



TAXING NUDITY:  
DISCRIMINATORY TAXES, SECONDARY  
EFFECTS, AND TIERS OF SCRUTINY

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In recent years, states have passed “pole taxes,” i.e., taxes targeting nude dancing at adult entertainment establishments. Such taxes generally target establishments where alcohol is consumed, and the proceeds generally fund programs that benefit victims of sex crimes (or similar). Some of these taxes are “erotic-expression taxes” that specifically target sexual dance or other expressive conduct, while others are more general “nudity taxes” that are not defined by reference to expressive conduct.

State governments have defended such taxes against First Amendment attack on the theory that (1) such taxes combat negative secondary effects and (under *City of Renton v. Playtime Theatres, Inc.*) should be analyzed under intermediate scrutiny as though they were content-neutral, and (2) such taxes survive intermediate scrutiny, given sufficient evidence of the link between the establishments and the secondary effects.

I make two independent claims here. First, erotic-expression taxes are subject to strict scrutiny because they are content-discriminatory. The *Renton* framework has never been applied to taxes (as opposed to regulations).

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Nor should it be extended to taxes: on the contrary, a strict-scrutiny approach is more consistent with modern First Amendment caselaw.

Second, for both erotic-expression taxes and nudity taxes, even if courts apply intermediate scrutiny, these targeted taxes are constitutionally vulnerable. A number of possible governmental interests are impermissible because they are themselves speech-suppressive or discriminatory; some other interests are potentially valid, but the targeted taxes do not further those interests more than general taxes. The interest in fighting a secondary effect can be valid, but only under stringent conditions that are often not met in practice.

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## INTRODUCTION

Two lines of First Amendment precedent are on a collision course.

First, the Supreme Court has long held that government can’t discriminate against particular expression because of its content. For instance, a city ordinance can’t prohibit picketing near a school but make an exception for labor-related picketing.<sup>1</sup> Not that such “content-discriminatory” (or, equivalently, “content-based”) laws are necessarily invalid; but they are subject to the familiar “strict scrutiny” standard—i.e., they must be supported by a compelling governmental interest and must be “narrowly tailored,” meaning that the government’s chosen means to pursue its interest must be the least restrictive (or least content-discriminatory) alternative.<sup>2</sup> As we all know, not many laws can survive that standard.

And how do we determine whether a law is content-discriminatory? We look to whether content discrimination is present on the face of the statute. But what if a statute is content-discriminatory on its face, but motivated by a content-neutral purpose, like promoting traffic safety<sup>3</sup> or avoiding school disruption<sup>4</sup> or encouraging fledgling publishers?<sup>5</sup> Irrelevant: content-neutral purposes can’t save a statute that’s content-discriminatory on its face from having to face strict scrutiny. This isn’t a new development; but the Supreme Court has strongly reaffirmed these principles recently, in *Reed v. Town of Gilbert*<sup>6</sup> and *Barr v. American Ass’n of Political Consultants, Inc. (AAPC)*.<sup>7</sup>

But at the same time, the Supreme Court has also ruled that content-neutral justifications sometimes *can* save a content-discriminatory law.

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<sup>1</sup> See *Police Dep’t of Chi. v. Mosley*, 408 U.S. 92, 95 (1972).

<sup>2</sup> See, e.g., *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 813 (2000).

<sup>3</sup> See *Reed v. Town of Gilbert*, 576 U.S. 155, 171–72 (2015).

<sup>4</sup> See *Mosley*, 408 U.S. at 99–100.

<sup>5</sup> See *Ark. Writers’ Project v. Ragland*, 481 U.S. 221, 231–33 (1987).

<sup>6</sup> 576 U.S. 155, 165–66 (2015).

<sup>7</sup> 140 S. Ct. 2335, 2346 (2020) [hereinafter *AAPC*] (plurality opinion); see also *id.* at 2364 (Gorsuch, J., concurring in the judgment in part and dissenting in part).

What if a city decided to zone establishments defined by a particular type of content—say, theaters showing adult movies—into a particular area of town, on the theory that such theaters attract transients and criminals and depress surrounding property values?<sup>8</sup> That sort of zoning ordinance would be content-discriminatory on its face (it would apply to theaters only if they show adult movies), but it might be supported by various content-neutral justifications—what the caselaw has come to call “secondary effects.”<sup>9</sup>

In this adult zoning context—in *Young v. American Mini Theatres, Inc.*<sup>10</sup> and *City of Renton v. Playtime Theatres, Inc.*<sup>11</sup>—the Supreme Court has held that a content-discriminatory law, if justified by reference to the need to combat secondary effects, can be treated as though it were content-neutral. And this move allows courts to evaluate the law under the more forgiving standard of “intermediate scrutiny.” Under that standard, a court will generally defer to a government’s empirical evidence of secondary effects, and the ordinance is likely to survive constitutional challenge. Since those early cases, this principle has been applied beyond the adult zoning context, and has shown up in contexts far from adult entertainment and outside the narrow setting of zoning.<sup>12</sup>

These two strands of doctrine seem to be in some tension with each other. Can content-neutral justifications save a facially content-discriminatory law from strict scrutiny, or can’t they? How can we reconcile these two strands?

Easy: we can’t. Several lower courts have recognized that at least some of their previous caselaw—in some cases, even including some adult entertainment caselaw—had to be revisited in light of modern cases like *Reed*.<sup>13</sup> Other courts have

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<sup>8</sup> *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 55 (1976).

<sup>9</sup> *Id.* at 71 n.34 (plurality opinion); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47–49 (1986).

<sup>10</sup> 427 U.S. 50 (1976).

<sup>11</sup> 475 U.S. 41 (1986).

<sup>12</sup> See text accompanying *infra* notes 180–193.

<sup>13</sup> See, e.g., *Reagan Nat’l Advert. of Austin, Inc. v. City of Austin*, 972 F.3d 696, 702–03 (5th Cir. 2020) (holding that *Reed* overruled previous Fifth Circuit caselaw allowing content-based laws relying on content-neutral justifications to be treated as though they were content-neutral, and citing Third and Fourth Circuit cases to the same effect), *rev’d*, 142 S. Ct. 1464 (2022). The Fifth Circuit gave nine examples of cases that were abrogated post-*Reed*, *id.* at 703 n.3. This partial list included four adult entertainment cases: *Illusions—Dallas Private Club, Inc. v. Steen*, 482 F.3d 299 (5th Cir.

assumed that *Renton*, though perhaps a relic of an older view, is still the law, and that the secondary effects doctrine is still good unless and until the Supreme Court overrules it.<sup>14</sup> Lawyers should do their own Westlaw searches, but at least in some places, it's probably prudent to assume that the secondary effects doctrine, in practice, survives as an exception to the usual rule. (But because the scope of the secondary effects doctrine appears to be both broader and narrower than adult entertainment, the contours of this exception aren't fully clear.) So far, the Supreme Court hasn't seen fit to resolve the tension.<sup>15</sup>

I don't take a position here on whether the secondary effects doctrine should survive.<sup>16</sup> But, as long as we have such a doctrine, we have to determine how far it extends. This question has renewed relevance, thanks to a current trend of taxes targeting adult entertainment.<sup>17</sup> These taxes—which I canvass in Part I—have been adopted in Texas, Georgia, Utah, and Illinois; there was such a tax for a few years

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2007); *Fantasy Ranch Inc. v. City of Arlington*, 459 F.3d 546 (5th Cir. 2006); *N.W. Enters. Inc. v. City of Houston*, 352 F.3d 162 (5th Cir. 2003); *Encore Videos, Inc. v. City of San Antonio*, 330 F.3d 288 (5th Cir. 2003). *But see* *Tex. Entm't Ass'n, Inc. v. Hegar*, 10 F.4th 495, 509–12 (5th Cir. 2021) (continuing to treat *Renton*'s purpose-based analysis as binding in an adult entertainment case, without citing the Fifth Circuit's (not-yet-overruled) *Reagan* precedent, though ultimately applying strict scrutiny because the government did not adequately show a content-neutral purpose). Though *Reagan* was reversed by the Supreme Court in *City of Austin*, the Supreme Court's decision was narrow, *see infra* Part II.B.2, and does not necessarily affect the *Reagan* court's conclusion as to which cases were abrogated. *See* *Ass'n of Club Execs. of Dallas, Inc. v. City of Dallas*, 604 F.3d 414, 421–24 (N.D. Tex. 2022) (noting “the apparent tension” between the Fifth Circuit's *Reagan* and *Texas Entertainment Ass'n* cases); *id.* at 424–25 (noting some uncertainty as to the validity of the Fifth Circuit's *Reagan* decision in light of its reversal by the Supreme Court).

<sup>14</sup> *See, e.g.*, *BBL, Inc. v. City of Angola*, 809 F.3d 317, 326 n.1 (7th Cir. 2015); *Maxim Cabaret, Inc. v. City of Sandy Springs*, 816 S.E.2d 31, 36 n.4 (Ga. 2018); *Flanigan's Enters., Inc. of Ga. v. City of Sandy Springs*, 703 F. App'x 929, 934–35 (11th Cir. 2017); Leslie Gielow Jacobs, *Making Sense of Secondary Effects Analysis After Reed v. Gilbert*, 57 SANTA CLARA L. REV. 385, 414–16 (2017).

<sup>15</sup> *See, e.g.*, Jacobs, *supra* note 14, at 388 (*Reed* “shot a missile” into the reasoning of the secondary-effects cases); *id.* at 413.

<sup>16</sup> *See id.* at 389 n.21 (citing critical literature about secondary-effects doctrine); *see also id.* at 450 (“Like it or not, Secondary Effects Analysis almost certainly will survive the Court's strong statements in *Reed v. Town of Gilbert*.”).

<sup>17</sup> *See* Rachele Holmes Perkins, *Salience and Sin: Designing Taxes in the New Sin Era*, 2014 BYU L. REV. 143, 145, 152–53 (identifying rapid expansion of sin taxes as a major recent development); *id.* at 154–55 (focusing on new taxes on “adult entertainment establishments and pornographic materials”).

in Tennessee; a bill along these lines was introduced in California; and the idea has been discussed in Pennsylvania.<sup>18</sup> Some of these are taxes on erotic expression, some are taxes on nudity; all of them seem aimed primarily at strip clubs, based on a belief that strip clubs contribute to child sex trafficking, sex crimes, or related social ills; and the proceeds of these taxes are often devoted to a fund for fighting whichever of these problems the government has identified.<sup>19</sup> Colloquially, these taxes on adult entertainment establishments have been called “pole taxes,”<sup>20</sup> “skin taxes,”<sup>21</sup> or “uncover charges.”<sup>22</sup>

These taxes look like traditional sin taxes, such as one can find levied on alcohol or tobacco—but alcohol and tobacco taxes, which don’t affect speech, don’t raise First Amendment concerns.<sup>23</sup> Erotic dance is another matter. Should these taxes be evaluated under strict scrutiny, on the theory that (at least in the case of taxes on erotic expression) they’re content-discriminatory on their face and any content-neutral justifications are irrelevant? Or should they be evaluated under the more deferential intermediate-scrutiny standard that applies under *Renton* when a law is motivated by content-neutral secondary effects?

In this Article, I make two independent arguments.

First, in Part II, I argue that erotic-expression taxes are indeed content-discriminatory and should be evaluated under strict scrutiny.

Second, in Part III, I argue that erotic-expression taxes should fail strict scrutiny because there always exists a less discriminatory option: the government could fight the relevant secondary effect by using general revenues (whether or not it uses a

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<sup>18</sup> See *infra* Part I.

<sup>19</sup> See Perkins, *supra* note 17, at 157 (discussing “Pigovian-type sin taxes” under which “taxpayers are forced to internalize the total cost of their behaviors, including the costs they do not bear directly”). For a discussion of the regulation of sex work, see generally Sheerine Alemzadeh, *Baring Inequality: Revisiting the Legalization Debate Through the Lens of Strippers’ Rights*, 19 MICH. J. GENDER & L. 339 (2013).

<sup>20</sup> See Perkins, *supra* note 17, at 154; Frances Taylor Bishop, Note, *Why the Patently Offensive Just Became More Expensive: The “Pole Tax” and the Texas Supreme Court’s Expansion of the Secondary-Effects Doctrine in Combs v. Texas Entertainment Ass’n*, 61 CATH. U. L. REV. 1183 (2012).

<sup>21</sup> See Alemzadeh, *supra* note 19, at 366.

<sup>22</sup> See Peter Mucha, *Pa. Tax Idea: \$5 per Strip-Club Patron*, PHILA. INQUIRER, May 29, 2008.

<sup>23</sup> But see the connection between nude dancing and alcohol in the statutes discussed here, which I elaborate on below, see *infra* Part II.B.3.

dedicated fund for that purpose). This is true even if the *Renton* secondary-effects caselaw continues to be valid in light of *Reed*: taxes simply don't fall within the scope of *Renton*. The Supreme Court has always applied *Renton* in the context of regulation, especially zoning and local land use, and has never used *Renton* to evaluate taxes.<sup>24</sup>

I further argue that even if one evaluated these taxes under intermediate scrutiny—for instance, if one considered nudity taxes (which aren't content-discriminatory), or if one weren't convinced by my first argument about erotic-expression taxes—they would still be constitutionally vulnerable.

The reason is similar: under intermediate scrutiny, when the government burdens speech, the burden needs to be “narrowly tailored” to some compelling governmental interest. Narrow tailoring under intermediate scrutiny doesn't require the least discriminatory option, but the government still needs to establish that its chosen means “promote[] a substantial government interest that would be achieved less effectively absent the [burden].” In other words, the governmental action can't “burden substantially more speech than is necessary to further the government's legitimate interests.”<sup>25</sup>

The possibility of neutral funding is relevant here, too, because money is money; the government could fight the secondary effect equally well by raising an equal amount of money from general revenues. Under intermediate scrutiny, we need to evaluate various possible governmental interests other than just raising revenue, but I conclude that a number of plausible governmental interests are either outright impermissible or are likely to fail narrow tailoring. The governmental interest in fighting the secondary effect is the most likely governmental interest to support the tax, but even then, a number of stringent conditions must be met before the tax can be constitutional.<sup>26</sup>

I conclude that, even if we accept the continuing validity of the secondary effects doctrine—even if the Supreme Court ends up reaffirming the doctrine as an exception to the facial-discrimination approach that would otherwise apply—taxes

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<sup>24</sup> As far as I'm aware, the only case holding the contrary is the Texas Supreme Court's *Combs v. Texas Entertainment Ass'n, Inc.*, 347 S.W.3d 277 (Tex. 2011).

<sup>25</sup> *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989) (internal quotation marks omitted).

<sup>26</sup> As far as I'm aware, the only case holding the contrary is the Utah Supreme Court's *Bushco v. Utah State Tax Commission*, 225 P.3d 153 (Utah 2009).

on erotic expression or nudity are still likely unconstitutional. And this isn't an argument for changing current blackletter law: my reasoning only directly contradicts the holdings of two state supreme courts.<sup>27</sup>

## I. EROTIC-EXPRESSION TAXES VS. NUDITY TAXES

### A. *Erotic-Expression Taxes*

Several states have adopted taxes targeting adult entertainment businesses. In Georgia, for instance, the Safe Harbor/Rachel's Law Act imposes a tax, equal to \$5000 or 1% of gross revenue, whichever is greater, on every "adult entertainment establishment."<sup>28</sup> The covered entities include, among other categories:

any place of business or commercial establishment where alcoholic beverages of any kind are sold, possessed, or consumed wherein . . . [t]he entertainment or activity therein consists of nude or substantially nude persons dancing with or without music or engaged in movements of a sexual nature or movements simulating sexual intercourse, oral copulation, sodomy, or masturbation.<sup>29</sup>

The money collected goes into the Safe Harbor for Sexually Exploited Children Fund, the purpose of which is to provide (among other things) "care, rehabilitative services, residential housing, health services, and social services, including establishing safe houses, to sexually exploited children."<sup>30</sup>

Note a few features of this statute, which are found in some other states' statutes as well. The set of covered businesses is defined in some way that includes nudity (or substantial nudity). The set of covered businesses is further limited to those that serve or allow the consumption of alcohol. And the money collected is to be used to fund (among other things) programs related to sex crimes.<sup>31</sup>

Here are a few other examples:

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<sup>27</sup> See cases cited *supra* notes 24, 26.

<sup>28</sup> GA. CODE ANN. § 15-21-209; see also Harry M. Rowland III & Christine H. Lee, *Legislative Branch: Appropriations*, 32 GA. ST. U. L. REV. 45 (2015) (giving the history of this bill).

<sup>29</sup> GA. CODE ANN. § 15-21-201(1) & (1)(A).

<sup>30</sup> *Id.* §§ 15-21-209; -202(c). Generally, the use of such dedicated funds is constitutionally prohibited in Georgia, see GA. CONST. art. 3, § 9, ¶¶ IV, VI, but this particular fund was approved by constitutional amendment as an exception to the rule, *id.*, art. 3, § 9, ¶ VI(o). On dedicated funds, see Frank S. Alexander, *Financing Affordable Housing in Georgia: The Possibility of a Dedicated Revenue Source*, 13 GA. ST. U. L. REV. 363 (1997).

<sup>31</sup> See Tracy Clark-Flory, *Taxing Strip Clubs for Rape*, SALON, May 27, 2012, [https://www.salon.com/2012/05/27/taxing\\_strip\\_clubs\\_for\\_rape/](https://www.salon.com/2012/05/27/taxing_strip_clubs_for_rape/).



- In Texas, the Sexually Oriented Business Fee Act imposes a \$5 per-customer fee on each “sexually oriented business”<sup>32</sup>—an entity defined as “a nightclub, bar, restaurant, or similar commercial enterprise that: (A) provides for an audience . . . live nude entertainment or live nude performances; and (B) authorizes on-premises consumption of alcoholic beverages.”<sup>33</sup> “The first \$25 million collected is to be credited to the sexual assault program fund, and the balance is to be used to provide health benefits coverage premium payment assistance to low-income persons.”<sup>34</sup> (This law was upheld by the Texas Supreme Court.<sup>35</sup>)
- Between 2018 and 2021, Tennessee imposed a tax on every “[a]dult performance business,” defined as “an adult cabaret or other adult-oriented establishment” that “[p]rovides live nude entertainment or live nude performances” and “[p]ermits the consumption of” alcohol.<sup>36</sup> For the terms “adult cabaret” and “adult-oriented establishment,” the statute incorporated definitions from two other sections:<sup>37</sup> “adult-oriented establishment” included places with “shows . . . [or] performances that contain acts or depictions of specified sexual activities,”<sup>38</sup> and “adult cabaret” included places with “entertainment of an erotic nature.”<sup>39</sup> The tax was equal to \$2 per customer; the revenues went into the general fund, but, according to

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<sup>32</sup> TEX. BUS. & COM. CODE § 102.052(a).

<sup>33</sup> *Id.* § 102.051(2).

<sup>34</sup> *Combs v. Tex. Entm’t Ass’n, Inc.*, 347 S.W.3d 277, 279 (Tex. 2011). The Texas Comptroller later administratively extended the tax to “latex clubs.” See *Hegar v. Tex. BLC, Inc.*, 2020 WL 4758474 (Tex. App. Aug. 18, 2020) (holding that this extension was consistent with the statute). This extension was ultimately struck down on First Amendment and Due Process grounds. See *Tex. Entm’t Ass’n, Inc. v. Hegar*, 10 F.4th 495, 509–13 (5th Cir. 2021).

<sup>35</sup> *Combs*. The law was also upheld against challenges under the Texas Constitution, including under Texas’s Free Speech Clause. See *Tex. Entm’t Ass’n, Inc. v. Combs*, 431 S.W.3d 790, 800–01 (Tex. App. 2014).

<sup>36</sup> TENN. CODE ANN. § 67-4-1201(1).

<sup>37</sup> *Id.* § 67-4-1201(1)(A) (incorporating definitions from *id.* §§ 7-51-1102, -1401).

<sup>38</sup> *Id.* § 7-51-1401(4)(C).

<sup>39</sup> *Id.* § 7-51-1102(2).

the statute, the intent of the legislature was that an equal amount be “allocated to programs for victims of sex trafficking.”<sup>40</sup>

I’ll refer to such taxes by the general label of “erotic-expression taxes.” The ones listed above target not just nudity, and not just eroticism, but particular performative expression—whether referred to generally as “entertainment” or more specifically as “dancing,” and possibly also incorporating particular erotic content, for instance “specified sexual activities” or “movements of a sexual nature.”

Such statutes require analysis under the First Amendment: nude dancing communicates an erotic message, and is thus expressive conduct.<sup>41</sup> Indeed, when a Supreme Court plurality in *Barnes v. Glen Theatre, Inc.* upheld a requirement that dancers wear pasties and G-strings, it didn’t rely on any theory that nude dancing was non-communicative. Rather, it wrote that such a requirement “does not deprive the dance of whatever erotic message it conveys; it simply makes the message slightly less graphic.”<sup>42</sup>

One may argue that nude dancing and similar activities are non-expressive or valueless and are therefore not a matter for the First Amendment, but that view would require a major change in doctrine.<sup>43</sup> That these activities have been characterized as being “within the outer perimeters of the First Amendment,”<sup>44</sup> or “within

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<sup>40</sup> 2018 TENN. LAWS, Pub. Ch. 764, H.B. No. 1701, § 1 (enacting TENN. CODE ANN. §§ 67-4-1201 to -1202, and providing that § 67-4-1202, the tax provision, would expire in 2021). *But see* Legality of Privilege Tax on Entry of Customers into Adult-Oriented Establishments, Tenn. Op. Att’y Gen. 08-78 (Apr. 2, 2008).

<sup>41</sup> *See, e.g.*, *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 570–71 (1991) (plurality opinion); *City of Erie v. Pap’s A.M.*, 529 U.S. 277, 293, 296 (2000) (plurality opinion) (repeatedly noting “the erotic message” of nude dancing).

<sup>42</sup> 501 U.S. 560, 571 (1991) (plurality opinion).

<sup>43</sup> While, in a previous age, people argued explicitly that immoral expression does not merit First Amendment protection, today arguments for control or taxation of sex-related activities such as pornography (as well as gambling and other traditionally disfavored activities) are more often bound up in psychological arguments referencing behavioralism or addiction. *See, e.g.*, Luke Morgan, *Addiction and Expression*, 47 HASTINGS CONST. L.Q. 197, 202 (2020) (“There is no good reason to protect addictive ‘speech.’ It actively undermines the values that the First Amendment exists to promote and plays no essential part in the exposition of ideas.”); *cf.* Matthew B. Lawrence, *Addiction and Liberty*, 108 CORNELL L. REV. 259 (2023); Sheldon A. Evans, *Pandora’s Loot Box*, 90 GEO. WASH. L. REV. 376, 438–39 (2022).

<sup>44</sup> *Barnes*, 501 U.S. at 566.

the outer ambit of the First Amendment’s protection,<sup>45</sup> is irrelevant: whether outer or inner, the First Amendment still applies. In fact, as I argue below,<sup>46</sup> these taxes not only require First Amendment analysis but also turn out to be unconstitutional: because they turn on what sort of content is presented, they’re content-discriminatory and should therefore be analyzed under strict scrutiny—a standard that they fail.

### B. Nudity Taxes

Other states have what I’ll call “nudity taxes”—the focus is still nudity and/or eroticism, but not necessarily particular *expressive* activity that conveys an erotic message.<sup>47</sup>

- For instance, Utah’s Sexually Explicit Business and Escort Service Tax “imposes a 10 percent gross receipts tax on businesses whose employees or independent contractors (1) perform services while nude or partially nude for 30 days or more per year, or (2) provide companionship to another individual in exchange for compensation. The revenue generated by the Tax helps fund treatment programs for convicted sex offenders and investigations of internet crimes against children.”<sup>48</sup> (This law was upheld by the Utah Supreme Court.<sup>49</sup>)
- Illinois’ Live Adult Entertainment Facility Surcharge Act<sup>50</sup> imposes a fee, equal to either \$3 per customer or a lump-sum amount,<sup>51</sup> on every “[l]ive adult entertainment facility,” defined as “a striptease club or other business that serves or permits the consumption of alcohol on its premises, and . . . offers or provides activities . . . that involve nude or partially denuded individuals that, when considered as a whole, appeal primarily to an interest in

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<sup>45</sup> *City of Erie*, 529 U.S. at 289 (plurality opinion).

<sup>46</sup> See *infra* Part III.

<sup>47</sup> A similar bill was also introduced in California. See A.B. 2441, 2011–2012 Assemb. (Cal. 2012).

<sup>48</sup> *Bushco v. Utah State Tax Comm’n*, 225 P.3d 153, 157–58 (Utah 2009) (citing UTAH CODE ANN. §§ 59-27-101 to -108).

<sup>49</sup> *Id.* at 158.

<sup>50</sup> 35 ILL. COMP. STATS. 175/1.

<sup>51</sup> The sum varies from \$5000 to \$25,000, depending on the facility’s receipts. *Id.* 175/10(a).

nudity or sex.”<sup>52</sup> Most of the money (except for 2%, which pays for the cost of administering and enforcing the Act) is paid into a “Sexual Assault Services and Prevention Fund.”<sup>53</sup>

The distinction between erotic-expression taxes and nudity taxes, while important, isn’t necessarily very sharp. The Utah statute seems to fall more on the nudity side, because the nude services covered by the statute include not just dancing but also non-expressive activities like waitressing or massage.<sup>54</sup>

One could say the same of the Illinois statute; activities could “appeal primarily to an interest in nudity or sex” without being expressive. But it’s a tougher case: the inclusion of “entertainment” within the defined term,<sup>55</sup> and the listing of “a striptease club” as one of the covered categories, could support an inference, based on standard methods of statutory interpretation, that the definition is meant to primarily cover expressive performances.<sup>56</sup> Moreover, for both of these statutes, we need to look at the government’s practice of enforcement to see whether it primarily targets expressive businesses.<sup>57</sup>

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<sup>52</sup> *Id.* 175/5.

<sup>53</sup> *Id.* 175/10(d). The statute is further interpreted by regulation. *See, e.g.*, 86 ILL. ADM. CODE 900.115.

<sup>54</sup> This is what the *Bushco* court held: “In this case, application of the Tax is triggered by nudity . . . [T]he Tax regulates the condition of nudity—not just specific instances of protected expression, like nude dancing. . . . [T]he Tax applies or does not apply without reference to either protected expression or any particular message.” 225 P.3d at 161 (internal quotation marks omitted); *see also id.* at 161 n.31.

<sup>55</sup> Though “[l]ive adult entertainment facility” is a term that has its own statutory definition, it’s a canon of construction that the words used in a defined term itself can help interpret what the term means. *See, e.g.*, *Solid Waste Agency of N. Cook Cnty.*, 531 U.S. 159, 171–172 (2001).

<sup>56</sup> Even though “a striptease club” is just an example, its listing in the statutory definition can narrow the definition under the *ejusdem generis* canon. *See, e.g.*, *Yates v. United States*, 574 U.S. 528, 544–46 (using the *ejusdem generis* and *noscitur a sociis* canons). Note also the “that, when considered as a whole, appeal primarily to an interest in nudity or sex” language, which echoes standard obscenity-defining language from First Amendment cases. *See Roth v. United States*, 354 U.S. 476, 487 & n.20 (1957) (quoting a draft of the Model Penal Code); *A Book Named “John Cleland’s Memoirs of a Woman of Pleasure” v. Atty. Gen. of Mass.*, 383 U.S. 413, 418 (1966); *Miller v. California*, 413 U.S. 15, 21 (1973).

<sup>57</sup> I return to this point below, *see infra* Part II.B.1.

Still, for purposes of this Article, the theoretical difference between a tax that targets erotic expression and a tax that targets nudity is significant. The Supreme Court has said that nudity—unlike nude dancing—isn't inherently expressive.<sup>58</sup> A properly phrased and evenhandedly enforced nudity tax would therefore be analyzed under intermediate scrutiny. I argue that such taxes are likely unconstitutional even under this lower standard,<sup>59</sup> but at least on its face the standard seems easier to meet.

### C. Tax Exemptions

There are also taxes on erotic dancing that are embedded within tax *exemptions*. That is, there's some general tax; there's an exemption from that tax for performances; but the exemption doesn't cover erotic dancing. So erotic dancing, unlike other performances, ends up being covered by the general tax.

For instance, the City of Chicago and Cook County had tax ordinances that taxed amusements, which they amended to provide exemptions for “live theatrical, live musical or other live cultural performances” taking place in small venues. But that category of “live . . . performances” was defined to specifically *exclude* “performances conducted at adult entertainment cabarets,” and such cabarets were defined in terms of whether topless dancers “[d]isplay or simulate the display of ‘specified anatomical areas’” or “[e]ngage in, or engage in simulation of, ‘specified sexual activities.’”<sup>60</sup> The state of New York, similarly, taxed “place[s] of amusement,” exempted “dramatic or musical arts performances,” but did not include exotic dancing at an adult “juice bar” in the exemption.<sup>61</sup>

These tax exemptions stand on a different footing than the taxes discussed above, because tax exemptions are subject to a different First Amendment regime than taxes. Even when a tax exemption is content-based, the Supreme Court has

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<sup>58</sup> See *City of Erie v. Pap's A.M.*, 529 U.S. 277, 289 (2000) (plurality opinion).

<sup>59</sup> See *infra* Part III.

<sup>60</sup> *Pooh-Bah Enters. v. Cnty. of Cook*, 905 N.E.2d 781, 784–86 (Ill. 2009).

<sup>61</sup> *In re 677 New Loudon Corp. v. State of N.Y. Tax Appeals Tribunal*, 979 N.E.2d 1121 (N.Y. 2012); see also *In re Petitions of HDV Manhattan, LLC*, State of New York Division of Tax Appeals, Determination DTA Nos. 824229, 824231, 824232, 824233 & 824234 (Jan. 30, 2014), cited in John O. Hayward, *Exotic Dancing: Taxable Gyration or Exempt Art?*, 68 TAX LAW. 739, 747–48 (2015); Riane Lafferty, *Workin' on Our Nite Moves: A Pole-arized Application of a Sales Tax Exemption to Exotic Dance*, 64 SYR. L. REV. 171 (2014).

conceptualized tax exemptions as subsidies, and “the government can make content-based distinctions when it subsidizes speech.”<sup>62</sup>

Perhaps this distinction between discriminatory *taxes* and discriminatory *tax exemptions* doesn’t make sense,<sup>63</sup> but it’s longstanding blackletter law.<sup>64</sup> Perhaps it ought to be questioned, but that’s beyond the scope of this Article. So I’ll just note that these content-discriminatory tax exemptions exist and have been assumed to be constitutional. If tax exemptions were judged on the same basis as actual taxes, they would be subject to all the arguments I make in the rest of this Article; but I won’t mention them any further.

## II. EROTIC-EXPRESSION TAXES AND CONTENT DISCRIMINATION

### A. *The Facial Approach to Content Discrimination*

Let’s talk about erotic-expression taxes first, and let’s begin with some blackletter law: government action that is “content-discriminatory” (or, equivalently, “content-based”) is subject to strict scrutiny. The Supreme Court has said so recently—in *Reed*<sup>65</sup> and *AAPC*<sup>66</sup>—but the principle has been well established for decades.<sup>67</sup>

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<sup>62</sup> *Davenport v. Wash. Educ. Ass’n*, 551 U.S. 177, 188 (2007); *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 545–47 (1983); *Cammarano v. United States*, 358 U.S. 498, 512–13 (1959).

<sup>63</sup> See, e.g., Steven J. Heyman, *State-Supported Speech*, 1999 WIS. L. REV. 1119; David Cole, *Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech*, 67 NYU L. REV. 675 (1992); see also *Speiser v. Randall*, 357 U.S. 513, 518–19 (1958).

<sup>64</sup> The Supreme Court recently noted that the subsidizing-vs.-denying-a-benefit distinction is “a notoriously tricky question of constitutional law,” *Matal v. Tam*, 582 U.S. 218, 239–40 (2017), though it did not have occasion in that case to try answering that question. Conceivably, if a government tried to abuse the distinction by disguising a discriminatory tax as a mere tax exemption—for instance, imposing a heavy tax but then exempting 99% of activities and only leaving a particular content (say, nude dancing) to be taxed—the Court might jettison the distinction or pierce the veil, but this is just speculation. Note, though, that the Supreme Court hasn’t always followed the tax-exemptions-as-subsidy approach. For instance, in *Arkansas Writers’ Project v. Ragland*, it struck down a content-discriminatory tax exemption without engaging with the dissent’s tax-exemption-as-subsidy argument. 481 U.S. 221, 235–38 (1987) (Scalia, J., dissenting).

<sup>65</sup> *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015).

<sup>66</sup> *AAPC*, 140 S. Ct. at 2346 (plurality opinion); see also *id.* at 2364 (Gorsuch, J., concurring in the judgment in part and dissenting in part).

<sup>67</sup> See, e.g., *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 813–15 (2000).

And how does one determine whether a law is content-based? In *Reed*, the Supreme Court used a simple approach. That was a case about a municipal sign code that treated political signs differently than other signs. “The Town’s Sign Code,” the Court wrote, “is content based on its face. . . . The restrictions in the Sign Code that apply to any given sign thus depend entirely on the communicative content of the sign.”<sup>68</sup>

The Court used the same simple approach five years later in *AAPC*: “a law is content-based if a regulation of speech ‘on its face’ draws distinctions based on the message a speaker conveys. That description applies to a law that singles out specific subject matter for differential treatment.”<sup>69</sup>

The law in *AAPC* discriminated between robocalls on different topics, giving preferential treatment to robocalls made to collect government debt. “A robocall that says, ‘Please pay your government debt’ is legal. A robocall that says, ‘Please donate to our political campaign’ is illegal,” the Supreme Court wrote. “That is about as content-based as it gets. Because the law favors speech made for collecting government debt over political and other speech, the law is a content-based restriction on speech.”<sup>70</sup> In fact, all nine Justices agreed that the law was content-based, though a minority disagreed on whether that should necessarily trigger strict scrutiny.<sup>71</sup>

And this facial approach is rooted in longstanding precedent:

- In *Police Department of Chicago v. Mosley*,<sup>72</sup> a protester whose picketing opposed racial discrimination in schools challenged a municipal ordinance that prohibited picketing near a school, but provided an exception for labor-related picketing. The ordinance regulated picketing “by classifications formulated in terms of the subject of the picketing,” the Supreme

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<sup>68</sup> *Reed*, 576 U.S. at 164.

<sup>69</sup> *AAPC*, 140 S. Ct. at 2346 (plurality opinion) (internal quotation marks omitted).

<sup>70</sup> *Id.* at 2346; *see also id.* at 2364 (Gorsuch, J., concurring in the judgment in part and dissenting in part) (“The statute is content-based because it allows speech on [one subject] while banning speech on [other subjects].”).

<sup>71</sup> *Id.* at 2358 (Breyer, J., concurring in the judgment in part and dissenting in part); *see also id.* at 2356 (Sotomayor, J., concurring in the judgment) (“I agree with much of the partial dissent’s explanation that strict scrutiny should not apply to all content-based distinctions.”).

<sup>72</sup> 408 U.S. 92 (1972).

Court wrote—focusing on the discrimination present on the face of the enactment—and the “central problem” was that the ordinance “describe[d] permissible picketing in terms of its subject matter.”<sup>73</sup>

- In *Regan v. Time, Inc.*,<sup>74</sup> a publisher challenged a federal statute restricting the use of photographs of currency. Under the statute, one couldn’t use such photographs *at all* unless one fell into various exceptions—these included exceptions for educational or newsworthy purposes—and even then there were some restrictions related to the size and color of the photo one could use.<sup>75</sup> The Supreme Court struck down this “purpose requirement” as “constitutionally infirm” because it discriminated based on content: “A determination concerning the newsworthiness or educational value of a photograph cannot help but be based on the content of the photograph and the message it delivers.”<sup>76</sup>
- In *Arkansas Writers’ Project v. Ragland*,<sup>77</sup> a publisher challenged a state tax that provided for exemptions for “religious, professional, trade and sports journals” but not for that publisher’s own product, a general-interest magazine. The Supreme Court struck down this tax exemption because it was content-discriminatory: “[T]he basis on which Arkansas differentiates between magazines is particularly repugnant to First Amendment principles: a magazine’s tax status depends entirely on its content.”<sup>78</sup> (This was so even though there was “no evidence of an improper censorial motive.”<sup>79</sup>)

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<sup>73</sup> *Id.* at 95. *Mosley* was an Equal Protection case, but the Court wrote that “the equal protection claim in this case is closely intertwined with First Amendment interests.” *Id.* at 94–95. The same Equal-Protection-plus-First-Amendment approach was followed in *Carey v. Brown*, 447 U.S. 455 (1980). But using Equal Protection doesn’t add anything to what a purely First Amendment analysis would have yielded. *See, e.g.*, *R.A.V. v. City of St. Paul*, 505 U.S. 377, 384 n.4 (1992); William E. Lee, *The First Amendment Doctrine of Underbreadth*, 71 WASH. U. L.Q. 637, 641 (1993); Michael J. Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023, 1076 (1979).

<sup>74</sup> 468 U.S. 641 (1984).

<sup>75</sup> *Id.* at 644–45.

<sup>76</sup> *Id.* at 648.

<sup>77</sup> 481 U.S. 221, 224 (1987).

<sup>78</sup> *Id.* at 229.

<sup>79</sup> *Id.* at 228.



- In *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*,<sup>80</sup> a publisher challenged New York’s “Son of Sam” law, which required convicted criminals to forfeit any profits from depictions of their crimes. The Supreme Court had little trouble determining that the statute was content-based, even though the legislature had no desire to suppress particular ideas:<sup>81</sup> “The Son of Sam law . . . singles out income derived from expressive activity for a burden the State places on no other income, and it is directed only at works with a specified content.”<sup>82</sup>
- In *Holder v. Humanitarian Law Project*,<sup>83</sup> various individuals and nonprofits challenged a federal statute that prohibited providing “material support or resources” to terrorist organizations. Their argument was that it was unconstitutional to prevent them from giving these organizations support (in the form of lobbying or international-law training) that furthered the organizations’ lawful and peaceful goals.<sup>84</sup> The Supreme Court upheld the statute, but in doing so, it rejected the view that the statute merely regulated conduct and was therefore subject to intermediate scrutiny. “Plaintiffs want to speak to [these organizations],” the majority wrote, “and whether they may do so under [the statute] depends on what they say.”<sup>85</sup> Therefore, “a more demanding standard”<sup>86</sup> (i.e., “exacting” scrutiny,<sup>87</sup> meaning the same as strict scrutiny) was required.

### B. Content Discrimination in Erotic-Expression Taxes

Erotic-expression taxes are thus content-based, because they impose a tax on a set of establishments defined by the substance of the expression they present.

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<sup>80</sup> 502 U.S. 105, 108–09 (1991).

<sup>81</sup> *Id.* at 116–17.

<sup>82</sup> *Id.* at 115–16. Because the statute was “so overinclusive,” the Court declined to consider whether the statute could be considered content-neutral under the *Renton* doctrine, *see infra* Part II.C.2; it would have been struck down either way. 502 U.S. 105 at 122 n.\*.

<sup>83</sup> 561 U.S. 1, 7–8 (2010).

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 27.

<sup>86</sup> *Id.* at 28 (quoting *Texas v. Johnson*, 491 U.S. 397, 403 (1989)).

<sup>87</sup> *Johnson*, 491 U.S. at 412 (citing *Boos v. Barry*, 485 U.S. 312, 321 (1988)).

### 1. Nude dancing as erotic content

Consider, for instance, the Georgia tax.<sup>88</sup> Most obviously, an establishment can become subject to the tax by having “nude or substantially nude persons . . . engaged in movements of a sexual nature.”<sup>89</sup> This is clear content discrimination, since the government can’t determine whether movements are “of a sexual nature” without having some revenue officer look at the movements and examine their content. The same goes for whether these movements “simulat[e] sexual intercourse” and the like.<sup>90</sup> Essentially, “engaged in movements of a sexual nature” is one way of presenting an erotic message. This is the very definition of “content-based.”

Moreover, an establishment can become subject to the tax by presenting this sort of dancing and these sorts of movements as “entertainment.” The statutory wording confirms that what’s being taxed is a type of performance being delivered in front of spectators. As Justice Souter wrote in his concurrence in the judgment in *Barnes*, “such performance dancing is inherently expressive.”<sup>91</sup> This was also true in Tennessee,<sup>92</sup> where the tax applied to places with “shows . . . or performances that contain acts or depictions of specified sexual activities”<sup>93</sup> or with “entertainment of an erotic nature.”<sup>94</sup>

What if we removed “engaged in movements of a sexual nature” from the Georgia statute, leaving “wherein . . . [t]he entertainment or activity therein consists of nude or substantially nude persons dancing”?<sup>95</sup> Would that be enough to make the tax content-neutral? One might think dancing isn’t a type of content, but rather a particular medium—and cases like *Leathers v. Medlock*<sup>96</sup> and *Turner Broadcasting System, Inc. v. FCC*<sup>97</sup> tell us that medium-based discrimination

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<sup>88</sup> See text accompanying *supra* notes 28–30.

<sup>89</sup> GA. CODE ANN. § 15-21-201(1)(a).

<sup>90</sup> *Id.*

<sup>91</sup> *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 581 (1991) (Souter, J., concurring in the judgment).

<sup>92</sup> See text accompanying *supra* notes 36–40.

<sup>93</sup> TENN. CODE ANN. § 7-51-1401(4)(C).

<sup>94</sup> *Id.* § 7-51-1102(2).

<sup>95</sup> GA. CODE ANN. § 15-21-201(1)(a).

<sup>96</sup> 499 U.S. 439, 449–53 (1991).

<sup>97</sup> 512 U.S. 622, 644–45 (1994).

doesn't warrant strict scrutiny. In *Turner Broadcasting*, for instance, the issue was discrimination between cable and non-cable TV providers, and the Court wrote that this was merely discrimination based on the type of speaker, or "the manner in which speakers transmit their messages to viewers."<sup>98</sup>

So, if dancing-based discrimination isn't presumptively unconstitutional, and if nudity as such isn't inherently expressive, perhaps there would be nothing suspicious about combining the two factors into "nude dancing."

Maybe. But a lot depends on how one interprets the statute—and how the tax is applied in practice. Would the local nudist ballroom dancing club be taxed if it serves alcohol? Or would the tax authorities, rather, assume that even a bare reference to nude dancing refers only to *erotic* dancing establishments? I strongly suspect the latter. Suppose the tax authorities go after non-erotic nude dancing, and the nudist waltzers and foxtrotters challenge the application of the tax to them. Would a court rule that *everyone knows* that nude dancing means *erotic* nude dancing? I suspect so.

In fact, this isn't just a matter of *everyone knows*—one can even make a good case to that effect based on ordinary principles of statutory interpretation, given the statutory context of fighting child sex trafficking (and statutory findings to that effect<sup>99</sup>) and the "adult" label of the covered businesses. So even without an explicit statement regarding eroticism, this content-based element would probably be implicit in the statute.<sup>100</sup> The same would be true in Texas, where the tax applies to "live nude entertainment or live nude performances," with the "sexually oriented"

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<sup>98</sup> See also *Deja Vu Showgirls of Las Vegas, LLC v. Nev. Dep't of Tax.*, 334 P.3d 392, 399–400 (Nev. 2014).

<sup>99</sup> See 2015 GA. LAWS 95 (S.B. 8), § 1-2 ("The General Assembly finds that a correlation exists between adult live entertainment establishments and the sexual exploitation of children. The General Assembly finds that adult live entertainment establishments present a point of access for children to come into contact with individuals seeking to sexually exploit children. The General Assembly further finds that individuals seeking to exploit children utilize adult live entertainment establishments as a means of locating children for the purpose of sexual exploitation. The General Assembly acknowledges that many local governments in this state and in other states found deleterious secondary effects of adult entertainment establishments are exacerbated by the sale, possession, or consumption of alcohol in such establishments.").

<sup>100</sup> See also *supra* Part I.B (discussing how some apparent "nudity taxes" could be interpreted as "erotic-expression taxes").

condition evident in the title of the Act and in the name of the category of businesses.<sup>101</sup>

But wait a minute, we might ask, thinking about burning draft cards: shouldn't this dancing count as "conduct," and aren't the rules for conduct subject to a lesser test? No: it's true that, under *United States v. O'Brien*,<sup>102</sup> there's a looser intermediate-scrutiny test for regulations of expressive conduct; but this is true only when the state action is content-neutral.

Thus, the Supreme Court has written, "*O'Brien* does not provide the applicable standard for reviewing a content-based regulation of speech."<sup>103</sup> Flag-burning is conduct, but, the Court held in *Texas v. Johnson*, *O'Brien* doesn't apply when the government's interest is related to the message that the conduct expresses.<sup>104</sup> *Cohen v. California*,<sup>105</sup> too, involved a statute that regulated conduct—"maliciously and willfully disturb[ing] the peace or quiet of any neighborhood or person . . . by . . . offensive conduct."<sup>106</sup> But of course the only reason one would prosecute someone with a "Fuck the Draft" jacket under that statute was because of the content of the text, and so the Court applied "more rigorous scrutiny" than the *O'Brien* standard.<sup>107</sup>

## 2. The limits of the facial approach

Is the Supreme Court really serious that content discrimination—triggering strict scrutiny—is always determined from the face of the statute? As Justice Breyer argued in his concurrence in the judgment in *Reed*, "Regulatory programs almost always require content discrimination. And to hold that such content discrimination triggers strict scrutiny is to write a recipe for judicial management of ordinary government regulatory activity."<sup>108</sup> What about labeling and disclosure requirements for drugs and securities and consumer goods, not all of which falls within

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<sup>101</sup> TEX. BUS. & COM. CODE § 102.052(a); see also text accompanying *supra* notes 33–35.

<sup>102</sup> 391 U.S. 367 (1968).

<sup>103</sup> *Holder v. Humanitarian Law Project*, 561 U.S. 1, 27 (2010).

<sup>104</sup> 491 U.S. 397, 406–10 (1989).

<sup>105</sup> 403 U.S. 15 (1971).

<sup>106</sup> *Id.* at 16 (quoting the then-current version of CAL. PENAL CODE § 415).

<sup>107</sup> *Id.* at 18; *Humanitarian Law Project*, 561 U.S. at 27–28.

<sup>108</sup> *Reed v. Town of Gilbert*, 576 U.S. 155, 177 (2015) (Breyer, J., concurring in the judgment).

less-protected categories like commercial speech?<sup>109</sup> Or—even staying within *Reed*'s context of roadway signs—what about (to take Justice Kagan's examples from the same case) exceptions for signs like “Blind Pedestrian Crossing” and “Hidden Driveway”?<sup>110</sup> Will the facial-approach, automatic-strict-scrutiny majority follow its logic to the end? Or will it blink at some point along the way? Or will it keep strict scrutiny, but in some watered-down form?<sup>111</sup>

In *City of Austin v. Reagan National Advertising of Austin, LLC*, the Court seemed to backtrack a bit, holding that the facial approach doesn't always apply.<sup>112</sup> But its reasoning in that case doesn't help erotic-expression taxes, and in fact (despite its limited backtracking) the Court reaffirmed that the basic *Reed/AAPC* facial approach is still good law.

In *City of Austin*, a municipal sign code regulated advertising for things not located on the same premises as the sign (“off-premises” advertising) more heavily than advertising for things located on the same premises (“on-premises” advertising).<sup>113</sup> On some level, this does seem content-based, because it's impossible to tell whether a sign contains on-premises or off-premises advertising without reading the sign and comparing the location described on the sign with the location of the sign itself. Signs are indeed regulated differently because of their content.

But, the Court wrote, this sign code was nonetheless content-neutral: “Unlike the sign code at issue in *Reed*,” the code “[did] not single out any topic or subject matter for differential treatment.”<sup>114</sup> The sign code's focus on a neutral factor like location made it different from codes turning on “[a] sign's substantive message,” embodying, for instance, “content-discriminatory classifications for political messages, ideological messages, or directional messages concerning specific events, including those sponsored by religious and nonprofit organizations.”<sup>115</sup>

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<sup>109</sup> *Id.* at 177–78.

<sup>110</sup> *Id.* at 180 (Kagan, J., concurring in the judgment).

<sup>111</sup> *See id.* at 178 (Breyer, J., concurring in the judgment); *id.* at 181 (Kagan, J., concurring in the judgment).

<sup>112</sup> 142 S. Ct. 1464 (2022).

<sup>113</sup> *Id.* at 1469–70.

<sup>114</sup> *Id.* at 1472.

<sup>115</sup> *Id.*

So even while upholding a particular sign code, the Court reaffirmed that the facial approach applies when a policy is based on the substantive content of expression. *City of Austin* thus doesn't affect the basic *Reed/AAPC* facial approach when it comes to erotic-expression taxes, where the tax depends on the presence of erotic subject matter.

Still and all . . . does the Court really mean what it says, and will the facial approach hold up in later cases, especially when disliked parties like strip clubs ask for its protection? Maybe, maybe not; but so far, the Court seems to have embraced the consequences of the doctrine, presumably signaling that the majority isn't fazed by Justices Breyer and Kagan's hypotheticals from *Reed*.<sup>116</sup>

### 3. The (in)significance of alcohol

But doesn't it make a difference that the unholy alliance of *alcohol and commerce* is required for this tax regime to kick in? Nude dancing *by itself* doesn't trigger the tax; what's being taxed is the combination of nude dancing and alcohol in a commercial establishment.<sup>117</sup>

It turns out, though, that alcohol and the commercial context don't change anything in this doctrinal analysis. Consider an establishment that serves alcohol. It isn't subject to the tax unless it offers nude dancing as entertainment. Obviously, as applied to this alcohol-serving establishment, the presence or absence of nude dancing determines whether the tax applies. One could tell such an establishment that the tax is easy to avoid—just stop serving alcohol.<sup>118</sup> This is true, and establishes that the tax discriminates against alcohol. But it's also irrelevant, because the tax could discriminate on multiple grounds. The First Amendment problem is that the establishment can also avoid the tax by not having nude dancing. The tax incentivizes giving up nude dancing, even if the tax *also* incentivizes other things. This is what makes the tax a content-based tax on alcohol-serving establishments.

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<sup>116</sup> See also *Reagan Nat'l Advert. of Austin, Inc. v. City of Austin*, 972 F.3d 696, 707 (5th Cir. 2020) ("The rule in *Reed* is broad, but this is not an unforeseen consequence. The separate opinions in *Reed* warned of just how broadly the rule could be interpreted."), *rev'd*, 142 S. Ct. 1464 (2022).

<sup>117</sup> See *Combs v. Tex. Entm't Ass'n, Inc.*, 347 S.W.3d 277, 287 (Tex. 2011) ("The fee is not a tax on unpopular speech but a restriction on combining nude dancing, which unquestionably has secondary effects, with the aggravating influence of alcohol consumption.").

<sup>118</sup> See, e.g., *id.* at 288 ("An adult entertainment business can avoid the fee altogether simply by not allowing alcohol to be consumed. For these reasons, we conclude that the fee is not intended to suppress expression in nude dancing.").

This same sort of argument shows up in the context of other antidiscrimination doctrines. Consider, for instance, affirmative action. Universities challenged for their race-conscious affirmative-action programs point out, as required by doctrine,<sup>119</sup> that they use race only as one factor among many.<sup>120</sup> But the fact that race is used together with many other factors surely doesn't make a race-conscious affirmative-action program not racially discriminatory: in a hypothetical case where two students have identical characteristics aside from their race, a race-conscious holistic review would treat one student differently than the other. At most, the fact that the process was holistic would affect whether the program satisfied strict scrutiny, not whether strict scrutiny was triggered in the first place.<sup>121</sup>

This point can be generalized. Consider any program that discriminates based on (suspect ground) *X* as well as (permissible grounds) *A*, *B*, and *C*—for instance, by requiring *A*, *B*, *C*, and *X* to be present simultaneously before a tax can apply. It is accurate to describe the program as discriminating based on *A*, *B*, and *C* (any one of those grounds separately, or any combination of them); and because those grounds of discrimination are permissible, a challenge based on those grounds will fail.<sup>122</sup> But it is also accurate to describe the program as discriminating based on *X*, and to apply whatever stricter standard applies to that suspect ground. This is because, if you have two cases that are identical with respect to *A*, *B*, and *C* and differ

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<sup>119</sup> See *Grutter v. Bollinger*, 539 U.S. 306, 337 (2003) (“When using race as a ‘plus’ factor in university admissions, a university’s admissions program must remain flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant’s race or ethnicity the defining feature of his or her application.”).

<sup>120</sup> See, e.g., *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 143 S. Ct. 2141, 2214 (2023) (Gorsuch, J., concurring); *id.* at 2242 (Sotomayor, J., dissenting).

<sup>121</sup> Note that racial discrimination differs from content discrimination in that one generally can't change one's race, whereas one can forgo particular content. So one can talk about a tax or regulation as disincentivizing content, whereas it's not usual to talk that way about race. But this distinction isn't relevant here, because the presence or absence of discrimination doesn't depend on whether there exists a way of escaping the discrimination: at most, this might affect whether a particular sort of discrimination is considered less harmful. See, e.g., Marcy Strauss, *Reevaluating Suspect Classifications*, 35 SEATTLE U. L. REV. 135, 161–65 (2011) (discussing immutability as one of several factors that affects whether a classification is deemed suspect). And as discussed above, the Supreme Court's caselaw has already determined that content discrimination triggers strict scrutiny.

<sup>122</sup> Provided, of course, these permissible grounds are not proxies or pretexts for discrimination on some other impermissible ground.

only as to *X*, those two cases will be treated differently, and that difference will be solely due to *X*. One can't minimize the role of discrimination based on *X* just because it's combined with discrimination based on a bunch of other, permissible factors.

But back to alcohol. In 1972, in *California v. LaRue*, the Supreme Court suggested that First Amendment considerations were reduced when alcohol licensing was involved: “[T]he critical fact is that California has not forbidden [nude dancing] across the board. It has merely proscribed such performances in establishments that it licenses to sell liquor by the drink.”<sup>123</sup> The Court rested its holding in part on states’ reserved liquor-regulation powers under the Twenty-First Amendment.<sup>124</sup>

But in 1996, in *44 Liquormart, Inc. v. Rhode Island*,<sup>125</sup> the Court rejected the notion that First Amendment rights are weakened when alcohol is involved; it “disavow[ed]” the reasoning of *LaRue* “insofar as it relied on the Twenty-first Amendment.”<sup>126</sup> *LaRue*’s “critical fact,” then, is no longer “critical.” Of course, the *44 Liquormart* Court wrote (citing its adult theater zoning and public indecency caselaw, *American Mini Theatres* and *Barnes*), “the State has ample power to prohibit the sale of alcoholic beverages in inappropriate locations” and to restrict “bacchanalian revelries.”<sup>127</sup> Governments can pass zoning ordinances regulating nude dancing in establishments that serve alcohol, but such regulations have to be supported under the First Amendment caselaw that would otherwise apply. The presence of alcohol thus has no bearing on the constitutionality of the tax.<sup>128</sup>

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<sup>123</sup> 409 U.S. 109, 118 (1972).

<sup>124</sup> *Id.* at 118–19.

<sup>125</sup> 517 U.S. 484 (1996).

<sup>126</sup> *See id.* at 515–16.

<sup>127</sup> *Id.* at 515 (internal quotation marks omitted).

<sup>128</sup> Nor does the fact that this all takes place in a commercial establishment: this speech does not propose a commercial transaction, so the lower level of scrutiny appropriate for commercial speech does not apply. *See Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 482 (1989) (“speech that proposes a commercial transaction . . . is what defines commercial speech” (emphasis omitted)).



### C. Content-Neutral Justifications and Secondary Effects

#### 1. The irrelevance of content-neutral justifications

But what if, despite facial discrimination based on content, the government seeks to justify the law using a content-neutral rationale? In other words, what if the purpose of the content discrimination is to combat certain “secondary effects” that are unrelated to content? Does that alter the result that the law is content-based? Does it lower the level of scrutiny?

Putting aside the *Renton* exception, which I’ll get to soon,<sup>129</sup> the answer is easy: the neutrality of the justification is *irrelevant* to whether strict scrutiny should apply. According to *Reed*:

On its face, the Sign Code is a content-based regulation of speech. We thus have no need to consider the government’s justifications or purposes for enacting the Code to determine whether it is subject to strict scrutiny. . . .

. . . A law that is content based on its face is subject to strict scrutiny regardless of the government’s benign motive, content-neutral justification, or lack of animus toward the ideas contained in the regulated speech. . . . [I]llicit legislative intent is not the sine qua non of a violation of the First Amendment, and a party opposing the government need adduce no evidence of an improper censorial motive. Although a content-based purpose may be sufficient in certain circumstances to show that a regulation is content based, it is not necessary. . . . [A]n innocuous justification cannot transform a facially content-based law into one that is content neutral.<sup>130</sup>

Though the general irrelevance of neutral justifications has been strongly reaffirmed in recent years, it isn’t some new invention; countless First Amendment cases (many of them postdating *Renton*) did the same, long before *Reed* and *AAPC*. The presence of content-neutral justifications may be relevant in evaluating whether a content-discriminatory law is constitutional—some such laws will be upheld under strict scrutiny—but it doesn’t affect whether strict scrutiny applies.

- In *Mosley*,<sup>131</sup> a pre-*Renton* case, the Court applied strict scrutiny to strike down a prohibition on picketing near schools, with an exception for labor picketing—even though the government sought to justify its ordinance by

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<sup>129</sup> See *infra* Part II.C.2.

<sup>130</sup> *Reed v. Town of Gilbert*, 576 U.S. 155, 164–66 (2015) (internal quotation marks, citations, and alterations omitted).

<sup>131</sup> *Police Dep’t of Chi. v. Mosley*, 408 U.S. 92 (1972).

reference to the neutral secondary effect of avoiding disruption of the school.<sup>132</sup>

- In *Simon & Schuster*,<sup>133</sup> the state was pursuing the neutral goal of ensuring that criminals didn't profit from their crimes, but that didn't stop the Court from applying strict scrutiny to the content-discriminatory "Son of Sam" law.<sup>134</sup> (The Court noted, though, that the precise standard didn't much matter: even if the neutral goal could make the statute content-neutral, the statute would still be unconstitutional because of its overinclusivity.<sup>135</sup>)
- In *Humanitarian Law Project*,<sup>136</sup> the federal government was pursuing the neutral goal of depriving foreign terrorist organizations of resources, but the Court had no trouble rejecting intermediate scrutiny and applying "a more demanding standard."<sup>137</sup>
- In *Arkansas Writers' Project*<sup>138</sup>—the case involving a content-based tax—the Court applied strict scrutiny even though the state asserted various neutral justifications like "encourag[ing] 'fledgling' publishers."<sup>139</sup>
- In *City of Cincinnati v. Discovery Network, Inc.*,<sup>140</sup> the government was pursuing the neutral goal of safety and aesthetics in regulating commercial newsracks, but the Court wasn't impressed by this neutral justification because the regulation was still facially discriminatory: despite the lack of

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<sup>132</sup> *Id.* at 98–102. *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975), also counts as a case where the Supreme Court has applied strict scrutiny to content-based time, place, or manner restrictions that seem to aim at secondary effects. See Jacobs, *supra* note 14, at 417. In *Erznoznik*, where the Court struck down a restriction on nudity in drive-in movies that was in part justified as a traffic regulation. The Court didn't name the level of scrutiny that it was using, but the case is probably rightly seen as a strict-scrutiny case because of the emphasis on the underinclusiveness of the traffic safety rationale.

<sup>133</sup> *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105 (1991).

<sup>134</sup> *Id.* at 118–21.

<sup>135</sup> *Id.* at 122 n.\*.

<sup>136</sup> *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010).

<sup>137</sup> *Id.* at 28 (internal quotation marks omitted).

<sup>138</sup> *Ark. Writers' Project v. Ragland*, 481 U.S. 221 (1987).

<sup>139</sup> *Id.* at 231–33.

<sup>140</sup> 507 U.S. 410 (1993).

“animus toward the ideas contained in those publications,” “the very basis for the regulation is the difference in content between ordinary newspapers and commercial speech.”<sup>141</sup> The Court didn’t apply strict scrutiny in this case because of the commercial-speech context,<sup>142</sup> but it still rejected the more lenient standard that would have applied if the regulation were truly content-neutral.<sup>143</sup>

- In *Turner Broadcasting System v. FCC*,<sup>144</sup> a cable network challenged a federal statute requiring cable systems to carry local broadcast TV stations. The Court did find the requirements to be content-neutral because they “impose burdens and confer benefits without reference to the content of speech.”<sup>145</sup> But while getting to that conclusion, the Court specifically stated that “the mere assertion of a content-neutral purpose [is not] enough to save a law which, on its face, discriminates based on content.”<sup>146</sup>

One could be forgiven for missing this trend over the years—and being surprised in 2015 when the principle was affirmed so strongly in *Reed*. Many past cases were ambiguous on this point, because the conflict between facial discrimination and neutral purpose often wasn’t squarely presented. After all, most of the time, facial content discrimination and content-discriminatory purpose go together: they’re both present or they’re both absent, and when only one is present, it’s usually the purpose, because smart discriminators are smart enough to mask their true intentions. For instance:

- In *Mosley*, the Court said that content discrimination could result from *either* facial discrimination *or* a discriminatory justification: “Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone.”<sup>147</sup>

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<sup>141</sup> *Id.* at 429.

<sup>142</sup> *Id.* at 416–28 (discussing commercial-speech caselaw and “reasonable fit” standard).

<sup>143</sup> See also Jacobs, *supra* note 14, at 417.

<sup>144</sup> 512 U.S. 622 (1994).

<sup>145</sup> *Id.* at 643.

<sup>146</sup> *Id.* at 642–43.

<sup>147</sup> *Police Dep’t of Chi. v. Mosley*, 408 U.S. 92, 96 (1972).

- When the Court encountered a flag-burning statute in *United States v. Eichman*,<sup>148</sup> it held that, even though there was “no explicit content-based limitation on the scope of prohibited conduct,” the statute was nonetheless invalid because “the Government’s asserted *interest* is related to the suppression of free expression and concerned with the content of such expression.”<sup>149</sup>

These are of course right: just like with religious<sup>150</sup> or racial discrimination,<sup>151</sup> either facial discrimination or a discriminatory purpose is bad enough on its own.<sup>152</sup>

Sometimes we have both facial discrimination and discriminatory purpose:

- In *Boos v. Barry*,<sup>153</sup> the Court struck down a D.C. ordinance prohibiting displaying any sign near a foreign embassy if the sign “tends to bring that foreign government into ‘public odium’ or ‘public disrepute.’”<sup>154</sup> The plurality noted that the ordinance was invalid because it was not only facially content-discriminatory<sup>155</sup> but also because it was “justified *only* by reference to the content of speech.”<sup>156</sup>
- Same with *Forsyth County v. Nationalist Movement*,<sup>157</sup> where the Court struck down a variable local fee for demonstrations on public property, os-

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<sup>148</sup> 496 U.S. 310 (1990).

<sup>149</sup> *Id.* at 315 (citation and internal quotation marks omitted).

<sup>150</sup> *See, e.g., Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 533 (1993) (“Although a law targeting religious beliefs as such is never permissible, if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral, and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest.”).

<sup>151</sup> *See, e.g., Yick Wo v. Hopkins*, 118 U.S. 356, 373–74 (1886); *Vill. of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 266 (1977).

<sup>152</sup> Note, also, that if a facially neutral regulation that vests standardless discretion in permitting officials, that standardless discretion can function like discriminatory purpose in triggering strict scrutiny. *See Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 313 n.12 (Marshall, J., dissenting) (listing cases).

<sup>153</sup> 485 U.S. 312 (1988).

<sup>154</sup> *Id.* at 315.

<sup>155</sup> *Id.* at 318–19.

<sup>156</sup> *Id.* at 321.

<sup>157</sup> 505 U.S. 123 (1992).

tensibly justified by the need for security. The fee was facially discriminatory because an official would have to examine the content to assess how much security was required (which would determine the amount of the fee);<sup>158</sup> and the purpose was also discriminatory because the goal was to make speakers pay more for speech that had a greater tendency to “offend a hostile mob.”<sup>159</sup> (This last example shows that a discriminatory purpose doesn’t need to reflect the government’s own hostility to a speaker’s message.)

- Same, too, with *United States v. Playboy Entertainment Group, Inc.*,<sup>160</sup> where the Court struck down a requirement that cable operators limit, scramble, or block sexually oriented programming, holding that the requirement was both facially discriminatory and justified by reference to content.<sup>161</sup>

These are also of course right: if either facial discrimination or discriminatory purpose is bad enough on its own, so are both together.

Occasionally, the Supreme Court has *upheld* a regulation by concluding that it’s not content discriminatory. Then, the Court has often covered both of its bases, by referring to *both* the absence of facial discrimination *and* the absence of content-discriminatory purpose—or has omitted any mention of facial discrimination when that aspect has been undisputed. For instance:

- In *Clark v. Community for Creative Non-Violence*,<sup>162</sup> the Court upheld a prohibition on overnight sleeping in certain parks, even when this was used to shut down a demonstration that involved overnight sleeping “for the purpose of demonstrating the plight of the homeless.”<sup>163</sup> Nobody had claimed that the prohibition was facially content-discriminatory; and the Court noted that “restrictions of this kind are valid provided that they are *justified without reference to the content* of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that

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<sup>158</sup> *Id.* at 134.

<sup>159</sup> *Id.* at 134–35.

<sup>160</sup> 529 U.S. 803 (2000).

<sup>161</sup> *Id.* at 811–12.

<sup>162</sup> 468 U.S. 288 (1984).

<sup>163</sup> *Id.* at 291–92.

they leave open ample alternative channels for communication of the information.”<sup>164</sup>

- In *McCullen v. Coakley*,<sup>165</sup> the Court analyzed a state law that restricted standing near an abortion clinic as content-neutral—ultimately striking it down under intermediate scrutiny—on the grounds that it was *neither* facially discriminatory *nor* justified by reference to content.<sup>166</sup>

These cases don’t tell us what would happen if facial discrimination were present but the purpose were content-neutral. This is why it’s so valuable to have a line of cases applying strict scrutiny due to the presence of facial discrimination, even when content-neutral justifications are present—*Mosley*, *Simon & Schuster*, *Humanitarian Law Project*, *Arkansas Writers’ Project*, *Discovery Network*, and especially the most recent additions, *Reed* and *AAPC*, which specifically deny the relevance of content-neutral justifications.

Granted, neutrality of purpose isn’t irrelevant in all cases. As I’ve noted above,<sup>167</sup> the Supreme Court’s recent *City of Austin* decision did suggest that neutrality of purpose, *together with neutrality as to subject-matter or substantive content*, could make a policy content-neutral even if it could technically be described as content-discriminatory.<sup>168</sup> But that narrow exception doesn’t help erotic-expression taxes—which precisely depend on substantive content, i.e., the erotic subject matter.

In the second place—and more importantly for our purposes—there’s also the exception associated with *City of Renton v. Playtime Theatres, Inc.*,<sup>169</sup> which explicitly allows for treating content-discriminatory regulations as though they were content-neutral in some cases, based on the presence of content-neutral “secondary effects.” This is the main precedent that opponents of erotic-expression taxes need to distinguish. I discuss the scope of this exception in the next subsection.

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<sup>164</sup> *Id.* at 293 (emphasis added).

<sup>165</sup> 573 U.S. 464 (2014).

<sup>166</sup> *Id.* at 479–82.

<sup>167</sup> See text accompanying *supra* note 112.

<sup>168</sup> See *City of Austin v. Reagan Nat’l Advert. of Austin, LLC*, 142 S. Ct. 1464, 1471 (2022) (“[The city’s sign code] is agnostic as to content. Thus, absent a content-based purpose or justification, the City’s distinction is content neutral . . .”).

<sup>169</sup> 475 U.S. 41 (1986).

## 2. The limited secondary-effects exception

In *Renton*, a zoning ordinance discriminated against theaters specializing in adult films. This was, on its face, content-discriminatory. And yet, the Supreme Court wrote, the ordinance was “aimed not at the content . . . but rather at the secondary effects of such theaters on the surrounding community,”<sup>170</sup> and was therefore properly examined under the more lenient standard applicable to time, place, and manner regulations: intermediate scrutiny.<sup>171</sup> Of course, reliance on secondary effects doesn’t magically transform a content-discriminatory enactment into a content-neutral one;<sup>172</sup> we just treat it like one, in the sense that we apply the level of scrutiny appropriate for content-neutral regulations.<sup>173</sup>

*Renton*’s secondary-effects doctrine is incompatible with the general facial rule for content-discrimination stated above. *Reed* and other recent cases didn’t, by their terms, purport to overrule the secondary-effects doctrine. As noted above, some courts have rethought some of their *Renton*-compatible caselaw after *Reed*, while others have said that, despite the obvious tension in reasoning, it’s an exception that still exists unless the Supreme Court says otherwise.<sup>174</sup> But assuming that *Renton* remains a viable exception, it has always, from the very start, been a limited one.<sup>175</sup>

*Renton*’s secondary-effects doctrine isn’t a rule that kicks in every time a government can point to some indirect effect unrelated to content. That much is obvious from *Simon & Schuster, Humanitarian Law Project, Arkansas Writers’ Project*,

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<sup>170</sup> *Id.* at 47.

<sup>171</sup> *Id.* at 49–50.

<sup>172</sup> See, e.g., *City of L.A. v. Alameda Books, Inc.*, 535 U.S. 425, 448 (2002) (Kennedy, J., concurring in the judgment) (“The [*Renton*] Court appeared to recognize, however, that the [‘content neutral’] designation was something of a fiction, which, perhaps, is why it kept the phrase in quotes. After all, whether a statute is content neutral or content based is something that can be determined on the face of it; if the statute describes speech by content then it is content based. . . . These ordinances are content based, and we should call them so.”).

<sup>173</sup> See, e.g., *Jacobs*, *supra* note 14, at 416–17 (“The aim of the regulation at ‘secondary’ effects is supposed to neutralize the content sensitivity that the rule displays on its face.”).

<sup>174</sup> See text accompanying *supra* notes 13–15.

<sup>175</sup> See, e.g., *Jacobs*, *supra* note 14, at 431 (“Secondary Effects Analysis will always be an odd fit within a Free Speech Clause framework that equates a content classification on the face of a regulation with a government purpose to censor speech.”).

and the other post-*Renton* cases discussed above, which applied strict scrutiny even though content-neutral justifications were present.<sup>176</sup>

One could try to characterize *Renton* as a more targeted doctrine—one that applies whenever adult entertainment is involved. But that wouldn't be right either: the adult rationale is both too broad and too narrow. *Renton* doesn't always apply when adult entertainment or pornography is at issue—just look at cases like *Ashcroft v. Free Speech Coalition*,<sup>177</sup> which involved virtual child pornography, or *Thomas v. Chicago Park District*,<sup>178</sup> which suggested that a licensing scheme targeting “businesses purveying sexually explicit speech” wasn't content-neutral.<sup>179</sup>

And *Renton* has also been applied beyond the adult entertainment context—just look at *Boos v. Barry*,<sup>180</sup> where a plurality distinguished *Renton* (thus assuming that it might be applicable absent that distinction) in analyzing a D.C. ordinance barring some forms of protest outside embassies;<sup>181</sup> *City of Cincinnati v. Discovery Network, Inc.*,<sup>182</sup> where a majority likewise distinguished *Renton* in analyzing a city's policy against newsracks for commercial handbills;<sup>183</sup> or *Ward v. Rock Against Racism*,<sup>184</sup> which relied on *Renton* to uphold sound amplification guidelines for a concert in a municipal park.<sup>185</sup> *Boos* and *Ward* both featured separate opinions protesting that *Renton* should be limited to the adult-entertainment context where it arose,<sup>186</sup> so it's clear that this extended use of *Renton* wasn't accidental.

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<sup>176</sup> See *supra* Part II.C.1.

<sup>177</sup> 535 U.S. 234 (2002).

<sup>178</sup> 534 U.S. 316 (2002).

<sup>179</sup> *Id.* at 322 n.2; see also *City of L.A. v. Alameda Books*, 535 U.S. 425, 448 (2002) (Kennedy, J., concurring in the judgment) (citing *Thomas* to show that the Supreme Court did not consistently characterize ordinances targeting sexually oriented businesses as “content neutral”).

<sup>180</sup> 485 U.S. 312 (1988) (plurality opinion).

<sup>181</sup> *Id.* at 320–21.

<sup>182</sup> 507 U.S. 410 (1993).

<sup>183</sup> *Id.* at 430.

<sup>184</sup> 491 U.S. 781 (1989).

<sup>185</sup> *Id.* at 791. See also various non-adult-entertainment lower-court cases cited in Jacobs, *supra* note 14, at 389 n.25.

<sup>186</sup> See *Boos*, 485 U.S. at 337–38 (Brennan, J., concurring in part and concurring in the judgment); *Ward*, 491 U.S. at 804 n.1 (Marshall, J., dissenting).



Indeed, in *City of Erie*, the plurality even analogized the *Renton* secondary effects doctrine applied in *Ward* to the incidental burdens doctrine applied in *O'Brien*<sup>187</sup> and *Clark v. Community for Creative Non-Violence*<sup>188</sup>—suggesting that a *Renton*-like approach is not some anomaly limited to a particular area. Rather, the Court suggested, both doctrines aim at effects unrelated to speech, so the *Renton* approach is actually quite widespread—a not-so-special case of a major First Amendment doctrine.<sup>189</sup> Justice Stevens’s dissent in *City of Erie* protested against this move, arguing that “*Ward* is not a secondary-effects case”<sup>190</sup> and that the secondary effects and incidental burden doctrines should be kept distinct.<sup>191</sup> And the modern-day *Reed* Court, seeking to move away from the reliance on neutral purposes, has pointed out that the restriction in *Ward* was actually facially content-neutral.<sup>192</sup> Be that as it may, the *Ward* Court itself did focus on the content neutrality of the *purpose*, and it really did cite *Renton* as support.<sup>193</sup>

So if *Renton* doesn’t apply every time secondary effects are present, and if *Renton* doesn’t inherently have anything to do with adult entertainment, what explains when *Renton* applies? I won’t give a complete answer here, but *at most*, *Renton* applies in the context of regulation (rather than taxation), especially when traditional local zoning or land-use considerations are at issue—when the regulation (even if apparently content-based) can fairly be characterized as a “time, place, or manner regulation.”<sup>194</sup> Thus, the Supreme Court’s recent *City of Austin* decision, which applied relaxed scrutiny to the “on-/off-premises distinction” because it was “similar to ordinary time, place, or manner restrictions,”<sup>195</sup> also arose in a local regulatory context, i.e., sign codes.

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<sup>187</sup> *United States v. O’Brien*, 391 U.S. 367, 376–77 (1968).

<sup>188</sup> 468 U.S. 288, 294 (1984).

<sup>189</sup> *See City of Erie v. Pap’s A.M.*, 529 U.S. 277, 294–95 (2000) (plurality opinion).

<sup>190</sup> *Id.* at 321 n.3 (Stevens, J., dissenting); *id.* at 325–26 (elaborating on the view that *Ward* did not involve secondary effects).

<sup>191</sup> *See id.* at 324–25.

<sup>192</sup> *See Reed v. Town of Gilbert*, 576 U.S. 155, 166–67 (2015).

<sup>193</sup> *See Ward*, 491 U.S. at 791.

<sup>194</sup> *See, e.g., Jacobs, supra* note 14, at 416, 449.

<sup>195</sup> *City of Austin v. Reagan Nat’l Advert. of Austin, LLC*, 142 S. Ct. 1464, 1473 (2022).

From its beginnings in *American Mini Theatres*,<sup>196</sup> the contours of the intermediate-scrutiny secondary-effects doctrine have been closely tied to zoning and land use. The plurality opinion in that case upheld a zoning ordinance targeting adult theaters based on “the city’s interest in preserving the character of its neighborhoods”;<sup>197</sup> “[i]t is this secondary effect which these zoning ordinances attempt to avoid, not the dissemination of ‘offensive’ speech.”<sup>198</sup> Justice Powell concurred, writing separately to express his view that local land-use regulation was different and special, because zoning is “the most essential function performed by local government”: “I view [this] case as presenting an example of innovative land-use regulation, implicating First Amendment concerns only incidentally and to a limited extent.”<sup>199</sup>

When the Supreme Court adopted the secondary-effects doctrine in a majority opinion in *Renton*, the context was also a zoning ordinance targeting adult theaters, and the rationale was closely tied to land use. The resolution of that case, the Court wrote, was “largely dictated” by *American Mini Theatres*,<sup>200</sup> and the concerns discussed were ones related to “the vital governmental interests” in “attempting to preserve the quality of urban life.”<sup>201</sup> When it came to stating the rule of law, the Court wrote: “in *American Mini Theatres*, a majority of this Court decided that, at least with respect to businesses that purvey sexually explicit materials, zoning ordinances designed to combat the undesirable secondary effects of such businesses are to be reviewed under the standards applicable to ‘content-neutral’ time, place, and manner regulations.”<sup>202</sup>

Small wonder that the Supreme Court later described this line of precedent as “[o]ur zoning cases.”<sup>203</sup> Whether or not one agrees with Justice Powell that zoning

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<sup>196</sup> *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50 (1976).

<sup>197</sup> *Id.* at 71.

<sup>198</sup> *Id.* at 71 n.34.

<sup>199</sup> *Id.* at 73, 80 (Powell, J., concurring in part and concurring in the judgment) (internal quotation marks omitted).

<sup>200</sup> 475 U.S. 41, 46 (1986) (citing *Young*, 427 U.S. at 84).

<sup>201</sup> *Id.* at 50 (internal quotation marks omitted).

<sup>202</sup> *Id.* at 49 (emphasis added) (footnote omitted).

<sup>203</sup> *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 815 (2000).

is “the most essential function performed by local government,”<sup>204</sup> the deference to local zoning and land-use authority is of a piece with the law’s generally deferential attitude toward zoning.<sup>205</sup>

To be sure, this doctrine has been applied beyond zoning in the narrowest sense. The municipal sound-amplification guidelines upheld in *Ward* weren’t zoning as such. But this was still a closely related context related to land use and licensing.<sup>206</sup> State and lower-federal-court cases applying this doctrine have arisen in various business-regulation contexts: just limiting ourselves to sexually oriented businesses, the contexts have included zoning, licensing,<sup>207</sup> prohibitions of alcohol and nude dancing together,<sup>208</sup> closing-time regulations,<sup>209</sup> “lighting or signage, . . . stage height and distance from customer requirements for nude performances,” and requirements “that viewing booths be open.”<sup>210</sup> And the particular secondary effects allowed had to do with physical proximity—the impacts of the businesses on the immediately surrounding community, including “crime, . . . neighborhood degradation, . . . lewdness, public indecency, prostitution, potential spread of disease, illicit drug use and drug trafficking, personal and property crimes, negative impacts on surrounding properties, blight, litter, and sexual assault and exploitation.”<sup>211</sup>

It makes sense that the secondary-effects doctrine applies to regulation and licensing—but not taxation—for several reasons, beyond just respect for and deference to local governments’ zoning and land use decisions. In the next Part, I’ll make the stronger claim that these taxes (whether erotic-expression or nudity taxes) can’t satisfy strict scrutiny and are vulnerable even under intermediate scrutiny.<sup>212</sup> But

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<sup>204</sup> *Am. Mini Theatres*, 427 U.S. at 80 (Powell, J., concurring in part and concurring in the judgment).

<sup>205</sup> *See, e.g., Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

<sup>206</sup> *Cf. Big Hat Books v. Prosecutors*, 565 F. Supp. 2d 981, 991 (S.D. Ind. 2008) (describing a licensing statute as having “‘zoning-like’ aims”).

<sup>207</sup> *See, e.g., Maxim Cabaret, Inc. v. City of Sandy Springs*, 816 S.E.2d 31 (2018).

<sup>208</sup> *See, e.g., Oasis Goodtime Emporium*, 773 S.E.2d 728 (Ga. 2015); *Goldrush II v. City of Marietta*, 482 S.E.2d 347 (Ga. 1997); *Ben’s Bar, Inc. v. Vill. of Somerset*, 316 F.3d 702 (7th Cir. 2003); *Sammy’s of Mobile, Ltd. v. City of Mobile*, 140 F.3d 993 (11th Cir. 1998).

<sup>209</sup> *See, e.g., Great American Dream, Inc. v. DeKalb County*, 727 S.E.2d 667 (Ga. 2012).

<sup>210</sup> *Jacobs*, *supra* note 14, at 407–09 nn.151–159 (citing various federal lower-court cases).

<sup>211</sup> *Id.* at 409–10 (internal quotation marks omitted) (quoting various cases).

<sup>212</sup> *See infra* Part III.

here I'll just focus on the narrower issue of whether the *Renton* exception should be understood to encompass taxes.

Zoning, land-use regulations, and other *Renton* contexts tend to fit within the secondary-effects doctrine's overarching rubric of "time, place, or manner regulations." *Renton*-type cases generally involve the following sorts of restrictions: "Don't have nude dancing at these hours—have them at these other hours instead" (time); "Don't have nude dancing in this part of town—have it in this other part of town instead" (place); "Don't have entirely nude dancing—wear G-strings instead" (manner). By contrast, a tax can't easily be described as a time, place, or manner regulation, because it doesn't prescribe when, where, or how to conduct any activities; it merely attaches a price to such activities in order to raise revenue.<sup>213</sup> Taxation thus doesn't fit well with the theory of *Renton*.

Moreover, the Supreme Court—which generally hasn't looked fondly on taxes or fees that burden constitutional rights<sup>214</sup>—has also, in particular, taken a negative, bright-line attitude toward *discriminatory* taxation that implicates constitutional values. As far back as *McCulloch v. Maryland*,<sup>215</sup> in the context of state taxation of a federal bank, the Court hasn't drawn lines between moderate and excessive taxation; it has reasoned instead that a tax, once allowed, can be increased without limit.<sup>216</sup> The same idea has been applied in the First Amendment context. For religious speech, a license tax is unconstitutional because, in principle, it could become

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<sup>213</sup> See Bishop, *supra* note 20, at 1201.

<sup>214</sup> See, e.g., *Murdock v. Pennsylvania*, 319 U.S. 105, 112–13 (1943) ("The power to tax the exercise of a privilege is the power to control or suppress its enjoyment. . . . A state may not impose a charge for the enjoyment of a right granted by the federal constitution."); *Legality of Privilege Tax on Entry of Customers into Adult-Oriented Establishments*, Tenn. Op. Att'y Gen. 08-78, at 3 (Apr. 2, 2008) (discussing caselaw allowing fees for engaging in constitutionally protected activity, as long as reasonably related to administrative expenses); Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443, 1543 (2009) (tying constitutionality of "modest content-neutral fees" for the exercise of certain constitutional rights, including demonstrating, fundraising for charity, declaring one's candidacy for political office, getting married, and building on one's property, to whether "the fees are tailored to defraying the costs of administering constitutionally permissible regulatory regimes").

<sup>215</sup> 17 U.S. (4 Wheat.) 316 (1819).

<sup>216</sup> See *id.* at 430–31.

too “costly.”<sup>217</sup> For the press, even a small content-discriminatory tax is unconstitutional because of “the possibility of subsequent differentially more burdensome treatment.”<sup>218</sup> The taxes discussed here aren’t necessarily small,<sup>219</sup> but even if they were, that would be irrelevant.<sup>220</sup>

Why can’t we draw a constitutional line between moderate and excessive taxes? Perhaps because “courts as institutions are poorly equipped to evaluate with precision the relative burdens of various methods of taxation.”<sup>221</sup> Or perhaps because a discriminatory tax inherently offends First Amendment values: “A tax based on the content of speech does not become more constitutional because it is a small tax.”<sup>222</sup> Regardless, this treatment of taxation stands in sharp contrast to the “time, place, or manner” inquiry under which we ask whether regulations “do not *unreasonably* limit alternative avenues of communication.”<sup>223</sup> The bright-line treatment of taxation would be out of place in *Renton*’s balancing inquiry.

Justice Kennedy was right, then, to observe in his concurrence in the judgment in *City of Los Angeles v. Alameda Books* that a government “may not . . . impose a content-based fee or tax . . . even if [it] purports to justify the fee by reference to secondary effects.”<sup>224</sup> Several courts have treated Justice Kennedy’s separate opinion as the controlling opinion in *Alameda Books* under the rule of *Marks v. United*

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<sup>217</sup> *Murdock v. Pennsylvania*, 319 U.S. 105, 112 (1943).

<sup>218</sup> *Minneapolis Star & Tribune Co. v. Minn. Comm’r of Rev.*, 460 U.S. 575, 588 (1983); *cf. also* *Leathers v. Medlock*, 499 U.S. 439, 447 (1991) (“A tax is also suspect if it targets a small group of speakers.”).

<sup>219</sup> *See* Bishop, *supra* note 20, at 1203 & n.136 (citing industry estimates that the Texas tax could put half of affected business owners out of business).

<sup>220</sup> *Contra* *Combs v. Tex. Entm’t Ass’n*, 347 S.W.3d 277, 287 (Tex. 2011) (taking *de minimis* considerations considered relevant to regulation in *City of Erie v. Pap’s A.M.*, 529 U.S. 277, 294 (2000), and applying them to taxes); *cf. Bushco v. Utah State Tax Comm’n*, 225 P.3d 153, 168–69 (Utah 2009) (same, in an *O’Brien* framework).

<sup>221</sup> *Minneapolis Star*, 460 U.S. at 589.

<sup>222</sup> *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 136 (1992); *see also* Ark. Writers’ Project, 481 U.S. at 229 (content-based taxes are “particularly repugnant to First Amendment principles”).

<sup>223</sup> *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986) (emphasis added).

<sup>224</sup> 535 U.S. 425, 445 (2002) (Kennedy, J., concurring in the judgment).

*States*,<sup>225</sup> but whether that opinion is technically precedential isn't very important, because Justice Kennedy was doing no more than restating longstanding, and sound, doctrine. The *Renton* secondary-effects doctrine doesn't apply, and has never applied, to taxes. Recent caselaw merely clarifies and strengthens the background rule that applies for non-*Renton* cases, which is that content discrimination is determined on the face of the statute, without reference to any content-neutral justifications, and that content-based enactments are analyzed under strict scrutiny.

### III. TAXATION AND THE NECESSITY INQUIRIES

#### A. *Taxes Fail Strict Scrutiny*

Once we determine that a tax is content-based and requires strict scrutiny, it must necessarily fail. Strict scrutiny requires that the government choose the least restrictive (i.e., least content-discriminatory) means of pursuing its goal. But the government can always pursue its goal—providing services to victims of sex crimes, or similar—by providing the same amount of money from general revenues. As the Supreme Court wrote in *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*:<sup>226</sup>

The main interest asserted by Minnesota in this case is the raising of revenue. Of course that interest is critical to any government. Standing alone, however, it cannot justify the special treatment of the press, for an alternative means of achieving the same interest without raising concerns under the First Amendment is clearly available: the State could raise the revenue by taxing businesses generally, avoiding the censorial threat implicit in a tax that singles out the press.<sup>227</sup>

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<sup>225</sup> 430 U.S. 188, 193 (1977) (“When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, ‘the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .’”); see 725 Eatery Corp. v. City of New York, 408 F. Supp. 3d 424, 464 (S.D.N.Y. 2019) (collecting cases from a number of circuits); Ass’n of Club Execs. of Dallas, Inc. v. City of Dallas, 604 F. Supp. 3d 414, 426, 438 (N.D. Tex. 2022) (applying the principle from Justice Kennedy’s opinion that a regulation cannot be sustained under secondary effects analysis unless it “leav[es] the quantity and accessibility of speech substantially intact”). *But see* Flanigan’s Enters., Inc. v. City of Sandy Springs, 703 F. App’x 929, 936–37 (11th Cir. 2017) (“Because Justice Kennedy’s *Alameda Books* proportionality test cannot be harmonized with the plurality’s opinion, it is not binding Supreme Court precedent.”).

<sup>226</sup> 460 U.S. 575 (1983).

<sup>227</sup> *Id.* at 586.

“The same is true of a tax that differentiates between members of the press,”<sup>228</sup> and the same is true of a tax that differentiates between erotic and non-erotic messages, or different types of content more generally.

Now perhaps I’m being too absolutist here—perhaps we shouldn’t take too literally the idea that we need to find the absolutely least discriminatory alternative; perhaps we should care at least a little bit whether those less discriminatory alternatives serve our purposes somewhat less well.<sup>229</sup> Maybe we need to do somewhat more balancing—like intermediate scrutiny, but drawing the line in a more speech-protective way, for instance by requiring the government to tolerate a greater harm to its asserted interest when strict scrutiny applies than when intermediate scrutiny applies.<sup>230</sup>

That’s not how the strict scrutiny cases state the test, so I’m inclined to say my absolutism is warranted here. Still, if one wants to be less absolutist, we’ll want to look closely at a variety of asserted government interests. But I’ll save that analysis for the next subsection, in which I argue that the tax is vulnerable even under intermediate scrutiny (which implies it would be even more vulnerable under strict scrutiny).

### *B. Taxes Are Suspect Under Intermediate Scrutiny*

Suppose we instead evaluate such a tax under intermediate scrutiny. This might be because we’re considering a nudity tax instead of an erotic-expression tax; or maybe, even as to an erotic-expression tax, you’re not convinced by my strict-scrutiny argument presented above.<sup>231</sup> Under intermediate scrutiny, a tax wouldn’t necessarily fail, but it would still be vulnerable.

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<sup>228</sup> Ark. Writers’ Project v. Ragland, 481 U.S. 221, 232 (1987).

<sup>229</sup> See Eugene Volokh, *Freedom of Speech, Shielding Children, and Transcending Balancing*, 1997 SUP. CT. REV. 141, 159 (1997).

<sup>230</sup> Cf., e.g., *id.* at 188–92 (exploring a possible weighing approach).

<sup>231</sup> Or, as suggested above, see text accompanying *supra* notes 229–230, maybe you believe in strict scrutiny but you still think it should involve more of a weighing than merely observing that using general tax revenues is a less discriminatory alternative. Then this section provides a guide for identifying and weighing government interests, though for strict scrutiny purposes the weighing should be done in a way that is more speech-protective.

One of the requirements of intermediate scrutiny is that the government’s interest must be “unrelated to the suppression of free speech.”<sup>232</sup>

Another requirement is that the tax has to be “narrowly tailored to serve a significant governmental interest.”<sup>233</sup> Both strict and intermediate scrutiny use similar “narrow tailoring” language when discussing the requisite means-ends relationship,<sup>234</sup> but this is confusing; in the context of intermediate scrutiny, “narrow tailoring” doesn’t require the least-restrictive alternative characteristic of strict scrutiny.<sup>235</sup> Still, under intermediate scrutiny, there must be a “reasonable fit” between the government interest and the chosen means.<sup>236</sup> Any burden on speech must “promote[] a substantial government interest that would be achieved less effectively absent the [burden]”; the governmental action can’t “burden substantially more speech than is necessary to further the government’s legitimate interests.”<sup>237</sup>

In this section, I examine a number of possible governmental interests that might be thought to support these taxes. I conclude that some possible government interests themselves are invalid—for instance, because they’re speech-suppressive or discriminatory. Other interests are legitimate, but a discriminatory tax doesn’t serve them any better than would a more neutral tax—e.g., any amount of revenue raised by a targeted tax could equally well be provided out of general revenues.

I identify one interest—the interest in combating secondary effects—that is both legitimate and could conceivably be pursued more effectively with a targeted

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<sup>232</sup> See, e.g., *Clark v. Comm. for Creative Non-Violence*, 468 U.S. 288, 294 (1984) (citing *United States v. O’Brien*, 391 U.S. 367, 377 (1968)).

<sup>233</sup> See, e.g., *id.* at 293.

<sup>234</sup> See Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417, 2418 (1996) (referring to tailoring requirements as a type of “‘ends and means’ inquiry”).

<sup>235</sup> See *Clark*, 468 U.S. at 299.

<sup>236</sup> “Reasonable fit” is a term taken from the Supreme Court’s commercial speech cases, where the standard is also intermediate scrutiny. See *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 416 (1993).

<sup>237</sup> *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989) (internal quotation marks omitted). *Ward* relies on the *Renton* secondary-effects doctrine, but see text accompanying *supra* notes 180–193 (discussing this point); but a similar factor is also present in the *O’Brien* doctrine for incidental burdens. See, e.g., *O’Brien*, 391 U.S. at 377 (“[T]he incidental restriction on alleged First Amendment freedoms [must be] no greater than is essential to the furtherance of [the governmental] interest.”); *City of Erie v. Pap’s A.M.*, 529 U.S. 277, 301 (2000) (plurality opinion) (similar).



tax. But the government must explicitly assert this interest and support it with empirical evidence that is squarely on point. Moreover, because any increase in effectiveness derives directly from the tax's chilling effect on expression, courts should be very skeptical of an argument based on this interest.

Therefore, these taxes are likely unconstitutional under intermediate scrutiny.

### 1. Reducing the activity as governmental interest

To figure out whether the tax satisfies intermediate scrutiny, we have to start by carefully identifying the government's interest, determining whether that interest is valid, and if it is, looking at whether it has the proper means-ends relationship (i.e., looking at the narrowness of the tailoring).

When taxes are involved, the governmental interest that most obviously springs to mind is the interest in reducing the activity: policymakers often suggest taxing undesirable activity and subsidizing desirable activity. Ideally, one can design an optimal system of deterrent taxes, where the amount of the tax is precisely equal to the amount of the social harm from the activity; this would optimally deter the harmful activity by making bad actors internalize its social cost. And even in a non-ideal world, one can just levy taxes of some amount in order to reduce the amount of the activity by some amount; the precise amount might not be optimal, and there might not be any serious attempt to quantify the amount of social harm (perhaps because, in morals contexts, harms might be subtle and diffuse), but it might still be better than nothing. This is the sort of thinking that goes by the name of “polluter pays” in environmental contexts, “sin taxes” in morals-regulation contexts, and “Pigouvian taxes” in public-finance contexts.<sup>238</sup>

But—common and praiseworthy though this thinking may be elsewhere—this can't be *the governmental interest* when burdens on expressive activity are concerned. To say that the government has an interest in reducing erotic dancing is just to say that the government is relying on the tax's “chilling effect” on expressive

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<sup>238</sup> See, e.g., Perkins, *supra* note 17, at 157; see generally William J. Baumol, *On Taxation and the Control of Externalities*, 62 AM. ECON. REV. 307 (1972); A.C. PIGOU, *THE ECONOMICS OF WELFARE* (1920). For an interesting discussion of Pigouvian issues in a law-enforcement context, see Sheldon A. Evans, *Punishment Externalities and the Prison Tax*, 111 CAL. L. REV. 683 (2023). For a discussion of political-economy problems with sin taxes, see Andrew J. Haile, *Sin Taxes: When the State Becomes the Sinner*, 82 TEMPLE L. REV. 1041 (2009).

conduct. But if the First Amendment means anything, it must be that a chilling effect on constitutionally protected expression can't itself be the governmental interest; i.e., it can't be a *positive* in a First Amendment case.

Perhaps a tax or regulation might pass First Amendment scrutiny on the ground that, given an important enough interest, the chilling effect is *justified* by, or *outweighed* by, some other benefits. But the chilling effect can't itself be the benefit. Such a "sin tax" rationale would run afoul of intermediate scrutiny's separate requirement that the state interest be unrelated to the suppression of speech.<sup>239</sup>

One could argue that the interest is not in reducing erotic dancing as such, but in reducing the combination of erotic dancing with alcohol.<sup>240</sup> But, as I've already shown above,<sup>241</sup> the doctrine doesn't support any different First Amendment analysis when alcohol is involved. If your interest is to reduce *erotic dancing* with alcohol but not to reduce *other kinds of dancing* with alcohol, then your problem is with erotic dancing—which means that you're still claiming the chilling effect on speech as a positive.

If your view is that erotic dancing plus alcohol uniquely contributes to some social problem, then combating that social problem (i.e., a secondary effect) might be a good governmental interest—and conceivably, the chilling effect might be justified as an acceptable way to pursue *that* interest. But if that's the case, you're not using the chilling effect—reducing speech, either by itself or with alcohol—as the governmental interest itself, and so this possibility has to be investigated separately. (I discuss that possible governmental interest below.<sup>242</sup>)

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<sup>239</sup> See, e.g., *O'Brien*, 391 U.S. at 377; *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986); see also *McCullen v. Coakley*, 573 U.S. 464, 486 (2014) (noting that, "[w]here certain speech is associated with particular problems, silencing the speech is sometimes the path of least resistance," but that this attitude does not comport with intermediate scrutiny's requirement of narrow tailoring); *id.* at 495 ("To meet [intermediate scrutiny's] requirement of narrow tailoring, the government must demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interests, not simply that the chosen route is easier.").

<sup>240</sup> See *Combs v. Tex. Entm't Ass'n*, 347 S.W.3d 277, 287 (Tex. 2011) ("[L]ogic and the evidence indicate that the fee provides some discouragement to combining nude dancing with alcohol consumption.").

<sup>241</sup> See text accompanying *supra* notes 119–127.

<sup>242</sup> See *infra* Part III.B.3.

## 2. Revenue-raising as governmental interest

Once we eliminate reducing the activity as a legitimate governmental interest, another possible interest could be raising revenue. But this doesn't work, for the same reason it didn't work in the strict scrutiny analysis above.<sup>243</sup>

Raising revenue is obviously a legitimate interest. But under intermediate scrutiny's narrow tailoring standard, a tax that burdens expression fails, because the State could achieve that goals equally well, with less burden on expressive conduct, by merely applying a more broad-based tax to raise the same amount of revenue—e.g., the state's ordinary income taxes, sales taxes, property taxes, or the like.<sup>244</sup> Money is money, so any way of raising a particular amount serves the revenue-raising goal as well as any other; a targeted tax is thus unnecessary to the government's legitimate goal of raising revenue.

Am I importing strict scrutiny's least-restrictive alternative analysis into intermediate scrutiny? Not at all. Under strict scrutiny, when a less-restrictive alternative is available, the government has to choose it, even when that's harmful to its (compelling) interest.<sup>245</sup> Intermediate scrutiny doesn't require such sacrifices to the governmental interest. As I've quoted above, there just needs to be a "reasonable fit"; the burden must "promote[] a substantial government interest that would be achieved less effectively absent the [burden]"; and so on.<sup>246</sup> But what this means is that if, hypothetically, one could identify a less-restrictive alternative that promoted the government's interest *exactly as well as the challenged burden*, at the same cost and with the same effectiveness, then the burden must fail intermediate scrutiny. The Supreme Court stated as much in explaining the concept of "reasonable fit" in *City of Cincinnati v. Discovery Network, Inc.*:<sup>247</sup>

We reject the city's argument that . . . our consideration of alternative, less drastic measures by which the city could effectuate its interests . . . violates [the doctrine] that

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<sup>243</sup> See text accompanying *supra* notes 226–228.

<sup>244</sup> Indeed, this would be the constitutionally required method in Georgia, if not for a special constitutional amendment allowing the use of a dedicated fund for the adult-entertainment tax discussed here. See *supra* note 30.

<sup>245</sup> See, e.g., Volokh, *supra* note 229, at 149–56 (arguing that the decision in *Reno v. ACLU*, 521 U.S. 844 (1997), required the government to use less-restrictive alternatives that were also less effective).

<sup>246</sup> See text accompanying *supra* notes 236–237.

<sup>247</sup> 507 U.S. 410 (1993).

regulations on commercial speech are not subject to “least-restrictive-means” analysis. . . . A regulation need not be absolutely the least severe that will achieve the desired end, . . . but if there are numerous and obvious less-burdensome alternatives to the restriction on commercial speech, that is certainly a relevant consideration in determining whether the “fit” between ends and means is reasonable.<sup>248</sup>

The availability of a broad-based tax that does just as well in pursuing the revenue-raising goal thus means that this interest cannot support intermediate scrutiny any more than it can support strict scrutiny.

One could dispute the view that a broad-based tax is less burdensome (and thus unproblematic from a First Amendment perspective) than a targeted tax, because a broad-based tax hits everyone while a targeted tax hits only a few.<sup>249</sup> But if a broad-based tax were more burdensome for First Amendment purposes, we could challenge the income tax itself (or any general tax), which does, after all, fall on some expressive activities along with everything else. Could we use the First Amendment to force the income tax and other general taxes to exempt all expressive activities? But that seems intuitively wrong. Moreover, it is doctrinally incorrect. “[E]very civil and criminal remedy imposes some conceivable burden on First Amendment protected activities,” but First Amendment scrutiny doesn’t come into play unless a policy burdens “conduct with a significant expressive element.”<sup>250</sup> Burning a flag or a draft card does have such an element, but earning income or selling goods doesn’t.<sup>251</sup> A general income or sales tax burdens general activities with no significant expressive element, and thus raises no First Amendment concerns.<sup>252</sup>

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<sup>248</sup> *Id.* at 417 n.13 (some internal quotation marks omitted).

<sup>249</sup> This was the view of the *Bushco* court: “Plaintiffs’ least restrictive means argument is contrary to its own position that a general tax—one that burdens all businesses—would satisfy First Amendment scrutiny under *O’Brien*. A generalized tax would no doubt inflict burdens on a greater variety of protected expression than the Tax at issue here, and therefore would not be the least restrictive means available.” *Bushco v. Utah State Tax Comm’n*, 225 P.3d 153, 168 (Utah 2009).

<sup>250</sup> *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 706 (1986).

<sup>251</sup> See *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 66 (2006) (“For instance, if an individual announces that he intends to express his disapproval of the Internal Revenue Service by refusing to pay his income taxes, we would have to apply *O’Brien* to determine whether the Tax Code violates the First Amendment. Neither *O’Brien* nor its progeny supports such a result.”).

<sup>252</sup> *Arcara*, 478 U.S. at 707 (“The New York Court of Appeals thus misread *O’Brien*, which has no relevance to a statute directed at imposing sanctions on nonexpressive activity.”).

Could we do somewhat better than the mere revenue-raising interest? Perhaps the government interest might be raising a given amount of revenue while generating the least economic distortion. Public-finance economists have a lot to say about how to set differential tax rates on various goods or activities so as to raise money while minimizing economic distortions. The distortionary effect of a tax arises from people's tendency to reduce the amount of the taxed activity or consumption of the taxed good. The ideal tax, from this perspective, is one that raises money without changing anyone's behavior. This is of course an unattainable ideal, because all money is used for something. But the least distortionary tax tends to be one that is assessed on goods or activities that aren't very responsive to price, i.e., goods or activities with "inelastic demand."<sup>253</sup> If a government followed that sort of economic advice, it's conceivable that it might choose nude dancing as one of these price-inelastic activities.<sup>254</sup>

But this motivation, while theoretically conceivable, is unlikely to be implicated here. In the first place, as a general public finance matter, broad-based taxes (like income taxes) are likely to be less economically distorting than targeted taxes on particular activities, because the tax base is much broader and so the same amount of revenue can be raised with a much smaller tax increase.<sup>255</sup>

And in the second place—as a factual matter in this context—the taxes discussed here are levied uniquely on adult entertainment, with no apparent concern for minimizing economic distortions. On the contrary, the statutory context suggests that these taxes are overwhelmingly motivated by the connection between the activity and some social ill—i.e., the secondary effect. If we take the statutory context at face value, this suggests that the government's true interest is in fighting the

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<sup>253</sup> See, e.g., Louis Kaplow, *Taxation*, in 1 HANDBOOK OF LAW AND ECONOMICS 647, 676–78 (A. Mitchell Polinsky & Steven Shavell eds., 2007) (discussing the inverse-elasticity result associated with the Ramsey model, though also arguing that such differential taxation is undesirable when income taxation is available).

<sup>254</sup> This is an additional argument for taxing addictive activities: the fact that they are addictive means that they are relatively unresponsive to price. See *supra* note 43.

<sup>255</sup> See *supra* note 253.

secondary effect (on which more below<sup>256</sup>), not in raising money in efficient ways.<sup>257</sup>

### 3. Fighting secondary effects as governmental interest

What about combating the secondary effect? Fighting child sex trafficking is obviously a legitimate interest (even a compelling one), and so are many other secondary effects that might be adduced in the adult-entertainment context. But the government still has to establish that the tax will reduce the secondary effect in the way required by intermediate scrutiny.

There are two main pathways for the tax to reduce the secondary effect. First, the tax money could be spent on activities that will reduce the amount of the secondary effect, like anti-trafficking enforcement; we could call this the “spending effect.” Second, even if there is no such spending, the tax can by itself reduce the amount of the secondary effect—by raising the price of the activity to consumers or by raising its cost to producers. We could call this a “deterrence effect,” but we should be more precise here. A regulation—say, a zoning ordinance—seeks to reduce the secondary effect, but doesn’t necessarily affect the total amount of the expressive activity. By contrast, if we ignore the spending effect, the only way a tax can reduce the secondary effect is by reducing the amount of speech. So we should more properly call this the “speech-deterrence effect.”

#### a. The spending effect

First, let’s just focus on the spending effect. That is, let’s assume that the government isn’t relying on any reduction in the expression at all; or, let’s assume that the tax is so small (or is structured in such a way) that it has no effect on the level of expression.<sup>258</sup> Thus, suppose the only way that the tax alleviates the secondary

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<sup>256</sup> See *infra* Part III.B.3.

<sup>257</sup> Perhaps we shouldn’t take the statutory context at face value: perhaps puritans claim that they only want to combat secondary effects, though their true goal is to reduce the expression as such. But even so, there is little reason to believe that efficiency-oriented public finance aficionados are setting targeted tax rates.

<sup>258</sup> Even a large tax does not necessarily alter activity levels. For instance, suppose zoning or other restrictions are such that there is only room in the market for a small number of adult entertainment establishments, and each of them makes substantial profits (what, in economics lingo, we would call “oligopoly rents”). Then, even a substantial tax, if it were assessed on a lump-sum basis rather than a per-entry or ad-valorem basis, and if it were smaller than the amount of oligopoly rents

effect is that the revenues will be spent on various relevant activities—like providing services to trafficked women or children, or funding sex-crime prosecutions.

Though alleviating the secondary effects is an adequate interest, merely *raising* money isn't enough here; it has to be actually spent.<sup>259</sup> Putting the money into the general fund with an expectation that the legislature will fund activities (like in Tennessee<sup>260</sup>) isn't good enough, because the government won't be able to show the necessary linkage between the tax and the spending. At a minimum, the money raised has to somehow be directly tied to combating the secondary effect; one possibility would be to use a dedicated fund.

Maybe not 100% of the money raised needs to go into that fund—in Texas, some of the money raised is used to subsidize health-insurance premiums for poor people,<sup>261</sup> and maybe this isn't fatal. But at least there needs to be some direct relation between the money raised and the money spent on reducing the purported secondary effect.

If the government uses a fund, then the tax adds money to the revenue pool, and at least part of that money will be spent on activities that reduce the secondary effect. That seems promising—but in an intermediate scrutiny context, even that isn't good enough. A tax that burdens speech not only must promote a governmental interest, but must promote it more effectively than would be possible without the burden on speech. As noted above, the governmental action can't "burden substantially more speech than is necessary to further the government's legitimate interests."<sup>262</sup>

And just as in the strict scrutiny context—and just as we saw above with the revenue-raising interest—the state could combat the secondary effect equally well, with less burden on expressive conduct, by merely applying a broad-based tax to raise the same amount. An obvious way of doing so would be to fund the relevant

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for all existing businesses, would not alter the amount of the activity. By contrast, even a small tax might have substantial effects if it were assessed on a per-entry or ad-valorem basis.

<sup>259</sup> See Bishop, *supra* note 20, at 1202–03.

<sup>260</sup> See text accompanying *supra* note 40.

<sup>261</sup> See text accompanying *supra* note 34.

<sup>262</sup> Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989) (internal quotation marks omitted).

activities directly out of general revenues (whether or not this is done through specific “funds”) rather than from a targeted tax on adult entertainment establishments.

This is what makes targeted taxes fundamentally different from targeted regulations: a targeted *regulation*, like a zoning ordinance—if properly targeted, which can be established with good empirical evidence—can have a direct effect on whatever secondary effect is being addressed, because the regulation itself forces changes in behavior. A non-targeted regulation would be no more effective, or even less effective (surely *all* businesses can’t be zoned into an adult area of town). But a targeted *tax* doesn’t do any better than a non-targeted tax, unless we can also consider the reduction in the expression (i.e., the speech-deterrence effect).

So, as a governmental interest, the revenue-raising interest works no better here than it did for strict scrutiny, even if we tie it to the interest in fighting the secondary effect. The only way fighting the secondary effect can work as a governmental interest is if there is also a deterrence effect—which is the subject of the next subsection.

## **b. The speech-deterrence effect**

### **i. May one rely on the speech-deterrence effect?**

As to the speech-deterrence effect, we’ve already seen above that reducing the amount of speech can’t *itself* be the governmental interest. But as long as *something else* (like reducing the secondary effect) is the government interest, it might be permissible to take the reduction in speech into account in determining whether that interest is sufficiently furthered.

Why do I say “might be”? Because it depends on how one interprets Justice Kennedy’s concurrence in the judgment in *Alameda Books*. Justice Kennedy wrote:

[A] city may not regulate the secondary effects of speech by suppressing the speech itself. . . . Though the inference may be inexorable that a city could reduce secondary effects by reducing speech, this is not a permissible strategy. The purpose and effect of a zoning ordinance must be to reduce secondary effects and not to reduce speech.”<sup>263</sup>

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<sup>263</sup> City of L.A. v. Alameda Books, Inc., 535 U.S. 425, 445 (2002) (Kennedy, J., concurring in the judgment); *see also* Jacobs, *supra* note 14, at 446–47.



At first glance, one might think that *of course*, regulation of adult entertainment *must* reduce its amount, because doesn't regulating an activity always burden that activity, and thus reduce its amount? Not so: a zoning regulation that places adult businesses together might actually promote competition among adult businesses and thus reduce their prices; or, if it makes law enforcement easier by putting adult businesses in one place, that might improve safety and attract more customers that way. The opposite might also be true: if having too many adult businesses in one area promotes crime, then a zoning ordinance that *spaces out* adult businesses might improve safety and thus attract customers. All that's necessary here is to observe that (1) this is an intensely empirical question, and (2) regulation of adult entertainment needn't entail speech suppression.

According to Justice Kennedy's approach, then, the government needs to reduce secondary effect *without reducing speech*. As I've mentioned above, courts have disagreed on whether Justice Kennedy's opinion is controlling.<sup>264</sup> But if we do treat it as controlling, that would suggest that we should treat any speech-deterrence effect as a negative, or at least ignore the speech-deterrence effect in deciding on the constitutionality of these targeted taxes.<sup>265</sup> Indeed, as Justice Kennedy wrote immediately afterward: "A city may not, for example, impose a content-based fee or tax. This is true even if the government purports to justify the fee by reference to secondary effects."<sup>266</sup> And if that's the case, then the targeted tax would fare no better under intermediate scrutiny than under strict scrutiny.

This would apply more broadly than the tax context: the insistence on not reducing speech would mean that the government could never use *Renton* analysis to *ban* a certain type of entertainment outright. Presumably we wouldn't be able to pretend that the secondary effects convert a facially content-discriminatory ban into a content-neutral one, and we'd have to use ordinary strict scrutiny analysis.

The Supreme Court hasn't encountered such a claim so far, so we don't know how whether it would follow Justice Kennedy's approach. Let's just observe that

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<sup>264</sup> See text accompanying *supra* note 225.

<sup>265</sup> See, e.g., *Ass'n of Club Execs. of Dallas, Inc. v. City of Dallas*, 604 F.3d 414, 438 (N.D. Tex. 2022) (striking down an ordinance, in part because it did not "leave the quantity and accessibility of speech intact").

<sup>266</sup> *Alameda Books*, 535 U.S. at 445 (Kennedy, J., concurring in the judgment) (citations omitted).

the tax would be invalid under that approach, and then explore what would happen if the Court *doesn't* follow that approach, and if the speech-deterrence effect *can* be considered when the governmental interest is fighting a secondary effect.

In that case, the government can argue that a targeted tax would be more effective than a broad-based tax because the speech-deterrence effect can be added to the spending effect—that is, a targeted tax fights the social ill better than a general tax does, because the targeted tax has the extra advantage of making the amount of adult entertainment go down. But even then, the tax would not automatically be valid.

## ii. The government must make the argument

First, the government must actually make this argument. This might sound obvious, but there are reasons why a government might make a different strategic decision. In Georgia, for instance, the government disclaimed any interest in reducing the speech as such, stressing that the tax was *de minimis* and left nude dancing establishments absolutely free to do whatever they were doing before—and even free to continue with their speech and avoid the tax as long as they stopped serving alcohol.<sup>267</sup> The need to raise revenue to fight child sex trafficking—i.e., the spending effect—was its primary argument; the speech-deterrence effect was minimized or completely denied.

Why not forthrightly admit that a tax would beneficially reduce the amount of the activity? The government might want to rhetorically blunt the argument that the tax is merely motivated by dislike of adult entertainment—even if this is actually the case. It might want to at least pay lip service to First Amendment values, and avoid giving courts the impression that reducing the activity is the actual governmental interest—rather than a collateral consequence that contributes to fighting the secondary effect. The *de minimis* argument (which is in strong tension, if not downright inconsistent, with the speech-deterrence argument) might be used to convince the court that the constitutional challenge is entirely frivolous; or it might be used to support a “greater power includes the lesser” argument (a type of argument I address below<sup>268</sup>).

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<sup>267</sup> See, e.g., *Br. of Cross-Appellee, Ga. Ass'n of Club Executives v. Riley*, No. S21X0900, at 7, 24 (Ga. June 21, 2021).

<sup>268</sup> See *infra* Part III.C.

In short, even if reducing the speech can contribute to an intermediate scrutiny argument based on fighting the secondary effect, the government must be willing to say so.

**iii. There must be empirical evidence**

Next, the government must have empirical evidence on the connection between reducing the speech and reducing the secondary effect.

It's worth pausing to consider the role of empirical evidence in intermediate scrutiny cases. In this Article, I haven't sharply distinguished between *Renton* secondary-effects scrutiny and *O'Brien* incidental-burdens scrutiny: both involve intermediate scrutiny, and both are broadly similar in how they state the test.<sup>269</sup> But there are some subtle differences between the two doctrines.

*Renton* secondary-effects cases, such as *Renton* itself or *Alameda Books*, have hinged on the quality of the government's empirical evidence tying the burdened expression with the secondary effect.<sup>270</sup> The questions in those cases concerned whether Seattle's experience was relevant to *Renton*<sup>271</sup> or whether a study about concentration of establishments could be generalized to concentration of operations within a single establishment.<sup>272</sup> But everyone assumed that some empirical evidence was necessary.<sup>273</sup>

*O'Brien* cases, on the other hand, have sometimes had no empirical evidence at all.<sup>274</sup> The *O'Brien* Court, for instance, did not seem particularly interested in whether a ban on destroying draft cards would pursue the government's draft-related interests substantially more effectively than other policies. (On the other hand, *O'Brien* held that "assuring the continuing availability of issued Selective Ser-

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<sup>269</sup> See text accompanying *supra* notes 188–189.

<sup>270</sup> See *City of L.A. v. Alameda Books, Inc.*, 535 U.S. 425, 437 (2002) (plurality opinion) ("[T]he city certainly bears the burden of providing evidence that supports a link between concentrations of adult operations and asserted secondary effects . . .").

<sup>271</sup> See *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 50–52 (1986).

<sup>272</sup> See *Alameda Books*, 535 U.S. at 438–39.

<sup>273</sup> *Contra Combs v. Tex. Entm't Ass'n, Inc.*, 347 S.W.3d 277, 288 (Tex. 2011) (upholding an erotic-expression tax without discussing empirical evidence).

<sup>274</sup> See *Bushco v. Utah State Tax Comm'n*, 225 P.3d 153, 165–66 & n.53 (Utah 2009).

vice certificates,” not just the effectiveness of the draft generally, was itself the “substantial interest”.<sup>275</sup> we probably don’t need empirical evidence to know that the destruction of draft cards harms that interest, or that regulations that allowed for draft card destruction would be worse for that interest than a ban on destruction.)

*City of Erie*, too, minimized the need for empirical evidence, noting the lack of empirical evidence in *O’Brien*.<sup>276</sup> But at the same time, it engaged in a lengthy discussion of the adequacy of the government’s empirical evidence before upholding the city’s nudity regulation.<sup>277</sup> The justices in *City of Erie* were split as to how much empirical evidence there needed to be that was specific to Erie’s own experience, but even the plurality considered it significant that there was some evidence.

There is probably less difference between these two strands of doctrine on this point that it seems. Even in *Renton*-land, governments are allowed to use imperfect studies that are “reasonably believed to be relevant”<sup>278</sup> and may supplement imperfect studies with “common sense,”<sup>279</sup> though they cannot get away with “shoddy data or reasoning.”<sup>280</sup> And *O’Brien*-style cases rely in part on government officials’ “expert judgments” based on their “firsthand knowledge.”<sup>281</sup> Both standards require an essentially factual inquiry into how well the regulation would further the government’s interest, whether the regulation is greater than essential or burdens substantially more speech than necessary—these are just different ways of expressing intermediate scrutiny’s “narrow tailoring” requirement.<sup>282</sup> So one really can’t avoid some empirical analysis, even if that empirical analysis is fairly casual. “Empirical analysis” isn’t the same as “peer-reviewed quantitative studies.”

So really, the question is how casual an analysis a government should be able to get away with in the context of erotic-expression or nudity taxes. Justice Souter has remarked, in several First Amendment cases, that the standard is flexible. In his *City of Erie* dissent, he wrote: “It is not that common sense is always illegitimate in

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<sup>275</sup> *United States v. O’Brien*, 391 U.S. 367, 381 (1968).

<sup>276</sup> *City of Erie v. Pap’s A.M.*, 529 U.S. 277, 298–99 (2000) (plurality opinion).

<sup>277</sup> *Id.* at 296–301.

<sup>278</sup> *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51 (1986).

<sup>279</sup> *City of L.A. v. Alameda Books, Inc.*, 535 U.S. 425, 439 (2002) (plurality opinion).

<sup>280</sup> *Id.* at 438.

<sup>281</sup> *City of Erie*, 529 U.S. at 297–98.

<sup>282</sup> *See supra* note 237 and accompanying text.

First Amendment demonstration. The need for independent proof varies with the point that has to be established, and zoning can be supported by common experience when there is no reason to question it.”<sup>283</sup> At the same time, he warned that “we must be careful about substituting common assumptions for evidence.”<sup>284</sup> And in his majority opinion in *Nixon v. Shrink Missouri Government PAC*, a campaign finance case, he wrote that “[t]he quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised.”<sup>285</sup>

This is why actual empirical evidence is necessary in these sorts of cases: mere intuition is likely to be misleading here. And the empirical evidence must actually be on point; studies purporting to establish secondary effects are often sloppy and rely on casual “sex-industry-is-bad” generalizations. The next subsection goes into greater detail on this point.

#### iv. The empirical evidence must be on point

The government’s empirical evidence must not only be present but must *actually substantiate* the connection between reducing the speech and reducing the secondary effect. When governments try to present empirical evidence, they are not always careful in connecting the dots. For instance, in Georgia, the government presented evidence showing that child sex trafficking is a problem (a proposition that nobody disputed),<sup>286</sup> and that this problem is connected, broadly speaking, to the adult industry (not specifically the adult nude dancing establishments that were challenging the tax). Much of the state’s evidence didn’t seek to show that the problem particularly stemmed from adult nude dancing establishments—as opposed to street prostitution or massage parlors, which (in part because of previous zoning) are often located near those establishments.<sup>287</sup> Nor did it seek to show that reducing nude dancing establishments would alleviate the problem.

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<sup>283</sup> *Alameda Books*, 535 U.S. at 459 (Souter, J., dissenting).

<sup>284</sup> *Id.*

<sup>285</sup> 528 U.S. 377, 391 (2000).

<sup>286</sup> See, e.g., STATE OF GEORGIA, SENATE RESEARCH OFFICE, FINAL REPORT OF THE COMMERCIAL SEXUAL EXPLOITATION OF MINORS JOINT STUDY COMMISSION (2008).

<sup>287</sup> See, e.g., ATLANTA WOMEN’S AGENDA, HIDDEN IN PLAIN VIEW: THE COMMERCIAL SEXUAL EXPLOITATION OF GIRLS IN ATLANTA (Sept. 2005).

Every jurisdiction has its own empirics and its own legal regime, so it's difficult to say anything generalizable here. But imagine a jurisdiction like Atlanta, where adult nude dancing establishments are licensed, regulated, and inspected; where minors cannot legally enter as patrons; and where minors cannot legally work as dancers—in fact, where dancers need to have permits issued by the local police department, which presumably is trained in recognizing fake IDs. Given the ease with which the police can inspect the permits of an establishment's dancers, and given the severe consequences of being caught employing an underage dancer, intuition suggests that sex trafficking of minors will overwhelmingly take place in places *other than* these regulated venues—and, indeed, that reducing the availability of regulated options might tend to drive patrons to less legal (and more exploitative) parts of the industry.<sup>288</sup>

These are of course empirical questions. When I referred above to “intuition,” it was not to establish an affirmative point, but to question casual assumptions in the other direction and to underscore the need for rigorous analysis. When the government submits its empirical studies to support its taxes or regulations, it needs to present not just data, but the sort of data that would answer the relevant questions. Generic arguments that boil down to “the sex industry is bad” or “the sex industry generally is associated with child sex trafficking” aren't enough. The government needs to at least try to answer whether the tax would reduce the speech at the specific type of affected business and whether that speech reduction would reduce the

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<sup>288</sup> Indeed, one of the studies that Georgia relied on talked about four sources of commercial exploitation of girls—the streets, the Internet, escort services, and major hotels. The study explicitly cast doubt on any connection between trafficking of minors and nude dancing establishments:

Furthermore, activity occurring inside adult entertainment clubs (i.e., strip clubs) is not included in this study. It is well known that these venues, at the very least, serve as meeting grounds for prostitution activities that take place outside of the venues themselves (often in adjacent motels), yet it is less clear how pervasive adolescent girls are in these clubs. In the City of Atlanta, where many of the state's adult entertainment clubs are located, every dancer is required to obtain a photo ID permit that—while not impossible to falsify—certainly would require a significant and well-coordinated fraud scheme to get around. The City of Atlanta Police Department conducts sweeps regularly to check dancers' permits. Adult entertainment clubs further have to weigh the risk-to-reward ratio of employing underage girls; the consequences of getting caught can be quite severe.

JUVENILE JUSTICE FUND, ADOLESCENT GIRLS IN GEORGIA'S SEX TRADE 5 (Sept. 2008).

overall secondary effect. The evidentiary burden isn't overwhelming, but at least it needs to be on point.<sup>289</sup>

#### v. Taking intermediate scrutiny seriously

Finally, even if the government explicitly relies on reductions in speech aimed at dealing with secondary effects, and even if it adequately supports this with empirical evidence that is on point, courts should be wary of accepting restrictions when there are alternatives that would not reduce the speech by as much.

This is not strict scrutiny, where the least-restrictive alternative is required; but First Amendment intermediate scrutiny requires that options that reduce speech at least be *disfavored* alternatives. As Justice Kennedy wrote in his concurrence in the judgment in *Alameda Books*:

The challenge is to correct the [secondary effect] while leaving the [speech], as far as possible, untouched. . . . A zoning measure can be consistent with the First Amendment if it is likely to cause a significant decrease in secondary effects and a trivial decrease in the quantity of speech.<sup>290</sup>

Or, as the Court wrote in *McCullen*: “Where certain speech is associated with particular problems, silencing the speech is sometimes the path of least resistance. But by demanding a close fit between ends and means, the tailoring requirement prevents the government from too readily sacrific[ing] speech for efficiency.”<sup>291</sup>

Does this merely restate the rule of intermediate scrutiny? Perhaps, but it does so with a rhetorical force that reminds us that the level of scrutiny is meaningful, and that deferring too readily to the claims of governments is inappropriate outside of rational basis cases.

#### 4. Targeting wrongdoers as governmental interest

Let's explore a more nuanced governmental interest. Perhaps the argument that we should use taxes to reduce undesirable expression is no good, because the

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<sup>289</sup> See, e.g., *City of L.A. v. Alameda Books, Inc.*, 535 U.S. 425, 438–42 (2002); *id.* at 451–52 (Kennedy, J., concurring in the judgment); see also *Ass'n of Club Execs. of Dallas, Inc. v. City of Dallas*, 604 F.3d 414, 431–39 (N.D. Tex. 2022) (evaluating the city's empirical data critically within an intermediate scrutiny analysis).

<sup>290</sup> *Alameda Books*, 535 U.S. at 445 (Kennedy, J., concurring in the judgment).

<sup>291</sup> *McCullen v. Coakley*, 573 U.S. 464, 486 (2014) (citation omitted) (internal quotation marks omitted).

chilling effect can't itself be the governmental interest in a free-speech context.<sup>292</sup> And perhaps the revenue-raising interest—either by itself, or in conjunction with the need to combat the secondary effect—also isn't good enough, because why couldn't we raise revenue neutrally?<sup>293</sup> But maybe we can creatively combine these and come up with an appropriate hybrid governmental interest that avoids those pitfalls.

Economists like the idea that all we should care about is the bottom-line quantity of an activity, the bottom-line amount of money, and traditional rich-vs.-poor distributional concerns. Under that view, there's no point to a tax unless it either raises revenue, alters the amount of an activity (whether upward or downward), or redistributes wealth between the rich and the poor. Normal people, though,<sup>294</sup> also care about fairness and the expressive function of the law; it might also matter to them whether the incidence of the tax is morally just.<sup>295</sup> So, if it's true that nude dancing in adult entertainment establishments causes or contributes to some negative secondary effect like child sex trafficking, one might think it's appropriate ("it's only fair") to make those responsible parties bear the cost of fighting the problem, rather than insisting that the burden be borne equally by everyone else—people who have no connection to the problem. And one's view that this is fair might well depend on the perceived moral appropriateness of the targeting—it wouldn't matter if the tax did nothing to reduce the activity, or if revenue could be raised equally effectively with neutral alternatives, or if the net distributional effects of the tax were about zero.

Of course, this governmental interest would require establishing the causal connection between the parties targeted by the tax and the negative secondary effect—which, as we've seen, is often hotly disputed. But for now, let's assume that

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<sup>292</sup> See text accompanying *supra* note 238.

<sup>293</sup> See text accompanying *supra* notes 243–261.

<sup>294</sup> I'm an economist, so I can say that.

<sup>295</sup> Can't economists also care about issues of moral justice? Maybe, but for an argument that they shouldn't, see LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE 52–58 (2002) (“[I]n important situations, fairness-based analysis leads to the choice of legal rules that reduce the well-being of every individual.”); Louis Kaplow & Steven Shavell, *Any Non-Welfarist Method of Policy Assessment Violates the Pareto Principle*, 109 J. POL. ECON. 281, 282 (2001) (“[A]ny conceivable notion of social welfare that does not depend solely on individuals' utilities will sometimes require adoption of a policy that makes every person worse off.”).



the causal connection has been well established by good statistical studies. Would this governmental interest—merely imposing the tax on those responsible for the problem—be sufficient?

This governmental interest, while creative, still doesn't work. To see why, we need to step back and consider what it means to say that adult entertainment establishments are "responsible" for secondary effects. We also need to consider the basic theory of antidiscrimination norms.

What does it mean to pin responsibility for a secondary effect like child sex trafficking on adult entertainment establishments? Obviously, it doesn't mean that *all* such establishments participate in child sex trafficking. If *some* do, then everyone agrees that *those* establishments are legitimate subjects of enforcement (as well as whatever owners, managers, employees, etc., are specifically responsible).

What, then, does it mean to say that *the industry as a whole* bears responsibility—and should pay through an industry-wide tax? It means that even the establishments that *don't* participate in the problem should also pay. And on what theory do we lump the non-participants in with the participants? Based on empirical evidence (which we're assuming valid for now) that, due to statistical associations and correlations, identifies the industry as a whole as being associated with the problem. Of course, if a particular industry has a number of bad actors, the presence of those bad actors will be reflected in any collective statistics or correlations based on the industry as a whole. So this comes down to the appropriateness of making innocent participants pay for the acts of guilty participants.

But this is precisely the sort of stereotyping that antidiscrimination norms—like the norm against content-discrimination—disfavor.

Am I arguing that an industry *as a whole* can never be held monetarily responsible for fighting a problem that it contributes to *on average*? Not at all. To address auto accidents, there's probably nothing unconstitutional about imposing a surcharge on the auto industry to fund safety programs or medical care for auto accident victims. This is true even if some members of the industry don't participate in the problem. Maybe Volvos are so safe for their drivers and for bystanders that they're involved in literally no accidents—but we can still impose a tax based on the statistical association between auto accidents and the auto industry as a whole, unfair to Volvo though it is. And to address global warming, there's probably nothing unconstitutional about taxing fossil fuel-intensive industries—even if some

businesses in those industries don't contribute to the problem because they use fossil fuels in ways that don't cause air emissions, or because they plant enough trees to be carbon-neutral.

But that's because we have no constitutional antidiscrimination norms relevant to auto design or fuel usage. On the other hand, we do have strong antidiscrimination norms based on various other factors: for instance, based on race and sex (in the Equal Protection Clause), based on state of origin (in the Dormant Commerce Clause and the Article IV Privileges and Immunities Clause), or based on religion or content/viewpoint of speech (in the First Amendment). Presumptively, a government can't hold members of a particular race or sex responsible for the bad acts of some members;<sup>296</sup> presumptively, a state government can't impose restrictions on people from a particular state because some people from that state have done bad things; and, presumptively, a government can't penalize a category of expression based on statistical associations driven by particular bad actors within that category.

Is this necessarily true? Note that I did write "presumptively" and "disfavor" above (not "necessarily" and "prohibit"). Even in the First Amendment context, an industry can be singled out for disfavored treatment based on statistical considerations, provided the government can satisfy the relevant level of scrutiny. But while such discrimination might be justifiable in some cases because it's an appropriately tailored way of pursuing some other interest, it can't count as the governmental interest itself. The interest itself must be nondiscriminatory.

This is generally true of antidiscrimination norms. These norms generally don't establish *per se* rules against discrimination: sometimes we can draw distinctions based on race, sex, content, etc. But the purpose of an antidiscrimination norm is to make us start out with a presumption that the discrimination itself is undesirable. Hypothetically, if we all agree that it is possible to pursue some goal equally well without discrimination (i.e., that the discrimination doesn't contribute to the goal *in any way*), an antidiscrimination norm says that we must do so. We always ask whether the discrimination is justified as an appropriately tailored way of pursuing some different—and nondiscriminatory—interest. Otherwise, it's too

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<sup>296</sup> Cf. *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018) (overruling *Korematsu v. United States*, 323 U.S. 214 (1944)).

easy: merely announce that the goal is discriminatory, and discrimination will always be an excellent way of pursuing that goal. Anyone can play that game.

The Supreme Court encountered a similar argument in *Simon & Schuster*.<sup>297</sup> The “Son of Sam” law prevented convicted criminals from keeping money they made from depictions of their crimes. What was the governmental interest involved? Of course, “suppressing descriptions of crime out of solicitude for the sensibilities of readers”<sup>298</sup> would have been an inherently invalid governmental interest (and even then, why single out just criminals who tell their own stories, and not writers who tell equally grisly stories?). Compensating victims is a fine governmental interest, but why just expropriate criminals’ assets related to depicting their own crimes, rather than all other assets they might have?<sup>299</sup> Preventing criminals from profiting from their crimes is a fine interest too, but the statute in that case was way too broad for that interest, because it covered income from a book on any topic—as long as the author at some point in the book admitted to committing a crime.<sup>300</sup>

But what about a more complex governmental interest—like “ensuring that criminals do not profit from storytelling about their crimes before their victims have a meaningful opportunity to be compensated for their injuries”?<sup>301</sup> This is clever, because (unlike the others) it establishes a direct link between the governmental interest and the state’s chosen means. But, said the Court, that was precisely the problem:

The Board cannot explain why the State should have any greater interest in compensating victims from the proceeds of such “storytelling” than from any of the criminal’s other assets. Nor can the Board offer any justification for a distinction between this expressive activity and any other activity in connection with its interest in transferring the fruits of crime from criminals to their victims. Thus even if the State can be said to have an interest in classifying a criminal’s assets in this manner, that interest is hardly compelling. . . .

[T]he Board has taken the effect of the statute and posited that effect as the State’s interest. If accepted, this sort of circular defense can sidestep judicial review of almost

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<sup>297</sup> *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105 (1991).

<sup>298</sup> *Id.* at 118.

<sup>299</sup> *Id.* at 118–19.

<sup>300</sup> *Id.* at 119–23.

<sup>301</sup> *Id.* at 119.

any statute, because it makes all statutes look narrowly tailored. . . . [S]uch an argument eliminates the entire inquiry concerning the validity of content-based discriminations. Every content-based discrimination could be upheld by simply observing that the state is anxious to regulate the designated category of speech.<sup>302</sup>

Just as with the “reducing the activity” interest discussed above,<sup>303</sup> targeting supposed bad actors because of the content of their speech cannot be an acceptable governmental interest. There are limited circumstances in which a targeted content-based tax can be imposed in pursuit of some legitimate governmental goal,<sup>304</sup> but targeting the speakers based on their content cannot be the goal itself.

### C. The “Greater Power Includes the Lesser” Paradox

There is an apparent paradox here. My argument is that some taxes would be unconstitutional, even though some regulations with an equivalent effect—even much more burdensome regulations—could be constitutional under *Renton*, given the proper empirical support.<sup>305</sup> Isn’t that a perverse result?

But this apparent paradox is just a form of the “greater power includes the lesser” argument. Just because the government can do something draconian (e.g., “prohibit the combination of nude dancing and alcohol”) doesn’t mean it can therefore do everything that’s milder.

These sorts of “greater power includes the lesser” arguments are generally disfavored in First Amendment law (as well as elsewhere in constitutional law<sup>306</sup>). The

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<sup>302</sup> *Id.* at 119–20 (citations and some internal quotation marks omitted).

<sup>303</sup> See *supra* Part III.B.1.

<sup>304</sup> As outlined above, see *supra* Part III.B.3.

<sup>305</sup> For instance, the *Bushco* court upheld the tax involved on the ground that it was “less burdensome” than the regulation upheld in *City of Erie*, and part of its reasoning was that “simply impos[ing] an additional cost” was “less of a burden on protected expression” than the “threat of criminal sanctions.” *Bushco v. Utah State Tax Comm’n*, 225 P.3d 153, 168 (Utah 2009) (emphasis omitted). “Since the Tax’s impact on protected expression is even less burdensome than the impact of the public nudity ordinance upheld in *Erie*, we determine that the Tax satisfies the ‘narrow tailoring’ prong of the *O’Brien* test.” *Id.* at 169. See also *Combs v. Tex. Entm’t Ass’n, Inc.*, 287 S.W.3d 852, 861 (Tex. App. 2009) (“The Comptroller also argues that the State has the power to categorically ban nude dancing or the sale of alcohol in the presence of nude dancing, and therefore the . . . tax must be constitutionally permissible because it is less restrictive than a total ban.”).

<sup>306</sup> See, e.g., *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 837 (1987) (“[E]ven though, in a sense, requiring a \$100 tax contribution in order to shout fire is a lesser restriction on speech than an outright ban, it would not pass constitutional muster.”).

Supreme Court did once endorse a form of this thinking in *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*.<sup>307</sup> But it repudiated that line of argument in *44 Liquormart*: “the ‘greater-includes-the-lessor’ argument should be rejected for the additional and more important reason that it is inconsistent with both logic and well-settled doctrine.”<sup>308</sup>

The reason why the “greater includes the lesser” argument doesn’t work in this line of doctrine has to do with the concept of *necessity* implicit in narrow tailoring. Strict scrutiny and intermediate scrutiny differ on how narrow the tailoring needs to be, but they both require some degree of tailoring, i.e., some degree of necessity, by which we mean some degree of correspondence between means and ends. A regulation or prohibition of nude dancing with alcohol might be constitutional, if a government can produce adequate evidence of secondary effects to pass the *Renton* test. This would be because, if there’s adequate evidence of secondary effects, a well-crafted regulation (perhaps even a prohibition) could directly alleviate that secondary effect. A targeted regulation (targeted to the specific problem) makes perfect sense in that context because it’s *necessary* in the way required by the doctrine—and the more targeted, the better.

But that doesn’t mean a targeted *tax* must be constitutional as long as its overall burden is less than the prohibition. Constitutionality, here, doesn’t depend on the *size* of the burden, but on whether the tax is necessary, i.e., whether it actually furthers the government’s interest with the requisite level of tailoring. If the government can show that the tax addresses the secondary effect better than other options, so much the better—but *that’s* the relevant inquiry, not whether the tax is less burdensome than some different regulations that would be upheld.

#### CONCLUSION

Even if we accept the secondary effects doctrine, and even if the Supreme Court ends up reaffirming the doctrine as an exception to the facial-discrimination approach that would otherwise apply, taxes on erotic expression or nudity are still constitutionally vulnerable. This is true if we apply strict scrutiny, but can also be true even if we use intermediate scrutiny.

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<sup>307</sup> 478 U.S. 328, 345–46 (1986) (“[T]he greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling . . .”).

<sup>308</sup> 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 511 (1996).

This isn't an argument for changing anything about U.S. Supreme Court caselaw in this area, which overwhelmingly deals with regulations, not taxes. Indeed, as far as I know, the only cases that contradict my thesis are *Combs v. Texas Entertainment Ass'n, Inc.*,<sup>309</sup> where the Texas Supreme Court upheld an erotic-expression tax under intermediate scrutiny, and *Bushco v. Utah State Tax Commission*,<sup>310</sup> where the Utah Supreme Court upheld a nudity tax under intermediate scrutiny. And the argument in this Article is that those cases were wrongly decided under *existing* First Amendment doctrine.

I haven't covered various other arguments one can make against these taxes. Particular statutes might be vulnerable to overbreadth arguments, because it's not necessarily easy to define adult erotic entertainment in a way that is both principled and excludes highbrow art.<sup>311</sup> That is, a statute might be overbroad because it violates the rights of theaters or concert venues that feature shows with nude or partially nude content or sexual themes, like the musical *Hair* or Madonna concerts. Or a statute might be discriminatorily applied so as to exempt "legitimate" theater on the grounds that "we know it when we see it."<sup>312</sup>

These are all intensely fact-based arguments, and they'll play out differently in different jurisdictions, depending on the scope of the problems in that jurisdiction and the quality of the respective governments' empirical studies. But the value of the arguments discussed in this Article is that erotic-expression taxes are unconstitutional *even if the state's empirical studies are excellent*; and nudity taxes, while more solid, are still not guaranteed to be constitutional.

Even if one believes that adult entertainment establishments are clearly responsible for a particular problem, a tax that defines such establishments based on their

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<sup>309</sup> 347 S.W.3d 277 (Tex. 2011).

<sup>310</sup> 225 P.3d 153 (Utah 2009).

<sup>311</sup> See *Thornhill v. Alabama*, 310 U.S. 88 (1940); *NAACP v. Button*, 371 U.S. 415 (1963). On overbreadth in adult entertainment, see *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002); *Purple Onion, Inc. v. Jackson*, 511 F. Supp. 1207, 1219–23 (N.D. Ga. 1981); *Pel Asso, Inc. v. Joseph*, 427 S.E.2d 264 (Ga. 1993); *Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507 (4th Cir. 2002); *Big Hat Books v. Prosecutors*, 565 F. Supp. 2d 981 (S.D. Ind. 2008).

<sup>312</sup> And as discussed above, one can also make specific arguments against the government's empirical studies. *City of L.A. v. Alameda Books, Inc.*, 535 U.S. 425, 438 (2002) (plurality opinion); Alemzadeh, *supra* note 19, at 363–66 (critiquing secondary-effects studies on methodological grounds, and also critiquing the general secondary-effects framework on feminist grounds).

content must be analyzed under strict scrutiny. And whatever the level of scrutiny, a tax that burdens a particular form of expression like nude dancing is unlikely to be narrowly tailored, even under the lower standard of intermediate scrutiny. Most of the possible governmental goals are either illegitimate, because they are themselves speech-suppressive or discriminatory; or they are legitimate but unhelpful, because a broad-based tax would be just as effective.

At most, the governmental interest in fighting the secondary effect could support the tax, but only to the extent that the government is willing to argue that the tax would deter the activity and if the government has good evidence *specifically* showing that decreases in the targeted activities would decrease that secondary effect. And even then, intermediate scrutiny demands that such arguments be disfavored unless the benefit of deterrence is substantial.

