POWERLESS TO PENALIZE: WHY CONGRESS LACKS THE POWER TO PENALIZE MARIJUANA BUSINESSES THROUGH § 280E OF THE INTERNAL REVENUE CODE

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This Note examines whether § 280E of the Internal Revenue Code—a thorny little provision that forces state-authorized marijuana businesses to pay exceptionally high taxes—is constitutionally justifiable under Congress's power to tax and spend. After canvassing the history and purposes behind § 280E, this Note outlines Supreme Court precedent regarding congressional power to tax before detailing the Supreme Court's analysis in National Federation of Independent Businesses v. Sebelius ("NFIB")*, a recent case addressing the limits of congressional power. This Note applies* NFIB *to § 280E and concludes that § 280E lies outside of Congress's Taxing Power because § 280E is an impermissible penalty. This Note then considers whether we should simply recast § 280E as a criminal penalty founded on Commerce Clause Power by examining the roles that precedent, the public-policy doctrine, and judicial deference to Congress should play. Lastly, this Note suggests alternative—constitutionally permissible—methods for Congress to generate revenue from marijuana sales and alternative avenues to impose criminal penalties for federally unlawful activities. This Note ends by suggesting that § 280E should not exist in its current form as a tax provision because it cannot be justified by Congress's Taxing Power.*

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INTRODUCTION

"[T]he federal income tax is a tax on net income, not a sanction against wrong-doing."[1] Chief Justice Roberts breathed new life into this pronouncement by acknowledging that mere tax hikes are within Congress's Taxing Power, but "there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such" and becomes "a mere penalty with the characteristics of regulation and punishment."[2] "Mere penalties"[3] circumscribe congressional Taxing Power: if Congress could penalize all it can tax, Congress

1. C.I.R. v. Tellier, 383 U.S. 687, 691 (1966); *see also* Charles A. Borek, *The Public Policy Doctrine and Tax Logic: The Need for Consistency in Denying Deductions Arising from Illegal Activities*, 22 U. BALT. L. REV. 45, 49 (1994) (citing United States v. Constantine, 296 U.S. 287, 295–96 (1935)) ("[F]ederal income tax law is not intended as a penal statute, but rather as a revenue-producing measure.").

2. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2594, 2599 (2012) [hereinafter NFIB v. Sebelius].

3. A penalty is an exaction imposed by statute as punishment for an unlawful act. *See* United States v. La Franca, 282 U.S. 568, 572 (1931) (defining a penalty as such).

could regulate via the tax code everything it could not reach under its other, limited powers. In such a world, Congress could use its Tax Power to step right over limits on its other regulatory powers—namely, the power to regulate commerce.[4] In this world, however, Congress can't dance like that: Congress unconstitutionally exercises its Taxing Power when it uses its Tax Power to penalize.[5]

The Supreme Court's recent reaffirmation of the penalty as a limit on congressional Taxing Power, combined with the Court's more restrictive treatment of congressional powers generally, ripens the subject for analysis of a thorny little provision in the Internal Revenue Code (the "Code") that forces marijuana businesses to pay exceptionally high taxes simply because they grow or sell marijuana. Section 280E is a provision of the Code that disallows ordinary and necessary business deductions for marijuana businesses,[6] effectively forcing marijuana businesses to pay much higher taxes than virtually every other business in the United States.[7] In other words, this provision financially saps marijuana businesses of profit that any other state-authorized business—one not selling marijuana—would enjoy. Even the Chief Counsel of the Internal Revenue Service ("IRS") publicly acknowledged that § 280E can act as a penalty: "Applied literally, § 280E severely penalizes taxpayers that traffic in a Schedule I or Schedule II controlled substance . . . ."[8] One retail marijuana business, currently challenging § 280E in the Ninth Circuit, owes the IRS a staggering 1,007% on its net income for one year.[9]

4. Steven Z. Hodaszy, *Testing for Regulatory Penalties: Insuring the Health of Federalism in the Age of Obamacare*, 119 W. VA. L. REV. 145, 186 (2016).

5. Jonathan S. Sidhu, *For the General Welfare: Finding a Limit on the Taxing Power after* NFIB v. Sebelius, 103 CAL. L. REV. 103, 110 (citing *NFIB*, 132 S. Ct. at 2600) ("[T]he Taxing Power only requires that individuals pay money into the Treasury, and if they pay their taxes, Congress does not have the power to punish them.").

6. I.R.C. § 280E (2012).

7. Erwin Chemerinsky et al., *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. REV. 74, 94 (2015). Many illegal businesses may take these types of deductions. *See infra* Section I.B.

8. Memorandum from W. Thomas McElroy, Jr., Senior Technician Reviewer, Office of Chief Counsel Internal Revenue Service 4 (Jan. 23, 2015); *see also* 161 CONG. REC. S2246-01, 2015 WL 1737142 (daily ed. Apr. 16, 2015) (Senator Wyden, stating that "the inability to make deductions, combined with other lost credits, often leads to these businesses paying an effective tax rate ranging from 65–75 percent; compared with other businesses who pay between 15–30 percent"); *Marijuana Business Conference Wrapup: 36 Tips, Lessons & Takeaways for the Cannabis Industry*, MARIJUANA BUS. DAILY (Nov. 15, 2012), mjbizdaily.com/marijuana-business-conference-wrapup-36-tips-lessons-take-aways-for-the-cannabis-industry.

9. Appellant's Reply Brief at 6, Canna Care v. Comm'r, No. 16-70265 (9th Cir. Aug. 31, 2016) ("[T]he application of I.R.C. § 280E has in substance generated a $229,473 penalty for tax year 2005 where the taxpayer's net income was $23,135, amounting to a staggering 1,007% penalty based upon actual net income."). Canna Care owes an even higher percentage of its net income for tax years 2007 and 2008. *Id.* ("[In 2007 and 2008,]

Every legal challenge to § 280E thus far has failed.[10] This Note proposes a new challenge: May Congress impose a heavy financial burden on businesses via its Tax Code because the businesses deal in a substance Congress has deemed illegal?

This Note examines the constitutionality of § 280E in light of *NFIB v. Sebelius*[11] and concludes that Congress lacks the power to enact this provision under the Tax and Spend Clause because § 280E operates as a penalty under the factors articulated in *NFIB*. After describing § 280E, including reasons for enactment and its current application to state-authorized marijuana businesses, this Note turns to § 280E's constitutional underpinnings. First, this Note briefly addresses the legislative directive that marijuana business owners reduce their gross receipts by the cost of goods sold ("COGS")—a move to preclude constitutional challenges to § 280E. Second, this Note sketches the limits of Congress's Taxing Power by summarizing relevant Supreme Court decisions, including *NFIB*. Third, this Note applies current law to § 280E to conclude that, post-*NFIB*, § 280E cannot be justified by Congress's Taxing Power because § 280E is an impermissible penalty. Finally, this Note addresses the constitutionality of § 280E in light of precedent, the public-policy doctrine, congressional power over interstate commerce, and the role of judicial deference to other branches. This Note concludes by suggesting alternative—more constitutionally sound—methods by which the federal government can raise revenue from marijuana sales.

I. SECTION 280E: SUBSTANCE, RATIONALE, AND OPERATION

A. Substance: What Does § 280E Mean?

In 1982, Congress added § 280E to the Code through the Tax Equity and Fiscal Responsibility Tax Act of 1982.[12] Section 280E provides in full:

> No deduction or credit shall be allowed for any amount paid or incurred during the taxable year in carrying on any trade or business if such trade or business (or the activities which comprise such trade or business) consists of trafficking in controlled substances (within the meaning of schedule I and II of the Controlled Substances Act) which is prohibited by Federal law or the law of any State in which such trade or business is conducted.[13]

In other words, businesses that traffic illegal drugs may not take deductions as elsewhere provided in the Code. Among the deductions prohibited for these types of businesses are "ordinary and necessary" business deductions taken by most

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Canna Care had losses of $60,983 and $19,508, respectively, and the IRS has imposed civil liabilities of $304,090 and $339,604, respectively.").

10. *See infra* Section I.C.

11. NFIB v. Sebelius, 132 S. Ct. 2566 (2012).

12. Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 324 (codified in various sections of Title 26 of the U.S. Code).

13. I.R.C. § 280E (2012).

businesses under § 162, like rent,[14] salaries,[15] advertising,[16] litigation expenses,[17] business insurance,[18] and licensing fees.[19] Section 280E also precludes deductions for depreciation,[20] interest,[21] state taxes paid,[22] or losses incurred.[23]

Courts have found that § 280E and its blanket prohibition of all deductions applies to marijuana businesses[24]—even those wholly compliant with state regulations in states that have legalized marijuana.[25] Because of § 280E's application, state-authorized marijuana businesses on paper pay a tax rate between 30 and 40%, but in reality pay closer to a 70, 80, or even 90% rate by some estimates.[26] The marijuana industry's lead trade publication deems § 280E's disallowance the "biggest threat" to marijuana business; it fears § 280E's

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14. I.R.C. § 162(a) (2012).

15. *Id.*

16. *Id.*

17. INTERNAL REVENUE SERV. DEP'T OF TREASURY, PUBL'N 529: MISCELLANEOUS DEDUCTIONS, Cat. No. 150560, at 3 (2016).

18. Treas. Reg. §1.72-16(a) (1993).

19. *See generally* Memorandum from W. Thomas McElroy, Jr., *supra* note 8.

20. I.R.C. § 167 (2007).

21. I.R.C. § 163 (2015).

22. I.R.C. § 164 (2015).

23. I.R.C. § 165 (2014).

24. *See infra* Section II.C.

25. Californians Helping to Alleviate Med. Problems, Inc. (CHAMP) v. Comm'r, 128 T.C. 173, 173 (2007) (rejecting taxpayer's argument that Congress never intended 280E to apply to state-authorized marijuana businesses on the basis that marijuana remains federally illegal and thus within § 280E's scope) [hereinafter CHAMP v. Comm'r]; *see also* United States v. Oakland Cannabis Buyers' Co-op., 532 U.S. 483, 483–84 (2001) (holding that the federal government can regulate and criminalize marijuana).

26. Katie Kuntz, *Marijuana Profits Up in Smoke Under IRS Rules*, USA TODAY (Nov. 3, 2014), http://www.usatoday.com/story/news/nation/2014/11/03/irs-limits-profits-marijuana-businesses/18165033/; *see also* 161 CONG. REC. S2246-01 (daily ed. Apr. 16, 2015) 2015 WL 1737142 (Senator Wyden, stating that "the inability to make deductions, combined with other lost credits, often leads to these businesses paying an effective tax rate ranging from 65–75 percent; compared with other businesses who pay between 15–30 percent"). A CNN report pegs this effective tax rate at 75%. Steve Hargreaves, *Marijuana Dealers Get Slammed by Taxes*, CNN MONEY (Feb. 25, 2013), http://money.cnn.com/2013/02/25/smallbusiness/marijuana-tax/. Fortune Magazine pegs it at 70%. Tom Huddleston, Jr., *The Marijuana Industry's Battle Against the IRS*, FORTUNE (Apr. 15, 2015), http://fortune.com/2015/04/15/marijuana-industry-tax-problem/. There was a time when the top marginal tax rate for individuals reached as high as 94%, see *Compare Top Federal Tax Rates*, INSIDEGOV, http://federal-tax-rates.insidegov.com/ (last visited May 1, 2017), but the highest *corporate* tax rate only ever brushed 52%. *See Corporate Top Tax Rate and Bracket*, TAX POL'Y CTR. (Feb. 14, 2017), http://www.taxpolicycenter.org/statistics/corporate-top-tax-rate-and-bracket (showing a corporate tax rate of 52% for years 1960–1963). Thus, marijuana businesses pay taxes at a rate far exceeding that ever imposed on U.S. businesses. *See* Benjamin Moses Leff, *Tax Planning for Marijuana Dealers*, 99 IOWA L. REV. 523, 526 ("This way of calculating taxable income produces much higher taxes than those faced by any other business, which was presumably okay when it applied only to drug dealers.").

enforcement could "push the entire industry underground"[27] if marijuana businesses cannot profitably sell marijuana at prices low enough to oust underground sales.[28]

B. Rationale: Why Was § 280E Enacted?

Section 280E is a creature born from congressional disgust with a tax court decision called *Edmondson v. Commissioner*.[29] In 1981, a tax court allowed a convicted drug dealer to deduct the expenses required to run his black-market drug business, reasoning that the Code contained no provision to bar the drug dealer's deductions.[30] One year after *Edmondson*, Congress enacted § 280E, stating in a Senate Finance Committee report that

> [t]here is a sharply defined public policy against drug dealing. To allow drug dealers the benefit of business expense deductions at the same time that the U.S. and its citizens are losing billions of dollars per year to such persons is not compelled by the fact that such deductions are allowed to other legal enterprises. Such deductions should be disallowed on public policy grounds.[31]

In other words, Congress enacted § 280E to ensure that convicted drug dealers could not benefit in the same way that legal business owners do from § 162 deductions, particularly given that drug dealers cost the United States and its citizens billions each year.[32] Section 280E is widely understood as Congress's reaction to *Edmonson*.[33] When Congress enacted § 280E in 1982, its power to do so could hardly be questioned: Congress enjoyed expansive power, the Rehnquist

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27. *Marijuana Business Conference Wrapup: 36 Tips, Lessons & Takeaways for the Cannabis Industry*, MARIJUANA BUS. DAILY (Nov. 15, 2012), mjbizdaily.com/marijuana-business-conference-wrapup-36-tips-lessons-take-aways-for-the-cannabis-industry.

28. One author argues that § 280E has a confiscatory effect on marijuana businesses that are taxed on their gross, rather than net, income—the practical effect of § 280E. Edward J. Roche, Jr., *Federal Income Taxation of Medical Marijuana Businesses*, 66 TAX L. 429, 430 (2013).

29. *See generally* Edmondson v. Comm'r, 42 T.C.M. (CCH) 1533 (1981).

30. *Id.*

31. S. Rep. No. 97-494, vol. 1, at 309 (1982); *see also* Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, § 351, 96 Stat. 324, 640 (codified at I.R.C. § 280E).

32. S. Rep. No. 97-494, vol. 1, at 309 (1982); *see also* Nikola Vujcic, Note, *Section 280E of the Internal Revenue Code and Medical Marijuana Dispensaries: An Interpretation Based on Statutory Purpose*, 84 GEO. WASH. L. REV. 249, 259 (2016).

33. Roche, Jr., *supra* note 28, at 437; *see also* Vujcic, *supra* note 32, at 258 ("The enactment of section 280E came as a direct response to *Edmondson v. Commissioner* . . . ."); Tony Nitti, *IRS Further Limits Deductions for State-Legal Marijuana Facilities*, FORBES (Jan. 24, 2015), https://www.forbes.com/sites/anthonynitti/2015/01/24/irs-futher-limits-deductions-for-state-legal-marijuana-facilities/#4d4b3e00a7ab.

Court had yet to constrict federal power,[34] and the penalty limit to congressional taxation power had all but died on the vine.[35]

Notably, other illegal businesses—bookmaking enterprises,[36] prostitution houses,[37] contract killing,[38] murder-for-hire,[39] racketeering,[40] illegal lottery operations,[41] illegal arms businesses[42]—encounter no such bar to § 162 deductions.[43]

C. Operation: How Have the Legislative, Executive, and Judicial Branches Addressed § 280E's Application to State-Authorized Marijuana Businesses?

1. The Legislative and Executive Branches

Though the question of Congress's power to enact § 280E under the Tax and Spend Clause lacked salience at the time it was enacted, the IRS was wary of

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34. *See infra* notes 212, 214.

35. *See infra* Part III.

36. *See* Comm'r v. Sullivan, 356 U.S. 27 (1958) (the Court allowed a taxpayer, previously convicted of running bookmaking establishments, to deduct amounts expended to lease premises and hire employees to conduct his illegal gambling enterprise because Congress had nowhere barred these deductions in the Code).

37. Stephen Fishman, *Can Medical Marijuana Dispensaries Deduct Their Business Expenses?*, NOLO, http://www.nolo.com/legal-encyclopedia/can-medical-marijuana-dispensaries-deduct-their-business-expenses.html (last visited Sept. 13, 2017); *see also* Sal Curcuru, *How to Deduct Expenses for Illegal and Nefarious Activities*, CURCURU & ASSOCS. CPA, PLC (July 3, 2013), http://curcurucpa.com/blog/illegal-deductions/ (CPA firm explaining that the legislative history of the Code provisions indicates that the Code provides an exhaustive list of deductions, so deductions not specifically denied by the Code are permitted).

38. Fishman, *supra* note 37.

39. *See, e.g.*, Leff, *supra* note 26, at 533 ("To be clear, this over-taxation of a marijuana seller's income is not simply the result of her engaging in an illegal business activity. If she were engaged in murder for hire, she would owe federal income tax on the profits she made from such activity, but would be allowed to deduct as ordinary and necessary business expenses the cost of her gun and bullets, the cost of overnight travel to and from the crime scene, any amounts she paid to employees or contractors who helped her carry out her crime, and other expenses associated with her criminal activity.").

40. *See* Borek, *supra* note 1, at 45.

41. Harbin v. Comm'r, 17 T.C.M. (CCH) 950, 950, 952, 1958 T.C.M. (P-H) ¶ 58, 190, at 820–21.

42. F.S.A. 2001-28-004 (July 13, 2001).

43. *Id.*; *see also* Roche, Jr,, *supra* note 28, at 434 (citing cases and an IRS ruling to illustrate that the Code typically treats legal and illegal businesses identically). In fact, during the Senate debate in 1913 on the bill that became the first modern income tax law, amendments limiting deductions only to lawful business were summarily rejected on the basis that the purpose of income tax is to "tax a man's net income" not to "reform men's moral characters." 50 CONG. REC. 3849 (1913); *see also* Lilly v. Comm'r, 343 U.S. 90, 97 (1952) (upholding deduction by business owners of a secret commission paid illegally after explaining that the judiciary need "voice no approval of the business ethics or public policy involved" to determine that such payments are "ordinary and necessary" within the meaning of § 162).

another constitutional attack on its power to tax income. In a preemptory strike against constitutional challenges under the Sixteenth Amendment, the IRS directed state-authorized marijuana businesses to reduce their gross receipts by COGS.[44] COGS are costs required to produce property that is eventually sold in a business.[45] For example, under the IRS directive, cultivators can (and must) subtract from their gross receipts the amount paid for wages, fertilizer, and other costs incurred in growing or acquiring the actual plant,[46] but may not subtract or otherwise deduct the costs attributable to general business activities or marketing.[47] More restrictively, businesses that sell but do not grow marijuana would reduce gross receipts only by the wholesale price paid for the plants later sold. Though on its surface this treatment sounds palatable, it may be less so in practice: an analysis of one marijuana business's taxes revealed that the company's after-tax net profit was a paltry 9% of its gross revenue.[48]

The IRS directive also proclaimed that state-authorized marijuana businesses should receive no other tax benefits[49]: they may not capitalize deductions[50] nor label a disallowed deduction an "inventoriable cost" or any other type of capitalized cost that would effectively allow them to circumvent § 280E.[51] Recognizing that "[a]pplied literally, § 280E severely penalizes taxpayers that traffic in a Schedule I or Schedule II controlled substance,"[52] the IRS directive noted that a state-authorized marijuana business currently tracking income and expenses using the cash method might have to switch to the inventory method to recover COGS.[53] Essentially, this switch means that instead of recognizing costs

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44. Memorandum from W. Thomas McElroy, Jr., *supra* note 8, at 2–3.

45. *Id.* at 5.

46. *See id.* at 8.

47. *See id.* The taxpayer may not reduce gross receipts by the cost of marijuana confiscated by the Drug Enforcement Administration ("DEA"). *See generally* Beck v. Comm'r, T.C. Memo 2015-149 (Aug. 10, 2015). See generally Roche, Jr., *supra* note 28, for a discussion of how far marijuana businesses might be able to go in classifying certain expenses as inventoriable costs.

48. Wei-Chih Chiang, Yong-Gyo Lee, & Jianjin Du, *Judicial Guidance on Medical Marijuana Tax Issues*, 92 PRAC. TAX STRATEGIES 266, 270 (2014). Chiang, Lee, and Du also noted that when business expenses exceed 16.5% of the gross revenues, a medical marijuana dispensary may lose money, and that if a medical marijuana dispensary is not operated efficiently, it may be forced out of the market due to the heavy burden of federal income tax. *Id.*

49. Memorandum from W. Thomas McElroy, Jr., *supra* note 8, at 5.

50. *Id.*

51. *Id.*

52. The full quote reads as follows: "Applied literally, § 280E severely penalizes taxpayers that traffic in a Schedule I or Schedule II controlled substance but don't use an inventory method for the controlled substance." *Id.* at 4. However, Canna Care used the recommended inventory method to capitalize its invoice prices and still wound up owing a staggering amount. *See supra* note 9. To the extent the inventory method lessens a marijuana business's financial burden, it helps retailers more than growers or producers of marijuana.

53. Memorandum from W. Thomas McElroy, Jr., *supra* note 8, at 1–2. Use of the inventory method permits a taxpayer to reduce its gross receipts by COGS during the

and payments for goods at the time of the sale (and thus reducing gross receipts for that taxable year), businesses would have to defer recognition until they receive payment, which could be years later.[54] Though a detailed comparison of the differences between the two is outside the scope of this Note, the idea is that given the Code's disallowance of ordinary and necessary deductions in § 280E, a business using the inventory method should have a smaller overall taxable income than that same business using the cash method. The inventory method would then more closely reflect the business's actual income and thereby make taxation of marijuana businesses more consistent with the Sixteenth Amendment.[55] However, "this allowance puts marijuana businesses in the unusual position of wanting to capitalize as many of their otherwise deductible expenses to inventory as possible, while most businesses would prefer a current deduction."[56] Though the IRS did what it could to allow marijuana businesses a small reprieve,[57] its enforcement of § 280E by its terms—terms Congress wrote—against marijuana businesses leaves those businesses financially disadvantaged.[58]

Other congressional action took the form of two bills proposed in the House and Senate, each adding a clause at the end of § 280E specifically excluding state-authorized marijuana businesses from § 280E's ambit.[59] Beyond the IRS directive and the proposed bills, however, Congress has done nothing to clarify how § 280E should apply to state-authorized marijuana businesses. Consequently, much of § 280E's current application has been wrought by the courts.

2. The Judicial Branch

State-authorized marijuana businesses have brought challenges to § 280E from all angles. Courts have rejected every one. Courts have ruled that marijuana businesses are a "trade or business" within the meaning of § 280E;[60] their business "consists of trafficking in controlled substances;"[61] and marijuana continues to be

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year the merchandise is sold. *Id.* at 4–5. Use of the cash method permits a taxpayer to account for its merchandise earlier, at the time goods are sold.

54. *Id.* at 5–6.

55. *Id.* at 2.

56. Roche, Jr., *supra* note 28, at 429.

57. Nitti, *supra* note 33.

58. *See supra* Section I.A.

59. Senators Wyden, Merkley, and Bennet proposed the Small Business Tax Equity Act, a bill amending the Code to allow deductions and credits relating to expenditures in connection with marijuana sales conducted in compliance with state law. Specifically, the Senators wanted to insert the following text before the period ending the current text of § 280E: "unless such trade or business consists of marijuana sales conducted in compliance with State law." The Small Business Tax Equity Act was first introduced in 2015 without effect. Small Business Tax Equity Act, S. 987, 114th Cong. (2015). Representative Blumenauer, on behalf of himself, Mr. Rohrabacher, Mr. Smith of Washington, Mr. Hanna, Mr. Polis, and Mr. Young of Alaska presented the same bill in the House. Small Business Tax Equity Act, H.R. 1855, 114th Cong. (2015).

60. Olive v. Comm'n of Internal Revenue, 792 F.3d 1146, 1149 (9th Cir. 2015).

61. *See* CHAMP v. Comm'r, 128 T.C. 173, 182 (2007) (defining "trafficking" to include supplying medical marijuana); *see also* Olive v. Comm'n of Internal Revenue, 139

classified as a Schedule I Controlled Substance.[62] A tax court ruled that Congress's lack of intent to include state-authorized marijuana businesses within the ambit of § 280E at its inception is irrelevant to § 280E's application to state-authorized marijuana businesses.[63] The Ninth Circuit attempted to create a medical-necessity exception, which would have excluded medicinal marijuana from the Controlled Substance Act's ("CSA") prohibitions, but the Supreme Court rejected the Ninth Circuit's carve-out on the basis that the CSA lacked evidence of any congressional intent to allow such an exception.[64] The D.C. Circuit summarily rejected a petition to reclassify marijuana as a non-Schedule I drug.[65] Each effort to ameliorate the impact of § 280E on state-authorized marijuana businesses has thus far failed.

II. PENALTIES AND THE CONGRESSIONAL TAXATION POWER

A. The Supreme Court's Waxing and Waning Interpretation of the Taxing Power

The Constitution empowers Congress "[t]o lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States."[66] The Sixteenth Amendment specifies Congress's power to tax income.[67] This congressional power is limited by the requirement that Congress tax and spend in pursuit of federal debts, defense, or the

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T.C. 19, 38 (2012) (holding that dispensing medical marijuana pursuant to state law constitutes trafficking within the meaning of § 280E).

62. 21 U.S.C. § 811 (2015) granted the Attorney General authority to schedule drugs; 28 C.F.R. § 0.100(b) (2017) delegated the Attorney General's authority to the DEA. Marijuana was classified as Schedule I in the early 1970s, shortly after the passage of the Controlled Substances Act of 1970 ("CSA"). *See* Harrison Jacobs, *The DEA Treats Heroin and Marijuana as Equally Dangerous Drugs*, BUS. INSIDER (May 22, 2016), http://www.businessinsider.com/us-drug-scheduling-system-heroin-marijuana-2016-5.

63. *Olive*, 792 F.3d at 1150 (rejecting the argument that that § 280E should not apply to medical marijuana dispensaries, because those dispensaries did not exist when Congress enacted § 280E, by simply stating: "That Congress might not have imagined what some states would do in future years has no bearing on our analysis.").

64. United States v. Oakland Cannabis Buyers' Co-op, 532 U.S. 483, 483 (2001). Justice Thomas, writing for the majority, reasoned that no implied medical necessity exception could be discerned from the language of the CSA, so district courts could not consider medical necessity when exercising their discretion to fashion injunctive relief. *Id.*

65. Ams. for Safe Access v. DEA, 706 F.3d 438, 440–41 (D.C. Cir. 2013).

66. U.S. CONST. art. I, § 8, cl. 1.

67. U.S. CONST. amend. XVI. The Sixteenth Amendment did not extend the original grant of power to tax, but merely removed the necessity of apportioning taxes equally among the states when Congress taxed income. Eisner v. Macomber, 252 U.S. 189, 206 (1920) (citing Brushaber v. Union Pac. R R. Co., 240 U. S. 1, 17–19 (1916)); Stanton v. Baltic Mining Co., 240 U.S. 103, 112 (1916); Peck & Co. v. Lowe, 247 U.S. 165, 172–73, (1918); *see also* Bowers v. Kerbaugh-Empire Co., 271 U.S. 170, 174 (1926) (providing that the Sixteenth Amendment did not extend the taxing power to new subjects, but merely removed the necessity which otherwise might exist for an apportionment among the states of taxes laid on income).

general welfare.[68] Another limit is not explicit in the Constitution but implied by the courts: Congress may not use its Taxing Power to penalize.[69] I call this limit to the Taxing Power the *penalty limit*. Following the Supreme Court's revival of the penalty limit in *NFIB*, a tax that is actually a regulatory penalty—even if promulgated in pursuit of federal debts, defense, or the general welfare—lies outside the scope of the Tax and Spend Clause and is thus an invalid exercise of that power.[70]

At times, courts have found penalties enacted in the form of taxes unconstitutional as outside of Congress's Taxing Power and not within any other enumerated power.[71] Though the penalty-limit doctrine is inconsistent,[72] scholars have classified congressional Tax Power jurisprudence into three eras: the 1920s and 1930s, the post-1937 era, and the modern era.[73]

B. The Penalty Limit in Case Law Preceding NFIB v. Sebelius

1. 1900s–1937: After a Deferential Beginning, the Court Strikes Down Penalties Enacted as Taxes

The 1900s marked a time of great judicial deference to Congress.[74] In contrast, the 1920s and 1930s beheld a Court that struck down tax after tax as

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68. U.S. CONST. art. I, § 8, cl. 1. The Court has deferred to congressional judgment as to what promotes "the general welfare." *See, e.g.*, Helvering v. Davis, 301 U.S. 619, 640 (1937) ("The line must still be drawn between one welfare and another, between particular and general . . . . The discretion, however, is not confided to the courts. The discretion belongs to Congress.").

69. *See In re* Desert Capital Reit, Inc. v. United States, Ch. 7 Case No. NV-11-16624-LBR, slip op. at 15 (B.A.P. 9th Cir. Aug. 11, 2014) ("The Supreme Court recently reaffirmed its approach to distinguishing taxes from penalties in *Nat'l Fed'n of Indep. Bus. v. Sebelius* . . . .").

70. NFIB v. Sebelius, 132 S. Ct. 2566, 2596 (2012).

71. *See, e.g.*, United States v. Butler, 297 U.S. 1, 65 (1936); Bailey v. Drexel Furniture Co., 259 U.S. 20, 42 (1922).

72. R. ALTON LEE, A HISTORY OF REGULATORY TAXATION x (1973); *see also* Robert D. Cooter & Neil S. Siegel, *Not the Power to Destroy: An Effects Theory of the Tax Power*, 98 VA. L. REV. 1195, 1210–18 (2012).

73. *See, e.g.*, Cooter & Siegel, *supra* note 72, at 1220; *see also* LEE, *supra* note 72, at 6–11.

74. For example, the Supreme Court upheld a very high tax on artificial butter to preclude any possible separation-of-powers violation. McCray v. United States, 195 U.S. 27, 27 (1904). Congress had levied a small tax on uncolored margarine (1/4 cent per pound) and a relatively large tax on margarine colored to look like butter (10 cents per pound). Act of May 9, 1902, Pub. L. No. 57-110, 32 Stat. 193, 194; *McCray*, 195 U.S. at 28. Fifteen years later, the Supreme Court upheld a special tax on persons who produced, imported, or transferred opium or cocoa leaves after recognizing the "unlimited nature" of Congress's power to tax. United States v. Doremus, 249 U.S. 86, 94 (1919). The Court inquired, "Considering the full power of Congress over excise taxation . . . have the provisions in question any relation to the raising of revenue?" *Id.*

"penalties," in what we now call the *Lochner* era.[75] The Supreme Court's pivot point is marked at 1922, the year the Court ruled that congressional power to tax does not translate to congressional power to penalize via its tax code.[76] For a period of time following its pivot, the Court struck down taxes for two reasons: (1) because the taxes were actually penalties that regulated,[77] or (2) because the taxes were penalties that violated notions of federalism.[78] Below, both lines of cases are briefly summarized following a summary of *Drexel Furniture*.

In 1922, the Court decided *Drexel Furniture*, also known as the *Child Labor Tax Case*.[79] This case was the genesis of the penalty limit.[80] In considering the constitutionality of a 10% excise tax on any business employing a child, the Court pinpointed three factors that tended to suggest the tax at issue was actually a penalty, and thus outside the scope of congressional taxation power.[81] First, the Court asked whether the tax imposed an exceedingly heavy burden.[82] In *Drexel Furniture*, 10% of a company's net income constituted a heavy burden.[83] Second, the Court asked if the tax contained a scienter requirement; if so, it was more likely to be a penalty.[84] In *Drexel Furniture*, the child-labor tax contained a scienter

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75. LEE, *supra* note 72, at x (explaining that the Court first used the Tenth Amendment to restrict the Taxing Power in areas the conservative justices thought were reserved to state control). The *Lochner* era takes its name from *Lochner v. New York*, 198 U.S. 45, 68 (1905), wherein the Supreme Court struck down a maximum-working-hours law for bakers on the basis that the Constitution prohibits the government from interfering with an individual's freedom to contract. *Id. Lochner* began a period that marked the Court's most aggressive use of its gavel, as it proceeded to strike down many progressive era and Great Depression laws regulating working conditions. *See, e.g.*, Carter v. Carter Coal, 298 U.S. 238, 278 (1936) (limiting congressional commerce power to preclude power regulating production); *see also* Adkins v. Children's Hosp., 261 U.S. 525, 571 (1923) (striking down a minimum wage for women and children on freedom-of-contract grounds).

76. *See Drexel Furniture*, 259 U.S. at 42; Sonzinsky v. United States, 300 U.S. 506, 512 (1937); NFIB v. Sebelius, 132 S. Ct. 2566, 2566 (2012).

77. *See Carter Coal*, 298 U.S. at 288–89; *see also* United States v. Constantine, 296 U.S. 287, 288–98 (1935); Hill v. Wallace, 259 U.S. 44 (1922). One scholar noted that during this time period, courts increasingly relied on "Dual Federalism," which limited congressional power under the Commerce Clause and forced Congress to turn to its taxation power as a source of regulation. LEE, *supra* note 72, at 125.

78. United States v. Butler, 297 U.S. 1, 87 (1936); *Constantine*, 296 U.S. at 288–98.

79. *Drexel Furniture*, 259 U.S. at 20.

80. Barry Cushman, NFIB v. Sebelius *and the Transformation of the Taxing Power*, 89 NOTRE DAME L. REV. 133, 136 (2013).

81. *Drexel Furniture*, 259 U.S. at 36–37. The notion that this tax could lie outside of congressional power came from a case decided a few years earlier, which held that a statute that prohibited child labor was unconstitutional under the Commerce Clause. Hammer v. Dagenhart, 247 U.S. 251 (1918), *overruled by* United States v. Darby, 312 U.S. 100 (1941).

82. *Drexel Furniture*, 259 U.S. at 36; NFIB v. Sebelius, 132 S. Ct. 2566, 2595 (2012).

83. *Drexel Furniture*, 259 U.S. at 36–37; *NFIB*, 132 S. Ct. at 2595.

84. *Drexel Furniture*, 259 U.S. at 36; *NFIB*, 132 S. Ct. at 2595.

requirement because it was only imposed on employers who knowingly employed a child in a manner proscribed by the Child Labor Tax Law;[85] the tax did not apply to employers who did not know that the child was within the specified age limits.[86] Third, the Court asked if people other than the IRS enforced the tax, because if so, the tax was more likely a penalty.[87] In *Drexel Furniture*, the Department of Labor, in addition to the IRS, had authority to enforce the 10% child-labor tax.[88]

Considering these factors, the Court in *Drexel Furniture* invalidated the child-labor tax because the tax operated as a penalty and thus fell outside Congress's Taxing Power.[89] This decision in effect declared the child-labor tax as outside of any congressional power because four years earlier the Court had invalidated substantially the same provision, just enacted in the form of a prohibition rather than a tax in the Code.[90] Though important to the case's disposition, the fact that the Court had invalidated a substantially similar provision was not a part of the penalty analysis.[91] In words that would resurface 90 years later, the Court noted, "there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty with the characteristics of regulation and punishment. Such is the case in the law before us."[92] *Drexel Furniture* illustrates the Court's unwillingness to allow Congress to penalize via the tax code, because a penalty may circumvent limitations on other congressional powers.

Between *Drexel Furniture* and 1937, the Court invalidated various federal taxes for two main reasons: (1) the tax was actually a penalty aimed at regulation, or (2) the tax was actually a penalty that violated notions of federalism. The Court struck some taxes down as penalties because the taxes were clearly not imposed to generate revenue, but rather "exacted as a penalty to compel compliance with the regulatory provisions of the act."[93] In *Hill v. Wallace*,[94] for example, the Court struck down a federal tax on grain futures contracts because the Court found it

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85. *Drexel Furniture*, 259 U.S. at 36–37; *NFIB*, 132 S. Ct. at 2595.

86. *Drexel Furniture*, 259 U.S. at 36–37; *NFIB*, 132 S. Ct. at 2595.

87. *Drexel Furniture*, 259 U.S. at 37; *NFIB*, 132 S. Ct. at 2595.

88. *Drexel Furniture*, 259 U.S. at 37; *NFIB*, 132 S. Ct. at 2595.

89. *NFIB,* 132 S. Ct. at 2595 (citing *Drexel Furniture*, 259 U.S. at 38).

90. Hammer v. Dagenhart, 247 U.S. 251 (1918) (5–4 decision), *overruled by* United States v. Darby, 312 U.S. 100 (1941). In *Hammer*, the Court invalidated an act created by Congress to prevent products of child labor from entering interstate commerce. *See* Act Sept. 1, 1916, 39 Stat. 675, c. 432 (Comp. St. 1916, §§ 8819a–8816f).

91. *Drexel Furniture*, 259 U.S. at 38.

92. *Id.*

93. *See* Carter v. Carter Coal, 298 U.S. 238, 288, 289 (1936) (striking a federal scheme that imposed an excise tax of 15% on bituminous coal but allowed a 90% credit against the tax for producers who submitted to other provisions of the Bituminous Coal Conservation Act of 1935); *see also* United States v. Constantine, 296 U.S. 287, 288–98 (1935) (striking down a federal excise tax on alcohol dealers who acted contrary to state laws because the tax "must be imposed alike on the just and unjust."); Hill v. Wallace, 259 U.S. 44 (1922) (striking down a tax on futures grains contracts because it was clearly regulatory).

94. 259 U.S. at 44.

"impossible to escape the conviction . . . that [the tax] was enacted for the purpose of regulat[ion] . . . ."[95] Other cases invalidating taxes were predominantly animated by federalism concerns. In *United States v. Butler*, for example, the Court invalidated a federal tax on certain agricultural products because the tax invaded police powers reserved to the states under the Tenth Amendment.[96] In *United States v. Constantine*, the Court struck down a federal excise tax on alcohol dealers who acted contrary to state laws.[97] The purpose of the tax, the Court said, was to penalize liquor dealers for violating state law,[98] which unconstitutionally invaded state police powers.[99] Again, federalism concerns predominantly motivated the Court.[100] This era of willingness to invalidate federal taxes, short as it was, came to a screeching halt in 1937.

2. 1937–1995: Expanding Commerce Clause Power Pushes Out Tax as a Means for Congress to Regulate

From 1937 until recently, Congress increasingly expanded its own power under the Commerce Clause, a move backed by the courts.[101] The Supreme Court overturned *Lochner* in 1937, concluding that congressional power over interstate commerce extended to regulation at the production[102] and manufacturing[103] levels, meaning Congress could regulate maximum working hours, minimum wages, or any activity that substantially affects interstate commerce.[104] As a result, Congress did not need to impose taxes to achieve its regulatory ends,[105] as it felt compelled to in the *Child Labor Tax Case*.[106] In this period, the Court upheld every federal tax it reviewed.[107] The Court did not overturn cases from previous periods; it

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95. *Id.* at 66.

96. United States v. Butler, 297 U.S. 1, 68 (1936). Specifically, the Court explained that the "purely local activity" of agricultural production was an area of regulation left to the states, and it was not Congress's prerogative to regulate agricultural production via the Code. *Id.* at 64, 68.

97. *Constantine*, 296 U.S. at 288–89.

98. *Id.* at 295. This tax was enacted before the Eighteenth Amendment was repealed in 1933; the challenge came after the Eighteenth Amendment was repealed. *See id.* at 287.

99. *Id.* at 295–96.

100. LEE, *supra* note 72, at 7.

101. *Id.* at x.

102. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

103. *See* Wickard v. Filburn, 317 U.S. 111 (1942).

104. *Id.*

105. LEE, *supra* note 72, at x. An example of Congress imposing a tax to achieve regulatory ends it could not otherwise achieve is illustrated perfectly by *Drexel Furniture* and *Hammer*, discussed *infra* in Section III.B.

106. *See supra* note 79 and accompanying text.

107. In 1937, the Court upheld an annual tax on firearm dealers. Sonzinsky v. United States, 300 U.S. 506, 506 (1937). In so doing, the Court did not overrule previous cases; it simply distinguished them. For example, the Court in *Sonzinsky* distinguished *Drexel Furniture*, *Hill*, and *Carter* on the basis that the National Firearms Act lacked "regulatory provisions related to a purported tax in such a way as has enabled this Court to say in other cases that the latter is a penalty resorted to as a means of enforcing the

simply distinguished each challenged tax provision from previously upheld tax provisions.[108] Overall, fewer tax-power cases were presented to the Court during this time: Congress could now directly regulate behavior under its expanded Commerce Power, and no longer had to settle with merely encouraging or discouraging behavior by enacting taxes.[109] Fewer taxes meant fewer challenges to taxes.

The Supreme Court's waxing and waning interpretation of the Taxing Power is enough to make any law student loony.[110] The Taxing Power's outer bounds are hazy in part because the Court has not overruled many *Lochner*-era tax precedents which seem to conflict with the more deferential rulings post-1937, and in part because modern-era jurisprudence is less deferential to congressional action than it once was.[111]

Fortunately, the Supreme Court jumped on the chance presented by *NFIB* to draw certain principles out from this haze of precedent. First, *Drexel Furniture* "remains the authority, and forty years later is still the law of the land . . . . The judicial revolution that overtook the commerce power in the late thirties did not bring reversal."[112] Second, the amount of revenue generated by a tax plays little to no role in the assessment of whether that tax is a penalty.[113] Third, the Court will take great pains to avoid overruling precedent.[114] These principles, as recognized and applied in *NFIB*, are not only the bread and butter for any subsequent tax-power analyses—they also form the foundation for concluding that § 280E lies outside of congressional power to tax.

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regulations." *Id.* at 513. The Court further distinguished *Sonzinsky* on the basis that the Code did not treat the tax on firearms dealers as criminal. *Id.* In 1950, the Court upheld a tax on the transfer of marijuana under the 1937 Marihuana Tax Act, an act that was later ruled unconstitutional on Fifth Amendment grounds. United States v. Sanchez, 340 U.S. 42, 45 (1950). The Court was careful to note that the tax was "not conditioned upon the commission of a crime." *Id.* The Court explained that "[s]ince his [Plaintiff's] tax liability does not in effect rest on criminal conduct, the tax can be properly called a civil rather than a criminal sanction." *Id.* The Court found no other reason for Congress not to have this power and concluded this tax was a valid exercise of congressional power. *Id.* at 45–46.

108. *See, e.g.*, *Sonzinsky*, 300 U.S. at 511–14.

109. *See infra* Section IV.C.

110. Ruth Mason, *Federalism and the Taxing Power*, 99 CAL. L. REV. 975, 995 (2011) (stating that currently, "the regulatory reach of the taxing power is unclear").

111. *Compare* United States v. Morrison, 529 U.S. 598 (2000), United States v. Lopez, 514 U.S. 549 (1995), *and* NFIB v. Sebelius, 132 S. Ct. 2566 (2012), *with* United States v. Darby, 312 U.S. 100 (1941), Wickard v. Filburn, 317 U.S. 111 (1942), *and* Perez v. United States, 402 U.S. 146 (1971).

112. Cushman, *supra* note 80, at 153 (quoting STEPHEN B. WOOD, CONSTITUTIONAL POLITICS IN THE PROGRESSIVE ERA 284 (1968)).

113. For example, the revenue generated from a tax on marijuana transactions, which the Court upheld, generated less revenue than the tax on child labor, which the Court struck down as a penalty. *Id.* at 164.

114. Despite apparent inconsistencies, none of the above-listed cases have been expressly overruled.

3. Current Treatment of the Tax/Penalty Distinction—NFIB v. Sebelius

The most recent case addressing the penalty limit is *NFIB v. Sebelius*,[115] variously described as a "blockbuster,"[116] a "watershed case that could remake the constitutional landscape,"[117] "the Court's most important case since *Bush v. Gore*,"[118] and "the case of the century."[119] NFIB challenged the Affordable Care Act's ("ACA") individual mandate,[120] which required most Americans to buy health insurance[121] or else make a "shared responsibility payment."[122] This payment was termed a "penalty" in the ACA's provisions. Plaintiffs challenged the constitutionality of the individual mandate on the ground that Congress lacked power to force people to buy insurance;[123] the government argued that the Commerce Clause bestowed this power upon Congress.[124] The Court found the Commerce Clause insufficient to justify the individual mandate because the individual mandate does not regulate existing commercial activity, and Congress could not regulate *in*activity.[125] The Court then "saved" the ACA by re-characterizing the individual mandate's penalty as a tax and finding the tax within Congress's Taxing Power because, under the *Drexel Furniture* test, the tax was not a regulatory penalty.[126]

The *NFIB* Court responded to two additional arguments. In its opening brief, the government first argued that per a 1937 case,[127] "[a]s long as a statute is 'productive of some revenue,' Congress may exercise its taxing powers irrespective of any 'collateral inquiry as to the measure of the regulatory effect of a tax.'"[128] Secondly, admitting that "the taxing power may not be used to impose 'punishment for an unlawful act'"[129] per *United States v. La Franca*,[130] the government argued that the minimum coverage provision does not impose

115. 132 S. Ct. 2566.
116. Sidhu, *supra* note 5, at 108.
117. Jonathan H. Adler, *The Conflict of Visions in* NFIB v. Sebelius, 62 DRAKE L. REV. 937, 937 (2014).
118. Mark A. Hall, *Supreme Court Arguments on the ACA—A Clash of Two World Views*, 366 NEW ENG. J. MED. 1462, 1462 (2012).
119. *Id.*
120. 26 U.S.C. § 5000A (2010).
121. *Id.* at (a).
122. *Id.* at (b)(1).
123. NFIB v. Sebelius, 132 S. Ct. 2566, 2566 (2012).
124. *See id.*; *see also* U.S. CONST. art. 1, § 8, cl. 3.
125. *NFIB*, 132 S. Ct. at 2587.
126. *Id.* at 2595–96.
127. Sonzinsky v. United States, 300 U.S. 506, 506 (1937).
128. Brief for Appellants at 50, NFIB v. Sebelius, 132 S. Ct. 2566 (2012) (Nos. 11-393, 11-398, 11-400); *see also NFIB*, 132 S. Ct. at 2594 (addressing this argument).
129. Brief for Appellants at 52, NFIB v. Sebelius, 132 S. Ct. 2566 (2012) (Nos. 11-393, 11-398, 11-400).
130. 282 U.S. 568, 572 (1931). The Court in *La Franca* noted that "an action to recover for a penalty for an act declared to be a crime is, in its nature, a punitive proceeding . . . ." *Id.* at 575.

punishment.[131] The challenger countered that the payment was called a penalty in the ACA "because it was, in fact, a penalty."[132] The challengers supported their argument by citing to *Drexel Furniture*.[133]

After noting that "every reasonable construction must be resorted to, in order to save a statute from unconstitutionality,"[134] the Court addressed the first issue: whether the payment could be fairly read as a tax.[135] Reaffirming the principle that substance prevails over form, the Court held that this exaction, though not labeled as such, was, in fact, a tax.[136] Dispositive to the Court's holding were the following considerations: the payment is made to the IRS;[137] the provision does not apply to individuals who do not pay federal income taxes;[138] the amount owed is determined by familiar factors like taxable income, number of dependents, and filing status;[139] the requirement to pay is found in the Code and enforced by the IRS;[140] and the payment yields the essential feature of any tax—"it produces at least some revenue for the [g]overnment."[141] Having determined that in substance the payment was a tax, the Court turned to the constitutionality of the "tax" under the Tax and Spend Clause.[142]

The second part of the Court's analysis essentially pulled the reasons underlying *Drexel Furniture* and repackaged them into a three-factor test.[143] The issue was "whether the shared responsibility payment falls within Congress's taxing power, '[d]isregarding the designation of the exaction, and viewing its substance and application.'"[144] Emphasizing this "functional" approach, the Court isolated three reasons underlying *Drexel Furniture*'s invalidation of the child-labor tax[145] and applied these in a factor-like analysis to the individual mandate.[146] First, unlike the prohibitory child-labor tax in *Drexel Furniture*, paying the ACA tax in lieu of buying insurance could be a "reasonable financial decision" because the ACA tax will likely be less than the price of insurance.[147] Second, unlike the tax in *Drexel Furniture*, which was only imposed on those who knowingly employed

131. Brief for Appellants at 52, NFIB v. Sebelius, 132 S. Ct. 2566 (2012) (Nos. 11-393, 11-398, 11-400).

132. Brief for State Respondents on the Minimum Coverage Provision at 61, Dep't of Health and Human Servs. v. Florida, 132 S. Ct. 2566 (2012) (No. 11-398).

133. *Id.* at 58.

134. *NFIB*, 132 S. Ct. at 2594 (internal citations omitted).

135. *Id.* at 2594.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.* (quoting United States v. Kahriger, 345 U.S. 22, 28 n.4 (1953)).

142. *Id.* at 2601.

143. *Id.* at 2595.

144. *Id.* (quoting United States v. Constantine, 296 U.S. 287, 294 (1935)).

145. *NFIB*, 132 S. Ct. at 2595–96; see *supra* Section II.B.1 for a more detailed summary of *Drexel Furniture*'s analysis.

146. *NFIB*, 132 S. Ct. at 2595–96.

147. *Id.* at 2596.

children in violation of the Child Labor Tax Law, the individual mandate contains no scienter requirement.[148] Elaborating on the second factor, the Court noted that "scienter requirements are typical of punitive statutes, because Congress often wishes to punish only those who intentionally break the law."[149] Third, unlike *Drexel Furniture*'s child-labor tax, which was enforceable by the Department of Labor—"an agency responsible for punishing violations of labor laws, not collecting revenue"[150]—the ACA payment is collected solely by the IRS.[151] The Court thus concluded that "[t]he reasons the Court in *Drexel Furniture* held that what was called a 'tax' there was a penalty support the conclusion that what is called a 'penalty' here may be viewed as a tax."[152]

The Court tied its analysis of the individual mandate to precedent using a thread of historically recurring themes. The Court acknowledged that taxes may affect individual conduct,[153] foreclosing a challenge on that basis alone. The Court took care to distinguish penalties from taxes, relying on a definition drawn from a double-jeopardy case decided in 1931.[154] There, Justice Sutherland explained that "[a] tax is an enforced contribution to provide for the support of government" while "a 'penalty' . . . is an exaction imposed by statute as punishment for an unlawful act."[155] Justice Sutherland's distinction drove the *NFIB* Court to address whether the individual mandate made the failure to purchase health insurance unlawful.[156] If so, it lay outside the Taxing Power. The *NFIB* dissenters concluded that the ACA's required payment indeed made the failure to purchase unlawful;[157] Chief Justice Roberts, writing for the majority, concluded that as long as one paid the tax in lieu of buying insurance, failing to buy insurance was not unlawful.[158] Based on this, the 5–4 majority concluded that Congress had the power under the Tax and Spend Clause to enact this exaction.[159]

The remainder of the *NFIB* opinion addresses tangential concerns. The Court determined that the tax did not violate any other provision of the Constitution because it was not a direct tax and not a capitation.[160] After

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148. *Id.* The Court clarified in a footnote that "[w]e do not suggest that any exaction lacking a scienter requirement and enforced by the IRS is within the taxing power." *Id.* at n.9.

149. *Id.* at 2595.

150. *Id.* (citing Bailey v. George, 259 U.S. 16, 37–38 (1922)); Dep't of Revenue of Montana v. Kurth Ranch, 511 U.S. 767, 780–82 (1937); United States v. Constantine, 296 U.S. 287, 294 (1935)).

151. NFIB, 132 S. Ct. at 2596.

152. *Id.*

153. *Id.* "Although the payment will raise considerable revenue, it is plainly designed to expand health insurance coverage." *Id.*

154. *Id.*; United States v. La Franca, 282 U.S. 568 (1931).

155. *La Franca*, 282 U.S. at 572.

156. *NFIB*, 132 S. Ct. at 2593–94, 2597; *see also* Cushman, *supra* note 80, at 136.

157. *NFIB*, 132 S. Ct. at 2652–54 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

158. *NFIB*, 132 S. Ct. at 2493–94, 2597 (majority opinion).

159. *Id.* at 2598, 2600.

160. *Id.* at 2599.

acknowledging the vastness of congressional taxing power, the Court reaffirmed that the power "is not without limits."[161] Citing *Butler*[162] and *Drexel Furniture*,[163] the Court noted that "[a] few of our cases policed these limits aggressively, invalidating punitive exactions obviously designed to regulate behavior otherwise regarded at the time as beyond federal authority."[164] Though the Court noted its more recent reluctance to scrutinize the regulatory motive behind taxes, it reiterated that "there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty with the characteristics of regulation and punishment."[165]

The *NFIB* Court chose to rely on certain precedent to the exclusion of other precedent when it analyzed the exaction under the "narrowest interpretations of the taxing power."[166] With this statement, the Court implicitly acknowledged the inconsistencies in precedent and explicitly chose one line of cases over the other. Why it did so we may only speculate, but what is clear is that the Court predominantly relied on the three reasons underlying *Drexel Furniture* to determine that the individual mandate in *NFIB* did not punish unlawful behavior; it also recognized that a contrary conclusion would render the mandate an impermissible penalty under Justice Sutherland's distinction.[167] Going forward, courts faced with an allegation that a tax is actually a penalty will have to either uphold it as a tax or invalidate it as a penalty in terms of these three reasons. Post-*NFIB*, then, federal taxes that constitute penalties under the *NFIB/Drexel Furniture* factors are not valid exercises of Congress's Taxing Power.

III. VALIDITY OF § 280E UNDER THE TAX AND SPEND POWER AFTER *NFIB V. SEBELIUS*

This Part considers the validity of § 280E using an analysis tracking *NFIB*. First, this Part considers whether in substance § 280E functions as a tax; second, this Part considers whether § 280E remains a tax under the *NFIB/Drexel Furniture* factors. This Part concludes that § 280E is functionally labeled a tax but that this "tax" acts as a penalty and thus may not be enacted under Congress's Taxing Power. Lastly, this Part considers this conclusion in light of cases preceding *NFIB*, the public-policy doctrine, congressional Commerce Clause power, and judicial deference to other branches of government.

A. Functionality Test

Whether § 280E can be classified as a tax is relevant insofar as the *NFIB/Drexel Furniture* test will apply to any "tax" enacted by Congress.

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161. *Id.*
162. United States v. Butler, 297 U.S. 1 (1936).
163. 259 U.S. 20 (1922).
164. *NFIB*, 132 S. Ct. at 2599.
165. *Id.* (quoting Dep't of Revenue of Mont. v. Kurth Ranch, 511 U.S. 767, 779 (1937)).
166. *Id.* at 2600.
167. *See id.* at 2595.

In *NFIB*, Chief Justice Roberts noted that courts traditionally give a high degree of deference to federal statutes and suggested that the statute should be saved if reasonably possible.[168] He asked whether the mandate was in effect a tax on certain taxpayers who did not obtain health insurance.[169] Because the mandate "looks like a tax in many respects"—it only applies to individuals who pay income tax, the amount owed is determined by normal tax considerations, the mandate is housed in the Code[170] and enforced by the IRS,[171] and it produces some revenue for the government[172]—it was, in fact, a tax.[173]

Similarly, § 280E itself "looks like a tax in many respects" and would likely be considered a tax for the initial part of the *NFIB/Drexel Furniture* test.[174] Section 280E only operates upon those who pay federal income tax; it's a provision of the Code; IRS agents enforce it;[175] it's calculated based on the classification of a business as "consisting in the trafficking of controlled substances" and by reference to other provisions of the Code; and it raises some revenue for the government. Denying a deduction raises an individual's taxable income and requires a person to pay a higher sum.[176] Moreover, because congressional power to tax is limited by the penalty test, this penalty test should apply to any provision enacted under Congress's tax power, even if the provision technically disallows a deduction, as opposed to imposing a tax.

Even if a court determines that a disallowed deduction is not the functional equivalent of a tax, a court will still analyze § 280E under the second part of the *NFIB/Drexel Furniture* test because the penalty limit circumscribes Congress's Taxing Power as a whole, not specifically Congress's power to impose tax.

B. Penalty Test

The *NFIB/Drexel Furniture* test embraces three factors for courts to consider: (1) whether the tax imposed an exceedingly heavy burden; (2) whether it contained a scienter requirement; and (3) whether it was enforced by an agency other than the IRS.[177]

The first factor weighs heavily on the side of an impermissible penalty. Estimates referenced in the Introduction of this Note—that marijuana businesses face far heavier tax burdens than non-marijuana businesses, one of which owes

168. *Id.* at 2594.
169. *Id.*
170. I.R.C. § 280E (2012).
171. 26 U.S.C. § 4980H(d) (2015).
172. *NFIB*, 132 S. Ct. at 2594.
173. *Id.* at 2595–96.
174. *See* Borek, *supra* note 1, at 48 ("There remains . . . the unanswered question of whether Congress possesses the power to impose a tax on the gross income of an illegal business, *a result achieved by denying the deduction of expenses*.") (emphasis added).
175. 26 U.S.C. § 4980H(d).
176. *See* Borek, *supra* note 1, at 48.
177. *NFIB*, 132 S. Ct. at 2595–96.

1,007% of its net revenue[178]—suggest this provision imposes an exceedingly heavy burden.[179] This suggestion grows stronger when we remember what fueled Congress's fire to enact § 280E in the first place: Congress simply reacted to a court case that allowed a drug dealer ordinary tax benefits because no Code provision provided otherwise.[180] Even the IRS acknowledged that "[a]pplied literally, § 280E severely penalizes taxpayers that traffic in a Schedule I or Schedule II controlled substance . . . ."[181] Because § 280E not only imposes an exceedingly heavy burden on marijuana businesses, but was *intended* to do so, the first factor weighs heavily in favor of an impermissible penalty.

Application of the second factor also seems to paint § 280E as an impermissible penalty. On its face, § 280E arguably lacks the explicit scienter requirement of *Drexel Furniture*: § 280E is imposed not only on those who knowingly conduct a business that traffics in controlled substances, but also upon all such businesses without regard to whether business owners have specific knowledge that what they are doing is illegal. One would be hard-pressed, however, to find marijuana business owners ignorant of the fact that they were defying federal law; practically speaking, any explicit scienter requirement Congress could have placed (but didn't) in § 280E would be met by every business. An explicit scienter requirement would thus be superfluous. However, a business need not argue that a scienter requirement exists, because § 280E appears more like a strict-liability penalty, and the Court explicitly denounced strict-liability penalties in *NFIB*. In clarifying that any exaction lacking a scienter requirement and enforced by the IRS is not automatically a permissible tax,[182] the Court explained that Congress could not expand its authority to impose criminal fines by creating strict-liability offenses enforced by the IRS rather than the Federal Bureau of Investigation.[183] Thus, either the provision contains an implied scienter requirement, or the provision imposes a form of strict-liability on businesses dealing in marijuana. Either way, § 280E looks like a penalty because it applies to those who violate an obvious federal law.

Even if both scienter arguments fail, this factor need not be met for a provision to exceed congressional power because it acts as a penalty.[184] In his dissent, Justice Scalia clarified that the presence of a scienter requirement suggests a penalty, but the absence of one does not necessarily suggest a tax.[185] He cautioned that "[s]ince we have an entire jurisprudence addressing when it is that a scienter requirement should be inferred from a penalty, it is quite illogical to

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178. *See supra* note 8 and accompanying text.

179. *See* Appellant's Reply Brief at 6, Canna Care v. Comm'r, No. 16-70265 (9th Cir. Aug. 31, 2016) (arguing that because marijuana retailer's net income was $23,000, and application of § 280E has in substance generated a $229,473 penalty, the marijuana business faces a 1,007% penalty).

180. *See* discussion *supra* Section I.B.

181. *See supra* Section I.C.1.

182. *NFIB*, 132 S. Ct. at 2596 n.9.

183. *Id.*

184. *Id.* at 2596.

185. *Id.* at 2654–55 (Scalia, J., dissenting).

suggest that a penalty is not a penalty for want of an express scienter requirement."[186] Thus, a court could easily read a scienter requirement into § 280E; but even if a court requires an explicit scienter requirement, and finds none in § 280E taken on its face, § 280E need not contain a scienter requirement to be an impermissible penalty.

The third factor also weighs in favor of an impermissible penalty because the IRS does not exclusively enforce compliance with § 280E. In addition to IRS enforcement, the Financial Crimes Enforcement Network ("FinCEN") requires banks to file suspicious-activity reports,[187] which can in turn require banks themselves to investigate marijuana businesses for compliance with all relevant laws, including an apparent inconsistency with federal tax obligations.[188] In effect, then, the FinCEN, in addition to the IRS, oversees marijuana businesses to ensure compliance with federal tax laws. This is like the situation in *Drexel Furniture*, in which the Secretary of Labor, in addition to the IRS, had authority to inspect businesses to ensure compliance with the child-labor tax.[189]

Section 280E imposes an exceedingly heavy burden on state-authorized marijuana businesses, need not contain an explicit scienter requirement for reasons articulated above, and is enforced by entities other than the IRS. Thus, the reasons from *Drexel Furniture*—repackaged as factors by *NFIB*—suggest that § 280E constitutes an impermissible penalty and as such, lies outside of Congress's Taxing Power.

IV. OTHER RELEVANT CONCERNS

This, however, is not the end of the inquiry: other concerns shed light on how § 280E will be interpreted by a court. Below, this Note considers the effect of cases pre-dating *NFIB*, the public-policy doctrine, the effect of congressional power to regulate marijuana under the Commerce Clause, and the role court

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186. *Id.*

187. 12 C.F.R. § 21.11 (2011). The Bank Secrecy Act, passed in its original form by Congress in 1970, requires U.S. financial institutions to assist governmental agencies by keeping records of cash purchases of negotiable instruments, file reports of cash transactions exceeding $10,000 in a day, and to report suspicious activity that might signify money laundering, tax evasion, or other criminal activities. *See FinCEN's Mandate from Congress*, FINCEN, https://www.fincen.gov/resources/statutes-regulations (last visited Apr. 17, 2017).

188. *BSA Expectations Regarding Marijuana-Related Businesses*, FINCEN (Feb. 14, 2014), https://www.fincen.gov/resources/statutes-regulations/guidance/bsa-expectations-regarding-marijuana-related-businesses. A financial institution providing services to a marijuana business is required to file a Suspicious Activity Report ("SAR") with the FinCEN. *Id.* This obligation is unaffected by a state's designation of marijuana as legal in any form. *Id.* FinCEN provides a list of "red flags" that indicate a marijuana business could be violating a state or federal law. *Id.* Per the list, banks should be suspicious when a business deposits more cash than "is commensurate with the amount of marijuana-related revenue it is reporting for *federal and state* tax purposes." *Id.* (emphasis added).

189. Bailey v. Drexel Furniture Co., 259 U.S. 20, 35 (1922).

deference to other branches plays. None of these concerns justify § 280E's operation as a penalty.

A. Effect of Cases Preceding **NFIB v. Sebelius**

The haphazard collection of cases preceding *NFIB* should have little effect on the outcome of any new challenge to a tax provision as a penalty. The *NFIB* Court had all of this precedent at its disposal—it could pick and choose which cases to use—and it picked *Drexel Furniture* and the penalty limit. It could have chosen many other cases, some of which advanced the more "unlimited nature" understanding of Congress's power to tax. The *NFIB* Court quoted Justice Sutherland's tax/penalty distinction from 1931: "A tax is an enforced contribution to provide for the support of government" [190] while "a 'penalty' . . . is an exaction imposed by statute as punishment for an unlawful act."[191] Using this distinction to decide the case solidified it as current law.

Further, unlike taxes more recently upheld by the Supreme Court,[192] Congress conditioned § 280E upon the commission of a crime.[193] If Congress seeks to punish unlawful acts, it should not do so through the Tax Code.[194] In an older case most topically related to a challenge to § 280E, the Court upheld a tax on the transfer of marijuana.[195] The Court justified its holding by expressly recognizing that the tax provision is "not conditioned upon the commission of a crime."[196] Not being conditioned upon crime was also a distinguishing feature of the tax upheld in *Sonzinsky*.[197] By conditioning § 280E's application to businesses that traffic controlled substances "prohibited by Federal law or the law of any state,"[198] Congress does exactly what it cannot: it conditions a tax provision upon the commission of a crime.

B. The Public-Policy Doctrine

The Senate Committee Report indicates that the deductions precluded by § 280E should be disallowed on "public policy grounds."[199] However, public-policy-ground jurisprudence is unlikely to affect a court's determination of congressional power to enact § 280E.

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190. United States v. La Franca, 282 U.S. 568, 572 (1931).
191. *Id.*
192. *See, e.g.*, United States v. Sanchez, 340 U.S. 42, 45 (1950); Sonzinsky v. United States, 300 U.S. 506, 512 (1937).
193. It is no secret that § 280E was enacted to further discipline those who committed federal crimes. *See supra* Section I.B.
194. *See* United States v. Constantine, 296 U.S. 287, 295–96 (1935); *see also* Borek, *supra* note 1, at 46.
195. *Sanchez*, 340 U.S. at 45.
196. *Id.* at 45.
197. *Sonzinsky*, 300 U.S. at 513.
198. I.R.C. § 280E (2012).
199. S. Rep. No. 97-494, vol. 1, at 309 (1982).

The public-policy doctrine is a judicially created doctrine: courts may disallow a deduction that otherwise satisfies the definition of deductible "ordinary and necessary" business expenses if allowing the deduction would otherwise "frustrate a sharply defined public policy."[200] Courts limit their use of the public-policy doctrine to the following "extremely limited circumstances": (1) where allowing a deduction would frustrate sharply defined national or state policies proscribing particular types of conduct; (2) the policies are evidenced by some governmental declaration; and (3) allowing the deduction would severely and immediately frustrate this public policy.[201]

In *Tank Truck Rentals v. Commissioner*, the Supreme Court precluded a taxpayer who had been fined by Pennsylvania for operating overweight trucks on its highways, in violation of state law, from deducting the fines imposed on them for violating the law.[202] The Court explained that allowing a business to deduct the amount paid for state-imposed fines and penalties would "frustrate state policy in a severe and direct fashion by reducing the 'sting' of the penalty prescribed by the state legislature."[203]

Congress's decision to ground § 280E in the public-policy doctrine is a highly questionable move. First, this is a judicially created doctrine that allows courts to disallow deductions. Section 280E is a product of the legislature. The judiciary may not supersede the mandates of the Constitution, and if Congress lacks power under the Constitution, then Congress lacks the power notwithstanding any judicially created doctrine.[204] Second, a court would be hard-pressed to find that allowing ordinary and necessary deductions frustrate a sharply defined policy against drugs given the conflicting mandates of the states and the federal government. While some states legalize marijuana, the federal government denounces it. Which sovereign reigns? The doctrine provides no direction in waters where two winds blow. Lastly, courts have allowed deductions for other illegal businesses—bookmaking enterprises, prostitution houses, and the like[205]: What's different between those federally illegal activities and this federally illegal activity? The public-policy doctrine cannot save § 280E.

C. Commerce Clause Power

An elephant lumbers in the wake of this Note's conclusion that Congress lacks taxation power to enact § 280E. Congress certainly has authority under the

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200. Roche, Jr., *supra* note 28, at 435 (2013); *see also* Borek, *supra* note 1, at 55 ("It is only in specific, narrowly drawn circumstances that allowance of a deduction will be considered to so sharply frustrate public policy that an exception will be read into the Code.").

201. Roche, Jr., *supra* note 28, at 435.

202. Tank Truck Rentals v. Comm'r, 356 U.S. 30, 31, 35 (1958).

203. *Id.* at 35–36.

204. U.S. CONST. art. VI, cl. 2. (the Supremacy Clause).

205. *See supra* Section I.B.

Commerce Clause[206] to regulate marijuana businesses; why does its source of authority matter?

It matters because not recognizing that § 280E is actually a criminal penalty enacted under Congress's Commerce Clause power undermines the executive's prerogative to declare policies of nonenforcement, like the Obama Administration's policy of not enforcing many federal marijuana criminal penalties in states that have legalized marijuana.[207] Were the current Department of Justice ("DOJ") to declare a policy of nonenforcement like that of the Obama Administration, its policy would certainly apply to the criminal penalties imposed by § 280E—but only if the penalties were recognized as such. When presented as a tax, § 280E's penalizing features may slip under the DOJ's radar: a policy of nonenforcement will target criminal penalties, not taxes. Were § 280E transparently presented as a penalty, the DOJ could make an informed decision about whether or not to enforce it. Disguising a penalty as a tax robs the DOJ of this choice.

In fact, experts in the field have already noted the tax law's incongruence with the former executive's stated policy of nonenforcement: "Federal tax rules treat these [state-authorized] marijuana business activities like any other federal drug crime, which enormously increases tax liability . . . ."[208] This incongruence is even more pronounced because § 280E—a financial penalty—was enforced while the criminal penalties[209] were not.

Further analysis of whether this impinges upon the executive's prerogative is beyond the scope of this paper. However, it is sufficient here to recognize that if § 280E were considered a criminal penalty, instead of a tax provision, then its enforcement would fall to the DOJ, which could then make an informed decision about whether to enforce it. In all likeliness, the Obama Administration would not have enforced § 280E if presented in its proper form as a criminal penalty. Congress should not be able to side-step the executive with such ease.

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206. U.S. CONST. art. I, § 8, cl. 3; *see also* Gonzalez v. Raich, 545 U.S. 1 (2005).

207. During the Obama Administration, the DOJ announced that it would not enforce the CSA's prohibition against marijuana in states that had legalized marijuana, as long as states enacted a robust regulatory program that did not allow marijuana use to violate eight stated federal priorities. Chemerinsky et al., *supra* note 7, at 77–79, 86–90. These priorities were preventing the following: (1) distribution of marijuana to minors; (2) marijuana-sales revenue from aiding criminal enterprises; (3) diversion of marijuana from states where it is legal to other states; (4) marijuana activity from being used as a cover for trafficking of illegal drugs; (5) violence and firearm use in marijuana activity; (6) marijuana-impaired driving and other adverse health consequences; (7) marijuana growing on public lands; and (8) marijuana possession and use on federal property. *See* U.S. Dep't of Justice, Office of the Deputy Att'y Gen., *Memorandum for all United States Attorneys: Guidance Regarding Marijuana Enforcement* (Aug. 29, 2013), http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf.

208. Chemerinsky et al., *supra* note 7, at 79.

209. Criminal penalties may include fines. *See, e.g.*, 21 U.S.C. § 841(b)(1)(B) (2012) (exposing a person with 100 or more marijuana plants to a $5,000,000 fine).

D. Deference to Other Branches

Animating *NFIB* was clear judicial deference to congressional policymaking and a push to uphold the ACA—a political hot potato at the time. Such motivating factors may not be present in a challenge to § 280E. First, § 280E only affects a small portion of the population, whereas the Individual Mandate affects the majority of Americans. Second, courts—particularly lower courts—have recently demonstrated a greater willingness to invalidate federal laws.[210] Third, *NFIB*, as a Supreme Court decision, is binding on every court in the country. Though the Court wove deference for federal enactments into its opinion, general notions of deference cannot override Supreme Court precedent that sets out clear factors to answer a constitutional question. Because *NFIB* would control any challenge to § 280E as a penalty, and because § 280E is a less contentious provision presented in a time of less deference and clearer guidelines, these types of concerns should have little effect on the outcome of the penalty test.

In stark contrast to the theme of deference to legislative policy choices, experts interpret *NFIB* as affirming the re-emergence of the judiciary as police of the limits to federal power[211]—an emergence that began with the revolution sparked by the Rehnquist Court.[212] Johnathan Adler, Professor of Law at Case Western Reserve University, suggests that *NFIB* presented a choice between two constitutional visions of federal power: one that is unconstrained by the courts and constrained primarily through the political process, and one that is constrained by the courts, whose role it is to enforce constitutional limits upon federal power.[213] By creating a new limit on federal power over interstate commerce—i.e., Congress cannot regulate inactivity—Professor Adler suggests that the Court reaffirmed the principle that federal power is subject to judicially enforceable limits, thereby embracing the constrained vision of federal power that began in the 1990s with the Rehnquist Court.[214] *NFIB* joins a succession of cases which have, since 1995,[215]

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210. *See, e.g.*, Nevada v. United States Dep't of Labor, 218 F. Supp. 3d 520 (E.D. Tex. 2016) (federal judge enjoins enforcement of rule increasing the minimum salary level for executive, administrative, and professional workers to be exempt from the Fair Labor Standards Act's overtime requirements because the Department of Labor exceeded its authority in raising the minimum salary).

211. *See, e.g.*, Adler *supra* note 117; *see also* Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1053–56 (2001).

212. Adler, *supra* note 117, at 953 n.80; Balkin & Levinson, *supra* note 211, at 1052–56 (stating that the Rehnquist Court's federalism decisions were a "constitutional revolution"); Erwin Chemerinsky, *The Federalism Revolution*, 31 N.M. L. REV. 7, 7 (2001) ("[T]here has been a revolution with regard to the structure of the American government because of the Supreme Court decisions in the last few years regarding federalism.").

213. Adler, *supra* note 117, at 937.

214. *Id.* at 952, 969. Professor Adler notes that the Court had ample precedent with which to uphold the individual mandate, stating that health insurance, and the purchase thereof, "were indisputably an economic activity subject to economic regulation, so a requirement that individuals purchase health insurance was also a form of economic regulation." *Id.* at 959. He further notes, "the purpose and effect of the requirement to buy health insurance were both clearly economic insofar as they were designed to ensure that

demonstrated greater judicial willingness to enforce the limits of congressional power.[216] If we are, as Professor Adler suggests, in a newly revived era of limited congressional power, it stands to reason that the penalty limit on federal taxation power—which *NFIB* itself pumped life into—will be wielded by the judiciary as more than mere rhetoric. In sum, the Court's recent willingness to enforce limitations on federal power darkens the sky for the future of § 280E.

A re-emergence of judicial constraints on congressional power bodes well for § 280E. Section 280E has particularly strong federalism undertones because it applies to businesses that states have decreed legal despite their federally illegal status.[217] Some scholars say that the current Supreme Court, as if on a pendulum, is swinging back towards the federalist vision that guided the court from the 1890s to 1937, once again narrowing the scope of congressional power, reviving the Tenth Amendment as a limit on Congress's authority,[218] and greatly expanding the scope of state sovereign immunity.[219] Section 280E's operation as a federal impediment to a state's choice to legalize marijuana could prove especially persuasive to a Court pushing these federalist themes.[220]

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more younger and healthier individuals participated in the individual market for health insurance . . . ." *Id.* at 959–60. Lastly, he argues that the individual mandate is reasonably considered an integral part of the broader regulatory scheme, as "a necessary and proper means of ensuring that insurance markets did not collapse in response to the imposition of new, and clearly constitutional, regulatory measures." *Id.*

215. In *United States v. Lopez*, 514 U.S. 549, 552 (1995), the Supreme Court struck down a federal statute as exceeding the scope of Congress's enumerated powers for the first time since 1936. *Id.* at 952 n.79.

216. *See* United States v. Morrison, 529 U.S. 598 (2000). *See generally* NFIB v. Sebelius, 132 S. Ct. 2566 (2012).

217. *See supra* Section I.C.

218. The most notable cases reviving the Tenth Amendment as a limit on Congressional power are *New York v. United States*, 505 U.S. 144 (1992) and *Printz v. United States*, 521 U.S. 898, 933 (1997). However, one expert argues that "Tenth Amendment jurisprudence is in a confused state in general" because the Court vacillates over whether the Tenth Amendment is "but a truism" or a clause with more meaning. Hannah Geller, *Reforming Municipal Bankruptcy: Lessons from Puerto Rico*, 7 NO. 1 U. P.R. BUS. L.J. 152, 182 (2015). *But see* Vik Kanwar, *A Fugitive from the Camp of the Conquerors: the Revival of Equal Sovereignty Doctrine in* Shelby County v. Holder, 17 BERKELEY J. AFR.-AM. L. & POL'Y 272, 296–97 (arguing that the Supreme Court's 2013 decision *Shelby* created the doctrine of equal sovereignty "but its underlying principles are copy-pasted from a discredited strand of Tenth Amendment jurisprudence" resurrected from a past battle long since lost).

219. Chemerinsky, *supra* note 212, at 7–8.

220. It is too early to determine which way the most recent appointee, Justice Neil Gorsuch, will lean on the federalism issue. He is well-known as a conservative tied in with the Federalist Society network, which may or may not influence his decisions. *See* Terry Gross, *How One Man Brought Justices Roberts, Alito and Gorsuch to the Supreme Court*, NPR (Apr. 12, 2017), http://www.npr.org/2017/04/12/523495201/how-one-man-brought-justices-roberts-alito-and-gorsuch-to-the-supreme-court; *see also* Dahlia Lithwick, *Neil Gorsuch Was Hatched in a Federalist Society Lab*, SLATE (Mar. 22, 2017), http://www.slate.com/articles/news_and_politics/jurisprudence/2017/03/neil_gorsuch_was_

V. ALTERNATIVE SOLUTIONS

If Congress seeks to collect revenue from the sale and distribution of marijuana—or any drug for that matter—the best method is via an excise tax,[221] not with the disallowance of deductions. After all, the Code is designed to tax income, not to punish wrongdoing.[222] Taxing marijuana with a "sin" tax—similar to the tax on alcohol, cigarettes, and the like—would be a more effective method to regulate, and raise revenue from, marijuana sale and distribution. Further, an excise tax would deter an appropriate target—users—rather than the legal businesses legally selling marijuana per state law. An excise tax would also lessen the incentive for these cash-only businesses to avoid paying taxes, thereby encouraging greater compliance with the Code's provisions.[223] An excise tax would likely survive the penalty test because the burden imposed on users pales in comparison to the burden imposed on businesses—a burden that may reach as high as 1,007% of net revenue—and the tax would be collected solely by the IRS. These two key characteristics, present in an excise tax but absent in § 280E, would legitimately allow Congress to regulate marijuana usage under its power to tax.

A second alternative is to rewrite § 280E as a criminal penalty. Though the former Administration would likely not have enforced a criminal fine against state-authorized businesses, given its non-enforcement policy, the DOJ under the Trump Administration may enforce a criminal penalty like this.[224] The key aspect is that the DOJ would be the body deciding whether to enforce criminal penalties—not Congress and the IRS.

CONCLUSION

NFIB has revived a dormant limit on Congress's power to tax. Congress may not penalize criminal conduct through the Code via § 280E without exceeding the power constitutionally granted to it by the Tax and Spend Clause. Section 280E would likely not survive an application of recent jurisprudence because § 280E imposes an "exceedingly heavy burden" on those who have committed a federal crime by selling, distributing, or cultivating marijuana; because a scienter

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hatched_in_a_federalist_society_lab.html. *But cf.* Kevin Russell, *Judge Gorsuch on Separation of Powers and Federalism*, SCOTUSBLOG (Mar. 15, 2017), http://www.scotusblog.com/2017/03/judge-gorsuch-separation-powers-federalism/ (predicting that Justice Gorsuch will not push a federalist agenda).

221. Excise taxes are taxes paid on the purchase of a good, such as gasoline. Excise taxes are often included in the price of the product. *Excise Tax*, IRS, https://www.irs.gov/businesses/small-businesses-self-employed/excise-tax (last visited Apr. 17, 2017).

222. *See* United States v. Constantine, 296 U.S. 287, 295–96 (1935); *see also* Borek, *supra* note 1, at 46.

223. *See* Chemerinsky et al., *supra* note 7, at 91–92 ("[M]arijuana businesses complying with state laws are forced to operate solely in cash . . . . [and] are much more difficult to regulate and tax if they are operating on a tax basis.").

224. *See* Steve Birr, *States with Legal Marijuana Gear Up for a Fight with the Sessions DOJ*, DAILYCALLER (Apr. 15, 2017), http://dailycaller.com/2017/04/15/states-with-legal-marijuana-gear-up-for-a-fight-with-the-sessions-doj/.

argument could be implied by this provision; and because this provision is not exclusively enforced by the IRS. Because this burden is imposed via the Code, and not only operates as—but was clearly intended to be—a penalty, § 280E lies outside of Congress's power to enact. As such, Congress should either rewrite § 280E as a criminal penalty, do away with it entirely, or impose an excise tax if Congress wishes to raise revenue.