhat more flexibility to engage in those activities than direct regulations; the taxes also send strong messages about governmental complicity in the controlled substance trade. On the other hand, controlled substance taxes may also be more politically palatable than direct regulations, and people's bounded rationality may support the imposition of both controlled substance taxes and direct regulations.

Behavioral Considerations. That people who are regulated by new laws might change their behaviors is no surprise; it is the point of regulation. Changed behavior results in costs because people are not engaging in their preferred behaviors.²²⁴ The more limited the choice of behavior post-regulation, the more likely these costs are to rise as people engage in less-preferred behaviors. In this vein, taxation often is understood to allow for greater behavioral flexibility than direct regulation because taxes often do not dictate the exact manner in which a person must approach the regulated activity.²²⁵ The taxpayer may act as she prefers so long as she can afford the tax payment. That said, uniformity in approach to a regulated activity has value. Perhaps lawmakers deem some activities so harmful that they should not be permitted at all; direct regulation may more easily target and restrict those activities than taxation.²²⁶

Additionally, the costs of administering a program to new behaviors that frustrate the policy goal bear on the choice between taxation and direct

²²⁴ In the tax literature, the costs of people shifting from their most preferred behaviors to less preferred behaviors are referred to as "deadweight loss." See Hayes R. Holderness, *The Unexpected Role of Tax Salience in State Competition for Businesses*, 84 U. CHI. L. REV. 1091, 1131-33 (2017).

²²⁵ See Mullane, *supra* note 222, at 1066; Ogus, *supra* note 69, at 776.

²²⁶ See Ogus, *supra* note 69, at 772 ("The deterrence approach is relatively unproblematic where a total prohibition of an activity is clearly desirable because little or no social utility is attributed to the activity (eg theft or rape)."); SURREY, *supra* note 23, at 156-57 (advocating for a direct regulation approach when the goal is to eliminate the regulated activity).

regulation. Taxation can be a relatively slow-moving tool compared to direct regulation. Taxes are typically not administered on a daily, or even monthly, basis, so tax programs may be difficult to alter quickly in response to new practices or circumstances.²²⁷ In contrast, the administration of direct regulations is typically ongoing, so administrators can adapt to changed behaviors quickly.

Further, people suffer from bounded rationality that may affect how they react to different types of laws.²²⁸ Bounded rationality describes the phenomenon of people not making economically rational choices because of cognitive biases and practical limitations on decision-making. For instance, a shopper might not accurately consider the cost of sales taxes because her mind anchors to the posted tax-free price—a cognitive bias—or because she does not have the time to make accurate calculations—a practical limitation.²²⁹ People’s reactions are likely to be influenced by the complexity and immediacy of the law; more complex and obscure provisions can exacerbate the effects of bounded rationality.²³⁰ This result is costly because it pushes people away from the most beneficial behaviors. Comparisons of taxation and direct regulation must consider how the different tools operate in a world of bounded rationality.²³¹

Returning to the case study, controlled substance taxes drastically increase the price of possessing and selling controlled substances, at least in theory,²³² without requiring people to act a certain way. Taxpayers are free to adjust their behavior to continue to engage in those activities if they can afford to do so. Direct regulations of controlled substances work similarly; they impose high costs on those who choose to possess and sell controlled substances. However, because the direct regulations impose a loss of liberty in addition to loss of property, they may be seen as offering less flexibility than taxes. In practical effect, the high cost of the controlled substance taxes

²²⁷ See Staudt, *supra* note 137, at 1213 (discussing the timing difficulties of providing ongoing aid through the tax system).

²²⁸ See generally, e.g., Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998) (surveying research regarding bounded rationality).

²²⁹ See Holderness, *supra* note 224, at 1121-23.

²³⁰ See *id.*

²³¹ See Jacob Goldin, Note, *Sales Tax Not Included: Designing Commodity Taxes for Inattentive Consumers*, 122 YALE L. J. 258 (2012) (analyzing how taxes might be designed to account for people’s reactions to the salience of the taxes).

²³² See *supra* notes 50-52 and accompanying text discussing the sporadic enforcement of controlled substance taxes.

and the direct regulations likely negates flexibility for those who would engage in the activities; either type of law, if enforced perfectly, would restrict the way people act. Additionally, both types of laws are enforced on an on-going basis, so timing and flexibility comparisons are not material.

Bounded rationality, though, can cause people to misjudge the sanctions placed on possessing and selling controlled substances, rendering lawmakers' efforts ineffective when people underestimate the sanctions. Disaggregated sanctions may lead to less underestimation of the total sanctions, counseling in favor of adopting both taxes and criminal sanctions. For example, multiple sanctions might lessen the optimism bias that causes individuals to underestimate the risks they undertake,²³³ as there would be multiple ways an actor might get caught. By dividing the sanctions up between criminal law and taxation, each sanction should be smaller and easier for individuals to comprehend, though also easier to ignore.²³⁴

Comparatively, each tool has its own potential advantages in addressing the effects of bounded rationality. The upfront cost of the taxes might address myopic misunderstandings about the sanctions.²³⁵ The regulated person must pay those costs before engaging in the possession or sale of controlled substances, whereas criminal sanctions would be applied sometime in the future. However, non-monetary sanctions also have the potential to be more salient to taxpayers, making them a more powerful deterrent.²³⁶

Political Considerations. In addition to behavioral considerations, there are political considerations when comparing taxation and direct regulation.²³⁷ Even when the underlying legislative goal is agreed upon, voters may have different reactions to the legislative tools used.²³⁸ Scholars indicate that the

²³³ Jolls *et al.*, *supra* note 228, at 1524-25 (describing optimism bias).

²³⁴ *See supra* note 229.

²³⁵ *See* Ted O'Donoghue & Matthew Rabin, *Studying Optimal Paternalism, Illustrated by a Model of Sin Taxes*, 93 AM. ECON. REV. 186, 187-90 (2003) (discussing myopic behaviors and how taxes might address them).

²³⁶ *See* Blank, *supra* note 137, at 725 (observing that collateral tax sanctions, because they are more salient, can generate greater deterrence than monetary sanctions).

²³⁷ *See* Scharff, *supra* note 32, at 1566 ("In some instances, a policy tool might be better because it is simply more politically viable."); Surrey & McDaniel, *supra* note 14, at 292-93; SURREY, *supra* note 23, at 147-48. For a succinct examination of the political concerns facing tax expenditures and direct subsidies, *see* Peter J. Wiedenbeck, *Paternalism and Income Tax Reform*, 33 U. KAN. L. REV. 675 (1985).

²³⁸ *See* Christopher Faricy & Christopher Ellis, *Public Attitudes Toward Social Spending in the United States: The Differences Between Direct Spending and Tax Expenditures*, 36 POLITICAL BEHAVIOR 53, 57 (2014) (observing differences in layperson perceptions of tax expenditures and direct appropriations).

imposition of taxes can be a more salient and unwelcome event for voters than the imposition of direct regulations achieving the same result, potentially making taxes more difficult to enact than direct regulations.²³⁹ On the other hand, some targeted taxes may be more politically palatable than direct regulations.²⁴⁰ The reduction of taxes is often met with less political resistance than providing equivalent direct expenditures.²⁴¹

Finding politically palatable tools for legislative policy is important, but where voter reactions to either taxation or direct regulations work to draw less scrutiny of the substantive policy, lawmakers might game those tools to achieve a legislative result that is not in line with their constituents' preferences, a harm of insidious regulatory taxes discussed earlier.²⁴²

Returning to the case study, controlled substance taxes may be more costly than direct regulations because people generally disfavor the imposition of taxes more than the imposition of direct regulations.²⁴³ However, the taxation of such targeted activities is unlikely to be that politically objectionable as many voters expect not to be impacted by the tax.²⁴⁴ Controlled substance taxes are not very politically salient, so they likely do not generate more adverse political reactions than direct regulations of controlled substances.²⁴⁵ If anything, common knowledge of the War on Drugs indicates a higher political salience of the direct regulations.

Morale Considerations. Finally, taxation and direct regulation can express societal values and expectations which can affect people's morale and faith in government.²⁴⁶ Given the prominence of taxation in the national discourse and the large number of taxpayers, what is taxed strongly signals what the

²³⁹ See *supra* note 133.

²⁴⁰ See Perkins, *supra* note 29, at 152-53 (noting the political popularity of sin taxes due to their not applying to a majority of taxpayers and because they promote some "opposition-resistant social good").

²⁴¹ See Clarke & Fox, *supra* note 157, at 1256 ("Americans are more likely to support policies when they are described as tax expenditures, and they are more likely to view tax expenditures as cheaper than direct outlays."); Faricy & Ellis, *supra* note 238, at 70-71 (2014) (finding that support for social spending programs is higher when the programs are presented as tax cuts than as direct spending).

²⁴² See *supra* Part II.C.

²⁴³ See *supra* note 133.

²⁴⁴ Traugher, *supra* note 40, at 160 (expecting support for controlled substance taxes from "law-abiding, tax-paying" citizens).

²⁴⁵ See *supra* note 135.

²⁴⁶ See authorities cited *supra* note 142.

government values.²⁴⁷ Though high-profile direct regulations can send similar signals, the revenue-raising aspect of taxation can enhance the message from taxes by indicating governmental complicity in taxed activities.²⁴⁸ If people agree with the values being expressed by the laws and the enforcement of those laws, then the more expressive tool can increase buy-in and compliance,²⁴⁹ reducing costs of enforcement.²⁵⁰ However, if the values being expressed are ill-received, the opposite results.²⁵¹

Returning to the case study, imposing taxes on the possession and sale of controlled substances, even restrictively high taxes, sends the message that the government permits those activities. In other words, the government is perceived as complicit in the controlled substance trade as it takes its cut.²⁵² This messaging undermines the goal of restricting the amount of controlled substances in society and may undermine people’s faith in government, leading to less compliance. Alternatively, criminalizing the activities through direct regulation sends a message of condemnation rather than complicity.²⁵³

Additionally, the outsourcing of the enforcement of controlled substance taxes to law enforcement personnel imposes serious costs related to people’s faith in government. Research has demonstrated that minority populations are disproportionately targeted for the enforcement of controlled substance laws.²⁵⁴ Allowing those biases to enter into the tax system leads to inequitable

²⁴⁷ See, e.g., Steve R. Johnson, *The Dangers of Symbolic Legislation: Perceptions and Realities of the New Burden-Of-Proof Rules*, 84 IOWA L. REV. 413, 413 (1999) (painting tax law as “a natural arena” for inquiry into the expressive use of law); Zelinsky, *supra* note 23, at 1184 (describing evidence that general newspapers report the tax institutions of the federal government to a greater degree than the direct expenditure system); Zolt, *supra* note 23, at 379 (observing the tax system’s ability to “display society’s displeasure”); LEE, *supra* note 14, at 203 (describing Congressman Daniel Reed as approving of the federal gambling tax contained in the Revenue Act of 1951 because “[h]e believed it would be ‘unconscionable’ not to tax this activity” and responding to concerns that the tax “would be difficult to enforce, Reed thought that failure to try would be ‘far more difficult to explain . . . to the American people.’”).

²⁴⁸ See *supra* note 144.

²⁴⁹ See Ogus, *supra* note 69, at 783 (noting that the mere expression of something as unlawful increases compliance).

²⁵⁰ See *supra* note 209 and accompanying text.

²⁵¹ See *supra* notes 145-146.

²⁵² Tomasson, *supra* note 17 (discussing these arguments); Seidman, *supra* note 39, at 261, 265 (noting concerns about the taxes “‘cast[ing] the appearance of legitimacy’ over an illegal activity”); see also *supra* note 248.

²⁵³ See Cheh, *supra* note 119, at 1353 (“The very act of labeling certain behavior as criminal clearly reflects the community’s moral judgment that it is deviant, unacceptable, and, therefore, to be officially and publicly condemned.”).

²⁵⁴ See *supra* note 124.

results—minority populations end up bearing a disproportionate amount of the tax burden. Because the taxes are not particularly salient, these burdens may be hidden from the public, inhibiting reform.²⁵⁵ When uncovered, these inequitable results can lead to the erosion of tax morale and respect for government more generally by demonstrating that the tax law is being used as a weapon against minority populations rather than a tool for the betterment of society.²⁵⁶ This is not to claim that the disproportionate enforcement of controlled substance regulations does not also contribute to low public morale and faith in government,²⁵⁷ but given that there are no enforcement gains from imposing controlled substance taxes in addition to criminal sanctions,²⁵⁸ there is little upside in adding an additional source of public discontent in the form of the taxes.

In sum, the comparison of people’s reactions to controlled substance taxes and direct regulations of controlled substances is hazy. Both tools have potential benefits and drawbacks, but the message of complicity inherent in the taxation of the activities and the risk of eroding people’s morale both give a strong push in favor of direct regulations. The taxes may be more politically palatable, but given the obscurity of controlled substance taxes, lawmakers should be cautious of using the taxes to cloak their policies.

As can be seen throughout the above discussion, the practical nature of the comparison of taxation and direct regulation makes conclusions highly contextual, though some generalizations can be made.²⁵⁹ If the comparison under this step favors taxation instead of direct regulation, then no further analysis is needed; the taxes should receive the customary privilege because they were enacted as the better tool. The comparison of controlled substance taxes to controlled substance regulations, however, indicates that the direct regulations would be the better choice. Thus the resulting controlled substance taxes may be insidious and in need of attention.

²⁵⁵ See *supra* Part II.C.

²⁵⁶ See *id.*

²⁵⁷ See Stoughton, *supra* note 217, at 612 (noting that “an unprecedented number of people report no or very little confidence in policing”).

²⁵⁸ See *supra* Part III.A.2.a.

²⁵⁹ After weighing the potential advantages and disadvantages of taxation and direct regulation, many commentators have concluded that, in general, lawmakers should not turn to taxation to achieve “non-tax” policy goals. See Zolt, *supra* note 23, at 360-74 (analyzing the effectiveness of tax penalty provisions at regulating conduct); Yorio, *supra* note 146, at 428-29 (arguing generally against using tax laws in lieu of direct expenditures); SURREY, *supra* note 23, at 148-49; *but see* Zelinsky, *supra* note 23, at 1166 (arguing that the case for direct expenditures instead of tax expenditures is overstated).

3. Comparing the Judicial Scrutiny Regimes of Taxes and Direct Regulations

The use of taxation to achieve a legislative goal where a comparison of taxation and direct regulation favors direct regulation presents a puzzle. The third step of the proposed framework focuses on the role the privilege for taxes has in solving this puzzle. Insidious regulatory taxes result when lawmakers use taxation to avoid the legal scrutiny faced by direct regulation. Directly uncovering such behavior can be difficult, but further comparison of taxation and direct regulation can expose the phenomenon.

Thus, the third step of the proposed framework is to compare the judicial scrutiny regimes facing taxation and facing direct regulation in the context of the particular legislative goal once a potentially insidious regulatory tax is uncovered. Where there is an advantage to using taxation over direct regulation—meaning that the regime of judicial scrutiny affects how the law is analyzed by the courts in a government-friendly way—then lawmakers' choice should be presumed to have been influenced by the privileged regime for taxes. This approach would take into account the different protections offered by different jurisdictions; if one state privileges taxes less than other jurisdictions, the comparison would reflect that fact for taxes challenged in that state. However, given the relatively uniform approach to judicial scrutiny of tax provisions,²⁶⁰ the analysis should be expected to depend on the amount of scrutiny given to direct regulations in the jurisdiction.

Returning to the case study, when the judicial scrutiny regimes facing tax laws and criminal laws are compared, it is clear that the lawmakers have much to gain by choosing taxation instead of the criminal law.²⁶¹ Here, constitutional protections for the accused are in play, as well as significant swings in the burden of proof. For instance, criminal defendants are afforded a pre-sanction hearing, protections against discovery, and higher burden of proof, all of which are generally not available for tax defendants.²⁶² Further,

²⁶⁰ See *supra* Part I.B.

²⁶¹ See Friel & Kilcommins, *supra* note 211, at *13-14 (noting the trend of “civilizing” the criminal law through the taxation of criminal activities in order to avoid the more stringent protections of criminal law for defendants); Tomasson, *supra* note 17 (describing the “key to the tax’s effectiveness” as avoiding the burdens criminal penalties place on the state).

²⁶² *E.g.* Iijima, *supra* note 43, at 102-03; Stewart, *supra* note 43, at 252-53; Sorrow, *supra* note 3, at 336-37. Sorrow also notes the potential for removing the protection of jury nullification by allowing civil penalties to be imposed on a criminal defendant who benefited from jury nullification. Sorrow, *supra* note 3, at 340.

officials acknowledge that the tax laws are being used to skirt the protections of the criminal laws.²⁶³ That taxes will not face the hurdles of the criminal law permits lawmakers to achieve their goals in a much easier fashion through tax law.²⁶⁴ Thus, in contrast to criminal law, tax law is an advantageous area of law for governmental actors.²⁶⁵

Highlighting these advantages, the individual harms of the government opting for taxes over criminal laws to those accused of possessing and selling controlled substances is clear. Removing constitutional protections and imposing the burden of proof on the taxpayer-defendant increases the odds of the person being sanctioned and risks introducing more injustice into how minority populations are treated under the law.²⁶⁶ These countermajoritarian protections cannot be overcome by a simple proclamation that people prefer harsher penalties for the possession and sale of controlled substances. Indeed, the protections exist precisely to protect against the undue punishment of a targeted class of people. Allowing lawmakers to impose controlled substance taxes to avoid criminal law protections and procedures would erode the foundation of the criminal justice system and would do so in a biased and obscure manner, increasing inequity in United States society.²⁶⁷

However, there may be alternative reasons for lawmakers to adopt a tax instead of a direct regulation despite evidence that the direct regulation would be the better choice. Lawmakers might inaccurately consider the costs of each tool, leading to flawed analysis.²⁶⁸ Similarly, lawmakers' individual values may differ causing the lawmakers to weigh some costs and benefits higher than others, leading to compromises that appear strange at first glance. Understanding these value judgments and compromises is important when analyzing whether the comparative analysis is flawed.

²⁶³ See *supra* note 17.

²⁶⁴ See Iijima, *supra* note 43, at 102-03; Ogus, *supra* note 69, at 780. Some states have specifically codified the advantageous burden of proof for the government with respect to their controlled substance taxes. See, e.g., Code of Ala. § 40-17A-12(c); K.S.A. § 79-5205(b); R.I. Gen. Laws § 44-49-13(b). Legislative actions like these can generate many of the same harms as insidious regulatory taxes but are not the focus of this Article. This Article is concerned with those taxes that arise due to the judicially-created privilege for taxes.

²⁶⁵ See *supra* note 119.

²⁶⁶ See *supra* note 124.

²⁶⁷ See Paganelli, *supra* note 51, at 1332 (“Despite Machiavelli’s assertions to the contrary, the ends here do not justify the means. This is particularly true in light of the constitutional barriers established to prevent an overzealous legislature from abridging the rights of its citizens to achieve an end that it perceives as worthy.”).

²⁶⁸ See Cooter, *supra* note 70, at 1532-37 (discussing the challenges lawmakers face in gathering information to craft social policy).

Another reason that lawmakers might choose taxation over direct regulation is to take advantage of the political salience of taxation in order to pass policies that their constituencies do not prefer.²⁶⁹ Lawmakers might do this to appease interest groups or their own preferences.²⁷⁰ Such actions undermine representative forms of government as they inhibit voters from keeping their representatives in check.²⁷¹

Where insidious regulatory taxes exist alongside one or both of the alternatives of mistake or political gamesmanship, a court should take evidence of the alternatives into consideration when determining whether the privileged regime for taxes drove the choice of the challenged regulatory tax. If the other solutions provide the reason for the choice, then the judicial incentive for regulatory taxes is not material.

By offering a route to rebut the presumption that a tax is an insidious regulatory tax, courts will encourage transparency with respect to lawmaking that addresses the ability of insidious regulatory taxes to obscure overregulation. While courts would likely be hesitant to upset lawmakers' political decisions by questioning their analysis, requiring the government to rebut the presumption would push those decisions out of obscurity such that they can be appropriately judged in the political realm. Errors in comparison and political gamesmanship might still occur, but the public would have a better opportunity to evaluate those actions. For instance, the controlled substance taxes might have been passed to avoid political scrutiny;²⁷² if proven, then they might not be treated as insidious regulatory taxes, but a record would be created showing such gamesmanship, enabling voters to weigh in in the future.

In any event, as the case study highlights, the advantage of using tax laws instead of direct regulations is likely to be most recognizable when constitutional protections are in play. In contrast, such an advantage might not exist in areas such as environmental law, where there are less strong legal protections for regulated individuals. But where an advantage to taxation is found after the comparative analysis favors direct regulation, it should be

²⁶⁹ See Goldin, *supra* note 231, at 294-95. Goldin concludes that “manipulating tax salience in ways that foster efficient tax policy is unlikely to be an effective strategy for a government seeking to mislead its citizens.” *Id.* at 295.

²⁷⁰ See *supra* note 141.

²⁷¹ See *supra* Part II.C.

²⁷² See *supra* notes 240-245 and accompanying text.

presumed until rebutted that the tax is insidious and corrective action should be taken.

4. Adjusting the Judicial Scrutiny for Insidious Regulatory Taxes

Once a litigant has demonstrated that a tax is an insidious regulatory tax, the court should take corrective action against the tax. Courts must act to stem insidious regulatory taxes because lawmakers cannot be relied upon to self-correct and stop creating the taxes, given the temptation of the privilege for taxes.²⁷³ From lawmakers' point of view, the privilege given to taxation makes taxes more effective tools than direct regulations.²⁷⁴ The law is less likely to be successfully challenged in court, and lawmakers have little incentive or limited ability to measure the costs of sacrificing the legal protections for minority populations.²⁷⁵

Judicial scrutiny being the source of the temptation for lawmakers, courts have the opportunity to effectively stop the creation of insidious regulatory taxes. Courts can effectively force lawmakers to consider the costs of sacrificing legal protections that exist in the case of direct regulations by refusing to grant the traditional privilege to tax laws when those laws are insidious.²⁷⁶ Instead, the tax law would be subject to the same legal protections that would exist in the case of direct regulation.²⁷⁷ Such actions would render taxes ineffective at overcoming the legal hurdles faced by direct regulation, removing that incentive to choose taxation over direct regulation.

In the case of controlled substance taxes, this approach would require incorporating the legal protections of the criminal law into the prosecution of

²⁷³ Some commentators have urged legislators and administrators to act. *See* Sorrow, *supra* note 3, at 325 (encouraging those actors to draft double jeopardy-like protection into controlled substance taxes and to exercise prosecutorial discretion when enforcing the taxes).

²⁷⁴ *See supra* Part I.B.

²⁷⁵ *See supra* note 141 and accompanying text.

²⁷⁶ *Cf.* Charney, *supra* note 117, at 482 (“[T]he alleged offender in a civil penalty case should receive the same protections afforded a defendant in a criminal case.”).

²⁷⁷ Others have encouraged the judiciary to engage in similar actions through alternative analysis. *See* Comment, *Tax Incentives as State Action*, 122 U. PENN. L. REV. 414, 419 (1973) (arguing for a “comprehensive scheme for the application of constitutional restrictions to all forms of government involvement with private conduct, including tax incentives”); Iijima, *supra* note 43, at 104 (arguing that the full spectrum of constitutional guarantees should apply when the government pursues punitive objectives through civil law). Cheh notes that “[t]he Supreme Court already has demonstrated that, when the states are high enough, due process may mean according civil defendants more stringent procedural protections, sometimes even protections akin to those found in criminal cases.” Cheh, *supra* note 119, at 1395.

controlled substance tax cases. This incorporation would be appropriate because the analysis above demonstrates that the taxes are the result of judicial privilege afforded to taxes and that the alternative direct regulation of controlled substances would be criminal sanctions. Though incorporation of criminal law protections into the administration of these tax laws would complicate enforcement of the taxes, this complication would result from courts meaningfully balancing individual interests with institutional ones in the tax realm.

In the end, courts should subject criminal law sanctions for the possession and sale of controlled substances and taxes on those same activities to the same level of judicial scrutiny. Lawmakers could then choose to accomplish their goals with whichever tool they deemed substantively better without being unduly influenced by the judiciary. That approach might still be to use the tax law, or it might be to turn to direct regulations.

B. Concerns Surrounding Increased Scrutiny of Insidious Regulatory Taxes

As the controlled substance taxes case study demonstrates, the end result of the analysis under the proposed framework is to lessen the privilege given to certain taxes. This result raises concerns about courts inhibiting the fundamental power of governments to tax.²⁷⁸ Additionally, adopting the proposed framework would require courts to evaluate comparisons of the costs of taxation with the costs of direct regulation and of the judicial scrutiny regimes facing both tools. This requirement would increase the burden on courts, both in individual cases and potentially by encouraging new cases to be brought, raising concerns of judicial competence and economy.²⁷⁹ The proposed framework might push sanctions out of the tax law into other problematic areas of law. These concerns are legitimate but should not prevent courts from adopting the framework and taking action to root out insidious regulatory taxes.

Providing less privilege to insidious regulatory taxes might imply a repudiation of the fundamental nature of the tax power that would disrupt the

²⁷⁸ See, e.g., Martinez, *supra* note 76, at 275-82 (offering rationales for placing the burden of proof on taxpayers in tax cases, particularly focusing on the efficient collection of taxes, and arguing that the burden of proof should not be moved to the government in order to protect those efficiencies).

²⁷⁹ One commenter's approach would be arguably more burdensome on the courts by requiring extensive analysis of the governmental activities and the rights involved to determine the amount of deference due to the law. Comment, *Tax Incentives as State Action*, *supra* note 277, at 426-27.

government's ability to function. However, as the courts have described it, the fundamental nature of the tax power arises because governments must raise revenue to support their activities and should not be impeded in that endeavor.²⁸⁰ However, tax laws that have significant regulatory goals should not be automatically privileged simply because they have some revenue goal; rather those goals should be balanced.²⁸¹ The proposed framework offers a balancing approach that allows courts to meaningfully focus on the affected individual under the laws of the particular jurisdiction rather than to continue shirking that responsibility behind sweeping respect for revenue-raising goals, making it appropriate for courts to adopt.²⁸²

This approach may be perceived as disruptive and costly to the adjudication of tax controversies. The proposed framework is likely to raise the burden on courts but in a manageable way. The framework is most relevant in a subset of tax cases—the cases where lawmakers are using the tax law to advance regulatory goals better achieved through direct regulations. Tax provisions that survive the tax expenditure analysis would still receive the traditional privilege out of respect for their revenue-raising purposes. As the judicial incentive for insidious regulatory taxes is rooted out, less of these cases should be expected to arise, mitigating the disruptive effects of the case-by-case approach.

Some commentators question the ability of courts to engage in meaningful tax expenditure analysis because of the difficulty of determining a normative tax base to guide the analysis.²⁸³ While determining a generally agreeable normative tax base is difficult for any actor,²⁸⁴ the proposed framework plays to a traditional statutory interpretation role of courts by asking them to determine the regulatory goal behind the challenged tax and generally what a direct regulation achieving that goal would look like. Courts are not asked to create complex normative baselines²⁸⁵—such as an ideal income tax—which would raise concerns of judicial competency in making policy

²⁸⁰ See *supra* notes 76-78.

²⁸¹ Cf. Mann, *supra* note 24, at 1816 (“[A]s function varies, so should procedure.”).

²⁸² See Comment, *Tax Incentives as State Action*, *supra* note 277, at 450 (recognizing that affording individuals more protections in tax cases will increase the complexity and difficulty of administering the tax laws but concluding that “[a]s significant as these additional burdens may be, administrative inconvenience is an insufficient rationale to justify the abrogation of constitutional rights”).

²⁸³ See *supra* note 164.

²⁸⁴ See *supra* note 155.

²⁸⁵ See *supra* Part III.A.1.

decisions that might have far-reaching consequences.²⁸⁶ Rather, by asking courts only to decide the issues presented in individual cases, the framework taps into a perceived strength of courts.²⁸⁷

Further, these burdens that the proposed framework would place on courts will be mitigated by the participation of litigants. Adversarial parties should be expected to provide comparisons for the courts to consider; judges will not be on their own in determining the appropriate taxes and direct regulations to compare. To further ease the burden on the courts, the party moving for more stringent judicial scrutiny should be asked to bear the burden of proof with respect to the comparisons required by the framework. Again, the framework taps the judiciary's competency in adjudicating individual disputes.²⁸⁸

Commentators also express concern that to address the disparity in judicial scrutiny between taxes and direct regulations would require courts to determine which taxes are revenue-raising and which are regulatory.²⁸⁹ The proposed framework negates this thorny issue by incorporating the lessons of modern tax expenditure scholarship. Having recognized that taxes can be both revenue-raising and regulatory, the focus shifts to whether taxes or direct regulations are the best legislative tool; courts need not distinguish between different types of taxes in their analysis.²⁹⁰ The solution does not deny

²⁸⁶ See Milligan, *supra* note 116, at 906-12 (discussing concerns about the judiciary's competency to engage in policymaking).

²⁸⁷ *Id.* at 907 n.38, 960 (observing arguments about the judiciary's capacity to exercise judgment in individual cases and to administer individual remedies, particularly in the context of private law disputes and intentional disparate treatment of the aggrieved party by government institutions)

²⁸⁸ *Id.*

²⁸⁹ See, e.g., Mason, *supra* note 32, at 1025. This concern is echoed in considerations outside of the tax realm as to whether a certain law is penal or regulatory in nature. See *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963).

²⁹⁰ But what of tax provisions like the charitable contribution deduction found in section 170 of the Internal Revenue Code, which are part of the tax law but have regulatory effects? Would the framework require additional scrutiny of such provisions? The short answer is "possibly". Compare William D. Andrews, *Personal Deductions in an Ideal Income Tax*, 86 HARV. L. REV. 309, 344-75 (1972) (arguing for including the charitable contribution deduction in the normative income tax base) with SURREY, *supra* note 23, at 20-22 (arguing against including the charitable contribution deduction in the normative income tax base). The framework is not meant to apply exclusively to regulatory taxes, though those taxes are the most likely to be impacted by the framework. For the framework to take effect, there must be an aggrieved taxpayer, a regulatory goal better achieved through direct regulation, and a comparatively advantageous scrutiny regime for the tax provision. Many tax provisions with regulatory effects should fall out of the framework's scope. Providing for charitable giving through a tax deduction is arguably more effective than through direct subsidies, for instance, and thus the framework would not alter the analysis of that deduction. Where the framework

lawmakers the ability to use regulatory taxes to raise revenue; it only provides for an appropriate level of judicial scrutiny of the effects of those taxes, realizing the ideal expressed by the Supreme Court to not “give . . . magic to the word ‘tax’”.²⁹¹

The more generalized argument that the burden of affording taxpayers more protections would increase caseloads and be too much for the courts to bear, is addressed well by Jonathan Charney:

Court crowding, a purely administrative problem, is a tenuous justification for the denial of the protections of the Bill of Rights to defendants in civil penalty cases. . . . Indirectly denying constitutional protections to defendants in civil penalty cases because of the burden that extension of such guaranties would place on the courts is equally defective.²⁹²

Simply put, increased burdens on the courts are no excuse for denying individuals’ their due legal protections.

Comfortingly, courts have demonstrated that they are capable of providing a more nuanced form of scrutiny to tax laws.²⁹³ As the Supreme Court and many state courts have recognized, taxpayers of taxes on illegal activity must be afforded protections against self-incrimination.²⁹⁴ These recognitions changed the tax laws to be more respectful of the individual rights involved,²⁹⁵ yet continued to otherwise maintain respect for the institutional interests in taxation.²⁹⁶ The proposed framework offers courts a reasoned method for expanding courts’ respect of individual rights in tax controversies.

does alter the analysis of a tax, it does so to protect individual interests that have been undervalued under the current framework.

²⁹¹ Child Labor Tax Case, 259 U.S. 20, 38 (1922).

²⁹² Charney, *supra* note 117, at 517 n. 181; *see also* Comment, *Tax Incentives as State Action*, *supra* note 277, at 450.

²⁹³ Some courts have also demonstrated this ability in the context of other revenue-raising laws, such as criminal fees. *See* Kleiman, *supra* note 24, at *48-49 (discussing such efforts).

²⁹⁴ *See supra* notes 58 & 64.

²⁹⁵ *See supra* note 65 and accompanying text.

²⁹⁶ *See* Marchetti v. United States, 390 U.S. 39, 60-61 (1968) (“We are fully cognizant of the importance for the United States’ various fiscal and regulatory functions of timely and accurate information, but other methods, entirely consistent with constitutional limitations, exist by which Congress may obtain such information. Accordingly, nothing we do today will prevent either the taxation or the regulation by Congress of activities otherwise made unlawful by state or federal statutes.”).

Though the proposed framework does not deny that insidious regulatory taxes are taxes and that lawmakers may still enact them, one might expect the proposed framework to push sanctions from tax law to other areas of law with their own attendant problems. For instance, treating controlled substance taxes as insidious might cause lawmakers to increase criminal sanctions on the possession and sale of controlled substances. Given the backlash against the size and biased enforcement of existing criminal controlled substance sanctions,²⁹⁷ this result is understandably worrisome.

However, this result is not inevitable. Lawmakers may keep the insidious regulatory taxes in place, accepting the heightened protections for taxpayers. This would presumably reduce the amount of sanctions people are subject to, as sanctions are currently being applied without certain protections. If lawmakers do opt to push sanctions from the tax law to other areas of law, at least the cover of the insidious regulatory taxes will be removed, allowing the public to more easily evaluate the policy decisions.²⁹⁸ Lawmakers may be punished by voters once the total level of sanctions is made clearer. In the case of controlled substances, lawmakers may not have the political capital to increase criminal sanctions for controlled substances if the controlled substance taxes fall into disfavor. Relying on the political system in this way may be fraught, but the alternative is to continue to allow insidious regulatory taxes to stealthily harm society. Fears of increased regulation in other areas of law should not discourage courts from altering the scrutiny applied to insidious regulatory taxes.

Finally, while the analysis and proposed solution recognize that taxation is more privileged than direct regulation, it does not directly focus on the judicial scrutiny applied to different types of direct regulations. Rather, the Article addresses the harmful effects of the subtle form of tax exceptionalism that results in insidious regulatory taxes; the goal has been to expose and rectify those harms. That said, a line of scholarship addresses the tension between civil sanctions and criminal sanctions more broadly.²⁹⁹ This scholarship highlights many of the perceived costs and benefits associated with applying civil sanctions in lieu of criminal sanctions, problems which are reflected in the analysis of the controlled substance taxes. The Supreme Court has attempted to address these distinctions with a multifaceted test to

²⁹⁷ See *supra* note 124.

²⁹⁸ See *supra* Part III.A.3.

²⁹⁹ See generally, e.g., Mann, *supra* note 24; Cheh, *supra* note 119; Clark, *supra* note 120; Charney, *supra* note 117.

determine when a civil sanction is equivalent to a criminal one.³⁰⁰ As courts come to grapple with insidious regulatory taxes, the scholarship and case law on civil versus criminal sanctions will be useful in determining the appropriate comparative judicial scrutiny regime.

Using the proposed framework to determine what scrutiny a particular tax law should receive will ensure that lawmakers' decisions do not turn on judicially-created distinctions between taxation and direct regulation. In turn, this will protect minority populations from lawmakers that would use taxation to skirt legal protections fundamental to the equitable application of the law. Even if the framework does not affect most tax provisions, adopting it would send the clear message that taxation is not a blank check for the government.³⁰¹

CONCLUSION

The surprising use of taxes as a weapon in the War on Drugs presents a fascinating puzzle. How did lawmakers come to enact such taxes? The answer is perhaps just as surprising: courts incentivized the lawmakers to act in this way.

However benign controlled substance taxes might appear, they are insidious by nature. In addition to burdening society with inefficient laws that are hidden from public view, the taxes stealthily harm individual taxpayers by stripping them of important legal protections. There is a reason these "crack taxes" are also referred to as "Al Capone laws"; if the government cannot get a criminal conviction, they can stick the defendant with a massive tax bill instead. Harkening to the feelings of the North Carolina taxpayer with whose story the Article began, using taxes in this way is a "setup."³⁰²

³⁰⁰ *E.g.* Hudson v. United States, 522 U.S. 93, 99-100 (1997) (laying out a multifactor analysis, preceded by examining the legislature's preference, focused largely on whether a putative civil penalty can be characterized as punitive). The test is reminiscent of the tests articulated in *Kurth Ranch* and *NFIB*. See *supra* notes 100-102 and accompanying text.

³⁰¹ See *NFIB*, 567 U.S. 519, 538 (2012) ("Our deference in matters of policy cannot . . . become abdication in matters of law."); *United States v. Kahriger*, 345 U.S. 22, 38 (1953) (Frankfurter, J., dissenting) ("[W]hen oblique use is made of the taxing power as to matters which substantively are not within the powers delegated to Congress, the Court cannot shut its eyes to what is obviously, because designedly, an attempt to control conduct which the Constitution left to the responsibility of the States, merely because Congress wrapped the legislation in the verbal cellophane of a revenue measure."); Kleiman, *supra* note 24, at *40 (advocating for "meaningful political and procedural protections against potentially exploitative government exactions").

³⁰² See Hennessey, *supra* note 1.

INSIDIOUS REGULATORY TAXES

Courts must stop participating in this setup. To do so, they should shift the way they scrutinize taxes. Insidious regulatory taxes like controlled substance taxes should no longer receive the blank check of lax judicial scrutiny; instead, they should be treated as their direct regulation counterparts would be. In this way, courts can finally confront and root out the insidious regulatory taxes they had a hand in creating.

APPENDIX

The following are sample images of the states' controlled substance tax stamps.³⁰³



ALABAMA



IDAHO



CONNECTICUT



IOWA

³⁰³ These images are sourced from a database compiled by NORML, a *available* at <https://norml.org/legal/tax-stamps>. NORML's database does not contain images for Rhode Island; the image of the Rhode Island stamp is sourced from the Henak family private collection, *available* at <https://henak.net/HenakHome/Pottax%20Exhibit/Pottax12.jpg>.

APPENDIX



KANSAS



MASSACHUSETTS



KENTUCKY



MINNESOTA



LOUISIANA



NEBRASKA

APPENDIX



NEVADA



NORTH CAROLINA



OKLAHOMA



RHODE ISLAND



SOUTH CAROLINA



TENNESSEE