

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
**THE SUPREME COURT**  
**OF THE**  
**UNITED STATES**

CAPTION: DEPARTMENT OF REVENUE OF MONTANA, Petitioner  
v. KURTH RANCH, ET AL.

CASE NO: No. 93-144

PLACE: Washington, D.C.

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PAUL VAN TRICHT, ESQ.	
On behalf of the Petitioner	3
JAMES A. FELDMAN, ESQ.	
As amicus curiae, supporting the Petitioner	20
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On behalf of the Respondents	30

1 P R O C E E D I N G S

2 (11:10 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 next 93-140 -- spectators are admonished the Court remains  
5 in session. Save your talking until you get outside the  
6 courtroom. We'll hear argument next in No. 93-144,  
7 Department of Revenue of Montana v. Kurth Ranch.

8 You're admonished not to talk while the Court is  
9 in session.

10 Mr. Van Tricht.

11 ORAL ARGUMENT OF PAUL VAN TRICHT

12 ON BEHALF OF THE PETITIONER

13 MR. VAN TRICHT: Mr. Chief Justice, and if it  
14 please the Court:

15 QUESTION: Counsel, before you get underway,  
16 straighten me out on a fact or two. Does Montana have an  
17 income tax?

18 MR. VAN TRICHT: Yes, Your Honor, it does.

19 QUESTION: Was this income subjected to that tax  
20 as well as to the marijuana tax?

21 MR. VAN TRICHT: I do not know, Your Honor. I  
22 was not privy to the income tax collection of Montana.

23 QUESTION: So you don't know whether it was  
24 doubly taxed.

25 MR. VAN TRICHT: We do not know, no. I do not



1 know.

2 QUESTION: Is that hard to find out?

3 MR. VAN TRICHT: In fact, it is, because under  
4 Montana law I can only have access to Montana income tax  
5 records if I am prosecuting an income tax case. We have a  
6 very strict confidentiality provision which basically says  
7 that I cannot go down, and out of curiosity, or even in  
8 connect -- conjunction with another case, look at the  
9 income tax returns. It's similar to the Federal, although  
10 we have a fire law to protect the confidentiality of the  
11 income tax returns.

12 QUESTION: Well, I'll ask opposing counsel then.

13 QUESTION: Could I ask you a slightly different  
14 question, following up on Justice Blackmun? Would --  
15 under the Montana income tax law, would it be appropriate  
16 for this taxpayer to pay an -- file an income tax return  
17 and pay the tax, whether he did it or not? Is he subject  
18 to the law?

19 MR. VAN TRICHT: Under the Montana income tax  
20 law the Kurths, the family or the individual members of  
21 the family, would be subject to income tax on the income  
22 earned from growing marijuana.

23 QUESTION: Even if it was illegal income, it  
24 would still --

25 MR. VAN TRICHT: Even if it was illegal income.

1 It's identical to the Federal law.

2 QUESTION: Before you say good morning and begin  
3 your argument, I'll have one more question.

4 (Laughter.)

5 QUESTION: Would there be a violation, a  
6 criminal violation for failure to pay the tax that's  
7 involved here?

8 MR. VAN TRICHT: This tax?

9 QUESTION: Yes. Is there a separate crime for  
10 the failure to pay this tax?

11 MR. VAN TRICHT: There is a criminal provision  
12 in the code. There is referenced in the code a criminal  
13 provision, yes, Your Honor.

14 QUESTION: So there could have been a criminal  
15 prosecution here for failure to pay the tax?

16 MR. VAN TRICHT: Under my understanding of the  
17 Montana interpretation of double jeopardy, I don't  
18 think -- under the State rule, I don't think that would be  
19 possible.

20 QUESTION: Thank you.

21 QUESTION: Excuse me, would not be possible?

22 MR. VAN TRICHT: As I understand Montana's  
23 Supreme Court's interpretation of the -- of our double --  
24 constitutional double jeopardy provisions and the Montana  
25 constitution, I don't think it would be possible. But I

1 am not sure, Your Honor.

2 QUESTION: So there's no sanction for failing to  
3 pay this tax. It's sort of a -- sort of a voluntary good  
4 faith tax.

5 MR. VAN TRICHT: Well, Your Honor, this brings  
6 up --

7 QUESTION: From people who have been growing  
8 marijuana, you sort of trust them to come up with it.

9 MR. VAN TRICHT: You -- well, Your Honor, this  
10 brings up one point. Under this Court's prior decisions  
11 in the Leary case and Marchetti, it is -- we cannot really  
12 compel the filing of a tax return without running --  
13 potentially running a file of self-incrimination.

14 QUESTION: But you can put them in jail if they  
15 don't, I mean.

16 MR. VAN TRICHT: Oh, we can only actually  
17 enforce it if -- we can only actually bring an enforcement  
18 action if there's not a payment of the tax assessment.

19 Your Honor, Montana has a tax of \$100 an ounce  
20 on marijuana. The tax assessment before this Court is  
21 \$181,000 because the Kurth family had possessed 100 --  
22 1,800 ounces of marijuana. The issue before the Court is  
23 rather quite simple; is the tax a tax or a penalty and is  
24 this -- and does this particular tax assessment violate  
25 the Kurth's rights under the double jeopardy provision of

1 the Fifth Amendment?

2 The lower Federal courts held that the tax was a  
3 penalty and that this assessment did violate the double  
4 jeopardy provisions of the Fifth Amendment. This decision  
5 stands in contrast and in conflict to a prior Montana  
6 Supreme Court decision that held that this tax was not a  
7 penalty and therefore could not violate the double  
8 jeopardy provisions.

9 Montana -- the lower Federal courts based their  
10 decision on this Court's decision in United States v.  
11 Halper. Montana's basic position is that the Halper  
12 decision does not apply because this tax is a true tax and  
13 not a penalty, and we believe it's a true tax based upon  
14 two factors: one, the legislature intended to create a  
15 tax and, two, this Court's past decisions on similar tax  
16 upheld Federal taxes of a similar nature.

17 Now, because --

18 QUESTION: Mr. Van Tricht, just as a matter of  
19 Montana procedure, why wasn't this tax made part of the  
20 plea and sentencing proceeding, the criminal proceedings  
21 against the Kurth family?

22 MR. VAN TRICHT: By the time -- by the time --  
23 the assessment procedures had not been completed by the  
24 time there was the criminal sentencing proceedings. That  
25 there was a contest. The Kurths -- there was a initial



1 tax assessment, the Kurths contested that assessment, and  
2 administrative proceedings began before the Department of  
3 Revenue which would have resulted in a final decision.  
4 That -- those -- that process was never completed.

5 The Kurths filed bankruptcy and the Montana  
6 Department of Revenue filed a proof of claim and a motion  
7 for relief from the automatic stay. That was denied and  
8 then we went into the adversary proceedings. So by the  
9 time -- by the time the bankruptcy court issued its  
10 decision upon the last -- on the assessment itself,  
11 Richard Kurth was already out of jail. So there was no  
12 way to merge the two, if it were desired.

13 QUESTION: It sounds, from what you describe,  
14 that it is -- it would not be the common pattern to have  
15 the two merged.

16 MR. VAN TRICHT: In my experience they have  
17 never been merged.

18 QUESTION: If they were merged you wouldn't have  
19 a problem, I assume.

20 MR. VAN TRICHT: Well, actually merger would  
21 create a great deal of problems because we're talking  
22 about an apples and oranges proceeding. The criminal  
23 proceedings have a much different procedural process --

24 QUESTION: But you wouldn't have this problem.

25 MR. VAN TRICHT: Yes, we wouldn't have this

1 problem, but we would have a great deal more problems  
2 in --

3 QUESTION: Well, this was settled by plea,  
4 wasn't it? There was no trial.

5 MR. VAN TRICHT: Yes, Your Honor, it was.

6 QUESTION: Criminal. So you could have -- if  
7 you had the two together, you could have negotiated both  
8 at the same time and had them -- you wouldn't -- I don't  
9 understand what the impediments would be if you didn't --  
10 if you were dealing by a plea rather than trial.

11 MR. VAN TRICHT: Well, the impediment in this  
12 case was the fact that we hadn't completed our assessment  
13 procedure. We didn't -- we hadn't -- the Department  
14 itself had an initial assessment and then the proceedings  
15 would have gone on through a -- through an adversary  
16 proceeding before a hearing officer of the Department,  
17 which would have resulted in a final assessment. So we  
18 really didn't -- the Department really hadn't nailed down  
19 the final assessment on this particular tax at that time.

20 QUESTION: Mr. Van Tricht, if the legislature in  
21 Montana had passed its law saying that anyone found in  
22 possession of marijuana, that there will be a civil  
23 sanction imposed of \$100 an ounce, do you think then we  
24 would be required to look at the Halper decision to  
25 determine its validity?

1 MR. VAN TRICHT: Yes, Your Honor, because --

2 QUESTION: Do you think it makes any difference  
3 that precisely the same thing is done, only it's called a  
4 tax?

5 MR. VAN TRICHT: Yes, I do, Your Honor, because  
6 there's a different --

7 QUESTION: Why?

8 MR. VAN TRICHT: There's a different intent by  
9 the legislature. In one action they're intending to  
10 create a tax, in another act they're intending to create a  
11 penalty or sanction.

12 QUESTION: Well, I don't see how the change of a  
13 word could alter the analysis?

14 MR. VAN TRICHT: I believe --

15 QUESTION: Calling it a sanction or a tax.

16 MR. VAN TRICHT: I believe it does in this case,  
17 Your Honor, because of this Court's past decisions which  
18 upheld similar or nearly identical Federal taxes.

19 QUESTION: Do you think we could ever view a tax  
20 as a sanction?

21 MR. VAN TRICHT: Yes, Your Honor.

22 QUESTION: So it isn't just the use of the word.

23 MR. VAN TRICHT: No, Your Honor. It's the  
24 structure, the entire statute itself that the Court has to  
25 analyze in the determination of whether it is a tax or a

1 sanction. And in this -- and the Court also has to look  
2 at past -- its past decisions on similar Federal taxes in  
3 that analysis.

4 QUESTION: Why doesn't the reference to  
5 structure go against you? Isn't it a very odd structure  
6 for a supposed tax to have two different valuation  
7 provisions and say we'll pick the one that brings in the  
8 most? That's not the usual structure for a tax.

9 MR. VAN TRICHT: Your Honor, it's -- it's not  
10 the normal structure, but there's a least one Federal tax  
11 that has the same structure, and that's the tax on small  
12 cigars which is 12.5 percent or \$30 per thousand cigars,  
13 whichever is greater.

14 QUESTION: Is that so.

15 MR. VAN TRICHT: So there -- it is a -- not a  
16 normal, but it is not an unusual. It has been done in the  
17 past.

18 QUESTION: Mr. Van Tricht, is it one or the  
19 other? It can't be a little bit of both. I mean you say  
20 it -- we have to decide whether it's a tax or a  
21 punishment. What if it's a tax and also a punishment, who  
22 wins?

23 MR. VAN TRICHT: Well, Your Honor --

24 QUESTION: Does its being a punishment exclude  
25 its being a tax or its being a tax exclude its being a



1 punishment?

2 MR. VAN TRICHT: For the purposes of analyzing  
3 under Halper, it makes a difference, Your Honor, because  
4 we're dealing about the Halper decision and Halper was  
5 talking about penalties and not taxes.

6 QUESTION: But Halper also said it was a very  
7 narrowly confined decision.

8 MR. VAN TRICHT: Yes, Your Honor.

9 QUESTION: So, why -- why don't you take the  
10 position that even though there may be some sanction or  
11 penal effect, if there's -- if it's also arguably a tax,  
12 you win?

13 MR. VAN TRICHT: Well, Your Honor, this Court  
14 has often recognized that a tax has both regulatory  
15 and -- effects and not -- effects other than its -- just  
16 its purely revenue-raising effect. And so there are  
17 certain aspects in a tax which to some people may seem  
18 nontax. Like, for example, a high tax on alcohol may have  
19 the purpose of discouraging alcoholic consumption. But I  
20 don't think that that -- that that is a collateral issue  
21 which does not change the basic intent of Congress or the  
22 legislature to enact the revenue-raising measure.

23 QUESTION: May I ask another question about the  
24 way this tax works? What is the taxable event? Is there  
25 an assessment date, a particular date when they -- when

1 you do it, or is it always triggered to the criminal  
2 proceeding?

3 MR. VAN TRICHT: Your Honor, the taxable -- the  
4 taxable event is the coming into possession of the  
5 marijuana.

6 QUESTION: The coming into possession of  
7 marijuana?

8 MR. VAN TRICHT: Yes.

9 QUESTION: And is he allowed to retain  
10 possession of the marijuana or does the State take  
11 possession of it when it finds it?

12 MR. VAN TRICHT: Well, if the State became aware  
13 of the possession, then it's contraband and it would be  
14 seized, unless there was some --

15 QUESTION: But you couldn't -- obviously  
16 couldn't tax it without being aware of it, so I suppose  
17 that as soon as it has the right to tax it also has the  
18 right to seize it. And then is it on -- is it being taxed  
19 on his prior possession, or is it taxing on something that  
20 he no longer owns? It's a little bit unusual to be taxing  
21 some -- an ad valorem property tax on something that the  
22 person is not permitted to own.

23 MR. VAN TRICHT: Well, Your Honor, Montana fully  
24 recognizes this is an illegal activity that it's taxing,  
25 and the statute's structure fully recognizes that and the

1 rules recognize that.

2 QUESTION: So it's a tax on the prior -- the  
3 fact that he previously owned the marijuana. Because at  
4 the time you levy it, you already have the marijuana, I  
5 gather.

6 MR. VAN TRICHT: Yes, yes, yes.

7 QUESTION: So you're -- he's being taxed for --  
8 because of the fact that he previously had in his  
9 possession marijuana?

10 MR. VAN TRICHT: Yes, Your Honor.

11 QUESTION: And, I see.

12 QUESTION: How do you apply a -- how, in theory  
13 at least, should you apply a possession tax on something  
14 which is growing when the tax is not keyed to a given day?  
15 I mean every time his plant comes up with a few new shoots  
16 should -- in theory, should he file a tax return?

17 MR. VAN TRICHT: Well, Your Honor, if he had a  
18 plant and it grew to a certain, you know -- a pound, he  
19 would owe a tax. If it added another pound, he would owe  
20 a tax on that additional pound.

21 QUESTION: So the taxable event is the accretion  
22 of a pound of weight to his agricultural product.

23 MR. VAN TRICHT: We tax the possession once and  
24 it's -- and each time -- each new possession of a  
25 different amount of marijuana --

1 QUESTION: Each new pound.

2 MR. VAN TRICHT: -- Or new marijuana is the  
3 taxable event. There's no -- once the tax is due on the  
4 old marijuana, there's no additional tax on that  
5 marijuana.

6 QUESTION: So in theory literally every time a  
7 new pound is added by nature's processes, he would be  
8 taxable on that.

9 MR. VAN TRICHT: Yes, sir.

10 QUESTION: Could the State generate additional  
11 revenue by allowing it to -- allowing him to retain  
12 possession for a while under supervision --

13 (Laughter.)

14 QUESTION: -- So that he wouldn't dispose of it,  
15 and then increase the taxable corpus.

16 MR. VAN TRICHT: In that event the State would  
17 get more -- additional revenue, Your Honor.

18 QUESTION: Strange tax.

19 QUESTION: There are some really nice questions  
20 here. I mean what if the plant gets sick and it dies down  
21 a little bit.

22 (Laughter.)

23 QUESTION: And then it grows back up. Is that  
24 the original pound or is that a new pound? I don't know.

25 (Laughter.)



1 MR. VAN TRICHT: Well, Your Honor, this  
2 brings --

3 QUESTION: I'm glad I don't have to administer  
4 this tax.

5 MR. VAN TRICHT: Your Honor, this brings up one  
6 point. We tax the dried weight of the marijuana at this  
7 point. We have -- we had an extended bit of litigation  
8 upon whether we were taxing the wet or the dry weight of  
9 marijuana, and we tax the dry weight.

10 QUESTION: But this -- there's one portion of  
11 this, what you call shake, where it's at 800 percent, the  
12 tax, is it not? There was a disparity between the rate  
13 applicable to the marijuana and the rate applicable to the  
14 shake, is that not so?

15 MR. VAN TRICHT: Your Honor, the Kurths were  
16 producing two -- they had 1,800 ounces of marijuana. Of  
17 that 2,000 -- 200 ounces were what's called bud marijuana  
18 which was sold at wholesale at \$1,800 a pound. The  
19 remainder -- and it was sold in smaller retail  
20 quantities -- that's -- retail quantity is a quarter  
21 ounce -- it would go anywhere from \$200 to \$400 an ounce  
22 in small quantities.

23 The remainder, the 1,600 ounce, the remaining  
24 1,600 ounces was shake, and that's the stems and the  
25 leaves of the marijuana plant. At wholesale that shake

1 sold for \$200 a pound, at retail it sold for \$250 to \$500  
2 a pound, and if it was -- if it were sold in smaller  
3 quantities it would -- like a quarter ounce, in quarter  
4 ounce quantities, it would sell anywhere from \$60 to \$120  
5 an ounce.

6 QUESTION: Well what was the tax on that \$200 to  
7 \$500 a pound?

8 MR. VAN TRICHT: The tax on the shake was \$100  
9 an ounce. The tax on the stems and leaves was \$100 an  
10 ounce.

11 QUESTION: And the value of that was how much an  
12 ounce?

13 MR. VAN TRICHT: The value of that -- the  
14 value -- the value of marijuana is dependant upon what is  
15 the --

16 QUESTION: But I thought there was a separate  
17 value -- there were two separate commodities. The shake  
18 sold for some -- whatever oil it eventually could make and  
19 the other sold as marijuana. Is that wrong?

20 MR. VAN TRICHT: Well, both of them -- both the  
21 shake and the marijuana bud are marijuana. Both the shake  
22 and the marijuana bud were being sold in Chouteau County.

23 QUESTION: But for different purposes, and one  
24 was more expensive than the other.

25 MR. VAN TRICHT: Well, shake of the quality that

1 the -- that we have here were being sold for the purposes  
2 of making marijuana cigarettes and smoking, in addition to  
3 making marijuana oil. The Kurths didn't sell shake, but  
4 shake of that -- of a similar quantity that the Kurths  
5 possessed was being sold in Montana at that time, in  
6 quarter ounces and ounces and pound portions.

7 QUESTION: I'm just trying to get an  
8 understanding of what was the tax on that commodity in  
9 relation to the value of that commodity, the market value  
10 of it.

11 MR. VAN TRICHT: The tax on that commodity,  
12 taking the lowest price, would be eight times the value.  
13 If you -- if you --

14 QUESTION: The tax was eight times the value.

15 MR. VAN TRICHT: Yes. If you -- if you  
16 determine the value at another --

17 QUESTION: And that's a tax that's eight times  
18 the value. I heard that the power to tax is the power to  
19 destroy; it seems that would clearly apply to something  
20 eight times the value.

21 MR. VAN TRICHT: But remember, Your Honor, we're  
22 taxing the entire -- all marijuana. As in any  
23 circumstances, you're going to have -- if you tax any type  
24 of product, you're going to have low-value product and  
25 high-value product and all the way down the stream.

1 The --

2 QUESTION: But I thought there's only two that  
3 were at issue here, the marijuana that was -- and the  
4 shake.

5 MR. VAN TRICHT: Yes, that's the only issue.

6 QUESTION: And the different rates applicable to  
7 each. What was the rate applicable to the -- to the  
8 marijuana?

9 MR. VAN TRICHT: Well --

10 QUESTION: What was the tax?

11 MR. VAN TRICHT: The tax is \$100 an ounce  
12 applicable to marijuana, whether it's marijuana bud or  
13 shake.

14 QUESTION: Yes, but the bud -- the marijuana bud  
15 is a much more expensive commodity, isn't it?

16 MR. VAN TRICHT: Considerably more expensive,  
17 Your Honor.

18 QUESTION: And what is the ratio of tax to value  
19 in the case of marijuana bud?

20 MR. VAN TRICHT: Tax to marijuana bud, the  
21 rate -- the -- in all instances the tax is less than the  
22 value. It starts -- the value starts at a minimum of  
23 about \$1,800 a pound and then goes up, and it could go up  
24 considerably. As I said, the record shows values in -- up  
25 to \$400 a ounce.



1 QUESTION: I assume that you don't collect this  
2 tax on every piece of -- on the usual percent. I assume  
3 there's more evasion of this tax than there is of most  
4 taxes in your State, isn't there?

5 MR. VAN TRICHT: Yes, Your Honor.

6 QUESTION: So to get the same net tax on all the  
7 marijuana, you -- eight times the ones you catch probably  
8 isn't -- isn't so outrageous, is it?

9 MR. VAN TRICHT: Your Honor, in this particular  
10 instance the Kurths were engaged in growing marijuana  
11 since January of 1986.

12 QUESTION: Right.

13 MR. VAN TRICHT: The only tax they are now being  
14 assessed with is the tax -- is the amount they had in  
15 October of 1987.

16 QUESTION: That you happened to catch him with.  
17 So he's probably paying a very modest, reasonable tax upon  
18 his total marijuana output.

19 MR. VAN TRICHT: Yes, Your Honor.

20 I thank the Court.

21 QUESTION: Thank you, Mr. Van Tricht.

22 Mr. Feldman, we'll hear from you.

23 ORAL ARGUMENT OF JAMES A. FELDMAN

24 ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE

25 SUPPORTING THE PETITIONER

1 MR. FELDMAN: Mr. Chief Justice, and may it  
2 please the Court:

3 In Halper against the United States this Court  
4 extended the Double Jeopardy Clause for the first time to  
5 civil measures, but the Court made clear that it is not  
6 the case that any civil obligation, including fines, money  
7 damages, attorneys fees, court costs, all of which can  
8 carry the sting of punishment, as the Court recognized,  
9 from the standpoint of the defendant -- the Court made  
10 clear that it is not the case that any of those things are  
11 punishments for purposes of the Double Jeopardy Clause.

12 Rather, it's only when a civil measure cannot be  
13 explained in terms of a nonpenal purpose, it is only in  
14 that case that it should be seen or can be seen as  
15 punishment for purposes of the Double Jeopardy Clause.

16 QUESTION: So you think it can be mixed. Can it  
17 be a tax and a punishment both? And in that case, what,  
18 the tax prevails?

19 MR. FELDMAN: Yes, I do. I think that the  
20 question that the Court asked in Halper is quite clear.  
21 There was a civil penalty that was imposed in that case.  
22 The Court said -- it was labeled a penalty. I think there  
23 was very little question that one of the things the  
24 legislature had in mind was penalizing the people who had  
25 submitted the false claims. But the Court said insofar as

1 it can be explained in terms of a compensatory purpose,  
2 we're -- that doesn't raise a double jeopardy problem.  
3 And, in fact, I believe the case was remanded to the  
4 district court for determination of whether it could be  
5 explained in terms of a compensatory purpose.

6 QUESTION: Well, but that -- but that means that  
7 if there is any -- to the -- contrariwise, to the extent  
8 that there is any penal purpose, it is invalid, and that  
9 means it must be totally nonpenal.

10 MR. FELDMAN: I don't believe -- I don't believe  
11 if -- that -- what the Court said several times in the  
12 course of the Halper opinion was if it bore a rational  
13 relationship to a nonpenal purpose, then it is not a  
14 penalty. And that relates to -- or it's not a penalty for  
15 double jeopardy purposes. That relates to, I think, the  
16 Chief Justice's point that he was making in his question  
17 before, that --

18 QUESTION: So that means that in this case if  
19 they labeled it a penalty your case would be just as  
20 strong. It wouldn't really make any difference whether  
21 they call it a tax or a penalty.

22 MR. FELDMAN: I think the difference -- I think  
23 that there wouldn't be -- well, I think this would be the  
24 difference. When you get to the question of what is the  
25 nonpenal purpose that's served, they are different,

1 generally speaking, with respect to civil penalties, which  
2 is what was at issue in Halper, and with respect to taxes.

3 The purpose of a civil penalty -- one of the  
4 purposes of a civil penalty is compensating the Government  
5 for costs that it imposes when the activity is carried  
6 out. That's not generally the purpose of a tax. In fact,  
7 if taxes were measured by whether they compensate the  
8 Government for particular -- for particular costs that the  
9 taxpayer imposes on the Government or particular benefits  
10 that the taxpayer receives from the Government -- if taxes  
11 were imposed on that basis, they all would be seen to be  
12 penalties because almost none of them can be justified  
13 like that.

14 The question with a tax is does it have a  
15 revenue-raising purpose. The State of Montana looked  
16 around and as it said in its -- in the preamble to the  
17 statute here and in entrusting its collection to the  
18 department of taxation and numerous other incidents of  
19 this tax, they saw an economic activity being carried on  
20 within the State and they thought that that activity,  
21 although it was illegal, that they should be permitted to  
22 tax that in the same way as the State of Montana and other  
23 Governments commonly tax other similar items. The example  
24 we give in our brief is cigarettes.

25 QUESTION: Well, do you think it would be

1 constitutional to pass a statute that says that everybody  
2 that's convicted of a felony shall, in addition to  
3 whatever punishment the judge imposes, 1 year after his  
4 conviction pay a tax of \$1,000?

5 MR. FELDMAN: No, I don't think --

6 QUESTION: So what's the difference?

7 MR. FELDMAN: Well, I think it would -- it would  
8 be constitutional for -- that would be -- I think that in  
9 that case it would be likely that you would see that as a  
10 criminal penalty. I don't think --

11 QUESTION: Because the class of persons who are  
12 subject to the tax is limited to those who have already  
13 been convicted of a crime. But isn't that precisely the  
14 kind of class we have here?

15 MR. FELDMAN: I think that the lesson of Halper  
16 was the question that's asked -- and the reason why Halper  
17 emphasized that it was a case -- it was an unusual case  
18 and it was a rare case, was the analysis turns on the  
19 purpose that's underlying the statute. The purpose here  
20 was raising revenue.

21 QUESTION: Well, what I'm really asking is do  
22 you think the State can constitutionally tax a class of  
23 taxpayers which is defined by the fact that they have all  
24 been convicted of a particular crime, without running into  
25 some kind of double jeopardy problem?



1 MR. FELDMAN: I think that you have -- I think  
2 the question is looking at the purpose in each case. I  
3 think where the tax -- I'll answer the question --

4 QUESTION: Well, they want to -- they do it  
5 because they want to raise money and they think this is an  
6 easily defined class, we get \$1,000 a head out of every  
7 burglar, we get that money -- and there are a lot of  
8 burglars around, so we'll raise a lot of money.

9 MR. FELDMAN: I think where it's tied to a  
10 certain --

11 QUESTION: It's a sin tax. They're all bad  
12 actors. Nobody's going to complain about that kind of a  
13 tax.

14 QUESTION: We want to discourage burglary.

15 MR. FELDMAN: I think where it's tied to a  
16 criminal conviction, that it would be so close - and this  
17 would -- is really related to maybe more the Austin case  
18 than the Halper case. It's so close to what historically  
19 has been seen as a criminal punishment that I think it  
20 would be very difficult for a State --

21 QUESTION: Well, do any people pay this  
22 marijuana tax except people who are convicted of  
23 possession of marijuana?

24 MR. FELDMAN: No, that's not true. The State --  
25 the State -- in the first place, the State supreme court

1 has specifically said that a conviction is not required  
2 for payment of this tax.

3 QUESTION: But as a practical matter, do they  
4 find people who are growing marijuana and they don't  
5 convict them of the crime?

6 MR. FELDMAN: I don't know. There may be -- it  
7 may be the case that there are people they find growing  
8 marijuana that for one reason or another they don't think  
9 ought to be prosecuted, or they don't have resources for  
10 prosecuting. I don't really know the decisions the State  
11 of Montana makes. As a matter of fact, it's had very  
12 little opportunity to put this tax into effect because I  
13 understand that once the bankruptcy court came out with  
14 its decision in this case, it stopped trying to enforce  
15 it.

16 But in any event, I think that the crucial point  
17 is that the State -- the State entrusted its collection to  
18 the Department of Revenue, earmarked its proceeds for the  
19 kinds of purposes that tax revenues are ordinarily used in  
20 Montana --

21 QUESTION: Of course, you could always do that  
22 with my burglary tax too. You can do all those things.

23 MR. FELDMAN: Right. And, as I said, I think in  
24 that case where it would be specifically tied to a  
25 criminal conviction, I think a State would have a very

1 hard time getting out from under the historical  
2 understanding of that kind of thing as punishment. But  
3 this Court has -- consistently recognizes that taxes are  
4 not ordinarily seen as punishment, there's no general  
5 historical record that they are, and that taxes on illegal  
6 activities are permissible.

7 Just as someone selling -- as we say in our  
8 brief, just as someone selling cigarettes in Montana is  
9 subject to paying a State tax, so in the same way somebody  
10 selling an illegal substance, the State of Montana looked  
11 around and say that there were people who were gaining  
12 substantial economic wealth within the State, that it was  
13 an industry that was carried on in the State, and that  
14 they too should shoulder the burdens of paying State tax.

15 QUESTION: You said in your brief, to describe  
16 what would be permissible, that this has to be within the  
17 general range of sin -- similar taxes, has to be something  
18 that is an ordinary kind of tax, and you give the sin tax  
19 as an example. How does one know whether the rates that  
20 are here are within the general range of sin taxes?

21 MR. FELDMAN: Actually, there are really two  
22 inquiries we suggested in our brief. The first is where  
23 it's a tax of general applicability in that it falls on  
24 both legal and illegal activities, we don't think there  
25 should have to be any further inquiry.

1 QUESTION: Yeah, I know, but that's not at issue  
2 here.

3 MR. FELDMAN: That doesn't apply to this case.  
4 The second principle is really kind of a corollary to  
5 that, it's where it's a tax that's similar in kind to the  
6 kinds of taxes that are ordinarily imposed on legal items,  
7 it also -- that confirms the legislative intent that this  
8 is a revenue-raising measure.

9 In this case, under our analysis, the primary  
10 commercial product or the primary product that they're  
11 talking about is the buds. That's what these people were  
12 really selling. The tax was at an 80 percent rate.  
13 That's actually not at all far off from the kinds of taxes  
14 that are imposed in some jurisdictions and the Federal  
15 Government may be considering imposing on cigarettes.

16 And especially when you keep in mind the Court's  
17 statement in Halper that all you really need is a rational  
18 relation to a nonpenal purpose, it doesn't have to  
19 exactly -- you don't require a court to kind of look at it  
20 penny by penny or --

21 QUESTION: In terms of the total amount that  
22 we're dealing with here, the 80 percent rate was on how  
23 much and the higher rate was on high much?

24 MR. FELDMAN: Well, I believe in this particular  
25 case the 80 percent rate was on 200 or 250 ounces.



1 as I said, QUESTION: And the higher rate was on -- the the  
2 eight times was on much more, wasn't it? a commercial

3 product MR. FELDMAN: That's correct. But I view that,  
4 or we view that as an artifact of the fact that this other  
5 product was simply an extremely low grade, hardly viable  
6 commercial product, and got swept within the minimum  
7 provision of the tax. The crucial -- and the record I  
8 think is clear on this, that what they were selling was  
9 marijuana buds, and it was that commercial activity that  
10 the State of Montana chose to tax. Now, there are  
11 mechanisms that the State adopted --

12 QUESTION: Well, wouldn't one say that to the  
13 extent that the product was not the buds but the shake,  
14 that it wasn't -- that that rate was not within the  
15 general range of such taxes. THE RESPONDENTS

16 MR. FELDMAN: I think if you saw the main focus  
17 of the tax as that, I think that would be a high rate. I  
18 haven't looked around to see whether there are other taxes  
19 that one might compare that with, but I think that's --  
20 that is much higher. as -- income taxed. The income

21 received QUESTION: But you did say in your test in your  
22 brief that you would look to see whether it was in --  
23 within the general range, so -- and here we go from a  
24 range of 80 percent to 800 percent. operates in this -- is

25 the State MR. FELDMAN: Right. If that's the problem --



1 as I said, I would look at that as kind of artifact of the  
2 fact that the commercial -- that there's a commercial  
3 product that they're taxing, and this other extremely low  
4 quality, barely -- low value product gets swept within it.  
5 If that's the problem with this tax, if the Court looked  
6 at it differently, that might suggest that the State  
7 couldn't tax the low quality marijuana product quite the  
8 same way. But I think the crucial point in the case is  
9 that the buds were the commercial product that the State  
10 was trying to tax.

11 Thank you.

12 QUESTION: Thank you, Mr. Feldman.

13 Mr. Goetz, we'll hear from you.

14 ORAL ARGUMENT OF JAMES H. GOETZ

15 ON BEHALF OF THE RESPONDENTS

16 MR. GOETZ: Mr. Chief Justice and may it please  
17 the Court:

18 First, I would like to answer Justice Blackmun's  
19 question. The answer is that the income of Richard and  
20 Judith Kurth was taxed as -- income taxed. The income  
21 received by the Halleys and the younger Kurths from the  
22 operation, that is their income as employees, was taxed  
23 and paid by them.

24 Moving to the tax as it operates in this -- in  
25 the State of Montana -- well, before I do that, one

1 question posed by Justice Scalia, I think, merits an  
2 answer from our perspective, and that is can a tax be  
3 called a tax and serve a dual function? And if so, what  
4 is the consequence?

5 Well, I think both Halper and Austin were quite  
6 clear on that point. My position is you can call  
7 something it a tax, it can raise revenue and therefore it  
8 can be a tax, and it can also punish, and it can be  
9 punishment for the purpose of the Double Jeopardy Clause.

10 And Austin said precisely on that dual-purpose  
11 point, fundamentally, even assuming that the statutes in  
12 question there served some remedial purpose, the  
13 Government's argument must fail. A civil sanction -- and  
14 they're quoting now from Halper -- a civil sanction that  
15 cannot be fairly said solely to serve a remedial purpose,  
16 but rather can only be explained as also serving either  
17 retribution or deterrent purposes, is punishment.

18 QUESTION: Because if we don't take that  
19 position, then we've put ourselves right back in the old  
20 problem of having to -- having to define the principal  
21 character of the tax again. I mean we've got the -- we  
22 would have the same problem we had with the regulatory  
23 revenue taxes. Different labels, but we'd have the same  
24 problem.

25 MR. GOETZ: Well, exactly. And the issue really

1 here, Halper and Austin set aside, is can you have a tax  
2 which is, under the guise of a tax, at least in part  
3 punishment. Because the Double Jeopardy Clause prohibits  
4 multiple punishment, and so if we return to the  
5 fundamental question then we have to ask whether a tax has  
6 an aspect of punishment, and if it does then double  
7 jeopardy is implicated.

8 Now, turning to the question posed by Justice  
9 Stevens, the answer is that -- and Mr. Van Tricht I think  
10 made this point -- that although this is called a tax on  
11 possession, this is contraband and it would be seized at  
12 the time the Government realizes that the person possesses  
13 or stores.

14 Turning to Justice Ginsburg's question on the  
15 quantities of the shake, what happened here is they  
16 weighed approximately 100 pounds of shake, which is low  
17 grade stems and seeds, bags of marijuana product, 100  
18 pounds or 1,600 ounces. There were a total of 1,811  
19 ounces in this case, so most of the product was the  
20 low-grade shake, approximately 90 percent. And that is  
21 worth -- and the record shows \$200.

22 Now, the argument here is, well, at retail it  
23 might be worth more, and there was evidence in the record  
24 of if you used something called the mari-gin you can  
25 process it to get some of the higher-quality marijuana

1 out. But, of course, that would reduce the weight. And  
2 so the plain and simple fact is that that was worth \$200  
3 and it was taxed at \$1,600 --

4 QUESTION: \$200 a pound --

5 MR. GOETZ: A pound.

6 QUESTION: -- An ounce, what?

7 MR. GOETZ: \$200 a pound and taxed at \$1,600 a  
8 pound, eight times its market value, 90 percent of the  
9 product at issue here.

10 Looking at the other aspects of the tax -- and  
11 it might help, I've --

12 QUESTION: Well, how important is that  
13 percentage, Mr. Goetz? Do we apply the same sort of  
14 analysis if someone comes in and challenges a cigarette  
15 tax, to say that the basic product is only worth 25 cents  
16 and yet the Government has put a tax of \$1.50 on it?

17 MR. GOETZ: Well, the problem with the  
18 cigarette-tax analogy that they try to make is they're  
19 mixing up retail --

20 QUESTION: Well, I'm trying to make it.

21 MR. GOETZ: Okay. You -- in my view you can't  
22 compare retail sales value with the wholesale value of the  
23 product that we have here or which we have in tobacco raw  
24 product.

25 QUESTION: So -- but if the figure got high

1 enough then? If, you know, instead of putting \$1.50 tax  
2 on stuff that's worth 25 cents at retail, they put \$3 on,  
3 then it would bring it into question?

4 MR. GOETZ: It might well. I think it depends  
5 on an analysis at the trial level of elasticity of demand.  
6 In other words, if you have a tax that is so great that  
7 there is essentially no market for the product, then it  
8 seems to me that's an indicator that that's not a true  
9 tax. It may indeed be a penalty. It may not be  
10 dispositive, but it is one of the indicators.

11 QUESTION: So it's enough if the tax has a very  
12 substantial deterrent effect to at least turn that factor  
13 against its validity as a tax?

14 MR. GOETZ: As one of the indicators, yes. And  
15 it depends on the facts, how dispositive that  
16 excessiveness or proportionality might be. Now, when  
17 you --

18 QUESTION: Mr. Goetz, do -- would you have any  
19 problem if this tax had been imposed in the same  
20 proceeding as a criminal trial for the unlawful possession  
21 of marijuana?

22 MR. GOETZ: Halper, I think, states explicitly  
23 that if you impose the tax at the same proceeding, or a  
24 civil sanction in Halper's case, then double jeopardy  
25 isn't implicated. I -- your question is would I have a



1 problem. Then we trigger the Eighth Amendment excessive  
2 fines issue, and it depends on what this Court means by  
3 excessive fines. But as far as double jeopardy, the  
4 answer is no.

5 Now, looking at the mechanics of this tax -- and  
6 I've appended the regulations to my brief at the end after  
7 page 46. And I think the regulations make it quite clear,  
8 the nature of this so-called tax. First, if we look at  
9 regulation 42.34.101 under definitions, the State defines  
10 market value. And market value is the value of the  
11 substance at the time of confiscation or report, and the  
12 use of the word confiscation I think relates to Justice  
13 Stevens' question. The answer is, of course, this is  
14 contraband, and if it's innocently reported, then it will  
15 be confiscated or seized.

16 But more importantly -- and the theme here is  
17 that this truly is not a tax; it's really tied to the  
18 criminal process. And if you look down at the next  
19 regulation, it talks about the tax return. And the last  
20 clause is "this return shall be filed within 72 hours of  
21 their arrest."

22 If you look down at number two, then there is a  
23 tax assessment within 30 days. Within 30 days of what?  
24 Within 30 days of the 72 hours after arrest.

25 If you look down at number three, quote: At the

1 time of arrest, law-enforcement personnel shall complete  
2 the dangerous drug informational reports, information  
3 reports.

4 If you look over on the next page it talks about  
5 "the law-enforcement officer shall certify and submit the  
6 form to the Department within 72 hours of the arrest."

7 If you look down at number five, it talks about  
8 the form and it talks about information on it, arrest and  
9 booking number.

10 And if you look at the next regulation down  
11 under subpart (c) it talks, quote: The associated  
12 criminal nature of assessments under this act is  
13 considered to be cause for emergency issue of a warrant of  
14 restraint.

15 Those are the --

16 QUESTION: So, in fact, no one could be  
17 prosecuted for not paying the tax as long as the return  
18 was filed within 72 hours of arrest for the possession.

19 MR. GOETZ: Exactly. Justice Scalia asked the  
20 question, well, isn't there an inordinate incidence of  
21 evasion of this tax? And I think the answer is quite the  
22 contrary, because how do you evade the tax? When is the  
23 tax even due? The tax is not due until 30 days after the  
24 assessment, or the assessment is due 72 hours after  
25 arrest. I think this tax probably has the lowest evasion

1 rate of any tax in the State of Montana.

2 (Laughter.)

3 QUESTION: It does refer to report, and I take  
4 it the word report, in your view, is the report that's  
5 filed by the law-enforcement officials in lieu of the  
6 defendant having done it?

7 MR. GOETZ: Yes. And that reminds me of one  
8 other point. If you go back to the first page of those  
9 regulations, the second regulation, 42.34.102, it talks  
10 about a return, but then everything else in the regulation  
11 talks about a report. Well, the only evidence we have in  
12 this record, and the only forms I've seen in connection  
13 with the Montana Dangerous Drug tax, are the reports of  
14 the law-enforcement officers.

15 I don't think the State has a form of a return.  
16 Now, they do for income taxes, they do for property taxes,  
17 as you might expect, but there is nothing in this record  
18 that would constitute a return. So, in fact, this tax is  
19 quite clearly implemented through the report of the  
20 law-enforcement officer, triggered upon arrest.

21 Now, other indicators --

22 QUESTION: One can accept all of that and still  
23 believe that the major purpose of this piece of  
24 legislation is to raise money. They don't require people  
25 to file before their arrest because they're worried about

1 the Fifth Amendment problems of that. They have it at  
2 such a high rate because they know that not many of these  
3 marijuana growers are caught, and therefore although they  
4 would like to impose a tax on all the marijuana, it's  
5 practically impossible and therefore they have a very high  
6 tax on the portion that they do catch. All of that is  
7 still consistent with essentially a revenue-raising  
8 purpose, isn't it?

9 MR. GOETZ: Well, I'd like to parse out the  
10 question. First, the words you used are the major portion  
11 of the measure is tax related, and if --

12 QUESTION: Change it. Exclusively. It's  
13 exclusively.

14 MR. GOETZ: Okay, if it's exclusively then we  
15 avoid that dual problem.

16 QUESTION: All right. Let's not get into that  
17 problem.

18 MR. GOETZ: Then going to the record in this  
19 case, in a document of the Department of Revenue I filed  
20 last week and asked judicial -- that judicial notice be  
21 taken of it. If revenue raising is the purpose -- and, by  
22 the way, the Solicitor General argues that the hallmark of  
23 a tax is its ability to raise revenue -- this tax has  
24 raised in 6 years \$30,000, according to that document.  
25 Last year it raised \$0. The year before, -\$10. The year

1 before they had a deficit of \$29,000 and then some  
2 positive sides before. So it -- the actual fact is it's  
3 not very well calculated and hasn't worked very well to  
4 raise revenue.

5 QUESTION: When you said raised, you mean the  
6 gross receipts from it discounted by the cost of enforcing  
7 it, or what?

8 MR. GOETZ: I think those were the gross  
9 receipts period.

10 QUESTION: How could they have minus gross  
11 receipts?

12 MR. GOETZ: Well, I think they had to pay some  
13 back. And I know they collected \$30,000 some in this case  
14 that they probably had to take out of one account and put  
15 in another, but I'm not sure. The document refers to  
16 \$29,000 minus, or a negative factor, so they may have had  
17 another problem.

18 QUESTION: Well, I agree with you. It's a bad  
19 tax if the State is paying out money.

20 (Laughter.)

21 MR. GOETZ: It's my definition of a good tax.

22 QUESTION: They're doing something wrong.

23 MR. GOETZ: In any event, going to another  
24 aspect of your question, that is perhaps the State, if we  
25 really want to speculate, was trying to avoid the Fifth



1 Amendment problem. If you -- if a State really wants to  
2 design a tax to make it more of a true tax, it perhaps can  
3 do so. Without advocating for Minnesota's or Iowa's tax,  
4 I want to talk about several features.

5 QUESTION: I just have to say, I don't see how,  
6 by confining the people who have to pay it, file a return  
7 to those who have been arrested, you've avoided any Fifth  
8 Amendment problem. If anything, you've accentuated the  
9 Fifth Amendment problem by saying only people under  
10 suspicion or for whom there's probable cause they're  
11 criminals, they're the only ones that have to make any  
12 self-incriminating statements. That avoids the Fifth  
13 Amendment problem?

14 MR. GOETZ: Well, I don't want to advocate for  
15 Justice Scalia, but I think maybe his point was that once  
16 the law-enforcement officers filed the report and the  
17 taxpayer may or may not sign -- and in this case they  
18 declined to sign, maybe his point is they would -- they  
19 could avoid, conceivably, the Fifth Amendment problem.

20 But a better way to avoid it if you want to  
21 draft a tax, as they did in Minnesota, is allow for the  
22 purchase anonymously of tax stamps and to penalize tax  
23 officials who make the information available to law  
24 enforcement on penalty of misdemeanor criminal charges and  
25 dismissal, and further to immunize the use of that

1 information in a criminal process.

2 Now, if you really --

3 QUESTION: Does Minnesota collect any money off  
4 that scheme?

5 MR. GOETZ: I don't know what their -- what  
6 their proceeds are.

7 QUESTION: Not too many stamps being sold?

8 (Laughter.)

9 MR. GOETZ: I'm not sure, Your Honor.

10 In any event, if we want to talk about the  
11 structural component of a measure such as this that might  
12 at least come closer to passing constitutional muster, it  
13 would be that kind of provision. Certainly not the kind  
14 as we've seen in Montana, we have here.

15 And furthermore, you've got the incidence of the  
16 tax is the greater of. I mean the State is arguing that  
17 this is a proportional excise tax, but I'm not aware of  
18 any other tax in Montana that says you will be taxed either  
19 at X value, or the greater of that, or a percentage of  
20 market value. So it's not a true excise tax. It's  
21 dependant on apportionment. And --

22 QUESTION: Didn't we get an example that there  
23 was one Federal tax that has the either/or, so it's not --

24 MR. GOETZ: I'm not sure --

25 QUESTION: I think the answer was that it's not

1 common, but it's not extraordinary.

2 MR. GOETZ: I don't recall saying that, Your  
3 Honor, but perhaps we did in the reply brief.

4 Proceeding to other aspects of this tax that I  
5 think indicate that it's directly tied -- it's not a true  
6 revenue-raising matter, it's directly tied to the criminal  
7 process. We compare it to other taxes. The double-tax  
8 question was raised, but there are no other taxes in  
9 Montana that we've been able to locate on growing crops.  
10 And you saw, in response to a question, how difficult it  
11 was to assess taxes on growing crop. Indeed, we went  
12 through a protracted trial and the State has now abandoned  
13 that issue.

14 There is no other tax on possession --  
15 possession, by the way, is kind of a term of the criminal  
16 law usually, but on possession of wheat or grains or  
17 vegetables. There's not even a tax on harvested grains in  
18 Montana. Instead, the farmers are taxed on the income  
19 received and they're taxed on their property.

20 QUESTION: Which they are likely to report, and  
21 it seems to me a reasonable judgment by the State that  
22 marijuana growers are likely not to be reporting the  
23 income they're making from growing marijuana, and  
24 therefore that crop, unlike the other crops, we will  
25 impose a crop tax on.

1 MR. GOETZ: Well --

2 QUESTION: That's a reasonable call.

3 MR. GOETZ: One could argue that that's  
4 reasonable, except there's no provision made, as I see it,  
5 for reporting this marijuana tax. Why would one report it  
6 when, A, there's no return form produced by the State;  
7 and, B, it's not due until a specified date, that is  
8 arrest; and, C, you're self-incriminating yourself, which  
9 the State could avoid, but if you report it then it's --  
10 then you incriminate yourself.

11 So while that argument could be made, I think in  
12 the whole range of the incident and the structure and  
13 application of this tax, it's simply, I don't think, a  
14 very persuasive argument, particularly when we return to  
15 the fundamental principle we're talking about here; is any  
16 aspect of this tax punitive?

17 Because they've already been punished for the  
18 same conduct, and because double jeopardy forbids the  
19 punishment twice for the same conduct. And here I think  
20 it's -- just as night follows day, this is a criminal  
21 matter. It's located and it's closely associated with the  
22 criminal process, and clearly punitive.

23 And one other point I'd like to make is that  
24 while the State argues that this Court has historically  
25 given great deference to tax matters, and I think this

1 Court generally has, that is not true where the tax  
2 measure may run afoul of a fundamental constitutional  
3 right. That is most of their precedent deals with  
4 antiquated Tenth Amendment types of challenges or just  
5 general amorphous challenges of taxes as penalties.

6 Now here we have --

7 QUESTION: Are you referring to those cases  
8 where the challenge was made that this isn't under the  
9 Congress' taxing power, and therefore it has to be under  
10 some other power, and Congress doesn't have that power?

11 MR. GOETZ: Basically. The United States v.  
12 Sanchez and the Doremus case and a number of those cases.

13 And here -- this Court said, in a different  
14 context, in 1975 in Austin v. New Hampshire, dealing with  
15 a tax of New Hampshire's that fell in a discriminatory way  
16 against nonresidents, and it was a Privileges and  
17 Immunities Clause case.

18 And this Court said: "Our review of tax  
19 classifications has generally been concomitantly narrow  
20 therefore, to fit the broad discretion vested in the State  
21 legislature." But then this Court said: "When a tax  
22 measure is challenged as an undue burden on an activity  
23 granted special constitutional recognition, however, the  
24 appropriate degree of inquiry is that necessary to protect  
25 the competing constitutional value from erosion."



1           Implying heightened scrutiny, and the Court  
2 actually -- this Court actually said that, saying: "Our  
3 prior cases therefore reflect an appropriately heightened  
4 concern for the integrity of the Privileges and Immunities  
5 Clause by erecting a standard of review substantially more  
6 rigorous than that applied to State tax distinctions."

7           QUESTION: But there you're talking, Mr. Goetz,  
8 about tax classifications. You know, you get various  
9 categories taxed at different levels. And I think that's  
10 quite a different type of review than the challenge is  
11 this a tax or is it not a tax.

12           MR. GOETZ: Well, I agree that that's a  
13 different kind of review, but I don't think the question  
14 is is this a tax or is it not a tax. Because I concede  
15 that this can be a tax. Indeed, the State says it's a tax  
16 and they call it a tax, and they try to raise money.

17           The question is notwithstanding the fact that  
18 it's a tax, may it also serve the dual purpose of  
19 punishment. And the answer, I think, from the structure  
20 of this legislation in Montana, is quite clearly it can  
21 and it does and it has done so in this case. And  
22 therefore because we're dealing with a fundamental  
23 constitutional right, the Double Jeopardy Clause,  
24 following the analogy of *Austin v. New Hampshire*, I submit  
25 that there has to be a heightened standard of review, and

1 there has to be a fairly probing analysis, as we see under  
2 Halper even, consistent with the principle of humane  
3 justice served the Double Jeopardy Clause.

4 That's my point, not that -- generally you don't  
5 defer to legislative judgment on taxes. I think you defer  
6 much less. You have a heightened standard of scrutiny  
7 when you have a fundamental constitutional right clashing,  
8 and here quite clearly you do.

9 QUESTION: But most of the cases in which are  
10 relaxed scrutiny, Lenhausen, that group of cases, the  
11 challenge has been under the Equal Protection Clause. And  
12 surely the Equal Protection Clause deserves as much  
13 constitutional recognition as the Double Jeopardy Clause,  
14 doesn't it?

15 MR. GOETZ: It depends on whether you have a  
16 fundamental right or a suspect classification. If you do  
17 involve -- Yes.

18 QUESTION: Well, you say -- you say the Equal  
19 Protection Clause generally isn't of the same stature or  
20 stature in the Constitution as the Double Jeopardy Clause.

21 MR. GOETZ: Well, this Court has held in  
22 numerous cases that you apply at least a two-tier standard  
23 in Equal Protection Clauses. Rational basis or minimal  
24 scrutiny in most cases, but where there's a fundamental  
25 right or a suspect classification involved, then you apply

1 heightened scrutiny. So I would say double jeopardy is  
2 equivalent to the suspect classification/fundamental right  
3 analysis of equal protection, but not generally so.

4 In other words, I'm not sure you can generalize  
5 about equal protection because of that two-tier approach  
6 that this Court has taken. But clearly this Court has  
7 said, in Benton v. Maryland and since, that double  
8 jeopardy is a fundamental constitutional right, and I  
9 think Halper reaffirms that proposition.

10 And so, following the Austin Privileges and  
11 Immunities Clause analysis, I think quite clearly  
12 warranted here is a very careful scrutiny of the State  
13 tax. Not that it's needed, because I think you can see,  
14 just trying to probe on various aspects of attempting to  
15 enforce and impose this Montana tax, that it doesn't pass  
16 even rational basis or minimal scrutiny.

17 Now, the State argues in that connection cases  
18 such as the Sanchez case, and I make the very distinction  
19 because Sanchez, dealing with the Federal marijuana tax,  
20 Federal marijuana transfer tax, was kind of an amorphous  
21 challenge arguing simply that it's a penalty and not a  
22 tax, but it didn't involve a double jeopardy issue. Here,  
23 of course, we have the clashing double jeopardy value that  
24 the Court has to preserve.

25 So I think the Sanchez case is justified as a

1 minimal scrutiny kind of a case because it was an  
2 amorphous tax case. And in any event, in that case this  
3 Court said that the Federal tax is punitive, or is  
4 deterrent in nature which is the equivalent of punitive.

5 And finally I'll close by simply pointing out  
6 apart from the --

7 QUESTION: The tax was upheld in Sanchez, was it  
8 not?

9 MR. GOETZ: That's right. My point is you  
10 didn't have the countervailing Double Jeopardy Clause  
11 problem because there was no previous conviction in  
12 Sanchez. At least there was none that was raised. There  
13 was not a double jeopardy issue raised. Moreover the  
14 Court -- this Court said specifically in Sanchez that the  
15 tax is not dependant on criminal prosecution, and here I  
16 think we have a great deal of difference.

17 Now, I've cited in a number of places in my  
18 brief the numerous cases, including cases of this Court  
19 and cases of lower Federal courts and the State cases,  
20 that have basically held what I think is quite obvious,  
21 and that is these kinds of taxes on dangerous drugs are --  
22 the purpose is, as the Utah Supreme Court said in the Sims  
23 case, quote, to punish and deter those in possession of  
24 illegal drugs.

25 And the Seventh Circuit said years ago about the

1 Federal marijuana tax is Tovar v. Jarecki, quote: Does  
2 anyone suppose that the Government is trying to raise  
3 revenue in either instance? Is it not perfectly plain  
4 that the Government is trying -- what the Government is  
5 trying to do is take the plaintiff's property and turn him  
6 and his family out on the street for not having a license  
7 to do something the Government did not want him to do.  
8 And there are numerous cases from other State  
9 jurisdictions to the same point.

10 So I respectfully submit that we have a case  
11 here where the individuals have been punished first, then  
12 for the same offense the State is trying to invoke a  
13 quasi-criminal process to punish them a second time, and  
14 the lower courts were quite clearly correct in dismissing  
15 because of double jeopardy problems.

16 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Goetz.

17 The case is submitted.

18 (Whereupon, at 12:08 p.m., the case in the  
19 above-entitled matter was submitted.)  
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21  
22  
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25



## **CERTIFICATION**

*Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:*

DEPARTMENT OF REVENUE OF MONTANA, Petitioner v. KURTH RANCH,  
ET AL. CASE NO: 93-144

*and that these attached pages constitutes the original transcript of the proceedings for the records of the court.*

BY Don Mani Federico

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