TAX LAW AS MUSE

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Admission charges at Chicago's small music venues are generally exempt from tax. But a few years ago, officials came after clubs that hosted rock, hip-hop, country, and DJ performances, claiming that those kinds of music weren't "commonly regarded as part of the fine arts." Controversy exploded, critics derided the idea of turning tax collectors into "culture police," and the law was quickly changed to avoid accusations of unconstitutionality.

Plaintiffs across the country have similarly alleged that selective tax exemptions for certain arts but not others amount to unconstitutional content discrimination. They claim that the government has no business judging what is art or deciding what types of art to favor. But if this is so, then all levels of government in the United States have been acting unconstitutionally for an awfully long time.

This Article recovers a largely forgotten history of federal taxation of the arts, dating back to World War I. Federal admissions and cabaret taxes grew large enough by the Second World War to change the course of music, hastening the decline of big band jazz, the death of tap, and the growth of bebop. Fights for exemptions embroiled Congress in debates over the value of various arts and their distinction from "mere" amusements like burlesque, band concerts, and the circus. And as the legislative history reveals, the lines that got drawn reflect the race, gender, and class disparities of the voices Congress heard during the nearly five decades the federal admissions tax remained in effect.

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Unearthing the historical context behind discriminatory tax exemptions like those in Chicago helps shed significant light on a notoriously difficult First Amendment problem: how to distinguish selective support of the arts from censorship. Perhaps surprisingly, the history bolsters the constitutionality of tax schemes like Chicago's. But at the same time, the history shows that government meddling in the arts—not least through the tax code—runs far deeper than even its critics realize. Over the last century, tax law in the United States has not just discriminated among the arts; it has helped determine what gets counted among the arts in the first place. And as Chicago's example proves, tax law continues to do this today, helping shape the perceived status and nature of performances by everyone from DJs to drag queens, and symphonies to strippers. Desirable as government subsidies for the arts might be, to see their effects is to realize the need for broader popular involvement in deciding who and what should receive them.

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INTRODUCTION

The City of Chicago and Cook County, where Chicago is located, tax "patrons of every amusement" on the admissions fees they pay.[1] Sporting events, circuses, flower shows, video arcades, even cable television and Netflix subscriptions are covered,[2] but a short list of other "amusements" are exempt.

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[1] CHI., ILL., MUN. CODE § 4-156-020(A) (2007); COOK COUNTY, ILL., CODE OF ORDINANCES § 74-392(a) (2023).

[2] MUN. CODE §§ 4-156-010, 4-156-020(A); *see also* Apple Inc. v. City of Chicago, No. 18 L 050514, 2022 WL 873882 (Ill. Cir. Ct. Mar. 11, 2022) (dismissing Apple's

In particular, no tax is charged on the fees paid for admission to small venues[3] that present "live theatrical, live musical or other live cultural performances."[4]

Controversy erupted several years ago when Cook County went after several small music venues in Chicago seeking hundreds of thousands of dollars in unpaid taxes. The issue: the venues hosted rock, country, and rap shows, whereas the city and county ordinances specifically defined "live musical or . . . cultural performance" as "a live performance in any of the disciplines which are *commonly regarded as part of the fine arts*, such as live theater, music, opera, drama, comedy, ballet, modern or traditional dance, and book or poetry readings."[5] According to one official, "'[r]ap music, country music, and rock 'n' roll' do not fall under the purview of 'fine art.'"[6] Lawyers for the venues were told they needed to call expert musicologists to "testify [that] the music [they] are talking about falls within any disciplines considered fine art."[7]

Reaction was furious. Club owners found it "offensive" that "the music we've been presenting in the city for 25 years is not thought to be cultural or enriching."[8] The *Chicago Reader*, a local independent paper, noted the "harsh criticism [the County received] in local and national publications for attempting to define art or elevate some genres of music as more worthy of a tax break than others."[9] Even one county commissioner agreed, quickly distancing himself from the idea that

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claim that the statute is unconstitutional as applied to streaming television).

3 Venues of 1,500 people or fewer in Chicago, 750 or fewer in Cook County. MUN. CODE § 4-156-020(D)(1); CODE OF ORDINANCES § 74-392(d)(1).

4 MUN. CODE § 4-156-020(D)(1); CODE OF ORDINANCES § 74-392(d)(1).

5 MUN. CODE §§ 4-156-010 (2007) (emphasis added).

6 Lee V. Gaines, *Cook County Doubles Down: Rap, Rock, Country, and DJ Sets Are Not 'Fine Arts,' Not Exempt from Amusement Tax*, CHI. READER (Aug. 22, 2016), https://www.chicagoreader.com/Bleader/archives/2016/08/22/cook-county-doubles-down-rap-rock-country-and-dj-sets-are-not-fine-arts-not-exempt-from-amusement-tax [https://perma.cc/6L7D-DSTT].

7 *Id.*

8 Lee V. Gaines, *Cook County Goes After Small Venues for Back Taxes, Arguing Their Bookings Don't Count as Live Music or Culture*, CHI. READER (Aug. 18, 2016), https://www.chicagoreader.com/Bleader/archives/2016/08/18/cook-county-goes-after-small-venues-for-back-taxes-arguing-their-bookings-dont-count-as-live-music-or-culture [https://perma.cc/X6Q2-3HMN].

9 Lee V. Gaines, *The Story of Cook County's Pursuit of Back Taxes from Small Music Venues Descends into the Surreal*, CHI. READER (Oct. 27, 2016), https://www.chicagoreader.com/Bleader/archives/2016/10/27/the-story-of-cook-countys-pursuit-of-back-taxes-from-small-music-venues-descends-into-the-surreal [https://perma.cc/34N5-6YKY].

the "government should be playing culture police and deciding what constitutes 'music.'"[10]

Within two months, Cook County relented, dropping the word "fine" from the "fine arts" exemption after officially finding that "it is not the role of government to restrictively decide and define what is and is not 'music.'"[11]

This last claim, however, is self-defeating on its face. Chicago and Cook County, after all, offer tax exemptions to *music* venues. Doing so requires those administering the tax—which is to say, the government—to decide what qualifies as music. The government can't offer arts exemptions without defining what counts as art. An exemption isn't an exemption if everyone gets it.

The controversy in Chicago shows two widely shared intuitions in conflict. One is the belief that the government should sometimes subsidize the arts, including through exemptions to otherwise generally applicable taxes. The other is the belief that "the taxman" has no business deciding what is art.[12]

This Article focuses on the second of these intuitions. For aside from the logical friction it creates with the first, the notion that government has no place deciding what is music or any of the other arts is flatly out of step with U.S. history. One of us has previously detailed the endless ways various state actors have long judged what is aesthetically valuable in areas ranging from land use and criminal law to intellectual property and tariffs—not to mention in funding decisions, state-run museums, performance venues, military bands, and public art and architecture.[13] The other of us has demonstrated the role of government policy in defining what counts as arts in America and in supporting that which qualifies.[14] Tax law turns out to be a crucial part of both stories. In fact, as this Article reveals, selective tax exemptions have shaped the course

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10 Marc Hogan, *Chicago Proposal Aims to Clear Up What "Music" Means, Save Small Venues*, PITCHFORK (Aug. 30, 2016), https://pitchfork.com/news/67925-chicago-proposal-aims-to-clear-up-what-music-means-save-small-venues/ [https://perma.cc/489V-UCQP].

11 COOK COUNTY, ILL., CODE OF ORDINANCES § 16-5102 (2016). Chicago continues to use the term "fine arts" in defining its exemption.

12 *See* Elizabeth Nolan Brown, *Chicago Culture Cops Tax Concert-Venues Because Rap, Rock, Country Aren't 'Art'*, REASON (Aug. 24, 2016, 10:30 AM), https://reason.com/2016/08/24/when-the-taxman-plays-art-critic [https://perma.cc/EAD7-27X8].

13 *See* Brian Soucek, *Aesthetic Judgment in Law*, 69 ALA. L. REV. 381 (2017).

14 *See* JENNIFER C. LENA, ENTITLED: DISCRIMINATING TASTES AND THE EXPANSION OF THE ARTS (2019).

of music, dance, and theater history in the century or so since the federal government first imposed admissions taxes beginning during World War I.

Over the course of this history, various artforms and arts venues fought for tax exemptions as necessary to their survival. At times they raised fairness claims, such as when the movie industry or the circus raised equal protection concerns about their treatment compared to the performing arts. Activities once treated as extraneous luxuries came to be seen as educational, and thus tax exempt, or distinctively ennobling, thus worthy of governmental subsidy. As a result, over time, the line separating "the arts" from other amusements was repeatedly redrawn, and the set of activities that count as relevantly similar, thus deserving equal treatment under law, shifted time and again.

Take a list like tap dancing, symphony orchestras, circuses, a DJ playing in a nightclub, a flower show, a drag performance in a bar, the Ice Capades, and a rodeo: how some of these come to be seen as art and others as "mere" entertainment or amusement—how some are, then aren't, grouped together and treated as similarly situated—this is a story that has played out not exclusively, but to a surprising and underappreciated extent, in the realm of tax law.

This Article shows that tax law's influence on the arts has been at once more constitutionally acceptable, and yet *far* more deeply meddlesome, than critics in places like Chicago ever realized. The history, scope, and purpose of the patchwork tax-and-exemption scheme that sparked the Chicago controversy all suggest that it should be upheld as a constitutional subsidy for activities the government wants to foster, not an unconstitutional sanction on expression the government dislikes. But at the same time, Chicago, like the federal government before it, did not just look at some exogenously formed list of activities called "the arts" and choose to subsidize certain arts over others. The list of what counts among the arts and the nature of many artistic practices have both been shaped in significant part by their treatment in tax codes. And they have been shaped in ways that reflect the racial, gendered, and class-based disparities in the voices legislators chose to hear.

To make these claims, this Article begins in Part I with an account of the controversy in Chicago, placing it within a broader set of selective subsidies for the arts across the country—and legal challenges brought by performers and performance venues denied the subsidies other arguably comparable performers and venues receive.

Part II widens the historical lens to show that selective taxation of the arts is nothing new, even if the federal government's involvement is now largely forgotten. The story of the federal government's tax on admissions, which lasted from 1917 to 1965, the definitions and distinctions that were made along the way, and the eventual devolution of these taxes to state and local governments is a history that is nearly absent in legal scholarship, and one which scholars in other fields have told only in piecemeal fashion. Drawing on thousands of pages of legislative history, government reports, Bureau of Internal Revenue regulations, and newspaper coverage from 1917 to the present, this Article offers the most complete account yet of the choices made at all levels of government about how to tax—and use tax law to subsidize—arts performance in America. This novel history provides the context necessary to understand the role tax law has played in shaping the arts—and to evaluate the constitutionality of its interventions.

Part III turns from history to legal doctrine and offers a framework for evaluating whether selective subsidies for expression run afoul of the First Amendment. Looking at sometimes chaotic caselaw, notable past scholarship, and shared intuitions about censorship versus selective support, Part III draws out a set of factors relevant to deciding the constitutionality of selective tax exemptions—or any subsidies—for expressive activities such as the arts. As we will see, the constitutional question cannot be determined just by looking at what gets an exemption. What *doesn't* get an exemption—or better, the scope of an exemption compared to that of the tax—is crucial, as is the size of the burden or benefit at stake, the reliance interests that have built up around it, and the point of providing exemptions in the first place. Each of these factors force us to look beyond the law. The history unearthed in Part II is needed, as context proves critical in determining what activities are even worth comparing.

Part IV uses the history traced in Part II to fill in the doctrinal variables offered in Part III in order to shed light on constitutional controversies of the kind that were identified in Part I. To say, as we ultimately do, that tax law's effect on the arts is (mostly) constitutional is decidedly *not* to deny the unappreciated extent to which the government, through its tax laws, has shaped artistic practice. Tax law has even helped shape what counts as artistic in the first place. And to acknowledge this—to stop pretending like the government can't or doesn't decide what arts to value—is to realize how crucial it is to diversify who gets heard when making those decisions.

I
CONTROVERSY

A. The Cook County Debacle

In the summer of 2016, owners of about half a dozen music venues in Chicago faced an unwelcome surprise. County officials were demanding "back taxes in the six figures"[15] to make up for admissions taxes that had long gone unpaid.[16]

The legal backstory: Chicago and Cook County, where Chicago is located, place 9% and 3% taxes, respectively, on the amount paid "for the privilege to enter, to witness, to view or to participate in an amusement" within their borders.[17] "Amusement" here is defined sweepingly to mean "any exhibition, performance, presentation or show for entertainment purposes," including, but not limited to:

> any theatrical, dramatic, musical or spectacular performance, promotional show, motion picture show, flower, poultry or animal show, animal act, circus, rodeo, athletic contest, sport, game or similar exhibition such as boxing, wrestling, skating, dancing, swimming, racing, or riding on animals or vehicles, baseball, basketball, softball, football, tennis, golf, hockey, track and field games, bowling or billiard or pool games; . . . carnivals, amusement park rides and games, bowling, billiards and pool games, dancing, tennis, racquetball, swimming, weightlifting, bodybuilding or similar activities[.][18]

Chicago's tax goes beyond the county's to include "paid television programming," which it has understood since 2015 to include streaming services and rentals but not sales and downloads of programs[19]—an interpretation that has been challenged in court, so far unsuccessfully.[20]

The music venues targeted in 2016 had not been paying the city and county admissions taxes because each exempts

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15 Gaines, *supra* note 8.

16 *Chicago Clubs Being Asked for Hundreds of Thousands of Dollars in County Back Taxes*, BILLBOARD (Aug. 23, 2016), https://www.billboard.com/music/music-news/chicago-clubs-cook-county-back-taxes-7486842/ [https://perma.cc/5RXR-KQPB] [hereinafter *Chicago Clubs Back Taxes*].

17 CHI., ILL., MUN. CODE §§ 4-156-010, 4-156-020(A) (2007); COOK COUNTY, ILL., CODE OF ORDINANCES § 74-392(a) (2023) (taxing the amount spent "for the privilege to enter, to witness or to view such amusement").

18 MUN. CODE § 4-156-010.

19 City of Chi., Dep't of Fin., Amusement Tax Ruling #5 (June 9, 2015).

20 Apple Inc. v. City of Chicago, No. 18 L 050514, 2022 WL 873882 (Ill. Cir. Ct. Mar. 11, 2022).

"live theatrical, live musical or other live cultural performances that take place in" small venues: those which seat 750 people or fewer for Cook County's tax or 1,500 for Chicago's.[21] Beauty Bar and Evil Olive, two of the music venues that went public with their disputes after being targeted, each satisfied the exemptions' size limits.

What they didn't satisfy, at least according to Cook County, was the tax law's definition of "live theatrical, live musical or other live cultural performances." Beauty Bar and Evil Olive both hosted performances by DJs, something the City of Chicago had specifically defined within its exemption in 2006.[22] Cook County, by contrast, extended its small venue exemption only to venues hosting "live performance[s] in any of the disciplines which are *commonly regarded as part of the fine arts*, such as live theater, music, opera, drama, comedy, ballet, modern or traditional dance, and book or poetry readings."[23] An additional limitation, which will make a return below, clarified that the exemption did not extend to "athletic events, races, or performances conducted at adult entertainment cabarets."[24]

Small venue owners immediately complained that the back taxes would be "crippling," and that owing the tax going forward would make it "close to impossible" to continue operating.[25] And in August 2016, they appeared before a county administrative hearing officer, Anita Richardson, to contest the bill.

At the hearing, Richardson told the bars' lawyers that they would ultimately "have to make a legal argument . . . that places what the disc jockeys do within the scope of what is referred to as 'fine arts.'"[26] She continued: "There actually are definitions out in the world about what fine arts are. And none of the definitions that I've come across have included the activities of disc jockeys doing whatever they do on equipment as being like fine arts."[27]

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21 CODE OF ORDINANCES § 74-392(d)(1); MUN. CODE § 4-156-020(D)(1).

22 City of Chi., Dep't of Revenue, Amusement Tax Ruling #4 (Dec. 1, 2006).

23 CODE OF ORDINANCES § 74-391 (2023), https://library.municode.com/il/cook_county/codes/code_of_ordinances/259998?nodeId=PTIGEOR_CH74TA_ARTXAMTA_S74-392TAIM [https://perma.cc/7GDW-LJN9] (emphasis added).

24 *Id.*

25 Gaines, *supra* note 8.

26 Hearing on Music as Art Before the Cook County Board of Commissioners, at 3:19–3:36 (Aug. 22, 2016) (recording on file with the authors).

27 *Id.* at 3:37–4:18. Richardson went on to explain what kinds of music she thought *would* qualify: "[I]f you read the definition in its entirety . . . the music is, well, shall we say, chamber orchestra music, symphony orchestra music, octets playing, you know, flute concertos or something like that." *Id.* at 4:20–4:46.

Richardson's skepticism about DJs producing fine art was bad enough for the bar owners, but the broader question she posed next was even more worrisome: "[D]o I understand you to say that . . . the exemption applies to rap music, country western music, rock and roll?," Richardson asked.[28] "I don't think the county is in the business of making normative judgments about what constitutes music," the lawyer for Beauty Bar replied.[29] Richardson: "Then what's that fine arts language in there for?"[30] "I think you're going to be hard pressed to say that the commissioners thought that *rap music* qualifies for the exemption because it is music. As far as I know, it's not quite in the category of 'fine arts,' yet."[31] Richardson's knowledge apparently came from "definitions out in the world" that she had "come across."[32]

"Outrage was widespread and virtually immediate," the music website *Pitchfork* would write, soon after news of the hearing hit the press.[33] Beauty Bar complained to *Billboard* magazine that the hearing made them worried that more than DJ sets were in the county's crosshairs; bands performing other genres of music were potentially taxable too.[34] All seemed to hinge on the bars' ability to bring in musicologists or other expert witnesses to convince Richardson that the bars hosted, as she put it, "the kind of music that the commissioners contemplated when they used the phrase 'any of the disciplines which are commonly regarded as part of the fine arts.'"[35]

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28 *Id.* at 7:41–7:51.

29 *Id.* at 7:54–8:01.

30 *Id.* at 8:01–8:03.

31 *Id.* at 10:35–10:52.

32 *Id.* at 3:38–3:57.

33 Marc Hogan, *Music Is Art, OK: Why Chicago's Absurd Nightclub Shakedown Matters*, Pitchfork (Aug. 26, 2016), https://pitchfork.com/thepitch/1274-music-is-art-ok-why-chicagos-absurd-nightclub-shakedown-matters/ [https://perma.cc/8CKM-DEJG] [hereinafter Hogan, *Music Is Art*]; *see also* Gaines, *supra* note 9 ("Richardson's comments shocked the music community. The county drew harsh criticism in local and national publications for attempting to define art or elevate some genres of music as more worthy of a tax break than others.").

34 *Chicago Clubs Back Taxes*, *supra* note 16; *see also* Zach Long, *Cook County Is Trying to Collect Six-Figure Back Taxes From Chicago Music Venues*, TimeOut (Aug. 23, 2016), https://www.timeout.com/chicago/blog/cook-county-is-trying-to-collect-six-figure-back-taxes-from-chicago-music-venues-082316 [https://perma.cc/PJY7-B4XR] ("[I]f Cook County successfully collects these taxes, it will likely set its sights on Chicago venues such as the Empty Bottle, the Hideout and Schubas Tavern—all of which hold fewer than 750 people and regularly present concerts featuring rock, rap and electronic performers.").

35 Hearing on Music as Art Before the Cook County Board of Commissioners, *supra* note 26, at 11:55–12:05.

The *Chicago Tribune* described the "showdown" as "downright embarrassing," something "like the plot to an old Elvis Presley movie: Can a bunch of cool kids convince an old fogy judge that the modern music they love has artistic merit and isn't worthless noise?"[36] "The taxman plays art critic," read a headline in *Reason*. According to the magazine, "Chicago Culture Cops" were taxing rap, rock, and country "because they're not artistic enough."[37]

Even as they were united in their derision, critics took different approaches to the question posed in the hearing. For some, the answer was absurdly obvious. As *Pitchfork* dismissively responded: "Music is Art, OK"?[38] By contrast, the *Chicago Tribune* described the question ("What kind of music is 'fine art'?") as unnecessarily intellectual, "more characteristic of a philosophy class than a courtroom."[39] Meanwhile, *Chicago Magazine* published a long and surprisingly philosophical essay, "This Is What Happens When Courts Decide What Is and Isn't Art,"[40] that pointed out stakes beyond the theoretical. Quoting philosopher of art Larry Shiner: "'when the genres and activities chosen for elevation [to the "spiritual status of fine art"] . . . reinforce race, class, and gender lines, what once looked like a purely conceptual change begins to look like an underwriting of power relations as well.'"[41] Others were blunter: "It's musical racism," DJ Gene Farris was quoted as saying.[42] It was not lost on most commentators that the music under

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36 The Editorial Board, Opinion, *Hey Mr. DJ, Are You Really an Artist?*, CHI. TRIB. (Aug. 23, 2016, 7:00 PM), https://www.chicagotribune.com/opinion/editorials/ct-music-dj-cook-county-amusement-tax-chicago-edit-0824-jm-20160823-story.html [https://perma.cc/7HLR-ZUVC].

37 Brown, *supra* note 12.

38 Hogan, *Music Is Art*, *supra* note 33.

39 Dawn Rhodes, *Is Music by a DJ 'Fine Art'? Cook County Judge May Decide*, CHI. TRIB. (May 23, 2019, 3:22 AM), https://www.chicagotribune.com/news/breaking/ct-back-amusement-taxes-music-bars-20160822-story.html [https://perma.cc/33EM-FBXT].

40 Whet Moser, *This Is What Happens When Courts Decide What Is and Isn't Art*, CHI. MAG. (Aug. 25, 2016, 2:12 PM), https://www.chicagomag.com/city-life/august-2016/cook-county-fine-arts/ [https://perma.cc/8RP9-MNCJ].

41 *Id.* (quoting LARRY E. SHINER, THE INVENTION OF ART 7 (2001)).

42 Dani Deahl, *Updated: When Chicago Says Hip-Hop Isn't Art, It's Not Just Wrong—It's Classist*, NYLON (Aug. 26, 2016, 11:55 AM), https://www.nylon.com/articles/chicago-amusement-tax-classist [https://perma.cc/4U9N-64HD].

threat was associated with racial minorities and less wealthy audiences,[43] and was central to Chicago's musical heritage.[44]

Critics warned that "the idea of an official deciding what is and isn't art should raise concerns far beyond Cook County,"[45] but they also expressed hope that those Cook County officials would "step in to stay the cases—not least because they don't want to be on the record insisting that some of Chicago's most important cultural products don't count as art."[46]

And this is in fact what happened. Little more than a week after the hearing with Richardson, Cook County Commissioner John Fritchey proposed an amendment to the county's admissions tax, telling the press: "I don't believe that government should be playing culture police and deciding what constitutes 'music.'"[47]

The following month, Commissioner Fritchey's belief became the statement of legislative purpose in a proposed amendment. The goal of the County's amusement tax exemption, it said, was "to recognize and encourage both the artists who add to our cultural identity as well as the venues that allow them to display their talents."[48] It went on to declare that "it is not

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43 *Id.* ("This argument by the county transforms a basic maneuver to collect extra tax revenue into something intensely more sinister: a statement on classism, a division of 'us' versus 'them,' a standpoint where the people's music is deemed lesser than that which exists in a historically upwardly mobile circle."); Ryan Smith, *Cook County Has Become an 80s Movie Villain in Its Attempt to Tax Small Music Venues to Death*, CHI. READER (Aug. 25, 2016), https://chicagoreader.com/blogs/cook-county-has-become-an-80s-movie-villain-in-its-attempt-to-tax-small-music-venues-to-death/ [https://perma.cc/4EHU-HSLE] ("In the county's view, only opera, ballet, symphony orchestras, and other so-called 'fine arts' deserve a tax break. And by 'fine,' the county seems to imply arts events where white people of a certain age and income level politely clap while holding programs, where socialites go to rub elbows clad in expensive Italian fabric and tinkle gold-rimmed glasses at cocktail receptions.").

44 Erin Hooley, *Courtroom Rock: DJs Are on the Docket in a Cook County Tax Case*, CHI. TRIB., https://digitaledition.chicagotribune.com/tribune/article_popover.aspx?guid=2dc9316f-f02f-4e6a-b354-6c18ebd20440 [https://perma.cc/SP68-MTS8] ("Chicago is a birthplace to the blues, it's a jazz capital, hometown to some of the world's greatest rappers and most influential indie bands. This is also, ahem, the city that gave its name to Chicago house music, the pioneering 1980s effort by local DJs like Frankie Knuckles to turn mashups of disco, funk and other grooves into a new genre of nightclub performance.").

45 Hogan, *Music Is Art*, *supra* note 33.

46 Gaines, *supra* note 8.

47 Dawn Rhodes, *Commissioner Seeks to Exempt Clubs Featuring DJs From Amusement Tax Law*, CHI. TRIB. (May 23, 2019, 4:24 AM), https://www.chicagotribune.com/2016/08/30/commissioner-seeks-to-exempt-clubs-featuring-djs-from-amusement-tax-law/ [https://perma.cc/AP6U-RWA3].

48 Cook County, Ill., Proposed Ordinance Amendment: Ordinance No. 16-5102 (Sept. 14, 2016).

the role of government to restrictively decide and define what is and is not 'music'."[49]

By the end of October 2016, Cook County had adopted this amendment. The 'fine' in 'fine arts' was removed from the exemption,[50] and a new section followed Chicago's lead in specifically—very specifically—defining what kind of disc jockeying qualified for the tax break. (So much, apparently, for the government staying out of the business of defining music.)

Under the new law, "the activities of a DJ" fall within Cook County's small venue exemption if and only if both of the following are true:

> a. The activities must substantially add to or otherwise modify the pre-recorded material used by the DJ, in the form of a significant degree of technical or manual manipulation; and
>
> b. There must be a written contract for the DJ's appearance between the venue, owner, manager or operator of the amusement and the DJ.[51]

In addition, at least five of these six factors must also be shown:

> a. The DJ uses a combination of audio equipment including, but not limited to, turntables, laptops, synthesizers, keyboards, and visual effects equipment including, but not limited to, lighting and video effects, etc.
>
> b. The DJ is featured in advertisements for the venue.
>
> c. The DJ is visible to patrons of the venue, who spend a substantial amount of time observing the DJ's performance.
>
> d. The DJ's performance is featured more prominently than other amusements or activities available at the venue.
>
> e. The DJ appears for a limited engagement for a period of time not to exceed eight performances in a calendar month.
>
> f. The DJ is represented by a manager and/or agent.[52]

With the County's ordinances amended, controversy largely fizzled. The clubs' tax exemption was clarified going forward and settlements were reached on the issue of back taxes.[53] As

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49 *Id.*

50 COOK COUNTY, ILL., CODE OF ORDINANCES §§ 74-391 to -92 (2023).

51 *Id.* § 74-392(g)(1), https://library.municode.com/il/cook_county/codes/code_of_ordinances?nodeId=PTIGEOR_CH74TA_ARTXAMTA_S74-392TAIM [https://perma.cc/S8SJ-STAQ].

52 *Id.* § 74-392(g)(2).

53 *See, e.g.*, Settlement Agreement at 1–2, Cook Cnty. Dep't of Revenue v. Wladyslaw Kowynia, Inc. (Cook Cnty. Dep't of Admin. Hearings Mar. 31, 2017) (settled).

Commissioner Fritchey said of the outcome, "[t]his agreement makes it clear that it was never the intent of the Administration for the County to play culture police and make decisions on what is, or isn't, music or art."[54]

The only problem: Fritchey's claim is absurd on its face.

It is worth recalling that this entire controversy began because small venues in Cook County, Illinois, wanted a tax exemption given to "live theatrical, live *musical* or other live cultural performances."[55] They wanted an exemption that is *not* given to movies, circuses, rodeos, animal shows, athletic events, Netflix, or any of the other amusements people in Cook County pay to see. In other words, they were seeking something that puts the County in the unavoidable position of "mak[ing] decisions on what is, or isn't, music or art." The only way to avoid this would be to defer entirely to the venues' own definitions of what counts as musical or cultural.

But that, the County is clearly unwilling to do. For one thing, the ordinance puts the burden on venue owners to "*establish*[] by books, records or other documentary evidence"[56] that they qualify for the exemption. For another, just look at the specificity of the test that applies to DJs. It's a bit rich for the commissioners to say that Cook County has gotten out of the business of defining music and culture before immediately going on to give an eight-factor test for determining whether a certain kind of music counts as a "cultural performance" for Cook County tax purposes.

To point this out, however, is not just to join the chorus of music lovers who were outraged by tax officials playing culture cops. It is instead to observe a contradiction underlying the outrage. Music lovers—and music presenters—wanted the government to give subsidies to music (and other live arts) not available to other amusements. But they did *not* want the government deciding what counts as music (or other arts). That's the contradiction. An exemption isn't an exemption if everybody gets it. And you can't have a selective subsidy without giving someone the power to make selections.

And yet, allowing the government the power to pick favorites among the arts potentially raises constitutional concerns under the First Amendment. Subsidizing certain types

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54 Marco Sgalbazzini, *Cook County Finally Agrees: Live Music and DJ Sets ARE Art* (Oct. 14, 2016, 6:00 AM), https://www.6amgroup.co/cook-county-finally-agrees-live-music-and-dj-sets-are-art/ [https://perma.cc/6JLL-UEDN].

55 Cook County, Ill., Code of Ordinances § 74-392(h) (2023) (emphasis added).

56 *Id.* (emphasis added).

of expression that are seen as especially worthy, or that might need governmental support to survive, may seem fine, but burdening expression by denying support to some may seem like censorship.[57] That difficult line-drawing problem is the topic of Part III. For now, the Cook County example just shows how hard that problem is to avoid when selective subsidies for expression are sought. Decrying "culture cops" while demanding public money for only *some* forms of culture is not a consistent position.

The "solution" to the Cook County controversy, such as it was, offers another important lesson. Including the work of disc jockeys—or *some* work by *some* disc jockeys—among the cultural performances deserving of subsidy seemed to assuage critics who had been justifiably offended by musical line-drawing that was at best outdated, at worst, classist and racist.[58] But bringing a new expressive practice within the fold of "art," as Cook County did with (some) DJs, can have an effect on the practice itself. Going forward, Cook County has chosen to encourage a very particular practice: one in which DJs are managed, touring, and well-publicized;[59] where they are not only visible, but watched;[60] and where spectatorship takes precedence over the other things an audience might do at a club.[61] DJing isn't just being *recognized* among the arts, it is being pushed toward a particular conception of what 'the arts' are like.

As the history told in Part II will show, effects like these are all too common when tax law selectively supports certain forms of art. As in Cook County, tax law hasn't just discriminated among various artistic practices, it has long helped shape them.

B. Other Cases

The previous Section ended with some bold claims, and the subsequent Parts of this Article aim to vindicate them. But readers might want reassurance that the deep dives into history

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57 Brian Soucek, *Censorship and Selective Support for the Arts*, *in* THE OXFORD HANDBOOK OF ETHICS AND ART 660 (James Harold ed., 2023).

58 *See supra* notes 40–44 and accompanying text.

59 CODE OF ORDINANCES §§ 74-392(g)(2)(b), (e), (f) (2023) ("The DJ is represented by a manager and/or agent"; "The DJ appears for a limited engagement . . ."; "The DJ is featured in advertisements for the venue.").

60 *Id.* § 74-392(g)(2)(c) ("The DJ is visible to patrons of the venue, who spend a substantial amount of time observing the DJ's performance.").

61 *Id.* § 74-392(g)(2)(d) ("The DJ's performance is featured more prominently than other amusements or activities available at the venue.").

and doctrine that follow are motivated by more than a single cherry-picked example. So, without aiming for anything like a comprehensive survey, a few more examples of discriminatory tax codes, and some of the legal challenges brought against them, might help show that discrimination among the arts—and between arts and other "amusements"—is hardly confined to Cook County.

Philadelphia's amusement tax applies to "[a]ny theatrical or operatic performance, concerts, motion picture shows, [and] vaudeville," as well as "circuses, carnivals, side shows, . . . amusement parks and athletic contests."[62] But since 1979 it has specifically exempted so-called "legitimate theater shows": "presentations of traditional forms of drama, comedy, musical comedy, tragedy, repertoire works, dramatic recitation of recognized works of literary art of the kind and in the nature normally associated with traditional and contemporary American theater."[63]

The State of New Jersey exempts admissions fees from taxation when they are used to fund organizations that maintain "symphony orchestras or operas and receiv[e] substantial support from voluntary contributions."[64] Florida similarly exempts non-profit organizations producing "live theater, live opera, or live ballet productions," but only if they have 10,000 subscribing members and meet a variety of other conditions.[65] Georgia, meanwhile, recently offered a broader exemption to spur economic recovery after COVID closures. Until the end of 2022, Georgia waived admissions taxes for non-profit organizations and museums presenting a "fine arts performance or exhibition," defined as "music performed by a symphony orchestra, poetry, photography, ballet, dance, opera, theater, dramatic

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62 PHILA., PA., CODE § 19-601(1)(a) (2021), https://codelibrary.amlegal.com/codes/philadelphia/latest/philadelphia_pa/0-0-0-297614 [https://perma.cc/2NST-Z4UJ].

63 *Id.* § 19-601(2)(c) (2021). This provision was challenged by M.A.G. Enters., Inc., d/b/a Cheerleaders, and Conchetta, Inc., d/b/a Club Risqué in 2013. *See* Brief for CMSG Restaurant Group, LLC et al. as Amici Curiae Supporting Petitioners, 677 New Loudon Corp. v. N.Y. Tax Appeals Tribunal, 19 N.Y.3d 1058 (2012) (No. 13-38), 2013 WL 6407536.

64 N.J. STAT. ANN. § 54:32B-9(f)(1)(B) (2018). *See infra* Part II.B.2 for the federal predecessor to this exemption.

65 FLA. STAT. § 212.04 (2024). A 1963 administrative ruling clarified that "admissions and membership subscriptions to philharmonic associations, little theatres and similar organizations" are similarly exempt, as they were under federal tax law at the time as well. *See* 1963–1964 FLA. ATT'Y GEN. BIENNIAL REP., at 198, https://www.myfloridalegal.com/histago/ago-63-132 [https://perma.cc/C9MT-NC73].

arts, painting, sculpture, ceramics, drawing, watercolor, graphics, printmaking, and architecture."[66]

The tax code that seems to have inspired the most controversy, however, is that of New York State, where admissions fees are taxed at 4% but an exemption is provided for "admission to a theatre, opera house, concert hall or other hall or place of assembly for a live dramatic, choreographic or musical performance."[67]

The Ringling Bros. and Barnum & Bailey circus sued New York in 1977, arguing that they were presenting live dramatic, choreographic or musical performances under the big tent.[68] But according to a state court, "the traditional circus acts . . . are primarily feats of physical skill, strength and daring, interspersed with clowns for comic relief and trained animals."[69] The statutory exemption, the court explained, was first enacted after Broadway had endured its "most disastrous year" in 1960.[70] "It was feared that without relief from the tax on admissions not only would the legitimate theatre industry further decline but that the city's economy would be seriously affected . . . . Similarly the concert stage, opera and ballet needed relief."[71] Circuses, apparently, did not. "[T]hey can accommodate a far larger audience than the usual theatrical production and therefore can better cover their costs, and they have wide public appeal which makes them capable of attracting large audiences."[72] The upshot: New York tax law treated circuses differently than the arts for legitimate economic reasons, not due to discrimination "in any constitutional sense."[73]

Three years later it was the Ice Capades suing for inclusion under the choreographic performance exemption.[74] The state tax commission had decreed that "[d]ramatic and musical arts performances do not include variety shows, magic shows,

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66 S.B. 6, 2021–2022 Gen. Assemb., Reg. Sess. (Ga. 2021), https://www.legis.ga.gov/legislation/58884 [https://perma.cc/VGA3-BLWX].

67 N.Y. TAX LAW §§ 1101(d)(5), 1105(f)(1) (McKinney 2022).

68 *See* Ringling Bros. and Barnum & Bailey Combined Shows, Inc. v. N.Y. State Tax Comm'n, 1978 WL 25633 (N.Y. Sup. Ct. Aug. 10, 1977), *aff'd sub nom.* Ringling Bros.-Barnum & Bailey Combined Shows, Inc. v. N.Y. State Tax Comm'n, No. TSB-H-78(16.1)S, 1980 WL 102278 (N.Y. App. Div. June 9, 1978).

69 *Id.* at *3.

70 *Id.* at *4.

71 *Id.* at *4.

72 *Id.* at *8.

73 *Id.*

74 *See* Metromedia, Inc. v. State Tax Comm'n, 430 N.Y.S.2d 698 (App. Div. 1980).

circuses, animal acts, ice shows, aquatic shows and similar performances."[75] But the court noted that if a show actually fits the statutory text—if it is a live choreographic or musical performance—the tax commission lacked authority to say otherwise. And given the coordinated movement of skaters with musical scores, scenery, costumes, and lighting that comprise an Ice Capades show, the court found that the exemption applied.[76]

The biggest fight over the meaning of "choreographic performances," however, would come not from the family fare of a circus or ice show, but instead, from a strip club. In 2005, New York tax authorities came after Nite Moves, an "adult juice bar" outside Albany, demanding over $125,000 in unpaid taxes on entrance fees, both to the club and to private rooms inside.[77] The club, meanwhile, claimed that both pole dancing and lap dancing qualified as tax-exempt choreographic performances. The case reached New York's highest court in 2012 and, in a 4-3 decision, the Court of Appeals decided that it "was not irrational for the Tax Tribunal to conclude that a club presenting performances by women gyrating on a pole to music, however artistic or athletic their practiced moves are," was not exempt, especially given the legislature's "evident purpose of promoting cultural and artistic performances in local communities."[78]

According to the dissenters, by contrast, "[i]t does not matter if the dance was artistic or crude, boring or erotic. Under New York's Tax Law, a dance is a dance."[79] As Judge Smith's dissent concluded:

> I find this particular form of dance unedifying—indeed, I am stuffy enough to find it distasteful. Perhaps for similar reasons, I do not read Hustler magazine; I would rather read the New Yorker. I would be appalled, however, if the State were to exact from Hustler a tax that the New Yorker did not have to pay, on the ground that what appears in Hustler is insufficiently "cultural and artistic." That sort of discrimination on the basis of content would surely be unconstitutional. It is not clear to me why the discrimination that the majority approves in this case stands on any firmer constitutional footing.[80]

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75 *Id.* at 699.

76 *Id.*

77 677 New Loudon Corp. v. N.Y. Tax Appeals Trib., 925 N.Y.S.2d 686 (App. Div. 2011).

78 677 New Loudon Corp. v N.Y. Tax Appeals Trib., 979 N.E.2d 1121, 1122–23 (N.Y. 2012).

79 *Id.* at 1124 (Smith, J., dissenting).

80 *Id.* at 1125 (Smith, J., dissenting) (citation omitted).

Claims by strip clubs that selective exemptions are unconstitutional are not confined to New York.[81] In fact, we can end Part I by bringing its story full circle, returning to Cook County and the City of Chicago. There, a company called Pooh-Bah Enterprises brought suit in 2001 because a bar it owned, featuring "scantily clad" dancers, was taxed as an "adult entertainment cabaret" rather than a venue for "live theatrical, live

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81 Nor are admissions taxes the only taxes that selectively favor particular arts. Just staying within New York, New York City offers an exemption on its rent and occupancy taxes when the tenant uses their space to produce a "theatrical work," where that refers to a "live dramatic performance (whether or not musical in part) that contains sustained plots or recognizable thematic material, including so-called legitimate theater plays or musicals, dramas, melodramas, comedies, compilations, farces or reviews," but not "performances of any kind in a roof garden, cabaret or similar place, circuses, ice skating shows, aqua shows, variety shows, magic shows, animal acts, concerts, industrial shows or similar performances, or radio or television performances." N.Y.C. ADMIN. CODE § 11-704(e)(2)(ii) (2023), https://codelibrary.amlegal.com/codes/newyorkcity/latest/NYCadmin/0-0-0-12115 [https://perma.cc/6PNJ-E22T].

When we turn from exemptions to admissions taxes to direct fee and permit regulations on the arts, things get even wilder. Paul Chevigny tells the important and implausible story of New York City's cabaret laws, which date to 1926 and at times subjected venues to different zoning and permitting rules based not just on how many musicians performed there—three was long the limit—but even on the type of instrument they played: piano and strings avoided the restrictions, but not horns or drums. *See generally* PAUL CHEVIGNY, GIGS: JAZZ AND THE CABARET LAWS IN NEW YORK CITY (2d ed. 2004).

San Diego amended its permitting requirements in 2000 in part to better regulate entertainment venues that "attract . . . illegal underground parties known as RAVE parties"; exempted from the police permit requirement were (and still are) theaters, defined as "any commercial establishment where regular theatrical performances, such as performances of literary compositions that tell a story, are given, usually on a stage, and usually with ascending row seating." San Diego, Cal., Ordinance O-18887 (Nov. 20, 2000), https://docs.sandiego.gov/council_reso_ordinance/rao2000/O-18887.pdf [https://perma.cc/M3SJ-F27V].

Meanwhile, until 2023, a special license was required in the unincorporated parts of Clark County, Nevada—which includes the Vegas Strip—to stage a so-called "rock musical concert," defined as "public rendition of music . . . consisting of several individual compositions performed by a musician or group of musicians utilizing electronically amplified instruments, which music is characterized by a persistent heavily accented beat and a great degree of repetition of simple musical phrases." CLARK COUNTY, NEV., CODE OF ORDINANCES § 6.65.020 (2023), https://library.municode.com/nv/clark_county/codes/code_of_ordinances?nodeId=TIT6BULI_CH6.65MUCO [https://perma.cc/63C9-9HB5]. For fifty years, Clark County differentiated "rock music" from "jazz/fusion, classical, gospel, ballet and adult contemporary music" having found that "public health, safety, morals and welfare of the inhabitants of the county outside of the incorporated cities and towns require" this "regulation and control." *Id.* § 6.65.010. The ordinance was passed after a riot broke out when the lead singer of Deep Purple failed to perform at the Las Vegas Convention Center in 1973. *See Rock Rules: Is the County Playing an Old-Fashioned Tune?*, LAS VEGAS SUN (Sept. 7, 2006, 7:13 AM), https://lasvegassun.com/news/2006/sep/07/rock-rules-is-the-county-playing-an-old-fashioned-/ [https://perma.cc/9WK8-LT7L].

musical, or other live cultural performances."[82] As noted earlier, adult businesses are explicitly excluded from the small venue exemption both in Chicago's and Cook County's ordinances.[83] According to Pooh-Bah, this amounted to unconstitutional content discrimination.

As Part III will explore in detail, the relevant case law governing this sort of claim is itself a matter of debate. For Pooh-Bah, the relevant cases were ones in which courts had struck down tax provisions that discriminate based on content.[84] For the city and county, "the line of cases allowing government to subsidize one activity to the exclusion of another" provided the more relevant precedent.[85] "[T]he first amendment is not a suicide pact that means that the government may not subsidize the fine arts unless it is also willing to subsidize activities that are known to have negative secondary effects."[86]

The Illinois Supreme Court sided with the government. It found relevant the fact that "a broad range of amusements," some protected under the First Amendment and some not, were subject to the amusement tax, while a relatively small subset were exempted in order "to foster the production of live performances that offer theatrical, musical or cultural enrichment to the people of Cook County and Chicago."[87] In the Court's words:

> Because the goal is to encourage live fine arts performances in small venues, it is perfectly logical for defendants to exclude categories of protected speech that will not advance its goals, *e.g.*, movies, television, promotional shows, performances at adult entertainment cabarets, and performances in venues that seat more than 750 persons.[88]

Crucially, the Court saw the admissions taxes as distinguishing among different types of activities, not as engaging in content discrimination within a particular type (namely, "any of the disciplines which are commonly regarded as part of the fine

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82 Pooh-Bah Enters., Inc. v. Cnty. of Cook, 905 N.E.2d 781, 786 (Ill. 2009).

83 Cook County, Ill., Code Of Ordinances § 74-391 (2015), https://library.municode.com/il/cook_county/codes/code_of_ordinances/259998?nodeId=PTIGEOR_CH74TA_ARTXAMTA_S74-392TAIM [https://perma.cc/FH93-FA6R].

84 *See Pooh-Bah Enters., Inc.*, 905 N.E.2d at 790, 795–98.

85 *Id.* at 790.

86 *Id.*

87 *Id.* at 800–01.

88 *Id.* at 802.

arts").[89] Just as movie theaters "are denied the exemption not because of the expressive content of their performances, but because they are not small fine arts venues[,]"[90] so too were adult cabarets seen as simply a different kind of thing than a modern dance show. And that "kind of thing," though denied a subsidy, was no less able to survive than it would have been had the small venue exemption never been enacted.[91]

To some, the difference in kind between ballet and pole dancing might seem clear enough to justify line-drawing like Cook County's and Chicago's. But one last example underscores the complexity here. As it turns out, city and county ordinances at the time each defined "adult entertainment cabaret[s]" to encompass not just strippers, but also "male or female impersonators."[92] So the exemption for live theatrical, live musical or other live cultural performances excluded not just pole and lap dances, but drag shows as well. Is there a reason—and does the constitution allow—for a city or county to subsidize comedy or dance shows in small venues unless the comic or dancer happens to be in drag? Is drag just a different *kind* of cultural product, or is it a viewpoint of type of content within existing and otherwise subsidized artforms?

It can be difficult to decide when tax law is favoring some artistic activities over other similar expressive activities for invidious reasons (like the homophobia behind these drag restrictions) as opposed to when it is just choosing to fund certain artistic activities over other, *different* kinds of artistic or even non-artistic activities—"mere" amusements. The former may sometimes be constitutionally problematic, as Part III will describe in more detail. But even when bad intentions are lacking, the law's effects on artistic practice have long been pervasive, and had sometimes had racially, sexually, or class-based disparities in their impact.

As we will soon see, fights over exemptions in tax law have helped shape what artistic activities we see as comparators, and even what activities we see as artistic in the first place.

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89 *Id.* at 803–04 (emphasis removed) ("Plaintiff is simply presenting an entirely different type of activity than what defendants are subsidizing.").

90 *Id.* at 805.

91 *See id.*

92 *See id.* at 786 (quoting COOK COUNTY, ILL. AMUSEMENT TAX ORDINANCE § 2 (1999); CHI., ILL., MUN. CODE § 4–156–010 (2007)). Chicago removed "male or female impersonators" from its definition of "adult entertainment cabaret" in 2015, Committee on Zoning, Landmarks and Building Standards, *Amendment of Section 16-16-030 of Municipal Code Concerning Adult Entertainment Cabarets*, 1 J. PROC. CITY COUNCIL CHI., ILL. 109070 (May 6, 2015), but Cook County's remains in effect.

The next Part looks back more than a century to show this happening not just at the state and local level, but first at the federal level, where admissions taxes date back to World War I.

II
HISTORY

From 1917 to 1965, the federal government placed a tax on admissions fees.[93] But the federal government also *exempted* certain kinds of admissions from taxation, thereby providing incentives for producers to adapt the pricing and even the content of the entertainment they provided. In doing so, the federal government did more than simply favor some entertainments over others. Its tax scheme helped draw a line between entertainment and something else—"the arts"—thereby shaping our conception of the arts and even artistic practice itself.[94] By tracing the history of the federal admissions tax, this Part tells that story.

The story begins with the passage of the first admissions and cabaret tax, imposed in the War Revenue Act of 1917. The first Section of this Part describes the Act's background and features, as well as initial interpretations of the Act that would prove fateful. Section B turns to the tax's exemptions, detailing the evolution of three types: those based on content; those based on the charitable purpose of the performances; and those based on ticket price. We distinguish these three categories of exemption in part to reveal their overlap. Notably, the history shows that *all* of these types of exemption ended up providing market advantages to certain artistic practices but not others. In effect if not on their face, each type of exemption resulted in content discrimination. And this discrimination helped establish a boundary between tax-exempt forms of expression that were valued as "art" versus "amusements" and "entertainments" that continued to be taxed.

As Section C describes, states and local governments persuaded Congress to leave admission taxing to them in 1965, nearly a half century after the admissions tax was first imposed. In abandoning the field, the federal government bestowed to

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93 *See* War Revenue Act of 1917, Pub. L. No. 65-50, § 700, 40 Stat. 300, 318; 111 CONG. REC. 13567, 13614 (1965).

94 On the demonstrable isomorphic effect of government policy on organizational structures and functions, see generally Paul J. DiMaggio & Walter W. Powell, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields*, 48 AM. SOCIO. REV. 147 (1983).

the states—and to cities like Chicago—a patchwork tradition of taxation which did not just reflect, but actually helped to create, artistic categories most of us take for granted today.

This Part offers the most comprehensive history of the federal admissions tax yet written. And as interesting and important as that is in its own right, given the tax's effects on the federal budget and on artistic practice, this history needs to be told for another reason too. As we will see in Part III, the doctrinal factors that speak to the constitutionality of content-discriminatory tax laws like those we encountered in Part I can be fleshed out only once we have the kind of thick historical and sociological description that this Part offers. We can't properly evaluate tax laws like Chicago's until we understand their background and context. This Part provides both.

A. The 1917 Act

Excise taxes, which impose fees for the use or sale of certain goods, services, and activities, were relatively new in the United States in 1917.[95] The federal government had only recently introduced income taxes,[96] having previously relied mostly on customs duties.[97] In the build-up to World War I, the U.S. government leveraged the ratification of the Sixteenth Amendment to fund itself using a novel combination of excise, income, and payroll taxes.[98] But the initial terms of the progressive tax meant only 2% of American households met the criteria for taxation, at a time when the war-related reductions in trade reduced our tariff revenues.[99] In 1917, the government responded by increasing income tax rates, reintroducing an inheritance tax, and imposing supposedly temporary excise taxes on a wide range of goods and service, including admissions;[100] the combined measures were predicted to generate $3.5 billion or more in much-needed revenue.[101]

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95 *See* THOMAS L. HUNGERFORD, CONG. RSCH. SERV., RL33665, U.S. FEDERAL GOVERNMENT REVENUES: 1790 TO THE PRESENT 4–6 (2006).

96 *Id.* at 5.

97 *Id.* at 3.

98 Roy G. Blakey, *The War Revenue Act of 1917*, 7 AM. ECON. REV. 791, 791 (1917).

99 HUNGERFORD, *supra* note 95, at 5.

100 George E. Lent, *The Admissions Tax*, 1 NAT'L TAX J. 31, 31 (1948).

101 Blakey, *supra* note 98, at 791. The 1917 War Revenue Act was designed to generate $2.5 billion "exclusively for war purposes" and increase Federal revenue 500%, to $3.5 billion. *Id.* While Blakey observed the immensity of the increase (three times the amount of the national debt in April 1916), it would not meet the

Table 1 shows the range of taxable items included in the War Revenue Act of 1917: utilities like electricity and telephone service; luxuries like pleasure boats and perfumes; near-essentials like insurance and tires; and materials for avocational pursuits, such as sporting equipment and club dues. There are some notable absences in each category: foodstuffs; bicycles; books and other printed matter; clothing and handbags; and many others. But by and large, the federal government's approach to wartime taxation was to tax most everything. And the tax on admissions was a major component of that, expected to bring in $50 million, more than anything but transportation, mail, liquor, and soft drinks.[102]

government's need: $21 billion in appropriations and authorizations had already been made for the 1917–18 fiscal year. For an authoritative account of American tax history, see generally W. ELLIOT BROWNLEE, FEDERAL TAXATION IN AMERICA: A HISTORY (3d ed. 2016).

102 $50 million in October, 1917 is equivalent to $1.16 billion in April 2024. Inflation calculator. *See CPI Inflation Calculator*, U.S. BUREAU OF LAB. STAT., https://www.bls.gov/data/inflation_calculator.htm [https://perma.cc/4JA4-CFHZ].

Table 1.—Estimated Revenue from the Several Bills.

	House Bill	Senate Bill	Enacted Bill
	(*Millions*)	(*Millions*)	(*Millions*)
Incomes, individual and corporate	$598.7	$842.2	$851.0
War tax on 1916 incomes	108.0	.....	.....
Excess profits	200.0	1,060.0	1,000.0
Spirits, liquors, wines	151.0	207.0	193.0
Soft drinks, syrups, etc.	20.0	11.0	13.0
Tobacco and manufacturers thereof	68.2	56.6	63.4
Freight transportation	77.5	77.5	77.5
Express transportation	15.0	18.0	10.8
Passenger transportation	75.0	37.5	60.0
Pipe lines	4.5	4.5	4.5
Seats and berths	.7	2.2	4.5
Electric lights, gas, telephone service	30.0	.....	.....
Telegraph and telephone messages	7.0	7.0	7.0
Insurance	5.0	.....	5.0
Automobiles	68.0	41.0	40.0
Tires and tubes	12.5	.....	.....
Musical instruments, etc.	7.0	.....	3.0
Motion picture films	7.0	.....	3.0
Jewelry	7.5	.....	4.5
Sporting goods	2.0	.8	1.2
Pleasure boats	.5	.5	.5
Perfumes and cosmetics	4.7	1.9	1.9
Proprietary medicines	8.5	3.4	3.4
Chewing gum	1.0	.....	.4
Cameras	.....	.5	.7
Admissions	60.0	18.0	50.0
Club dues	1.5	.....	1.5
Stamp taxes, etc.	33.0	22.0	9.0
Estate taxes	6.0	.....	5.0
Customs duties	200.0	.....	.....
First-class mail matter	70.0	.....	70.0
Second-class mail matter	19.0	.....	6.0
Munition manufacturer's tax	.....	.....	25.0
Totals	**$1,868.8**	**$2,411.6**	**$2,514.8**

Originally set at "1 cent for each 10 cents,"[103] the admissions tax rate would float over the years to come, typically falling between 5-10%; as applied to cabarets, the tax reached a high of 30% between April and July 1944, but typically held between 10-20%.[104] Lawmakers consistently observed the critical contribution that the admissions and cabaret tax made to federal revenues. Renewed for forty-seven years, the tax outlasted both the world war that gave rise to it and the one that followed, eventually generating in excess of $2.2 billion.[105]

The 10% tax imposed in the 1917 Revenue Act applied to "admission to any place by a person 12 years of age or over."[106] The Act itself did not define "any place" but the Bureau of Internal Revenue would soon explain that "the context indicates that in general only admissions to places of amusement and entertainment were intended to be taxable."[107] The tax was not strictly directed at the "arts." It applied to all movie, theater, opera tickets and circuses, cabarets, extravaganzas, and airdromes; membership dues to a canoe club, a boxing club, or any social, athletic, or sporting club; entry to amusement parks or "bench shows" (*e.g.*, the Westminster Dog Show), and tickets to view athletic events and livestock shows.[108]

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103 War Revenue Act of 1917, Pub. L. No. 65-50, § 700, 40 Stat. 300, 318.

104 *See* John Copeland, *Some Effects of the Changes in the Federal Cabaret Tax, in 1944*, 38 PROC. ANN. CONF. ON TAX'N UNDER AUSPICES NAT'L TAX ASS'N 321, 322 (1945); Eric Felten, *How the Taxman Cleared the Dance Floor*, WALL ST. J. (Mar. 17, 2013, 6:09 PM), https://www.wsj.com/articles/SB10001424127887323628804578348050712410108 [https://perma.cc/CYU2-HR6V].

105 Authors' own computation. Data covers 1918–1947 except 1928–1932. Data for 1918–1927, inclusive, is sourced from Price L. Marsh, *The Admission Tax*, 1 INTERNAL REVENUE NEWS 21, 22 (1928) (published by the Bureau of Internal Revenue, Treasury Department). Data for 1932–1947, inclusive, is sourced from Lent, *supra* note 100, at 33.

106 U.S. INTERNAL REVENUE SERVICE, REGULATIONS NO. 43 RELATING TO THE WAR TAX ON ADMISSIONS AND DUES UNDER TITLE VII OF THE ACT OF OCTOBER 3, 1917, at 3 (1918) [hereinafter INTERNAL REVENUE REGULATIONS NO. 43]; *see* War Revenue Act of 1917, Pub. L. No. 65-50, § 700, 40 Stat. 300, 318.

107 INTERNAL REVENUE REGULATIONS NO. 43 at 4. If an admissions charge is assessed only in exchange for access to "certain equipment" then "admission is incidental to the privilege of using such equipment, and the tax does not apply." *Id.* This exempted greens fees at a golf course and access to a pool table, swimming pool, or "Turkish bath." *Id.* Amusingly, the Bureau of Internal Revenue clarified in 1933 that airborne aircraft used for sightseeing are not taxable "if the aircraft is not affixed to the earth" because those aircraft are not "a 'place' as intended by the statute." *Rulings of the Bureau of Internal Revenue*, 11 TAX MAG. 233, 234 (1933).

108 *See* Lent, *supra* note 100, at 31.

The 1917 Act included four qualifications.[109] First, children under twelve would pay a tax no greater than 1 cent. Second, persons admitted somewhere for free should pay the 10% tax based on the value of "the same or similar accommodations" unless they were "bona fide employees, municipal officers on official business, and children under 12 years of age." Third, attendees with season tickets or other permanent use of a seat or box should pay a 10% tax based on the value of similar accommodations. Thus, any discount offered to season ticket holders would not be extended to their tax burden. And fourth, patrons of cabarets and other forms of entertainment in which "the charge for admission is wholly or in part included in the price paid for refreshment, service, or merchandise" would pay a tax to be computed by the Commissioner of Internal Revenue, who thus needed to define both the applicable rate and the places where this "cabaret tax" would apply.

Crucially, the 1917 Revenue Act also included two categories of exempt admissions: first, to venues for which "the maximum charge for admission . . . is 5 cents" (or 10 cents at amusement parks); and second, for charitable fundraisers.[110] Specifically, the Act stated:

> No tax shall be levied under this title in respect to any admissions all the proceeds of which inure exclusively to the benefit of religious, educational, or charitable institutions, societies, or organizations, or admissions to agricultural fairs none of the profits of which are distributed to stockholders or members of the association conducting the same.[111]

Thus, from its beginning, the federal admissions tax allowed an exemption for low-cost entertainments, just as it kept its hands off admissions meant to fund charities. The scope of both exemptions would generate continual controversy and amendment in the five decades to come.

B. Exemptions

Over time, four categories of exceptions to the federal admissions tax emerged and sometimes intermingled: those based around particular persons, content, charitable purposes, and price.

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109 All quotations in this paragraph are from the same passage found at § 700, 40 Stat. at 318.

110 *Id.* at 318–19.

111 *Id.* at 319.

Children were the primary group of persons offered a discount in the original act,[112] though members of the military, National Guard members, fire and police officers, and their spouses and dependents would receive similar benefits in future acts.[113] We set aside these identity-based exemptions in what follows in order to focus on the three other categories of exemption, each of which played a more significant role in shaping how we now think of the arts.[114]

Exemptions that were explicitly based on the *content* of the entertainments being taxed had the most obvious influence on the arts—and most closely resemble the controversies described in Part I. But as the following sections will show, fights over the contours of charity-based exemptions also turned into content wars, as presenters of certain arts fought to be exempted either *as* charities or as something ennobling enough to be *akin to* charity. And price-based exemptions, though facially content-neutral, also had a disparate impact on various arts, something which was obvious to theater producers and others who lobbied for the benefits that motion pictures and similarly inexpensive forms of entertainment at times enjoyed. In the history that follows, we report qualitative and quantitative claims of differential impacts but leave an independent assessment of the scale of these impacts to future research.[115]

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112 *Id.* at 318.

113 Uniformed military and naval personnel were added in 1918, Revenue Act of 1918, Pub. L. No. 65-254, ch. 18, 40 Stat. 1057, 1120 (1919), and military veterans, National Guard and Reserve associations or posts, and fire and police officers were all added to the list of exempt ticket-buyers in the War Revenue Act of 1924, Pub. L. No. 68-176, ch. 68, 43 Stat. 253, 321. Most of these, except for servicemen in uniform, were eliminated by the start of World War II. LEGISLATIVE HISTORY OF THE REVENUE ACT OF 1941 : P.L. 77-250 : September 20, 1941, at 6633 (1941).

114 This is not, however, to deny content-discriminatory effects that identity-based exemptions might have caused. Children, after all, were surely more likely to attend the circus and the movies than the symphony or opera. And members of the armed services, police, and fire departments may have gravitated toward certain entertainments over others as well. But we have no evidence of these effects.

115 Establishing sociological cause and effect relationships is exceptionally complicated, conventionally requiring the elimination of all suspected sources of spurious correlation. John H. Goldthorpe, *Causation, Statistics, and Sociology*, 17 EUR. SOCIO. REV. 1, 2 (2001). *See generally,* Daniel Hirschman & Isaac A. Reed, *Formation Stories and Causality in Sociology*, 32 SOCIO. THEORY 259, 261 (2014). In this study, an assessment of the variable effects of the tax on multiple amusements over a half century far exceeds what is feasible or even desirable, when our purpose lies elsewhere. Thus, all the claims about impacts within this article are attributed to specific speakers.

The following sections take each of these categories of exemption in turn, though as we will see, arts producers sometimes tried multiple paths toward tax avoidance and, over time, hybrid exemptions—content-based charitable exemptions, for example—would become increasingly common.

1. *Content*

The 1917 War Revenue Act tasked the Commissioner of Internal Revenue with deciding how to tax cabarets and "other similar entertainment"—places where admissions fees are folded into the overall bill rather than being paid upfront.[116]

Responding to the assignment, the Commissioner Daniel C. Roper determined in a December 1917 ruling that cabarets up-charged patrons at least 20% to cover the costs of entertainment. As a result, he imposed the 10% admission tax on 20% of the total bill patrons incurred at cabarets. Commissioner Roper defined a cabaret as a public place in which refreshments or merchandise were sold alongside "any vaudeville or other performance or diversion in the way of acting, singing, declamation, or dancing, either with or without instrumental or other music."[117] But notably, in the subsequent sentence, the Commissioner introduced the admission tax's first exemption based on artistic content: "Every form of entertainment so conducted is included," the ruling decreed, "*except that furnished by orchestras performing instrumental music only, unaccompanied by any other form of entertainment*."[118] "[E]ntertainment in the form of dancing" was taxable, the ruling went on to specify.[119]

The Commissioner's ruling apparently sought to distinguish cabaret-style entertainment from ambient music that venues might provide for diners, for example in hotel lobby bars, which otherwise resemble cabarets in their mix of refreshments and entertainment. As a subsequent Bureau of Internal Revenue regulation would put it: "Every form of entertainment . . . is included, except that furnished by orchestras such as were usual in hotels and restaurants before the advent of cabarets."[120] The legislative history does not reveal why the presence of singing or dancing should have made the difference

116 § 700, 40 Stat. at 318.

117 T.D. 2603, 19 Treas. Dec. Int. Rev. 370, 371 (1917).

118 *Id.* (emphasis added).

119 *Id.*

120 Internal Revenue REGULATIONS NO. 43, *supra* note 106, at 8.

in what was taxed.[121] But those distinctions in the first administrative interpretation of the 1917 Act opened a door for additional content-based exemptions in the revenue acts to come.

Content-based exemptions like these naturally create incentives to stage—or avoid—particular content. And in the case of the cabaret, the incentives had an effect. After the Internal Revenue Commissioner's ruling, cabaret owners often began booking purely instrumental groups, cancelling bookings with singers.[122] They ensured these instrumental groups performed "un-danceable" music, so as to avoid triggering the tax. Others provided "pantomime" acts during which performers would lip-synch to recorded music, taking advantage of the carve-out for venues providing "mechanical music alone."[123] Some venues simply reduced the number of total hours of live entertainment they offered—one estimate held that this accounted to as much as a 40% increase in the amount of time when only food and beverages were available.[124] In 1960, Senator Robert Anderson shared a report from the Committee on Finance which stated that the cabaret tax was particularly onerous because it "discriminates against the combination of food or beverages and entertainment since either, if provided separately, is taxed at a lesser rate or is not taxed at all."[125] The remarkable rise in popularity of bebop musicians (and the decline of big band jazz) is sometimes attributed in part to its production of music unsuitable for dancing.[126] The drummer Max Roach saw the tax as the cause: "If somebody got up to dance, there would be 20% more tax on the dollar. If someone got up there and sang

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121 It is highly likely, however, that racial animus against mixed-race dancing couples and a similar animus against Black women (who were largely excluded from instrumental roles but filled many lead and backup singing positions in orchestras and bands) played a significant role.

122 James E. Powers, *Entertainers Call for A Slash in Tax: Variety Artists' Union Deluged with Reports of Closed Clubs All Over the Country*, N.Y. Times, Apr. 23, 1944; Frederick C. Othman, *Cabaret Changes Its Entertainment to Escape Federal 20 Per Cent Tax*, The Austin Statesman, July 12, 1950; *Cabaret Men Glum as Trade Slumps*, N.Y. Times, Apr. 3, 1944, at 23.

123 Felten, *supra* note 104.

124 Figures reported by Senator Robert B. Anderson, whose figures (of unknown origin) describe the impacts on cabarets in continuous operation between 1943 and 1954. S. Rep. No. 1084, at 2 (1960).

125 *Id.*

126 Lee B. Brown, David Goldblatt & Theodore Gracyk, Jazz and the Philosophy of Art 24-25 (2018); Patrick Jarenwattananon, *How Taxes and Moving Changed the Sound of Jazz*, NPR: A Blog Supreme (Apr. 16, 2013), https://www.npr.org/sections/ablogsupreme/2013/04/16/177486309/how-taxes-and-moving-changed-the-sound-of-jazz [https://perma.cc/VH23-SCA8].

a song, it would be 20% more," he said. "It was a wonderful period for the development of the instrumentalist."[127]

No records remain that would explain why the Internal Revenue Commissioner made the choice he did in 1917, fateful as it would turn out to be. What we do have, however, are surprisingly lengthy debates in Congress about exemptions sought for another art: spoken-word theater—what we now refer to as "plays." These arguments are worth pausing over, as they shed light on the federal government's thinking about the arts more broadly.

In September 1918, Marc Klaw, Henry W. Savage, and Winthrop Ames, representing theater owners and play producers, told the Senate Finance committee that the admissions tax "had dealt theatres a heavy blow in attendance" in just the one year it had been in effect, and this would lead both to closures and less tax revenue.[128] They were the first theater representatives to appeal—unsuccessfully—for exemption from the tax.

In 1924, Representative Henry Thomas Rainey of Illinois, who would go on to be Speaker of the House at the start of the New Deal, introduced an amendment to lower the tax rate on theater admissions to 5%.[129] Observing that the body appeared inclined to offer relief to less "educational" industries—cigarettes and chewing-gum in particular—Rep. Rainey reminded legislators that the tax harmed theaters, too. He recalled what dramatist Augustus Thomas had told the Ways and Means Committee, that "this tax in three years has cut off 66 per cent of the theaters in the country, and 75 per cent of the theaters in the cities."[130] Rainey added, "It is unusual in the history of the world to impose a tax upon education, upon cultural instrumentalities, but that is what we do in this section [of tax law]."[131] Rainey was concerned that the high tax on theater was driving consumers to the movies instead, where "you can suffer all the emotional pangs you feel like suffering, but there is nothing in the movies that appeals to the intellect."[132] Rainey issued a challenge to legislators:

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127 Felten, *supra* note 104; *see also* DIZZY GILLESPIE WITH AL FRASER, TO BE, OR NOT . . . TO BOP, at 232–33 (1979).

128 *Condemn Tax on Tickets*, N.Y. TIMES, Sept. 12, 1918.

129 *Near a Fist Fight Amid Clash in House During Tax Debate*, N.Y. TIMES, Feb. 27, 1924.

130 65 CONG. REC. 3129, 3184 (1924).

131 *Id.* at 3185.

132 *Id.*

> has not the time come to do something for the education of the young of the country and the culture of the country? The taxes on the spoken drama are in effect a tax on culture; it is like reaching out from some unknown source with a hand of steel and throttling the sculptors as they produce their masterpieces, which appeal to the culture of those of this generation and the next. It is like stilling the hand of the painter at his work. We measure the culture, the progress, and the advance of any era in the history of the world by calling attention to the drama of that period and to the art of that period in all its forms. You might as well tax painting and sculpture as to tax the drama.[133]

Rainey finished his exposition to a round of applause from the House.

It is hard to provide a simple characterization of the several hours of debate that ensued. Legislators offered amendments to increase price exemption levels to 50 cents,[134] 75 cents,[135] and $1;[136] they even discussed eliminating the tax.[137] Legislators tended to divide along party lines, with Democrats like Rainey supporting tax relief, and Republicans objecting to reductions in government revenues.[138] Capturing the disdain many Republicans displayed in this discussion, Rep. Begg asked that "somebody give some idea as to how many of these high-class educational entertainment admissions will be affected as compared to the other kind, which are purely recreational."[139] Rep. Rainey argued that even if the size of the relief was small, theater deserved favored status that popular entertainments did not, stating "I am not so much interested in ["high class"] vaudeville . . . as I am in the drama, which has an educational and a cultural influence."[140] Others argued that what benefited theater would benefit other fields: Rep. LaGuardia argued that setting the price exemption at $1 "would make it possible to encourage good music as well as high-class drama."[141] Some

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133 *Id.* at 3185.

134 *Id.*

135 *Id.* at 3190.

136 *Id.* at 3188.

137 *Id.* at 3191.

138 Two amendments ultimately received an accounting: Rep. Hawley reported that LaGuardia's $1 price exemption would reduce revenues by $58 million, while Rainey's 50 cent price exemption would reduce revenues by $51 million. *Id.* at 3189.

139 *Id.* at 3189.

140 *Id.* at 3185.

141 *Id.* at 3188.

argued—Rainey chief among them—that the current law was discriminatory, and raising the price exemption would remediate the harm by equalizing the tax burden of those who pay no tax to see "Douglas Fairbanks in his athletic stunts" in the movies, but pay a tax to see "a Shakesperean production or to see one of Augustus Thomas's dramas, or anything that provides a really proper emotional outlet for the people of this country."[142]

Interestingly, the superior educational value of the theater also featured in arguments to *eliminate* tax exemptions. Rep. Lowrey, a Mississippi Democrat, proposed an amendment to remove all exemptions from the tax, and argued that "[i]f we are going to encourage anything" it should be:

> the entertainment that will really appeal to the literary and cultural side of the people and mean something to them. It seems to me that the bill as it stands encourages the cheaper shows, those that there would be less culture in, and taxes those that are more cultural. But I believe that they are all in a sense a luxury. And I believe in the principle of taxing luxuries rather than necessaries.[143]

He concluded, "Therefore I simply offer the amendment to go back to where we were and make no distinction, and let them stand on the same basis and tax all picture places and places of amusement."[144] Lowrey was in the minority, and his amendment was defeated, but he was not alone: Rep. Mills, Republican of New York, also argued in favor of eliminating exemptions: "Do not say that we are going to relieve the movies . . . the cheaper forms of entertainment, but that we are going to keep the maximum war tax as it exists to-day on that sort of entertainment which can be classified as art and which is of real educational and cultural benefit to our people."[145]

Unrelenting, Rainey continued to push for a content exemption for theater. He offered an amendment to apply a reduced tax rate "only to theaters where spoken drama is produced or to operas or to Chautauqua or lyceum programs or to lectures; that is all. The other entertainments will be still subjected to existing rates, including prize fights."[146] When

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142 *Id.* at 3185.

143 *Id.* at 3191.

144 *Id.*

145 *Id.* at 3187.

146 *Id.* at 3189.

asked if he would "be willing to include" concerts, prize fights, and baseball, Rainey only said no to baseball.[147]

Rep. Green of Iowa rose and spoke with vigor: "Mr. Chairman, this amendment presents the greatest case of reversing I ever knew. The fact of the matter is the gentleman [Rep. Rainey] is doing just the opposite from what he really intends. This puts the tax load on the very objects he is trying to exempt and exempts prize fights and movies and all such things as that."[148] After a rapid-fire exchange, Rainey asked to amend his proposed amendment, "so that it will read 'any place except theaters,' and so forth."[149] The amendment was rejected.

A second wave of discussion focused not on content, but on charitable recipients, the topic of the next Section. In the end, lawmakers granted an exemption for admissions benefitting National Guardsmen, police and firemen and their dependents and heirs, and Reserve officers, while leaving in place a 10% tax on admissions with a 50 cent price exemption.[150]

One can imagine Rainey's frustration, having heard many lawmakers advocate for relief for the theater, but unable to generate consensus on how to achieve it. Rainey's next strategy was to form a starry panel of experts to devise a definition of "legitimate spoken drama" that would distinguish it from "ephemeral productions such as farce comedies, burlesques and extravaganzas."[151] The clear purpose of this effort was to disentangle "educational" drama from "cheaper forms of entertainment" in the hope that the former would so closely resemble existing content-based exemptions (namely, for symphony orchestras and instrumental music in cabarets) that at least some theater could enjoy tax relief.[152] The specificity of the resulting definition—produced in consultation with two theater professors, an actor and producer, and, once again, the playwright Augustus Thomas—is striking;[153] it would have limited the subsidy to any

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147 *Id.*

148 *Id.* at 3190.

149 *Id.* at 3190.

150 Revenue Act of 1924, Pub. L. No. 68-176, ch. 68, 43 Stat. 253, 320–21.

151 *Tax on Near-Beer to Aid Dry Law*, N.Y. TIMES, Nov. 18, 1925. "The task of drafting this provision has been difficult because it has been desired to secure a precise definition of the legitimate spoken drama and at the same time avoid the implication of reflecting on other attractions which the committee did not believe should be free from taxation."

152 65 CONG. REC. at 3185, 3187.

153 Rainey consulted Professors George Pierce Baker and Brander Matthews, actor and producer William J. Brady, and playwright Augustus Thomas. *Tax on*

> play which is consecutive narrative interpreted by one set of characters, all necessary to the development of the plot, the presentation of which consumes more than 1 hour and 45 minutes of time, the same being a dramatic work in consecutive narrative form, reproduced and presented by animate actors portraying the roles and repeating the lines of the dramatic work, and regardless of whether such presentation is with or without musical parts or musical accompaniment.[154]

Rainey's proposed content-based exemption was rejected by the Senate in 1926.[155] The press attributed this decision to partisan politics: Republicans and the Treasury Department prioritized revenue generation in order to retire the public debt.[156]

Theater advocates reiterated their appeal for relief in 1932.[157] Speaking on behalf of the League of New York Theaters and Broadway producers, Dr. Henry Moskowitz and William A. Brady informed the Ways and Means Committee that the 10% tax on theater admissions amounted to "unjust discrimination."[158] It was unjust, they argued, because the tax for amusements was levied at 10% while the general manufacturers' tax was only 2.25%.[159] Their appeal failed. But theater did win a small victory the following year, when the Rainey definition of "legitimate theatre" finally found its way into law in June 1933, but only as exemption for adults admitted to a play for free.[160]

One reason theater found it so difficult to secure an exemption is because its producers, products, and audience members did not fit neatly into a single legal or artistic category. At the time, actors worked across the boundary between "legitimate" theater and other entertainment: Irving Jacobson and Joseph Bulock acted in Broadway musicals like *Man of*

Near-Beer to Aid Dry Law, *supra* note 151.

154 *Id.*

155 *Democratic Program for Half-Billion Reduction is Rejected*, WASH. POST, Jan. 12, 1926.

156 *Id.*

157 75 CONG. REC. 11260, 11297 (1932).

158 *Theatres League Protests Tax Plan*, N.Y. TIMES, Mar. 7, 1932.

159 *Id.*

160 The differences between the definition of drama that made it into law in 1933, and the one offered to the Senate in 1926, are small but interesting. The 1933 text refers to "any spoken play (not a mechanical reproduction)," presumably to preempt claims that moving pictures were spoken plays. The 1933 text also includes a new stipulation that the play must have "two or more acts." Nat'l Indus. Recovery Act, Pub. L. No. 73-67, 48 Stat. 195, 209–210 (1933).

la Mancha and *Oklahoma!* and appeared on Yiddish Theater stages. Cultural products didn't fit neatly into one category or the other: Yiddish Theaters staged translations of Shakespeare's *Hamlet* and Richard Wagner's operas, and introduced American audiences to Ibsen, Tolstoy and Shaw long before Broadway recognized them.[161] Even the definition offered by theater advocates betrays the fuzziness of the boundary of "legitimate drama," by stipulating a duration for the event, prohibiting the use of puppets or corpses ("animate actors"), and excluding "farce comedies, burlesques and extravaganzas."[162] The content discrimination here was not responding to existing boundaries so much as creating them.

Many people argued that theater's loss was cinema's gain—when taxes drove theater prices too high, a film was an acceptable substitute—but legislators began to receive reports that the whole cultural infrastructure was buckling under the weight of these taxes. By 1950 even movies were in distress: many of the studios had cut their production schedules by half or more.[163]

In response, both Houses of Congress passed the Mason Bill in 1953, which would have exempted movie theaters entirely from the federal admissions tax. But President Eisenhower pocket vetoed the Bill. In a "memorandum of disapproval," Eisenhower offered two reasons: the government could not afford the loss of $200 million of revenue and, he said "it is unfair to single out one industry for relief at this time."[164] Eisenhower assured Congress that he would recommend a reduction in the admissions tax as part of a proposed overhaul to federal excise taxes; he argued his proposal would avoid the current "improper discrimination between industries and among consumers."[165] What Eisenhower did not mention was that movies would not have been the only artform singled out; instrumental music without dancing and "legitimate drama" had been too, though at the cost of imposing bizarrely

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161 JOEL BERKOWITZ, SHAKESPEARE ON THE AMERICAN YIDDISH STAGE (2002).

162 Definition of Spoken Drama, N.A., *Tax on Near-Beer to Aid Dry Law*, *supra* note 151, at 5.

163 *Revenue Revisions of 1950: Hearing on H.R. 8920 Before the Comm. Of Fin.*, 81st Cong. 161 (1950) (statement of Gael Sullivan, Executive Director, Theater Owners of America, Inc.).

164 *A Necessary Veto*, N.Y. TIMES, Aug. 7, 1953, at 18; *see also* 99 CONG. REC. 11161 (1953). This figure is equivalent to $2.3 billion in April 2024.

165 99 CONG. REC. 11161.

specific limits on the far more varied entertainments that had been common before the tax.

These content-based exemptions from the admissions tax were not even the ones that ended up having the most discriminatory effects. Charitable exemptions to the admissions tax were more widespread, and as they became increasingly tied to particular types of artistic content, they became more distorting of expression as well—as the following Subsection explains.

2. *Charity*

The 1917 Revenue Act exempted any performance where the proceeds "inure exclusively to the benefit of religious, educational, or charitable institutions, societies, or organizations or admissions to agricultural fairs none of the profits of which are distributed to stockholders or members of the association conducting the same."[166]

Language like this was not original to the 1917 Act. The first charitable exemption from federal income taxes had been offered in the Wilson-Gorman Tariff Act of 1894, which exempted charitable organizations from the flat 2% tax on income.[167] While that law was determined to be unconstitutional in 1895, its language describing the exemption would reappear in later legislation: "corporations, companies, or associations organized and conducted solely for charitable, religious, or educational purposes, including fraternal beneficiary associations."[168]

Similar language was used in the Revenue Act of 1909, which granted tax exemption to "any corporation or association organized and operated exclusively for religious, charitable, or educational purposes, no part of the net income of which inures to the benefit of any private stockholder or individual."[169] And in the Emergency Tax Revenue Act of 1914, a flat $10 tax assigned to "proprietors or agents of . . . public exhibitions or shows for money" would "not apply to Chautauquas, lecture

166 War Revenue Act of 1917, Sess. I, ch. 63, 40 Stat. 300, 319 (1917).

167 Matthew Cowen, *A Century of the Federal Income Tax*, 108 FIN. HIST. 36 (2013); Sheldon D. Pollack, *Origins of the Modern Income Tax, 1894–1913*, 66 TAX LAW. 295 (2013).

168 Paul Arnsberger, Melissa Ludlum, Margaret Riley & Mark Stanton, *A History of the Tax-Exempt Sector: An SOI Perspective*, STATS. INCOME BULL. 105, 106 (Winter 2008), https://www.irs.gov/pub/irs-soi/tehistory.pdf [https://perma.cc/S2DR-PGHD]

169 *Id.* at 107.

lyceums, agricultural or industrial fairs, or exhibitions held under the auspices of religious or charitable associations."[170]

The use of "charitable" in these various statutes drew on a long common law tradition in which "*charity* in its generally accepted legal sense is broad and comprehensive, and has been so for centuries."[171] But "charitable associations" should not be confused with non-profit organizations generally.[172] To qualify as charity, an organization had to further one of four general purposes: relieving poverty, advancing religion, providing education, or offering other benefits to the community (*e.g.*, repairing bridges or highways), all but the last of which are noted in the text of the 1917 Revenue Act.[173]

It was "the character of the organizations for which the benefit is given and not the purpose of the particular benefit" that controlled whether an exemption would apply.[174] As applied to the admissions tax, entertainment presenters got the exemption so long as all the profits were delivered to a charitable organization, even if the presenter itself was a commercial proprietor.

In fact, a wide range of private organizations produced and presented charitable fundraisers and benefits. A hotel ballroom might host a fundraiser for indigent women and children where light entertainment was provided. For example, in February 1922, when the entire New York Biltmore Hotel was staffed by "society women" who provided entertainment (including a cabaret!) as a fundraiser for the Society for the Prevention and Relief of Tuberculosis, tickets were tax exempt.[175] Or, a patron

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170 Emergency Internal Revenue Act of 1914, Pub. L. No. 63-217, ch. 331, 38 Stat. 745, 751–52.

171 Herman T. Reiling, *Federal Taxation: What Is a Charitable Organization?*, 44 AM. BAR ASS'N J. 525, 527 (1958) (emphasis in original).

172 In 1949, the Supreme Court forestalled any confusion about whether all non-profits were exempt from the admission tax. "In § 1701 Congress exempted admissions to certain classes of events and admissions all the proceeds of which inured exclusively to the benefit of designated classes of persons or organizations," the Court explained. "But since Congress did not exempt all activities not for profit as it readily might have done, it appears that admissions to such activities are not for that reason outside the admissions tax scheme." Wilmette Park Dist. v. Campbell, 338 U.S. 411, 416 (1949).

173 These four are mentioned in Reiling, *supra* note 171, in reference to Lord Macnaghten's definition, employed in a British tax law case: Special Comm'rs v. Pemsel, [1891] A.C. 531, 3 G.B. Tax Cases 53, 96. It resembles the list contained in the preamble of the Statue of Elizabeth, or the Charitable Uses Act of 1601.

174 TREAS. DEPT., U.S. INTERNAL REV., SUPPLEMENT TO TREASURY DECISIONS (T.D. 3293), REGULATIONS 43 (PART I) RELATING TO THE TAX ON ADMISSIONS UNDER THE REVENUE ACT OF 1921 (1922).

175 *Society: Current Doings*, N.Y. TIMES, Jan. 29, 1922, at 74.

like Miss Anne Morgan could sponsor a production of *Salomé* by the Chicago Opera Company to raise funds, tax-free, for the American Committee for Devastated France, as she did in 1922.[176] The Department of the Treasury routinely produced advisory documents with examples like these to illustrate how the tax should be applied.[177]

What was *not* exempt, as the Treasury Department clarified in 1921, was a fundraiser that distributed net proceeds to specific poor individuals; this would be taxed, while a fundraiser that distributed its proceeds to a charitable organization, which *then* distributed the funds to the poor, could enjoy the exemption.[178] Thus, private citizens and organizations were required to secure charitable organizations as partners in order to avoid admissions taxes.

Given the structure of the 1917 Act, which tied the charitable exemption to the character of the beneficiary rather than that of the presenter, or that of the presentation itself, it is hardly obvious that this carve-out should have anything to do with the *artistic or expressive content* of the events that were taxed (or not). The exemption didn't turn on whether you charged admission to an opera or to a rodeo, so long as a charity benefitted.

But in fact, the charitable exemption came to be quite closely tied to artistic content, for two reasons. First, over time, certain arts organizations fought to be recognized as educational in nature, thus bringing them within the common law definition of charitable beneficiaries—the original 1917 exemption. An organization like the Metropolitan Opera could thus sell opera tickets tax-free, since proceeds would go back to the Met, which the Treasury Department recognized as an educational institution. Second, organizations that failed to qualify *as* charities sought legislative recognition that what they did was beneficial or ennobling enough to be *akin to* charitable work, thus worthy of an enumerated exemption of their own. The very first amendment to the admissions tax, in 1918, explicitly added such a carveout, putting admissions that went toward "maintaining symphony orchestras" alongside the charitable purposes that had been exempted in 1917.[179]

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176 *Id.*

177 SUPPLEMENT TO TREASURY DECISIONS (T.D. 3293), REGULATIONS 43 (PART I) RELATING TO THE TAX ON ADMISSIONS UNDER THE REVENUE ACT OF 1921, *supra* note 174).

178 *Id.* at 36.

179 War Revenue Act of 1918, ch. 18, 40 Stat. 1057, 1121 (1919).

We take these two different approaches in turn.

Arts as Charity

As theater advocates were trying and failing for years to secure an exemption from the admissions tax, the Metropolitan Opera Company achieved it. The Met did so not by persuading lawmakers to pass a legislative carveout, as the theater folks sought, but instead by persuading the Treasury Secretary, Ogden Mills, to recognize the Met as a non-profit educational organization,[180] thereby bringing it within the admission tax's existing charitable exemption in 1931 or 1932.[181]

The Met's leadership engaged in a lengthy process to get this dispensation. Orchestrated by the powerful Chairman of the Board, Otto Khan, the Met transformed itself from a "real estate corporation" into a non-profit, educational charity. Khan loudly criticized the impact of taxation on the nation and on the Met in particular.[182] In December 1927, he complained to the Senate Finance Committee, noting that the Senate's proposal to raise the ticket exemption price to 75 cents "may be an acceptable relief to a certain number of people, but it is negligible as a relief of the burden" faced by the Met Opera and many other arts organizations. "Indeed," he continued,

> the main effect of that concession, instead of being to help music and drama, may very well prove to be that of intensifying the competition they have to meet from the popular 'movie house.' From every point of view there are cogent reasons why music and the drama should be encouraged in all practical ways and made as widely accessible to the people as possible. Why, instead of being encouraged, music and drama should be singled out to bear a special burden is, I confess, to me altogether inexplicable.[183]

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180 *See Revision of Revenue Laws, 1938: Hearings Before the H. Comm. On Ways and Means*, 75th Cong. 828–38 (1938).

181 Peter Clark, *Technology in Troubled Times*, METRO. OPERA, https://www.metopera.org/discover/articles/technology-in-troubled-times/ [https://perma.cc/8RQS-5Q6R] (stating that the Metropolitan Opera Association, formed in 1932, was the "first non-profit entity in the company's history"). There are inconsistent reports of the date of the Metropolitan Opera's exemption. In testimony concerning the Revenue Revisions of 1950, William de Forest Manice, the Met's director, stated the opera "has been exempted since 1931." *Revenue Revisions of 1950*, *supra* note 163, at 162.

182 Joyce Meeks Anderson, Otto H. Kahn: An Analysis of His Theatrical Philanthropy in the New York City Area from 1909 to 1934, at 28–30 (May 1983) (Ph.D. dissertation, Kent State University) (ProQuest).

183 *Id.* at 53.

Khan emphasized the universal, civic value of the arts to lawmakers and stakeholders during the reorganization of the Met. And what did they choose to put on the stage, to provide this value? "[M]any thousand performances of a relatively small number of operas" very few of which were penned by Americans.[184] Native composers authored only twenty-three of the operas performed in the Met's first century, and "[h]ardly any" of those composers or compositions "are familiar today."[185] American arts organizations were willing to present non-American art if it meant they were more likely to be treated as charitable, educational non-profits. This strategy depended upon the assumption that lawmakers would view the definitions of art established by the culture ministries of foreign governments to be unassailable and transferrable to the American context.

The Met Opera's efforts to achieve tax relief was a subject of intense interest among arts administrators, who felt similarly burdened by the tax. In fact, arts organizations had been incorporating themselves as educational non-profits since the 1830s in order to take advantage of tax benefits. The non-profit organizational form was first used in the arts in the 1830s to create the Boston Museum of Fine Arts and the Boston Symphony Orchestra.[186] Founded by white, urban elites, these organizations provided both moral and physical walls that protected the "refined" tastes of these elites and marked their cultural and social superiority.[187] They joined the boards of these organizations, and exerted their influence over what made it onto the stages or the walls.[188] Their consolidated social,

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184 Carl Johnson, *American Opera at the Met: 1883–1983*, 33 AM. MUSIC TCHR. 20 (1984).

185 *Id.*

186 In the 1930s (and before, and after), very few arts organizations were incorporated as non-profits. Paul DiMaggio, *Nonprofit Organizations and the Intersectoral Division of Labor in the Arts, in* THE NONPROFIT SECTOR: A RESEARCH HANDBOOK 432 (Walter W. Powell & Richard Steinberg eds., 2d ed. 2006); LENA, *supra* note 14. Most non-profit foundings occurred during four short periods: during the Second World War, in the early Cold War, after the Vietnam War, and in the first years of the 2000s. Michael L. Jones, *The Growth of Nonprofits*, 25 BRIDGEWATER REV. 13 (2006).

187 Paul DiMaggio, *Cultural Entrepreneurship in Nineteenth-Century Boston: The Creation of an Organizational Base for High Culture in America*, 4 MEDIA, CULTURE & SOC. 33 (1982); *see also* ALAN TRACHTENBERG, THE INCORPORATION OF AMERICA (2007); WALTER MUIR WHITEHILL, MUSEUM OF FINE ARTS, BOSTON: A CENTENNIAL HISTORY (2 VOLUMES) (1970); NATHANIEL BURT, PALACES FOR PEOPLE (1977); PETER DOBKIN HALL, THE ORGANIZATION OF AMERICAN CULTURE, 1700–1900 (1984); Judith R. Blau, *The Disjunctive History of U.S. Museums, 1869–1980s*, 70 SOC. FORCES 87 (1991).

188 Vera L. Zolberg, *Conflicting Visions in American Art Museums*, 10 THEORY & SOC'Y 103 (1981).

economic, and political power ensured their power to define American art, and the tax exemption afforded by non-profit incorporation gave the impression of federal endorsement.

What did those with the power to define American art show on their walls and stages? It turns out, a lot of European art. In orchestral music, board members advocated for a small group of "great" dead composers and against staging work by contemporary composers. The intended result came to pass: of the 1,612 composers ever performed by American symphony orchestras from 1879 to 1959, a small group of just thirteen composers accounted for half the total performances.[189] In museums, wealthy board members and allied curatorial staff sought to focus collections on paintings and sculpture by artists already consecrated in European collections, while eschewing works by living artists and by all but a few American artists. Even controversial urban planner Robert Moses found time to critique the "ultra-conservative" trustees of the Metropolitan Museum of Art, who "have ruled that the year 1900 or some other magic date represents the end of art" so they refuse to hang modern paintings.[190] Elite arts organizations appealed for relief on the basis of their civic and educational value, while increasingly narrowing what was recognized as valuable. Although they afforded a view of the smallest sliver of American culture, these elite arts organizations played an outsized role in the government's imagination of civic entertainment and the educational power of culture.

Efforts by the Met and others to qualify for charitable exemptions from the admissions tax were mooted in 1941, when Congress, needing war funding, eliminated all exemptions and set the admissions tax rate at a universal 10%.[191] At the same time, Congress imposed new excise taxes and increased rates on those that existed, impacting a huge range of goods and services, including spirits, automobiles, matches, luggage, furs, telephone bills, and outdoor advertising.[192] These taxes were expected to generate over $900 million in revenue for the war effort.[193]

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189 Pierre-Antoine Kremp, *Innovation and Selection: Symphony Orchestras and the Construction of the Musical Canon in the United States (1879–1959)*, 88 SOC. FORCES 1051 (2010).

190 *Museums Too Musty for Moses; He Says They Intimidate Visitors*, N.Y. TIMES, Mar. 3, 1941.

191 *See* 87 CONG. REC. 7277, 7297 (1941).

192 *See* 87 CONG. REC. 6736, 6743 (1941).

193 *See id.* at 6782. This is equivalent to around $19 trillion in today's dollars.

By the time the war was over, and Congress was prepared to reinstate exemptions and reduce taxes, the Metropolitan Opera began appealing to legislators for an enumerated exemption. And it was not alone. Leaders of arts organizations clearly believed that Congress might be willing to pass specific content exemptions rather than relying on the original charity/education carve-outs. Their belief was supported by decades of practice dating back to the 1918 Revenue Act, the moment to which we now return.

Arts as Akin to Charity

In drafting the 1918 Revenue Act, just one year after the admissions tax was first enacted, lawmakers bowed to demands from lobbyists and created a targeted carve-out for performances benefitting symphony orchestras.[194] The relief was far from what musicians had sought. But it represented a major departure from the tradition of charitable exemptions which the 1917 Act had incorporated.

The 1918 exemption for symphony orchestras was not a straightforward content-based carveout, like that which instrumental music at cabarets received from the Commissioner of Internal Revenue after the 1917 Act. The exemption did not go to just any concert by a symphony orchestra. Instead the exemption covered charitable performances whose profits inured "exclusively to the benefit of organizations conducted for the sole purpose of maintaining symphony orchestras."[195] Subsequent regulations were quite specific about what would qualify:

> The name by which an organized group of musicians is called is not the test of whether or not such group is a symphony orchestra. To be a symphony orchestra as contemplated in the Act it must have a personnel of sufficient size and ability to render symphonies capably, must make them a part of its regular programs, and must receive substantial support from voluntary contributions. Bands and ordinary orchestras are clearly not included in the exemption. [196]

The fairly scant legislative history behind this enumerated exemption shows that it was a fall-back position suggested by arts organizations that had failed to qualify as charities. In

194 War Revenue Act of 1918, ch. 18, 40 Stat. 1057, 1121 (1919).

195 *Id.*

196 Bureau of Internal Revenue Taxes on Admissions, Dues, and Initiation Fees, 26 CFR § 100.19 (1938).

September 1918, for example, the chairman of the Civic Music League, a volunteer-led concert series in Dayton, Ohio, appealed directly to Congress after the Treasury Department had "ruled that [they] were simply an amusement organization," even though he, "as a lawyer," had assumed that "a civic music organization with no profits . . . would be exempt as an educational organization."[197] He continued:

> As a former legislator, I know that it is difficult for a member of a legislative body to draft an exception to a revenue bill that has any teeth in it . . . , but the thought comes to me that, with your legislative experience, you might draw an effective exception that would really exempt civic music and community lecture and concert courses as fully as agricultural fairs are now excepted and exempted.[198]

What he was suggesting, and what came to pass in narrower form, was a specifically enumerated exemption, added alongside the exemptions for charities—and agricultural fairs!—that had been included in the original Act.

The purpose of 1917 Act were straightforward and expressively content-neutral: raise money for the federal government, but not on the backs of charities, as traditionally defined. The 1918 Act complicated this purpose by including a subsidy for one particular artform: symphony orchestras. The precedent was set. Having clouded the aims of the admissions tax in this content-discriminatory way, there would be nothing to stop other arts from seeking a subsidy of their own in the decades to come.

In 1921, Congress exempted performances "conducted for the sole purpose" of "maintaining a cooperative or community center moving-picture theater—if no part of the net earnings thereof inures to the benefit of any private stockholder or individual."[199] The exemption for the "cooperative or community center moving-picture theater" was introduced by Senator Overman of South Carolina, who wished "to give the same privilege to such community centers" as he has observed in South Carolina farm towns, "as is given to municipalities."[200] Performances benefitting municipalities, towns, and cities

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197 *To Provide Revenue for War Purposes: Hearings on H.R. 1286 Before the Senate Committee on Finance*, 65th Cong. 165 (1918) (statement of William G. Frizell, Chairman of the Artist Concert Committee, Civic Music League).

198 *Id.*

199 Revenue Act of 1924, Pub. L. No. 68-176, ch. 68, 43 Stat. 253, 321.

200 61 CONG. REC. 7150, 7162 (1921).

were mentioned explicitly in the Act, so Overman sought to add unincorporated areas too, although in a way that specifically singled out motion pictures.[201]

In 1951, when Congress was again ready to offer exemptions after their wartime suspension, symphony and opera admissions tickets sold by "a society or organization conducted for the sole purpose of maintaining symphony orchestras or operas and receiving substantial support from voluntary contributions" were granted their own enumerated carve-out.[202] Home and garden tours that were temporarily open to the public were also rendered exempt, as long as they were "conducted by a society or organization to permit the inspection of historical homes and gardens—if no part of the net earnings thereof inures to the benefit of any private stockholder or individual."[203] And finally, admission tickets sold to "historic sites, houses, shrines, and museums" were deemed exempt, as long as profits were directed to the benefit of the public.[204]

Perhaps surprisingly, and certainly alarmingly, almost none of these content-based exemptions—not community center moving-picture theaters, or home and garden tours, or historic sites and homes—were substantively debated in either House of Congress. And in deciding what to exempt, Congress certainly employed no process or criteria akin to the elaborate ones used by tax officials to determine what qualifies as an educational non-profit.

What began as a traditional, common law-based exemption for admissions fees put to charitable purposes over time became something far more complicated: a hybrid non-profit/content-based exemption in which organizations structured a particular way would benefit if and only if they were associated with one of a handful of specific arts. The charity-based exemptions, in other words, became as content discriminatory as the instrumental music, spoken word theater, or movie exemptions discussed in the previous Subsection. Once the precedent for this was set in 1918, each art that won an enumerated exemption in the following decades poked another hole in the tax scheme, producing a Swiss cheese system of taxation that localities like Chicago would eventually inherit, and locking

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201 *Id.*

202 Revenue Act of 1951, Pub. L. No. 82-183, § 301, 65 Stat. 452, 520; Olin Downes, *Financial Woes—Musical Organizations of America Face Critical Times and Need Help*, N.Y. TIMES, Apr. 1, 1951, at 103.

203 Revenue Act of 1951, at 521.

204 *Id.*

legislators and arts presenters in perpetual rounds of hearings where the value of various arts was continually contested and compared.

3. *Price*

The 1917 Act provided a tax exemption for tickets costing no more than five cents.[205] That amount would float over the years, going as high as $3.00 in 1928, which "amounted virtually to a repeal of the admissions tax until 1932" when the tax floor was lowered to forty cents.[206] In other years, including 1918 and 1941, the price-based exemption was eliminated.[207] The rationales offered for these floating price exemptions are illuminating.

In 1924, when the price exemption was raised to fifty cents, the Ways and Means Committee Report explained that: "The effect in increasing the amount of the exemption will be to eliminate the tax paid by the great number of people whose main source of recreation is attending the near-by motion pictures, since admissions to such theaters is usually less than 50 cents."[208] This report suggested the government viewed cost-accessible recreation as a public good. Protecting that public good by raising the price exemption level would cost the government an estimated $33 million in lost revenue.[209] In the same report, the Ways and Means Committee recommended a repeal of the tax on telephones and telegraph messages because it "was a tax upon a public utility so widely used as to be a necessity."[210]

The view of amusements as a public good but not a necessity may help justify the adjustments to price exemption levels made over the years. According to George E. Lent, one of the first economists to study the impact of admissions taxes, "no consistent policy can be inferred with respect to the purpose of price exemptions except that they reflected the changing standards of what constituted 'luxury' entertainment."[211] Lent also noted that floating price exemptions indicate moments when

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205 War Revenue Act of 1917, Pub. L. No. 65-50, ch. 63, § 700, 40 Stat. 300, 318.

206 Lent, *supra* note 100, at 32.

207 *Id.*

208 H.R. REP. NO. 179, at 46 (1924).

209 *Id.* at 38.

210 *Id.* at 46.

211 Lent, *supra* note 100, at 32.

"the efforts of the powerful movie industry were rewarded by the Administration and Congress."[212]

These were also moments during which lawmakers remarked upon each others' disregard for the public's interest. In 1925, Rep. Bloom made an appeal that "music be encouraged rather than restricted"; just "as education and science are not taxed and should not be taxed, then music should not be taxed" because "a tax upon music is a tax upon creativeness, refinement, taste, and culture. If the United States is to become as great in the musical world as it is in technical skill, in manufacture, and in commerce she must encourage her musicians."[213] He added:

> Ninety per cent of the people of this country who attend concerts have very little money. The richest people in our cities attend the concerts given by the symphony orchestras, yet there is no tax on the latter. What a disgrace to abolish the tax for an audience that attends the Boston and Philadelphia symphony orchestra concerts at Carnegie Hall, where mostly wealth is represented, and to insist upon the tax being paid by audiences that attend piano recitals, violin recitals, and song recitals of great artists, which are just as educational.
>
> What greater proof need you have that music is a great educational force than that it is taught in our public schools . . . ?[214]

If most concert audience members had little money, and many of the concerts they attended did not receive a charitable exemption, then price exemption levels transformed those price exemptions into forms of content discrimination. They determined whether a hall could fill to capacity, whether an orchestra could maintain a full schedule, and whether programmers had sufficient independence from market necessities to offer avant-garde content. Harold Prince, President of the National Association of the Legitimate Theater, traced this sequence for House members: a 50% increase in ticket prices, a corresponding decrease in ticket sales, and a more than 500% increase of the cost of staging a drama, resulting in a 30% decrease in the number of new plays, over the period between 1944 and 1964.[215]

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212 *Id.*

213 67 CONG. REC. at 1019 (1925).

214 *Id.* at 1020.

215 *Federal Excise Tax Structure: Hearings Before the H. Comm. On Ways & Means*, 88th Cong. 1178–79 (1964) (statement of Harold Prince, President, Nat'l Ass'n of the Legitimate Theater).

Dramatic stage producers were upset that low price exemption levels of the admissions tax operated "to penalize and handicap an industry already struggling for its existence."[216] Time and again, representatives of "legitimate" theater told lawmakers that low price exemption levels would run them out of business. They reported to lawmakers that ticket prices, inflated by the tax, were beyond the reach of their core audience. Potential audience members would simply go to a movie instead. Ligon Johnson, testifying to Congress on behalf of the International Theatrical Association, said as much in 1927: he personally observed consumers willing to pay $2.50 for a theater seat, who refused to pay the added 10 cents in tax, and instead "go to a picture show. I have seen it repeatedly."[217] It was only in 1928, when the Senate approved an increase of the price exemption level to $3, that the tax burden placed on stages began to align with that placed on movie theaters.[218] But by then, the number of spoken word theaters had shrunk 75% in the previous five years, even while its advocates argued that drama remained "the universal art of expression for all people" having "educational value . . . [that] cannot be overestimated."[219]

Price exemption levels also impacted different portions of the country differently. By imposing the same rate on all citizens who go to amusements, a federal admissions tax was unable to prevent differential impacts on differently situated communities. Legislators were made aware of this possible harm in the debates leading up to the passing of the original 1917 Revenue Tax Act. Lobbyists representing entertainers working in rural and more economically moribund communities testified that they were often the only locally available amusements. If price exemption levels were set too low and they were forced to shutter, whole communities would suffer.

Legislators were aware of how price exemption levels produced disparate impacts on communities and industries when the House debated the Revenue Act of 1924. In a discussion about the ticket price exemption level (50¢ versus $1), lawmakers observed that a higher price could serve to "substantially equalize . . . the movie with the spoken drama" thereby

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216 *See Tax Reduction*, WASH. POST, Apr. 12, 1928, at 6

217 *Revenue Revision 1927–28: Hearings Before the H. Comm. On Ways & Means*, 69th–70th Cong. 837, 841 (1927) (statement of Ligon Johnson, Int'l Theatrical Ass'n).

218 H. Z. T., *The Theater: The Drama and the Tax*, WALL ST. J., Apr. 28, 1928, at 4.

219 *Id.*

preventing "favoritism."[220] Rep. Rainey called their attention to the unequal burden experienced by members of "smaller communities," where the elimination of spoken-word theater was imminent. And Rep. Bacharach recalled earlier discussion in the Ways and Means Committee, where the purpose of proposed cuts to the admission was "to take care of the theaters in small communities . . . not to take care of the theaters in the large centers."[221]

Helpfully, legislators had data on hand that quantified the differential impact on spoken word theaters of the two price exemption levels they were considering. Rep. Garner of Texas reported that "the number of theaters charging from 10 to 40 cents is 13,443; charging from 50 cents to 99 cents, 430; and charging $1 and more, 27."[222]

Price exemptions impacted the kinds of culture on offer, with spoken word theaters finding themselves unable to remain in operation, particularly in rural areas with fewer arts offerings, while other industries found ways to adapt and bear the burden of the tax. Thus, price exemptions also functioned in some cases as content-based exemptions.

C. The Move to Localism

As early as the 1920s, lawmakers advocated for localizing the federal admissions tax. In the 1925 House discussion of the Revenue Act of 1926, Rep. Moore of Virginia argued that admissions taxes could benefit states in need of revenue because they could "conveniently" apply these taxes.[223] He added a principled argument: "Whatever we can reasonably do I think we should do to release to the States subjects of taxation which can be easily made use of by the States and which the Federal Government would not have thought of adopting or maintaining except under the pressure of war necessity."[224]

Connecticut had begun taxing admissions as early as 1921, imposing a supplement equal to half the ticket's federal tax liability.[225] When the Federal government increased exemptions

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220 65 CONG. REC. 3129, 3185–87 (1924).

221 *Id.*

222 *Id.* at 3189.

223 67 CONG. REC. 973, 1016 (1925).

224 *Id.*

225 Lent, *supra* note 100, at 42 (citing R. B. TOWER, N.Y. STATE TAX COMM'N, LUXURY TAXATION AND ITS PLACE IN A SYSTEM OF PUBLIC REVENUES 63 (1931)); *see also* COORDINATION OF FEDERAL, STATE AND LOCAL TAXES, H.R. REP. NO. 2519, at 81 (1953).

by ticket price in the 1920s, Connecticut no longer received appreciable revenue and repealed the tax in 1929. South Carolina imposed a tax in 1923, and Mississippi did so in 1930.[226] By January 1952, 26 states levied taxes on some admissions tickets.[227]

Philadelphia was the first major city to implement admissions taxes, imposing a 4% tax in 1937.[228] By the end of June 1951, 192 cities and large towns had admissions taxes on the books, yielding over $16 million in revenue, and generating $0.93 per capita each year.[229] Tax rates ranged between half a percent and 10%.[230] Although their use was widespread, cities in Ohio, Pennsylvania, and Washington housed the majority of cities that essayed the tax.[231]

Municipal governments may have experienced more pressure to extend exemptions to the tax "because [they] . . . are closer to the public than is true of federal and state governments," and as a result, it was commonplace for these laws to offer charitable exemptions, and those for military members, civic officers, and venue employees.[232] Some ordinances provided exemptions to "veterans, veterans' organizations or police or firemen's pension organizations."[233] And almost all offered a charitable exemption, if the proceeds were used "exclusively for charitable, eleemosynary, educational, or religious purposes."[234] One innovation of state taxes on amusements was the inclusion of an exemption for presenters chartered as non-profit organizations; nine states offered such an exemption by 1952.[235]

In December 1948, the American Municipal Association called upon Congress to abolish the admissions tax and

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226 COORDINATION OF FEDERAL, STATE AND LOCAL TAXES, *supra* note 225, at 81.

227 *Id.* at 81–83.

228 *Id.*at 84.

229 MUN. FIN. OFFICERS ASS'N, MUNICIPAL NONPROPERTY TAXES 1951 SUPPLEMENT TO WHERE CITIES GET THEIR MONEY 21 (1951). This is equivalent to $194 million in April 2024.

230 COORDINATION OF FEDERAL, STATE AND LOCAL TAXES, *supra* note 225, at 81 (noting in 1953 only four states were applying a 10% tax and all of them had "special provisions which ameliorate the degree of" overlap with the Federal Tax).

231 COORDINATION OF FEDERAL, STATE AND LOCAL TAXES, *supra* note 225. at 84.

232 MUN. FIN. OFFICERS ASS'N, MUNICIPAL NONPROPERTY TAXES 1951 SUPPLEMENT, *supra* note 229, at 21.

233 CHARLES S. RHYNE, NAT'L INST. MUN. L. OFFICERS, ADMISSIONS TAXES —EXPERIENCE OF CITIES—MODEL ANNOTATED ORDINANCES 21 (1949).

234 *Id.* at 16.

235 COORDINATION OF FEDERAL, STATE AND LOCAL TAXES, *supra* note 225, at 82–83.

transfer its admissions tax authority to municipalities.[236] Their petition was joined by the United States Conference of Mayors in 1949.[237] Over the next decade, lawmakers increasingly supported requests to repeal the tax: seventeen bills proposing its repeal were introduced in Congress in 1957 alone.[238] It wasn't until 1965, however, that the federal admissions and cabaret tax was repealed. The Congressional Record states only: "The tax on admissions including admission to racetracks and cabarets is repealed at noon on December 31."[239]

After 1965, state-level admissions taxes and, more commonly, local ones like Chicago's and Cook County's were all that remained, such that by the time the DJ controversy broke out in Chicago, few even remembered the federal tax that had led the way.

The City of Chicago first enacted a 3% amusement tax in 1947, just as the calls for localization were growing louder. The Mayor spoke in favor of the tax because the City needed a "large increase in revenue" in order to carry out necessary public services and "make possible certain salary increases for City employees, which he felt were necessary."[240] He argued that "motion picture interests had not been fair in their campaign of opposition to the proposed amusement tax, for they had in no way acquainted the public with the City's financial plight and with the City's dire need for increased revenue."[241]

The language of the Chicago amusement tax strongly resembled the federal tax, though it was more explicit about the broad range of amusements taxed. Given the city's revenue needs, it originally offered no exemptions except to machine operated amusements, which were taxed separately. Chicago only added its small venue exemption in 1998, and by that point, the city's other exemptions largely mirrored those in

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236 Bess Furman, *Talk on Tax Areas of U.S., Cities is Set*, N.Y. TIMES, Dec. 16, 1948, at 36.

237 RHYNE, *supra* note, 233, at 3.

238 103 CONG. REC. 13631, 13631 (1957) ("Mr. Speaker, H. R. 17 as introduced was comparable in objective with 16 other bills that have been introduced thus far in the 85th Congress; namely, the repeal of the so-called cabaret tax of 20 percent. The introduction of 17 bills with the same aim certainly demonstrates a widespread recognition of the unfairness of permitting the cabaret tax to remain at its present basis.").

239 111 CONG. REC. 13567, 13614 (1965).

240 Tax of 3% Imposed upon Amusements, and Ordinance Provisions Revised in Reference to Amusements, CHI. CITY COUNCIL J. OF PROC. 1167, 1168 (Nov. 6, 1947).

241 *Id.*

the federal law, including those for charitable and educational fundraisers, and an enumerated exemption for "symphony orchestras, opera performances and artistic presentations."[242] Decades of lobbying for federal exemptions still left its mark on tax law, even once the federal admissions tax was long gone.[243]

III
DOCTRINE

There seems to be a rule in constitutional law that any discussion of selective governmental benefits must begin with a statement of dismay at the area's doctrinal incoherence.[244]

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242 Amendment of Title 4, Chapter 156 of Municipal Code of Chicago Regarding Amusement Tax, CHI. CITY COUNCIL J. OF PROC. 81835, 81839–40, (Nov. 12, 1998). For discussion of the federal predecessors of these exemptions, see *supra* Part II.B.

243 For more on the broader tendency of states to import federal tax policies into their own, see generally Ruth Mason, *Delegating Up: State Conformity with the Federal Tax Base*, 62 DUKE L.J. 1267 (2013). For criticism of this widespread practice and suggestions for reform, see generally Adam B. Thimmesch, *Tax, Incorporated: Dynamic Incorporation and the Modern Fiscal State*, 54 ARIZ. STATE L.J. 179 (2022).

244 *See* Joseph Blocher, *New Problems for Subsidized Speech*, 56 WM. & MARY L. REV. 1083, 1085 (2015) ("One of the most intractable problems in constitutional law is defining what kinds of conditional offers the government can make to individuals, organizations, and states."); Erwin Chemerinsky, *The First Amendment: When the Government Must Make Content-Based Choices*, 42 CLEV. STATE L. REV. 199, 200 (1994) ("Increasingly, I came to see that some of the hardest First Amendment issues, the ones most dividing lower courts and perplexing commentators involved instances in which the government had to make content-based choices."); Randy J. Kozel, *Leverage*, 62 B.C. L. REV. 109, 111 (2021) ("Even among the darkest corridors of constitutional law, the doctrine . . . of unconstitutional conditions is famously opaque."); Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1298 (1984) ("The problem, of course, is not new. . . . Examination of the doctrine's development, however, suffers from a disorienting quality."); Leslie Kendrick, *Content Discrimination Revisited*, 98 VA. L. REV. 231, 232–33 (2012) ("[O]thers believe that, whatever the merits of a content-discrimination principle as a conceptual matter, the Supreme Court's application of it has been unprincipled, unpredictable and deeply incoherent."); Adam B. Cox & Adam M. Samaha, *Unconstitutional Conditions Questions Everywhere: The Implications of Exit and Sorting for Constitutional Law and Theory*, 5 J. LEGAL ANALYSIS 61, 62 (2013) ("[J]ust about all constitutional questions may be converted into versions of this notoriously hard question. The question involves unconstitutional conditions."); Robert C. Post, *Subsidized Speech*, 106 YALE L.J. 151, 152 n.7 (1996) ("It is no wonder that the haphazard inconsistency of the Court's decisions dealing with subsidized speech has long been notorious; the precedents have rightly been deemed 'confused' and 'incoherent, a medley of misplaced epigrams.'"); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415–16 (1989) ("[R]ecent Supreme Court decisions on challenges to unconstitutional conditions seem a minefield to be traversed gingerly.").

Only slightly more optional is an expression of hopelessness at the prospect of improvement.[245]

The problem of selectively subsidized speech—often brought under the umbrella of the so-called "unconstitutional conditions" doctrine,[246] but also referred to as the problem of allocational sanctions[247] or the conditional offer puzzle,[248] seeks to distinguish cases where a failure to receive a subsidy is simply that—a non-subsidy—from cases which operate as a penalty on the non-subsidized parties.[249] For our purposes

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245 *See* Richard A. Epstein, *Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 8 (1988) ("There is a special conceptual problem with the doctrine of unconstitutional conditions, however, that does not arise in connection with ordinary constitutional limits on government powers. Why does the doctrine exist at all?"); Frederick Schauer, *Too Hard: Unconstitutional Conditions and the Chimera of Constitutional Consistency*, 72 DENV. L. REV. 989, 990 (1995) ("[S]ome constitutional problems are irredeemably intractable, and are so precisely because they replicate the deepest, hardest, and therefore least solvable problems of constitutional government. . . . [T]he problem of the doctrine of unconstitutional conditions is just such an intractable problem".); Steven J. Heyman, *State Supported Speech*, 1999 WIS. L. REV. 1119, 1120 ("Nowhere has this challenge proven more difficult than in the area of state-supported speech."); Martin H. Redish & Daryl I. Kessler, *Government Subsidies and Free Expression*, 80 MINN. L. REV. 543, 544 (1996) ("Determining the constitutionality of government subsidization of expression is one of the most frustrating tasks facing scholars of the First Amendment."); Cass R. Sunstein, *Why the Unconstitutional Conditions Doctrine is an Anachronism (with Particular Reference to Religion, Speech, and Abortion)*, 70 B.U. L. REV. 593, 594 (1990) ("[T]he unconstitutional conditions doctrine should be abandoned."); Maurice H. Merrill, *Unconstitutional Conditions*, 77 U. PA. L. REV. 879, 879 (1929) ("[I]mperceptibly and without arousing attention at the time, decisions and dicta at variance with doctrines long regarded as established find place in the fabric of the law. When this occurs, it is necessary to work out in some fashion a reconciliation of the old and the new lines of decision, or, if this attempt fails, to determine which deserves to survive. Such a situation seems to have arisen in connection with the recent development of the doctrine of unconstitutional conditions.").

246 *See, e.g.*, Mitchell N. Berman, *Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 GEO. L.J. 1 (2001); Cox & Samaha, *supra* note 244; Epstein, *supra* note 244; Philip Hamburger, *Unconstitutional Conditions: The Irrelevance of Consent*, 98 VA. L. REV. 479 (2012); Merrill, *supra* note 244; Sullivan, *supra* note 244; Sunstein, *supra* note 245. *But see* David Cole, *Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech*, 67 N.Y.U. L. REV. 675, 679 n.17 (1992) (distinguishing and listing authors who have attempted a unifying theory of unconstitutional conditions from those who think that a useful theory will be specific to the particular right—speech, for example—that is affected).

247 Kreimer, *supra* note 244.

248 Mitchell N. Berman, *Coercion, Compulsion, and the Medicaid Expansion: A Study in the Doctrine of Unconstitutional Conditions*, 91 TEX. L. REV. 1283, 1316 (2013); Blocher, *supra* note 244, at 1085.

249 Gary Feinerman, *Unconstitutional Conditions: The Crossroads of Substantive Rights and Equal Protection*, 43 STAN. L. REV. 1369, 1378 n.51 (1991); Sullivan, *supra* note 244, at 1420, 1439.

here, the question is when a selective tax exemption punishes those who don't receive the exemption based on the content of their expression.

What follows in this Part is a series of considerations that emerge from the scholarly literature, from Supreme Court cases, and—hopefully—from readers' intuitions about how permissible non-subsidy should be distinguished from an unconstitutional penalty on expression. This is well-trod territory, and the goal here isn't to be either comprehensive or especially original. The point instead is to highlight what is doctrinally relevant in the far more comprehensive and original historical story just told in Part II. That done, we can return in Part IV to the question of whether selective tax exemptions like those in Chicago and elsewhere are, given their history and structure, permissible subsidies or unconstitutional censorship.

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Tax exemptions are a form of government subsidy. As the Supreme Court said in *Regan v. Taxation with Representation*, "[a] tax exemption has much the same effect as a cash grant to the organization of the amount of tax it would [otherwise] have to pay."[250]

It is generally the case that the government can choose to subsidize some things rather than others without giving rise to constitutional objections from those denied a subsidy. This is true not just when Congress chooses between subsidizing, say, corn-based ethanol[251] or algae-based biofuel,[252] but even when fundamental rights are involved. "[A] legislature's decision not to subsidize the exercise of a fundamental right does not

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250 Regan v. Taxation with Representation of Wash., 461 U.S. 540, 544 (1983) ("[T]ax exemptions . . . are a form of subsidy that is administered through the tax system."). *See generally* STANLEY S. SURREY & PAUL R. MCDANIEL, TAX EXPENDITURES 2–5 (1985) ("[W]henever government decides to grant monetary assistance to an activity or group, it may choose from a wide range of methods, such as a direct government grant or subsidy; a government loan, perhaps at a below-market interest rate; or a private loan guaranteed by the government. Or the government may use the tax system and reduce the tax liability otherwise applicable by adopting a special exclusion, deduction, or the like for the favored activity or group. . . . These tax reductions in effect represent monetary assistance provided by the government.").

251 John Aziz, *It's Time for America to End Ethanol Subsidies*, THE WK. (Jan. 11, 2015), https://theweek.com/articles/461619/time-america-end-ethanol-subsidies [https://perma.cc/5M9R-KXJF].

252 *Advanced Algal Systems*, OFF. ENERGY EFFICIENCY & RENEWABLE ENERGY: BIOENERGY TECH. OFF., https://www.energy.gov/eere/bioenergy/advanced-algal-systems [https://perma.cc/Q5AV-PG9B] (last visited Jan. 25, 2024).

infringe the right, and thus is not subject to strict scrutiny," the Supreme Court has said,[253] citing cases about campaign funding and denials of subsidies for abortion (back when reproductive rights were still protected).[254] In the Court's words, from a case where expressive rights were at stake:

> The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way. In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other.[255]

This general principle applies to the selective subsidies that are prevalent—and often seen as constitutionally unobjectionable—in the context of the arts. A decency criterion that Congress imposed on public arts funding in 1990 was challenged, unsuccessfully, as unconstitutionally vague and viewpoint discriminatory in *Finley v. National Endowment for the Arts*.[256] But even in *Finley*, the notion that the government could selectively subsidize art was not itself challenged; Karen Finley, after all, was an artist seeking a subsidy! And the roughly $162 million that the NEA works with is small compared to arts subsidies from states ($435 million) and local governments ($860 million),[257] or to the commissions funded by the Art-in-Architecture Program, under which 0.5% of the estimated cost of federal building projects is dedicated to "large-scale, permanently installed artworks."[258] Even the Pentagon subsidizes the arts on a significant scale, providing funding for military bands that is more than twice as much as the NEA's budget.[259] Each of these subsidy schemes results in winners

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253 *Regan*, 461 U.S. at 549.

254 *See, e.g.*, Harris v. McRae, 448 U.S. 297 (1980); Buckley v. Valeo, 424 U.S. 1 (1976); *see also* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

255 Rust v. Sullivan, 500 U.S. 173, 193 (1991).

256 *See* Finley v. Nat'l Endowment for the Arts, 795 F. Supp. 1457 (C.D. Cal. 1992), *aff'd*, 100 F.3d 671 (9th Cir. 1996), *rev'd*, 524 U.S. 569, 573 (1998); Soucek, *supra* note 13, at 392–96.

257 Ryan Stubbs & Patricia Mullaney-Loss, *Public Funding for the Arts 2020*, 31 GIA READER no. 3, 1, 9 (2020) (found at https://www.giarts.org/public-funding-arts-and-culture-2020 [https://perma.cc/7ZEU-NN3E]).

258 *Art in Architecture Program*, U.S. GEN. SERVS. ADMIN., https://www.gsa.gov/real-estate/design-and-construction/art-in-architecturefine-arts/art-in-architecture-program [https://perma.cc/QLC8-E3W6] (last updated Sept. 13, 2024).

259 *See* Lee Cyphers, *And the Band Plays On: Manufacturing Patriotism Through U.S. Military Bands*, SPECTRE J. (July 4, 2021), https://spectrejournal.com/

and losers; in each, the government has to decide what kinds of art, or in some cases what particular artworks or artists, to fund.

And yet this discretion is not entirely without limits, in arts funding as in other government benefits. Though some on the Court have at times treated selective subsidies as immune from First Amendment constraints,[260] constraints are easy to find. The government may pay for all or part of our sidewalks, parks, and postal system, but the public forum doctrine sharply limits the government's ability to discriminate based on content when deciding what speakers can use them.[261] University funding for so-called limited public forums like student organizations have to be made available in a viewpoint-neutral manner.[262] Justice Holmes's famous quip that a policeman "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman"[263] has now been soundly repudiated;[264] most government jobs now cannot require the employee to stay silent, or speak only as the government might wish, outside of work. Similarly, funding for public broadcasting can't come with a requirement that PBS refrain from editorializing,[265] and subsidies for legal services can't come with a restriction on challenges to welfare laws.[266]

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and-the-band-plays-on/ [https://perma.cc/V2YE-E6HE]; Tara Copp, *It's Hard to Measure the Performance of the Military's 136 Musical Bands*, MIL. TIMES (Aug. 10, 2017), https://www.militarytimes.com/news/your-military/2017/08/10/gao-measures-military-band-performance-hits-sour-note/ [https://perma.cc/HP4M-K4JY]; Jessica T. Mathews, *America's Indefensible Defense Budget*, N.Y. REV. (July 18, 2019), https://www.nybooks.com/articles/2019/07/18/americas-indefensible-defense-budget/ [https://perma.cc/4RVK-EZJE].

260 *See Finley*, 524 U.S. at 599 (Scalia, J., concurring) ("The nub of the difference between me and the Court is that I regard the distinction between 'abridging' speech and funding it as a fundamental divide, on this side of which the First Amendment is inapplicable."); *see also* Ark. Writers' Project, Inc. v. Ragland, 481 U.S. 221, 236–38 (1987) (Scalia, J., dissenting).

261 *See* Ward v. Rock Against Racism, 491 U.S. 781, 803 (1989); Speiser v. Randall, 357 U.S. 513, 518 (1958); Post, *supra* note 244, at 157.

262 *See* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 845–46 (1995).

263 McAuliffe v. Mayor of New Bedford, 29 N.E. 517, 517 (Mass. 1892).

264 *See* Garcetti v. Ceballos, 547 U.S. 410, 425 (2006); Pickering v. Bd. of Educ., 391 U.S. 563, 574 (1968); Rankin v. McPherson, 483 U.S. 378, 392 (1987). *But see* City of San Diego v. Roe, 543 U.S. 77, 84 (2004) (finding that a police officer selling videos of himself engaging in sexually explicit acts is not a matter of public concern and thus not deserving of employment protection).

265 F.C.C. v. League of Women Voters, 468 U.S. 364, 402 (1984).

266 Legal Servs. Corp. v. Velasquez, 531 U.S. 533, 547 (2001).

Most relevantly here, the Supreme Court has in several cases found First Amendment limits on selective subsidies that take the form of tax exemptions. In *Speiser v. Randall* in 1958, the Court disapproved of a state property tax exemption available to veterans only if they swore a loyalty oath to the U.S. government.[267] Unlike oaths that had earlier been upheld in the context of public employment as a means of protecting public safety, the tax exemption for veterans was simply being used as leverage for the suppression of certain ideas.[268] In *Minnesota Star v. Minnesota Commissioner of Revenue* in 1983, the Court considered a state tax on ink and paper that not only singled out the press,[269] but ended up applying only to the state's fourteen largest newspapers due to an exemption on the first $100,000 of ink and paper consumed.[270] "[W]hen the exemption selects such a narrowly defined group to bear the full burden of the tax," the Court wrote in finding the tax unconstitutional, it "begins to resemble more a penalty for a few of the largest newspapers than an attempt to favor struggling smaller enterprises."[271] Finally, in *Arkansas Writers' Project v. Ragland* in 1987, the Court struck down an Arkansas state tax that applied to general interest magazines but not to newspapers and religious, professional, trade, or sports journals.[272] The tax in Arkansas was even worse than Minnesota's, the Court noted, because at least when it came to magazines, taxability was based not on size but on content.[273] (The Court sidestepped the question of whether "differential treatment of newspapers and magazines" was itself problematic.[274])

By contrast, in *Regan v. Taxation With Representation* in 1983, the Court approved a bar on lobbying activities by 501(c)(3) organizations, which are subsidized insofar as the donations

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267 Speiser v. Randall, 357 U.S. 513, 529 (1958).

268 *Id.* at 527 ("Each case concerned a limited class of persons in or aspiring to public positions by virtue of which they could, if evilly motivated, create serious danger to the public safety. The principal aim of those statutes was not to penalize political beliefs but to deny positions to persons supposed to be dangerous because the position might be misused to the detriment of the public."). *See generally* Kozel, *supra* note 244 (reviewing the application of leverage in the context of unconstitutional conditions).

269 460 U.S. 575, 581–90 (1983).

270 *Id.* at 578, 591–92.

271 *Id.* at 592.

272 Ark. Writers' Project, Inc. v. Ragland, 481 U.S. 221, 234 (1987).

273 *See id.* at 229.

274 *See id.* at 233.

they receive are tax deductible.[275] "Congress is not required by the First Amendment to subsidize lobbying," the Court held, even when it subsidizes lobbying in a related context—namely, by veterans' organizations.[276] As an earlier opinion, repeatedly cited in *Regan*, had put it: "A refusal to fund protected activity, *without more*, cannot be equated with the imposition of a 'penalty' on that activity."[277] The question once again becomes: what is the "more" that would turn a failure to subsidize into a penalty?

Regan offered two related possibilities. One: if the conditions placed on a subsidy program affected recipients' expressive opportunities *beyond* the program. In *Regan*, that kind of leveraging was avoided because 501(c)(3) organizations that were unable to lobby could set up 501(c)(4) affiliates which *could* lobby, so long as the former didn't subsidize the latter.[278] Given this, Congress was seen as refusing to subsidize lobbying without thereby prohibiting it. Things would have been otherwise if Congress had "denied Taxation With Representation tax benefits for its *nonlobbying* activities on account of its lobbying."[279]

Regan thus suggests a principle:

> *Conditions on a subsidy must be relevant to the aims of the subsidy program. The more those conditions affect activity beyond the program, the more restrictive or punitive they appear.*

The relevance of selection criteria to the purposes of a given subsidy scheme helps explain why some criteria but not others strike us as intuitively problematic. To borrow a relevant example from Seth Kreimer:

> The decision of the NEA to fund only cubist painters would appear permissible, despite the fact that by exercising their first amendment right to paint in their own style, pointillists

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275 461 U.S. 540, 544 (1983); *see also* 26 U.S.C. § 501(c)(3).

276 *Regan*, 461 U.S. at 546–47.

277 Harris v. McRae, 448 U.S. 297, 317 n.19 (1980) (emphasis added).

278 *See Regan*, 461 U.S. at 544; *id.* at 552–53, 552 n.* (Blackmun, J., concurring); Sullivan, *supra* note 244, at 1465.

279 Sullivan, *supra* note 244, at 1465 (emphasis added). *See also* Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc., 570 U.S. 205, 214–15 (2013) ("[T]he relevant distinction that has emerged from our cases is between conditions that define the limits of the government spending program—those that specify the activities Congress wants to subsidize—and conditions that seek to leverage funding to regulate speech outside the contours of the program itself."); South Dakota v. Dole, 483 U.S. 203, 207–08 (1987) (discussing the "germaneness" requirement for conditions imposed on funding under the Spending Clause).

> forfeit their opportunity to receive benefits. By contrast, a failure to fund Republican painters would intuitively seem to violate first amendment norms.[280]

Kreimer's point is that if the promotion of artistic value is the purpose of the NEA, and if (following Kreimer, we stipulate that) cubism has more artistic value than pointillism, cubism and pointillism are differently situated with regard to the purpose of the NEA, whereas Democratic and Republican artists are not. Put a different way, making political party relevant would *leverage* arts funding in order to affect (political) expression that lies beyond the bounds of the funding program. Making artistic style relevant arguably does not do so.

Robert Post builds on Kreimer's example to point out that often this lack of relevance gets cashed out doctrinally as a problem of unconstitutional *viewpoint discrimination*.[281] Post's point, like Kreimer's, is that selective subsidies for expressive activities *always* promote a viewpoint: the idea that cubism is more worthy than pointillism, for example, or that artists are more worthy of subsidy than carpenters.[282] All too often, findings of viewpoint discrimination are, in Post's words, "formalistic labels for conclusions, rather than useful tools for understanding."[283]

Shifting analysis from talk of viewpoint discrimination[284] to an analysis of relevance—the relevance of the "discrimination" to the purpose(s) of the program at hand—is particularly crucial for our context here, where what counts as viewpoint or content discrimination within the arts is even murkier than it is elsewhere.[285] Particularly when it comes to the non-representational arts, we might wonder whether viewpoint includes

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280 Kreimer, *supra* note 244, at 1374.

281 Post, *supra* note 244, at 167 ("[I]magine[] a case in which a chemistry department awards research grants only to students who oppose abortion rights. Although we might be tempted to say about this case that the department's criteria for awarding grants are outrageously viewpoint discriminatory, what we would actually mean is that the criteria are completely irrelevant to any legitimate educational objective of the department.").

282 *See also* Cole, *supra* note 246, at 690 ("*Every* decision to subsidize a particular message has the effect of singling out a disfavored group on the basis of speech content, namely the group that does not receive the subsidy because it seeks to express a different message.") (quotation marks omitted).

283 Post, *supra* note 244, at 152.

284 Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995).

285 For discussions of the murkiness elsewhere, see, e.g., Elena Kagan, *The Changing Faces of First Amendment Neutrality: R.A.V. v St. Paul, Rust v Sullivan, and the Problem of Content-Based Underinclusion*, 1992 SUP. CT. REV. 29, 70; Post, *supra* note 244, at 166 n.96.

matters of style (*e.g.* abstract expressionism vs. minimalism), or form/genre (sonatas vs. minuets), or medium (music vs. sculpture)?[286] Recall the Supreme Court's eagerness, in *Arkansas Writers' Project*, to sidestep the question of whether a tax that distinguishes newspapers from magazines was content- or merely format-based.[287] Insofar as artists may claim that their medium is part of the message of their works, distinguishing format from content may be a fool's errand when it comes to the arts.

All of this provides background for the second way *Regan* could have turned out differently. As the Court repeatedly noted, that case would have turned out differently if the subsidy program at issue had been "aimed at the suppression of dangerous ideas"[288] or "designed to discourage the expression of particular views."[289] Stated as a principle:

> *Selective subsidies are not permissible if they are designed to discourage disfavored viewpoints.*

This was not a problem in *Regan* itself because the subsidies there were denied for (nearly) all lobbying activities. The one exception—the preferential treatment given veterans' organizations, who (presumably) lobby only for pro-veteran positions—was explained not as viewpoint discrimination against other views, but rather as another of the longstanding benefits offered to veterans as compensation for their service.[290] Note the connection here between what counts as viewpoint neutral and what is traditional, thus expected, when it comes to government benefits.

The resort to tradition recalls the "historical baseline" which Seth Kreimer, in a pathmarking 1984 article, offered as relevant to deciding whether a subsidy scheme should be seen as expanding someone's expressive opportunities rather than coercing speakers to engage in less or different expression than they otherwise would.[291] Kreimer looks to historical tradition both because of built-up reliance interests and on the basis of psychology's insight that "losing a good is worse than not receiving it."[292] Coercion is lessened when someone

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286 *See* Soucek, *supra* note 13, at 465.

287 *See* 481 U.S. 221, 233 (1987).

288 Regan v. Tax'n with Representation of Wash., 461 U.S. 540, 550 (1983).

289 *Id.* at 551 (Blackmun, J., concurring).

290 *Id.* (Blackmun, J., concurring).

291 Kreimer, *supra* note 244, at 1352, 1359–63.

292 *Id.* at 1362.

denied a subsidy never expected to receive it in the first place. Kreimer also argues that change, unlike inertia, "requires justification."[293] And this offers a clue about the connection between tradition and viewpoint discrimination. Just as courts looking for discrimination in an equal protection case will look more closely at laws "of an unusual character,"[294] and procedural or substantive novelty are two of the factors used to find "improper purposes,"[295] so too might we wonder, when government suddenly changes course on selective subsidies, whether its reasons might be more punitive than generous. The principle:

> *A benefit suddenly denied to some subset of past recipients is more constitutionally suspicious than a mere refusal to extend benefits long given.*

Mention of reliance interests suggests another way in which subsidy denials can become especially coercive: when government funding dominates the market, the costs of exclusion from that subsidy scheme can have existential consequences. This market power could have a basis in history, arising over time as did our reliance on the postal service,[296] but it need not. When the onset of COVID suddenly halted the economy and Congress responded with the Paycheck Protection Program, part of the largest stimulus package in American history, businesses excluded from the program's subsidies had precious few other places to turn.[297] As one of us has previously written, "The traditional argument that those denied government subsidies for their speech can simply continue speaking on their own dime loses force when fewer dimes are out in private circulation."[298] The takeaway, and a fourth principle:

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293 *Id.* at 1361.

294 Romer v. Evans, 517 U.S. 620, 633 (1996); *see also* United States v. Windsor, 570 U.S. 744, 768 (2013) (quoting *Romer*, 517 U.S. at 633).

295 Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 267 (1977).

296 *See* Kreimer, *supra* note 244, at 1362; *see also* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 581–82 (2012) (referring to a threatened loss of Medicaid funding, around which "the States have developed intricate statutory and administrative regimes over the course of many decades," as "more than 'relatively mild encouragement'—it is a gun to the head"); Milwaukee Soc. Democratic Publ'g Co. v. Burleson, 255 U.S. 407, 437 (1921) (Holmes, J., dissenting) ("The United States may give up the Post Office when it sees fit, but, while it carries it on the use of the mails is almost as much a part of free speech as the right to use our tongues[.]").

297 *See* Brian Soucek, *Discriminatory Paycheck Protection*, 11 CALIF. L. REV. ONLINE 319, 319 (2020).

298 *Id.* at 331.

> *The more a subsidy is necessary to its recipients' ability to survive and engage in expression, the more constitutionally worrisome any conditions on that subsidy will be.*[299]

The coercion of speakers is just one of the worries animating this principle. As David Cole has emphasized, speakers aren't the Constitution's only concern; *listeners* are too.[300] The First Amendment is meant to protect speakers from coercion, but also listeners from becoming "victims of government indoctrination."[301] And indoctrination can stem not just from the government's own speech, but also from state subsidies that skew what listeners hear.[302] As Cole puts it, courts "should be more suspicious of a government program allocating tax exemptions on the basis of the content of newspapers than of the existence of a single government newspaper."[303] The worry here centers on the narrowing of what listeners have the opportunity to hear.

Turning back to coercion, and Kreimer's account, a final factor in determining a subsidy's constitutionality looks to what he calls the "equality baseline." Kreimer is quick to admit that selective subsidies always require treating recipients differently—that is, unequally—from others.[304] But "[n]ot all inequalities are equally offensive," he argues; we are bothered more if the losers, the ones denied a subsidy, are few than if they are many.[305] As we saw in *Minneapolis Star*, exempting

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299 *See* Post, *supra* note 244, at 179 ("Consider, for instance, the Kennedy Center, which the federal government subsidizes to present classical and contemporary music, opera, drama, dance, and other performing arts. These criteria for the allocation of subsidies exclude political and academic speech. Such speech is of course public discourse, yet its dependence upon the Center is so slight that we would not be tempted to read the effects of the government's exclusions as roughly equivalent to that of a criminal prosecution.") (quotation marks omitted).

300 Cole, *supra* note 246, at 680.

301 *Id.* at 697.

302 *See id.* at 697; *see also id.* at 705 ("From the listener's perspective, the dangers posed by selective support of expression differ only in degree, not kind, from the dangers posed by selective prohibitions on speech . . . If the funding offered is large enough and the penalty imposed small enough, the funding program may well cause greater distortion than the criminal prohibition. The problem with both government actions is their skewing effect on public debate.").

303 *Id.* at 733. Professor Cole argues that selective subsidies are most worrisome when they affect an important locus of public debate, such as public forums, public schools, and the press. *See id.* at 736. But importantly, Cole also identifies "artistic expression" as "central to the cultural and political vitality of democratic society." *Id.* at 739.

304 *See* Kreimer, *supra* note 244, at 1366.

305 *Id.* at 1367–69; *see also* Minneapolis Star Trib., Co. v. Minn. Comm'r of Rev., 460 U.S. 575, 582 (1983) ("By creating this special use tax, which, to our

most newspapers while taxing just a few comes across as a penalty on those forced to pay. By contrast, when we award, say, a prize to a favored few, we are unlikely to be seen as punishing the rest.[306] Those of us never selected for the Presidential Medal of Freedom are unlikely to view ourselves as thereby censored. The principle:

> *A tax exemption is more likely a permissible subsidy when it is the exception rather than the rule.*

Of course, when determining the size of an exemption compared to the tax, fixing the denominator is crucial, and sometimes non-obvious. It may require that we determine which taxed products or activities are relevantly similar. And "relevantly" there will again, often be determined in reference to the history and purpose(s) of the subsidy scheme.[307]

Take an example from the preceding Part: instrumental music without dancing, which was exempted from the cabaret tax imposed in 1917. Often when it is discussed,[308] instrumental music is contrasted with vocal music and music with dancing, all performed at cabarets. Cabaret performances are the denominator, in other words, and big band jazz seems unfairly targeted in comparison to music like bebop.

But as we have seen, the cabaret tax was just one of the many taxes on admissions imposed in 1917, and admissions taxes were themselves a subset of the excise taxes the 1917 Revenue Act imposed on a far wider set of products and services—everything from alcohol and jewelry to cars and insurance.[309] With a denominator this broad, a narrow exemption for the kind of ambient music "furnished by orchestras such as were usual in

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knowledge, is without parallel in the State's tax scheme, Minnesota has singled out the press for special treatment."); Plyler v. Doe, 457 U.S. 202, 238 (1982) (Powell, J., concurring) ("The classification at issue deprives a group of children of the opportunity for education afforded all other children . . . .").

306 *See* Kreimer, *supra* note 244, at 1352, 1367–68 ("[I]f [the National Endowment for the Arts] provides a subsidy to every show except 'Hair,' or worse, if the IRS suddenly levies a prohibitive tax only on the tickets to 'Hair,' a claim of impingement on freedom of speech becomes more plausible.").

307 Though this raises the potential problem that we can always just redescribe the purposes of a given subsidy scheme, *see* Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc., 570 U.S. 205, 215 (2013) ("[T]he definition of a particular program can always be manipulated to subsume the challenged condition."); Legal Servs. Corp. v. Velasquez, 531 U.S. 533, 547 (2001) ("Congress cannot recast a condition on funding as a mere definition of its program in every case."), good evidence may be found from looking at why and how the program came about.

308 *See, e.g.*, Felten, *supra* note 104.

309 *See supra* Table 1.

hotels and restaurants before the advent of cabarets"[310] seems far more like a targeted subsidy, if a quirky one, than an attempt to punish big bands or other taxed entertainments.

When "the arts" are seen as amusements to be taxed, either alongside luxuries like perfume and pleasure boats or ordinary pleasure providers such chewing gum and soft drinks, the set of comparators is quite large; taxation appears far more the rule than the exception. But when the arts come to be seen as a category of their own, exemptions for the symphony and opera, but not for theater or motion pictures, start to look more like content-based discrimination. As Part IV will discuss, one crucial way that the federal admissions tax has affected the arts is by affecting which activities are seen as relevant comparators—what sociologists refer to as "commensuration."[311]

History, in other words, is needed to properly understand what may have seemed like a simple legal principle: that subsidies for expression are more constitutionally suspect when they are more the exception rather than the rule. In fact, all of the factors just canvased turn out to be like this. In addition to the proportion of subsidy recipients to those denied, the relevance of a subsidy's conditions to its purpose, the extent those conditions affect activity beyond the subsidy scheme, the expectations that have developed historically surrounding the subsidy and the way it dominates a particular market, and the discriminatory purpose, if any, behind the subsidy's limits—each of these factors require knowledge beyond the law. (This is one reason why the present Article has two authors.) Thick historical, sociological, or economic description is necessary to apply the constitutional doctrine in this area.

The point of this Part has been to draw out from our intuitions, case law, and a large existing academic literature, a set of factors that help distinguish permissible subsidies from denials of funding that operate more like penalties on disfavored expression.

Part IV does the work of applying these factors, drawing on the extensive history of Part II in order, finally, to evaluate constitutional controversies of kind that launched our discussion back in Part I.

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310 INTERNAL REVENUE REGULATIONS NO. 43, *supra* note 106, at 8.

311 *See, e.g.*, Wendy Nelson Espeland & Mitchell L. Stevens, *Commensuration as a Social Process*, 24 ANN. REV. SOCIO. 313 (1998).

IV
Applying History to Doctrine

The factors that determine whether a selective subsidy crosses the line from benefit to censorship require something the law itself cannot provide: thick description of the subsidy's history, purpose, structure, and effects. This explains why we took such pains to unearth the history recounted in Part II. Set against that history, the tax exemptions that provoked such controversy in Chicago look at once more constitutionally permissible, and more deeply impactful on the arts, than their outraged critics seemed to realize.

To see this, we need to apply the factors laid out in Part III to the tax exemption schemes of Part I, viewed in the context of their predecessor, the federal admissions tax described in Part II. We'll take the factors in turn.

Selective subsidies are not permissible if they are designed to discourage disfavored viewpoints.

Evidence of legislative animus against particular arts, or artistic genres, is largely absent in the history we have canvassed. Outlier cases admittedly do exist—some of which seem outrageous. Take, for example, the special licenses Clark County, Nevada requires for rock concerts as opposed to "adult contemporary" performances.[312] It explicitly justifies this "regulation and control" on the basis of rock music's past, demonstrated threats to the "public health, safety, morals and welfare of the inhabitants of the county."[313] Similarly targeted are San Diego's permitting requirements for entertainment venues, which were imposed to avoid "RAVE parties" but not applied to theaters offering "performances of literary compositions that tell a story, . . . usually with ascending row seating."[314]

It is likewise hard to see Cook County's continued classification of "male [and] female impersonators"[315] as "adult entertain[ers]," whose performances are subject to admissions taxes, as anything but discrimination against disfavored

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312 *See supra* note 81.

313 Clark County, Nev., Code of Ordinances § 6.65.010 (2023), https://library.municode.com/nv/clark_county/codes/code_of_ordinances?nodeId=TIT6BULI_CH6.65MUCO [https://perma.cc/W3HN-X5P4].

314 San Diego, Cal., Ordinance No. O-18887 (Nov. 20, 2000), https://docs.sandiego.gov/council_reso_ordinance/rao2000/O-18887.pdf [https://perma.cc/M3SJ-F27V].

315 Cook County, Ill. Amusement Tax Ordinance § 2 (1999); Chi., Ill., Mun. Code § 4–156–010 (2008).

viewpoints regarding gender and sexuality. When Chicago's first gay alderman, Tom Tunney, worked to overturn the city's parallel drag classification in 2015, he asked: "[W[hat part of [drag] is so objectionable? . . . It's an artistic form now. There's not the fear surrounding it that there was 40 or 50 years ago."[316]

But for all the talk in Cook County about the racism and classism of its "fine arts" exemption—the controversy with which we began—there is little to suggest that the subsidies given, say, classical music, modern dance, and poetry readings were offered in order to *discourage* rap, electronic, or country music. Instead, Chicago largely inherited the federal government's Swiss-cheese admissions tax, in which holes were created over time as certain powerful interests convinced Congress that arts like symphonies and operas merited special subsidies, either because markets wouldn't otherwise sustain them or because they were uniquely ennobling.

In short, there is little evidence to suggest that the federal admissions tax, which gave shape to Chicago's and Cook County's amusement taxes, was "designed" in any intentional or comprehensive way at all, much less designed to discourage disfavored viewpoints. A lucrative tax was imposed in wartime, and loopholes to the tax emerged over time.

But to be very clear: saying that these exemptions were not designed to censor is *not* to say that the resulting laws are not infused with racism and classism—and we can add sexism, too. But the history reveals an important point about the form they took and the role they played. The prejudice manifested less as legislative animus and more as highly selective listening on the part of legislators. The problem was not that Congress in 1917, and Chicago's aldermen decades later, *designed* the tax to censor and harm but that they took the time to hear from only some of those whom their tax threatened to harm.[317]

Thus, for all we heard in Part II about the ennobling character of theater or opera, the propagandizing potential of the movies, or the economic fragility of American orchestras, other arts and artists, and other forms of entertainment, were simply not heard from at all. No one in Congress was talking about,

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316 Fran Spielman, *Ald. Tunney Moves to Complete 'Mainstreaming' of Male and Female Impersonators*, CHI. SUN TIMES (Mar. 19, 2015), https://chicago.suntimes.com/city-hall/2015/3/19/18604123/ald-tunney-moves-to-complete-mainstreaming-of-male-and-female-impersonators [https://perma.cc/A8PQ-DBMQ].

317 Unfortunately, the legislative history and other contemporaneous sources we have found don't reveal legislators' motivations for calling some witnesses rather than others at their hearings.

much less hearing from, female vocalists, among the first to lose their jobs when the instrumental carve-out to the cabaret tax was introduced. With few women employed as instrumentalists, the exemption was bound to have a sexually disparate effect. No one heard from tap dancers, although the tax on cabarets where dancing occurred clearly threatened to destroy one of America's leading Black artforms.[318] Legislators invited opera advocates, but they never heard from the ballet dancers who shared the same stages. In fact, all forms of dance were left unaddressed, including powerful modern dance advocates seeking "to elevate their activities to the position of classical music and fine art" starting in 1900, through "ennoblement by association with the established arts."[319]

Legislators' failure to hear from *certain of those* whom the admissions tax affected amounts to what feminist theorists and philosophers have more recently referred to as a "testimonial injustice."[320] Like a jury that gives less credence to a witness because of the color of their skin, or a work meeting where a man gets credited for a suggestion a female colleague previously made, the testimonial injustice caused by selective legislative attention amounts to a moral injury to the disregarded speaker.[321] And it ultimately results in a tax scheme that has disparate effects based on race, sex, and class—and forms of culture that tend to break along those lines.

To say that tax laws like Chicago's are racist (or sexist or classist) in ways other than their critics suggested is decidedly not to defend them. But it is to acknowledge, however grudgingly, that current legal doctrine is extremely badly suited to handling such inequities, and the distortion of free expression that results.[322]

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318 Donna-Marie Peters, *Dancing with the Ghost of Minstrelsy: A Case Study of the Marginalization and Continued Survival of Rhythm Tap*, 4 J. PAN AFR. STUD. 82, 92 (2011) ("During and after the 1960s, there has been a continuing struggle by professional tap artists to gain acceptance by mainstream audiences and to garner artistic legitimization from the arbiters of art."); *see also* LENA, *supra* note 14.

319 GANS ET AL. CULTIVATING DIFFERENCES: SYMBOLIC BOUNDARIES AND THE MAKING OF INEQUALITY 38 (Michèle Lamont & Marcel Fournier, eds., 1992).

320 *See generally* KATE MANNE, DOWN GIRL: THE LOGIC OF MISOGYNY (2018); MIRANDA FRICKER, EPISTEMIC INJUSTICE: POWER AND THE ETHICS OF KNOWING (2007); Kristie Dotson, *Tracking Epistemic Violence, Tracking Practices of Silencing*, 26 HYPATIA 236 (2011); PATRICIA HILL COLLINS, BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT (2d ed. 2000).

321 FRICKER, *supra* note 320.

322 For an example of such a doctrine, see Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979).

To put it simply: no one has a right to testify before Congress. If Congress, for example, hears testimony from airlines but not cruise ships operators during COVID, then passes subsidies that respond only to the complaints they heard, cruise operators would lack a plausible equal protection claim. If legislators heard from veterans and enacted a hiring preference whose beneficiaries were 98% male, women *still* wouldn't have an equal protection claim, at least under current doctrine.[323] Similarly, current free speech law asks about the design of a subsidy scheme—whether it was *intended* to disfavor certain viewpoints—not merely whether legislators were more solicitous to some views than others.[324] In the latter situation, other factors are necessary to take us from constitutional subsidy to unconstitutional censorship.

Before turning to those other factors, though, it's crucial to emphasize that we can do more than just throw up our hands in response to the failures of current constitutional doctrine. The controversy in Cook County points the way. Legislators' selective attention to forms of culture that skew white, or male, or relatively wealthy might not have a judicial remedy under the First Amendment or Equal Protection Clause. But there is a popular remedy: legislative attention can be demanded by the people. And that is exactly what happened when Cook County's tax threatened hip hop and country and electronic music in Chicago. Selectivity in what was subsidized there prompted national news, widespread ridicule, and a change in the law within mere months. Constitutional law is often not the only, or best, response to injustice—a point to which we will return.

When shutting down particular expression is not a subsidy's aim, its constitutionality hinges on the other factors from Part III, including the extent to which the subsidy scheme proves necessary to recipients' ability to continue engaging in expression.

> *The more a subsidy is necessary to its recipients' ability to survive and engage in expression, the more constitutionally worrisome any conditions on that subsidy will be.*

This may well be the factor that weighs most strongly against admissions taxes' selective exemptions. After all, the

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323 *Id.*

324 Rust v. Sullivan, 500 U.S. 173 (1991); Nat'l Endowment for the Arts v. Finley, 524 U.S. 569 (1998).

complaints of the music club owners in Chicago—that paying back taxes would be "crippling," and owing the tax going forward would make it "close to impossible" to continue operating[325]—were just the latest in a century's worth of similar complaints.

These artists and arts producers were not crying wolf. In 1932, the Ways and Means Committee heard from Frank Gilmore, president of the Actors' Equity Association, that

> in 1929 there were 7,466 actors employed; that in 1931 the number had decreased to 3,730. In 1928 there were 20,000 musicians employed in the theaters of the United States. To-day there are probably not more than 8,000 employed. [] The secretary of the Theatrical Protective Union, an organization of stage hands in the New York district, states that fully half the membership of that organization is now unemployed.[326]

Big band leaders and tap dancers saw their performance opportunities evaporate and their artforms largely die out. By the 1950s, the number of ballrooms and other dining facilities subject to the cabaret tax had decreased from 700 to 250.[327] Within New Jersey alone, simply because of the tax, 948 musicians lost their jobs because businesses closed or "discontinued the employment of live musicians."[328]

Exemptions, by their nature, are subsidies that increase and decrease with the size of the underlying tax. So as the federal admissions and cabaret tax rates fluctuated over the course of their history, the coercive power of the exemption criteria fluctuated as well. A band playing a cabaret might have been able to afford keeping on a singer when the tax that she triggered was at 10%, though not when it reached 30% as it did (briefly, and to great outrage) in World War II.[329] And some arts and entertainments, particularly in rural markets, operated at such close margins that even smaller tax hikes might have put them out of business.[330] Even if this did not coerce them to

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325 Gaines, *supra* note 8.

326 75 CONG. REC. 11260, 11297 (1932).

327 103 CONG. REC. 13631, 13632 (1957).

328 *Id.* at 13633.

329 *See supra* note 102 and accompanying text.

330 For example, Mr. Pete Sun, representative of the Sun Brothers Circus, told the Senate in 1917:

change their content, it reduced the variety of expression that the public in those areas was able to access. Tailoring taxes to local conditions to avoid these effects was, importantly, one of the leading benefits of the move to localism, particularly after the federal tax was repealed in 1965.

Subsidy recipients may depend upon the subsidy simply because of its size. But they also may develop reliance interests on a subsidy that has become historically entrenched. Recall the principle:

> *A benefit denied to some subset of past recipients looks more constitutionally suspicious than a mere refusal to extend benefits long given to others.*

In light of the long history of admissions tax exemptions just traced, which way should we say this factor cuts? Here the answer really seems to depend on the point in history at which we are asking the question.

The initial structure of the federal admission tax seemed unobjectionable in granting familiar favorable treatment to children and charities (*i.e.* activities done for charitable, educational, or religious purposes). This was complicated, however, when admissions fees benefiting symphony orchestras received an exemption one year later. Once exemptions went beyond, say, the common law notion of charity, expectations changed. Suddenly exemptions seemed more like a choice than inertia, and those not chosen had reason to feel disfavored, at least until *all* exemptions were repealed in 1941.

> [w]e have a small show, and we bring this show away back into the woods where the people never have a chance to see animals; where they never have a chance to see anything at all. They do not even read the newspapers. I have done business with hundreds of people who could not even read a bill or write their name when I pay them a bill, and I feel that if you put that tax on, which you are trying to put on, you will put us out of business.

Revenue to Defray War Expenses: Hearings and Briefs on H.R. 4280 Before the S. Comm. on Finance, 65th Cong. 397 (1917) (statement of Pete Sun, Sun Bros. Shows) [hereinafter *Revenue to Defray War Expenses*]. These impacts were felt even within mass entertainments. In a statement to the Senate during the 1917 debates over the proposed tax, a representative from the Motion Picture League of North Carolina explained that a tax on tickets would have different impacts on theaters in large cities and those in rural and small towns. Mr. Varner, Secretary of that League, said that a tax on proceeds—even a total capture of all net profits—would be less discriminatory than one on individual ticket sales; he stated, "we do not object" to paying a tax, but "we do object to being put out of business." *Id.* at 387–88 (statement of H.B. Varner, Secretary, Motion Picture Exhibitors' League of North Carolina).

Where reliance interests played a bigger role was in Chicago, where Beauty Bar and Evil Olive, the venues charged with back taxes in 2016, had simply assumed that they were exempt under the small venue exception. Had that exemption never existed, or were it repealed entirely, bar owners might have been displeased, but it never would have made national news. What sparked outrage in Chicago was the fact that tax officials were seen as taking away an existing benefit just from some: those presenting something not "commonly regarded as part of the fine arts."[331] The taking away of a benefit appeared like a punishment or condemnation rather than a mere decision not to subsidize.

Outrage was all the worse in Chicago because the music seemingly being punished was so closely identified with Chicago culture. What could possibly justify a city/county arts subsidy that excluded some of Chicago's greatest contributions to the arts? The relevant factor here:

> *Conditions on a subsidy must be relevant to the aims of the subsidy program, not used simply as leverage to affect activity beyond the program.*

The Chicago City Council explicitly stated its aim when it first passed the small venue exemption in November 1998. It wanted to "foster the production of live performances that offer theatrical, musical or cultural enrichment to the city's residents and visitors"; it found that small venues produced "new and creative live cultural performances"; and it recognized that the costs of these were especially hard for small venues to bear, thus "requir[ing] governmental support."[332]

The notion that small performance venues are economically fragile bastions of cultural creativity—the motivation behind Chicago's admissions tax exemption—in no way depends on any kind of high/low art distinction. And while we can certainly imagine arts subsidy programs that aim to foster performances that ennoble or cultivate the taste of the populace, that simply wasn't the aim in Chicago.

We can imagine such a subsidy program, of course, because the federal admissions tax exemptions were seen (at times, and by some) as exactly that: a cultivating force, meant

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331 COOK COUNTY, ILL., CODE OF ORDINANCES § 74-391 (2015), https://library.municode.com/il/cook_county/codes/code_of_ordinances/259998?nodeId=PTIGEOR_CH74TA_ARTXAMTA_S74-391DE [https://perma.cc/6WRE-SHDN].

332 Amendment of Title 4, Chapter 156 of Municipal Code of Chicago Regarding Amusement Tax, CHI. CITY COUNCIL J. OF PROC. 81835, 81836 (Nov. 12, 1998).

to preserve certain "high" arts. To be sure, that's not how the admissions tax scheme started out. The 1917 tax, with its limited exemptions for charities, children, and cheap tickets had a straightforward aim: raise as much money as possible, but not on the backs of those who could least afford it or were (like charities) protected by longstanding exemptions.

Once again, it was the 1918 exemption for admissions fees benefitting symphony orchestras that blurred this aim. What purpose to ascribe to a carveout like that? It didn't make the admissions tax more progressive. It didn't honor a common law tradition. Predictably, what it did was provoke others to claim similar exemptions for themselves, and in analogizing themselves to the symphony, they increasingly suggested that their art was just as valuable, just as ennobling, and just as economically endangered. They were ascribing a purpose to the tax scheme—protecting sufficiently valuable, ennobling, and endangered arts—that it didn't originally have.

Measuring up to this newly ascribed aim sometimes required contortions. Consider the theater—sorry, the "legitimate spoken drama"[333]—which was so desperate to distinguish itself from "farce comedies, burlesques and extravaganzas," that it allowed itself to be defined as, among other things, a "consecutive narrative" spun out over at least 105 minutes.[334] Surely none of these requirements had anything to do with the aim of the federal admissions tax scheme. But they exerted pressure on playwriting nonetheless, and they made the admissions tax a more destructive force on the burlesques and extravaganzas that were increasingly defined in contrast to legitimate theater.

Pressures like these continue into the present. Just look at Chicago's and Cook County's small venue exemptions, even after their most recent amendment. To the satisfaction of most critics, DJs at small venues can now qualify for an exemption from both city and county taxes. But the seven-part test they have to meet in order to do so has a tenuous connection to the aims that motivated the exemption in the first place. Why, for example, does a DJ need to have a manager or agent to qualify? Instead of advancing the subsidy's stated goals, a requirement like this simply leverages the subsidy to control choices DJs make beyond the subsidy program. If you want a gig in Chicago, you'd better become the kind of DJ who has an agent.

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333 *See supra* notes 151–54 and accompanying text.

334 *Id.*

This brings us to the final factor:

> *A tax exemption is more likely to be seen as a permissible subsidy when it is the exception rather than the rule.*

Giving one employee an award doesn't or shouldn't make the other employees feel censored; by contrast, giving a bonus to all employees but a few surely seems like a penalty on the disfavored few. That intuitive distinction appears in doctrine as well.[335] So when it comes to tax exemptions for the arts, just how prevalent have the number of exemptions been compared to those who are taxed?

The question is not as easy to answer as it might seem. The difficulty does not come from gaps in the history—anyone who made it through Parts I and II now grasps what was taxed when. The difficulty, and interest, of the question stems from the fact that the set of relevant comparators can't just be assumed. To ask what percent of *x*'s received an exemption requires us to decide what should count as *x*'s. The history of the admissions tax consists of evolving debates over what should get compared with what when deciding whether tax exemptions are equitably awarded. It is a process of what sociologists refer to as 'commensuration.'[336] And as we can see in Chicago, the commensuration process is not over.

There are questions about what to compare dating back to the very start of the federal admissions tax, in 1917. Recall that admissions fees were just one of dozens of things taxed in the War Revenue Act of 1917, alongside everything from cars to chewing gum. If "items taxed in 1917" comprises the denominator—the set of relevant comparators—then the short list of admissions that were exempted from the 1917 Act (children, cheap tickets, charitable benefits, eventually instrumental music at cabarets) make up an exceedingly small proportion. They were clearly the exception, not the rule. But the same is true even if the denominator is limited just to admissions, rather than all the goods and services targeted in 1917. This too was broad in scope. "[A]dmission to any place"[337] encompassed everything from burlesque to prize fights, the opera to the circus, dancing pavilions to boxing clubs. Once again, the Act's limited exceptions still remain fairly exceptional.

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335 *See, e.g.*, Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575 (1983).

336 *See* Espeland & Stevens, *supra* note 311.

337 War Revenue Act of 1917, Pub. L. No. 65-50, ch. 63, 40 Stat. 300.

In this regard, the amusement taxes in Chicago and Cook County echo their federal predecessor. Amusements subject to tax include "theatrical, dramatic, musical or spectacular performance[s]" and "motion picture show[s]," but also poultry shows, circuses, sports, amusement park rides, and, in Chicago, streaming television services.[338] Only in 1998 did the City Council expand an existing exemption for professional theater companies to any "live theatrical, live musical or other live cultural performances" in venues capped at 750 people.[339] The following year this was defined to cover "any of the disciplines which are commonly regarded as part of the fine arts, such as live theater, music, opera, drama, comedy, ballet, modern or traditional dance, and book or poetry readings"[340]—the definition that spawned the controversy with which we began.

The controversy in Chicago centered on whether it was discriminatory to grant a tax exemption to classical music but not rap, rock, country western, or electronic music. The arguments made in the press, recall, were that the County didn't find these kinds of music to be "artistic enough" to qualify for an exemption;[341] that County officials were "elevat[ing] some genres to the spiritual status of fine art and their producers to heroic creators while relegating other genres to the status of mere utility";[342] or even that the government was condemning some genres as "the devil's music."[343]

Behind all this was an implicit assumption that "the arts" comprised the relevant set of comparators and that among those, certain artistic genres were being unfairly disfavored. Rap, electronic, rock, and country musicians appeared to be uniquely singled out. But in truth, they were being treated like most other sources of amusement in Chicago, from football games to bowling halls to Netflix subscriptions. Clubs with DJs were not being treated better than circuses or rodeos—or, we might add, movie theaters, drag shows, or strip clubs—but

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338 *See supra* note 18 and accompanying text.

339 Amendment of Title 4, Chapter 156 of Municipal Code of Chicago Regarding Amusement Tax, CHI. CITY COUNCIL J. OF PROC. 81835, 81840–41 (Nov. 12, 1998).

340 Amendment of Title 4, Chapter 156 of Municipal Code of Chicago Relating to Applicability of Amusement Tax to Live Cultural Performances, CHI. CITY COUNCIL J. OF PROC. 91750, 91752 (Apr. 21, 1999).

341 Brown, *supra* note 12.

342 Mosher, *supra* note 40.

343 Rhodes, *supra* note 39 (quoting the lawyer for Evil Olive bar).

relatively few amusements were, when we look at the full scope of the tax.

Why, then, did it seem so natural to those swept up in the Chicago controversy to see "the arts" rather than "amusements" as the relevant denominator—the natural set of comparators?

This is where the long history of the federal admissions tax offers its deepest insight. The five decades of exemption-seeking described in Part II involves an ever-narrowing set of activities seen as commensurable, and deserving of Congressional attention and subsidy. In 1917, agricultural fairs received a carve-out, incidental music in hotels got favored treatment in the cabaret tax, and circus operators were testifying in Congress about the shows they bring to rural areas.[344] Of course, symphony orchestras were being heard as well, and their exemption got added in 1918. The motion picture industry, meanwhile, was keeping Congressional attention on the minimum price that triggered the admissions tax, hopeful that their tickets would remain largely exempt.

By the time the Second World War was over and admissions tax revenues were less necessary, when Congress focused again on expanded exemptions or the possibility of a full repeal, a far smaller number of artistic fields appear in the Congressional Record. Dozens of speakers and letters advocated on behalf of opera companies and symphony orchestras, but two from the Modern Dance Council represented all of American dance.[345] Advocates for art music had representatives from the American Federation of Musicians, and the Educational Theatre Guild was present to represent plays, but the hundreds of small jazz clubs had no one to speak on their behalf. By the time the admissions tax was repealed in 1965, what was once a conversation about excise taxes had become one about a small list of arts not unlike those that Congress was contemporaneously choosing to fund by establishing the National Endowment of the Arts.

Along the way what Congress heard was a series of arguments from producers of "legitimate spoken drama," the opera, and other similarly elite artforms, each making (at least) three claims. First, that their art was especially ennobling; second, that this distinguished it from other amusements, which

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344 War Revenue Act of 1917, Pub. L. No. 65-50, ch. 63, 40 Stat. 300; INTERNAL REVENUE REGULATIONS NO. 43, *supra* note 106, at 8; *Revenue to Defray War Expenses*, *supra* note 330.

345 *Federal Grants for Fine Arts Programs and Projects: Hearings Before a Special Subcomm. of the H. Comm. on Educ. & Lab.*, 83d Cong. 1 (1954).

provided more distraction than uplift; and third, that the market would not sustain their art without subsidy.

Crucially, these arguments on behalf of particular artistic practices did not leave those practices as they found them. Arts organizations began to shape their programming around the desire to gain an exemption, as symphonies prioritized works by a small group of European composers and opera companies did the same; museums eschewed living American painters and sculptors in favor of "great works" from European "masters." Attaining an exemption often meant leaving part of the practice behind, as vocal and danceable jazz was outpaced by a whiter spectatorship of increasingly concertized styles like bebop. Recall the weirdly specific definition the "legitimate" theater had to develop in order to get even the meagre exemption it eventually received.[346] Look at the ways certain forms of theater, wanting to be categorized with opera and ballet, sought to distinguish themselves from the burlesques and extravaganzas that used to share their same stage, or even programs.[347] Consider what it meant for arts organizations to adapt their programming to qualify as "educational" charities.[348] And notice how motion pictures failed to get an exemption in the 1950s even as opera and symphony orchestras saw theirs expanded.[349]

The point is that the history of exemptions to the admissions tax show not just the set of relevant comparators shifting—that was the point, after all, of the constant comparisons and contrasts that were argued to Congress. It also shows certain cultural practices adapting, or contorting, themselves in order to make the comparisons more plausible.

Little wonder, then, that by the time controversy broke out in Chicago, the terms had grown familiar—almost unquestioned. No one was outraged by the fact that movies and "spectacular shows" were not getting an exemption, and no one seemed to notice that shows with "female impersonators" or pole dancers did not either. For all the talk of getting the government out of defining what is art, commentators showed themselves surprisingly accepting, or ignorant, of all that government had done through tax law to define what might possibly qualify as art. And the bizarrely specific set of conditions placed on DJs—heralded as the successful resolution to the

346 *See supra* Part II.B.1.

347 *Id.*

348 *See supra* Part II.B.2.

349 *See supra* notes 164–65.

controversy in Chicago—just shows how tax law continues to exert unseen pressure on the shape artistic practices must take if they want to be seen as such.

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The factors that are meant to distinguish unconstitutional abridgement of expression from permissible subsidy don't just automatically generate an answer. But as applied to the federal admissions tax or its amusement tax progeny in Chicago and Cook County, the factors point generally towards constitutionality, at least at most points in history.

The size of the federal tax may have grown large enough at some points to have become an existential threat, making exemptions a necessary lifeline, at least in some industries, in some parts of the country. Conditions on the exemptions may then have become unduly coercive, and the range of expression audiences could access may have been unduly limited. Both are First Amendment concerns.

By contrast, factors like historical expectations and reliance, or the proportion of subsidy recipients to those denied it, largely point toward constitutionality. And the irrelevance of subsidy limits to the program's purpose and any discriminatory aims behind those limits are hardly clear enough to support constitutional claims. The aim of these exemptions shifts over time, after all, and they do so without demonstrating the kind of animus the law recognizes. What the history reveals instead is a failure by legislators to consider fully the racial, sexual, or class-based impact of their decisions.

To say that these impacts do not make most tax exemptions affecting the arts *unconstitutional* is hardly to praise them, much less to downplay the extent to which they have changed artistic expression. If anything, admissions taxes and their exemptions have affected the arts far more profoundly than most of those who have questioned their constitutionality ever realized.

CONCLUSION

Where does this leave us?

We began with outrage that music venues in Chicago were being taxed differently if they presented a DJ, country band, or rap group than if they sold tickets to see chamber music. Facing ridicule for letting tax assessors decide what is art, the government purported to get out of that business.

But it did no such thing, nor could it, if was to give music venues what they were demanding: a tax exemption for (certain of) the arts. By adding DJs—at least a carefully circumscribed subset of DJs—to the existing exemption and clarifying that arts, not "fine arts" were the intended recipients, the government merely changed the beneficiaries of their expressive discrimination, they didn't end it.

Expressive discrimination isn't necessarily unconstitutional, though, particularly when it involves subsidies like tax exemptions. If it were, the officials who assuaged critics by including (some) DJs within their exemptions would be constitutionally liable for excluding pole dancers. Yet outrage in Chicago didn't extend that far. Perhaps the critics weren't aware that adult theater and bar owners have raised constitutional claims of their own against the subsidy. Or perhaps those critics, like the courts, viewed pole and lap dancing as *something different* than the dancing Chicago and Cook County subsidize in other venues.

It is distinctions like these that the law—specifically tax law—has helped to draw. To put exemptions and controversies like Chicago's in their much larger historical context is to see that constitutional issues around selective subsidies turn out to be less important than understanding how thoroughly tax law has helped shape the set of activities that are even seen as contenders for such funding.

Put a different way, constitutional claims about selective subsidies of the arts seem to reach the problem too late. They ask whether favoring one art over another is constitutionally allowed without asking why both are considered arts, and other things aren't, in the first place. The history this Article has unearthed shows that tax law is an important part of the answer to this latter question, as it has long helped establish the line between the arts and other "mere" amusements.

Even if, as Part IV concluded, the constitutional claims against selective admissions taxes prove weak, it in no way follows that we should simply accept the status quo, built as we've seen it to be on legislative indifference to cultural production by people whose race, sex, or class differs from most of their representatives.

The lesson we should take from the Chicago controversy is not that constitutional claims against selective tax exemptions are bound to fail, but that popular opinion about where those subsidies should go might very well prevail, if expressed as loudly as it was in Chicago. The right response is not to pretend that the government has no business deciding what is art,

but instead to involve a broader set of constituents in making those decisions.[350]

The controversy over discriminatory tax exemptions in Chicago turns out to be exemplary—a story with a happy ending. In just two months, popular uproar and media attention led to changes in the law that better reflected both the will of the people and the purpose the small venue exemption was always meant to advance.

This, by way of conclusion, shows an underappreciated virtue of the move to localism that followed the repeal of the federal admissions tax in 1965. Where even the might of the Hollywood studio system often couldn't get results at the federal level,[351] local decision-making about what arts to subsidize—or even what amusements to include as arts—has the potential to be far more responsive to a far more varied set of voices.

Tax law has long played the role of muse, shaping artistic practice. But it's worth remembering that the ancients recognized multiple, competing muses. And we too can decide what diverse cultural practices our communities will foster, even if that happens through something as far from the divine as our tax laws.

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350 This is a point that arts policy experts have made for years: "the 'ritual of controversy' . . . affirms public life," STEVEN J. TEPPER, NOT HERE, NOT NOW, NOT THAT!: PROTEST OVER ART AND CULTURE IN AMERICA 255 (2011), because "the health of civil society depends upon periodic renewal of the population's commitment to core values, and such renewal comes about through rituals and controversies as much as through more routinized mechanisms[,]" Robert Wuthnow, *Clash of Values: Government Funding for the Arts and Religion*, *in* NONPROFITS & GOVERNMENT: COLLABORATION & CONFLICT 335 (Elizabeth T. Boris & C. Eugene Steuerle eds., 2d ed., 2006).

351 99 CONG. REC. 11161 (1953).