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In this installment of Academic Perspectives on SALT, Shanske and Wilbur examine the arguments surrounding Maryland's digital advertising gross receipts tax.

## Introduction

We await word from the Maryland Tax Court as to the provisional fate of Maryland's digital advertising gross receipts (DAGR) tax. In the meantime, we think it helpful to review some recent developments, and then explore certain broad issues and themes raised by commentators and the litigation.

What we want to emphasize above all is that the new evidence introduced in the tax court evidentiary hearings raises some interesting new arguments that have not been considered in depth in the public discussion before the trials.

In this article, Wilbur summarizes some of the facts he introduced as evidence as an expert for Maryland, and Shanske offers the interpretations and implications those facts have for the related legal questions.

## Legal Frame

First, we want to remind readers that state taxing power is primary, and thus, as both a matter of common sense and doctrine, any federal displacement of state taxing power is disfavored.[1]

Second, we want to remind readers that the Internet Tax Freedom Act protects electronic commerce, which means "any transaction conducted over the Internet or through Internet access" from discrimination. Meanwhile, Maryland taxes digital advertising services.[2] As Wilbur demonstrated,[3] and as the Maryland comptroller's office subsequently codified in Technical Bulletin No. 59, these two categories are not the same.[4] The Maryland tax excludes gross receipts of certain ads delivered over the internet (for example, a classified ad on Craigslist) and includes gross receipts of certain ads not delivered over the internet (for example, DirecTV addressable TV ads conveyed to consumers by satellite broadcast signals).

It would be a funny kind of discrimination that reaches some, but not all, of the supposed disfavored class. For example, if Congress tells states that they may not impose a discriminatory tax on dogs, and then a state taxes Great Danes and ponies but does not tax Chihuahuas, it would not look like the state is imposing a discriminatory tax on dogs. To be sure, Great Dane owners would be annoyed and would complain that they are being discriminated against. Nevertheless, the tax would plausibly seem to be on animals beyond a certain size, which may be reasonable given the difference in resources such creatures consume.

One may object that this is not a good reason to tax horse-size dogs, but this brings us back to our first point. It is not the role of courts to interpret the scope of federal preemption creatively to expand the dislocation.

[1] Darien Shanske and Young Ran (Christine) Kim, "Digital Barter Taxes: A Legal Defense," *Tax Notes State*, June 17, 2024, p. 865.

[2] See later discussion.

[3] Cameron Browne, "Maryland Tax Court Concludes Evidentiary Hearings on Digital Ad Tax," *Tax Notes Today State*, Aug. 1, 2025.

[4] Comptroller of Maryland, Technical Bulletin No. 59, "Digital Advertising Gross Revenues Tax" (July 11, 2025).

But also, crucially, unlike our fanciful scenario involving dogs, a tax on digital ads makes a lot of sense. Analytically, the ads in question are ensconced in a larger ecosystem of persuasion and prediction. It is not hard for anyone except lawyers to distinguish an old-school ad from a digital ad next to a news story that was so populated because the user recently searched for a related keyword. (Below, we cite external explanations of those differences in more detail.)

There are sound reasons to tax the gross receipts of this type of business. As Shanske has emphasized, the gross receipts from the ads are a reasonable proxy for untaxed consumption, since advertising often subsidizes consumer access to nominally free information and entertainment.[5] One might believe that the profits generated from the ads are not being effectively taxed in any other way. Also, one might believe that such a business model may be harmful for a number of reasons that have been documented elsewhere, and thus a state government like Maryland's might reasonably earmark the revenue from such a tax for education reforms.[6] Again, a reasonable person could well disagree with those policy conclusions, but to return to our first point, states are permitted such reasonable surmises. Congress has to be clear if it is to take such power away — and it has not been.

## Reminder: What the ITFA Does and Does Not Do

Before going deeper, we should be clear on what the ITFA does and does not do. On the one hand, the ITFA protects an internet seller (think Amazon) from being charged a higher tax than a main street seller that offers the same thing (say, books).

On the other hand, the ITFA did not make the entire internet a duty-free zone. When the ITFA was first written (and, indeed, last revised), internet sellers were protected by the *Quill* physical presence rule. This meant that without physical presence, such remote sellers did not need to collect the use tax, which gave them a big competitive advantage. The ITFA went out of its way to make clear that it was not enshrining the *Quill* rule because it proscribed only discrimination and, therefore, states were free to treat internet sellers the same as physical sellers. In other words, the statute was designed to create a level playing field, not one that favors electronic commerce.

Furthermore, and with the same upshot, when Congress enshrined "discrimination" in the ITFA in 1998, it was doing so against the background of that term's plain meaning, namely, "discrimination . . . assumes a comparison of substantially similar entities."[7]

Finally, Congress went out of its way to insist that the ITFA did not undo the balance between state and federal power.[8]

And so here we are, many years later, with the DAGR. Is it more like a tax that discriminates against electronic commerce? Or is it more a nondiscriminatory tax on something else that implicates some electronic commerce, but not in a manner that discriminates against it? Congress instructs that we are to dislocate state taxing power only if it has been extremely clear.

## Advertising Facts

Evidence related to a tax on digital advertising services begins with the statute. The DAGR statute does not define the terms "advertising" or "digital advertising," which are the bases of the tax.[9] It does say that "'digital advertising services' includes advertising services on a digital interface, including advertisements in the form of banner advertising, search engine advertising, interstitial advertising, and other comparable advertising services." The latter catchall category is a substantial gray area.[10]

And so we are looking to understand the term "advertising" in a way that encompasses three included categories (banner, search engine, interstitial) while allowing for sensible elaboration. Starting with the term "advertising," definitions vary greatly across sources and

[5] *See generally* Kim and Shanske, "State Digital Services Taxes: A Good and Permissible Idea (Despite What You Might Have Heard)," 98 *Notre Dame L. Rev.* 741 (2022).

[6] *E.g.*, Jonathan Haidt, *The Anxious Generation: How the Great Rewiring of Childhood Is Causing an Epidemic of Mental Illness* (2024).

[7] *General Motors Corp. v. Tracy*, 519 U.S. 278, 298-299 (1997).

[8] *See* ITFA section 1101(b).

[9] Md. Code Ann. Tax-Gen. section 7.5-102(a).

[10] Md. Code Ann. Tax-Gen. section 7.5-101(e)(1).

encompass distinct ranges of taxable activities. The broadest definition uses advertising to refer to any commercial speech. Most businesspeople use "advertising" much more narrowly, to distinguish promotional speech in paid media (that is, promotional communication opportunities purchased from other parties, normally called "publishers," subject to contractual terms negotiated with the sellers) from promotional speech in owned media (that is, promotional communication opportunities generated by and controlled by the speaking organization) or earned media (uncontrolled speech by third parties without contracts). Businesspeople usually use "marketing communications" to refer to the broader range of all promotional speaking opportunities, among which paid advertising is an important but particularly expensive variety. Given the range of interpretations and the variance in published definitions, Wilbur's expert report offered a relatively narrow definition of advertising as "a publisher's conveyance of an advertiser's promotional message to a potential recipient or audience."[11] Wilbur opined that the perspectives of all three parties — advertiser, publisher, and advertisement recipient — matter, but advertiser perspectives should matter most because advertisers pay for advertisements. Advertisers care most about the profits they may realize from advertising campaigns.

Next we have digital. The dictionary definition of digital is plain: It refers to the property of data being stored or transmitted using binary formats, that is, as sequences of zeros and ones. All internet data are digital because all computer networks are digital, but crucially, not all data is conveyed using the internet. In fact, publishers convey digitally encoded advertisements to consumers using various means without traversing the internet. For example, the United States completed its transition to digital broadcast television signals in 2009, so essentially all broadcast television advertisements have been stored, conveyed, decoded, and rendered digitally since 2009.[12] Another prominent example is digital terrestrial and satellite radio, which embed digital advertisements within digital audio signals. A third prominent example is television advertisements conveyed on private digital networks by multichannel video programming distributors (MVPDs), a mouthful of an acronym that refers to digital TV distributors like Comcast, digital satellite TV distributors like DirecTV, and digital fiber optic network TV distributors like Verizon Fios.[13] Cable television systems used analog signals before the industry began its transition to digital signal distribution in the 1990s, as digitization enabled more efficient network usage.

Many advertising professionals use the term "digital advertising" to refer to internet advertising, a subcategory of digital advertising. An explanation for this usage is that the first digital advertisements in the mid-1990s were conveyed using the internet, so the term was accurate upon its inception. However, there is no principled basis for the continued limiting of the adjective "digital" to describe internet advertising only, given that prominent means of digital media have conveyed digital advertising without the internet for decades, as described above.

The most important aspect of digital advertising for advertiser campaign profitability is programmatic advertising practices, which are defined as the use of technology to *automate* and

[11] As will be explained more below, Wilbur provided a narrow interpretation on the theory that the nonpaid media are too dissimilar to be compared to the Maryland Legislature's examples of banner advertising, search engine advertising, and interstitial advertising.

[12] It is worth noting in this regard that the DAGR statute "does not include advertisement services on digital interfaces owned or operated by or operated on behalf of a broadcast entity or news media entity," in which "'news media entity' means an entity engaged primarily in the business of newsgathering, reporting, or publishing articles or commentary about news, current events, culture, or other matters of public interest." Md. Code Ann. Tax-Gen. section 7.5-101(e)(2). The statute defines broadcast entities as "primarily engaged in the business of operating a broadcast television or radio station." This proviso suggests that these business models do not raise the same policy concerns, such as causing externalities or generating supranormal returns. In our examples we assume that certain entities (like DirecTV) are nonbroadcast entities (because they require subscriptions) and are non-news-media entities.

[13] MVPDs are distinguished from "virtual MVPDs," which convey traditional broadcast programming over the internet, including such prominent services as Hulu and YouTube TV.

*optimize* advertising services.[14] A distinguishing characteristic that banner advertising, search engine advertising, and interstitial advertising all share is the availability and typical use of programmatic advertising by both buyers and sellers of advertising opportunities. The automation and optimization of advertising decisions increase advertiser profit and seller revenue significantly, leading to better, faster, cheaper, and more efficient marketplaces. Industry reports indicate that by 2024 programmatic ads dominated (92 percent) spending on digital ads.[15]

Rob Leathern, an advertising executive with experience at Google, Meta Platforms (Facebook's parent company), and LinkedIn, wrote a recent article, "The AI Ads Cash Machine," that describes the models, data, and practices constituting programmatic advertising practices.[16] As he puts it:

> For two decades, Google and Meta have run auctions in which models estimate the value of pairing a particular person, in a particular context, with a particular ad. Money has kept changing hands because these ads have yielded outcomes for advertisers — sales, leads, website views. That marriage of prediction and pricing turned machine learning from a research curiosity into a cash machine, long before anyone ever used ChatGPT.

Leathern further distinguishes modern advertising practices by saying that "advertiser-selected targeting [is] no longer that important," because increasingly advertisers rely on automated systems to optimally decide which consumers to target with ads. Leathern continues:

> The canonical blueprint is DLRM, or Deep Learning Recommendation Models, a neural network built for ads. It was engineered precisely for this: it converts user IDs, ad IDs, and other categorical data into vectors that capture their meaning, then learns how those vectors interact to predict clicks and conversions. . . . Every ad serving decision balances exploiting known high-performing matches against exploring potentially better ones; but with billions of daily decisions, the platform can afford to be patient. A fraction of traffic is always devoted to exploration: showing ads that models are uncertain about, serving creative variants that haven't been fully evaluated, or testing entirely new advertiser-audience pairings. This isn't random; it's principled uncertainty sampling that targets the queries where learning has the highest expected value. The beauty is that exploration pays for itself: even "failed" experiments generate the labeled data that sharpen future predictions.

Leathern's analysis is cogent, accurate, and helps to explain why programmatic advertising practices are sufficiently different from nonprogrammatic practices that they represent a paradigm shift in advertising.

The programmatic distinction is not just academic. Programmatic advertising practices have had dramatic implications for the largest advertising sellers. Economists at the Federal Reserve Bank of St. Louis recently reported that the two largest advertising sellers, which almost exclusively employ programmatic selling practices, collected approximately 1.4 percent of U.S. GDP in advertising revenue in 2023.[17]

[14] The Interactive Advertising Bureau (IAB) is the preeminent industry advocacy nonprofit organization. It is unique in that it is funded by more than 700 advertising buyers, publishers, and intermediaries. IAB, "Our Story" (last visited Oct. 15, 2025). The IAB's definition of programmatic advertising is worth reproducing in full:

> Media or ad buying that uses technology to *automate and optimize*, in real time, the ad buying process. This ultimately serves targeted and relevant experiences to consumers across channels. On the back end, algorithms filter ad impressions derived from consumer behavioral data, which allows advertisers to define budget, goal, and attribution and optimize for reduced risk while increasing ROI. [Emphasis added.]

IAB, "Glossary: Digital Media Buring & Planning" (undated).

Note how this definition does not specify the internet, but it does specify automation, optimization, and real-time use of customer data.

[15] IAB and PwC, "Internet Advertising Revenue Report" (Apr. 2025).

[16] Rob Leathern, "Rob's Notes 29 — The AI Ads Cash Machine," Rob's Notes (Sept. 22, 2025).

[17] Ricardo Marto and Hoang Le, "The Rise of Digital Advertising and Its Economic Implications," On the Economy blog, Oct. 10, 2024.

The comparison of programmatic advertising to nonprogrammatic advertising was the basis for various courtroom comparisons of a Tesla, a race car, and a horse and cart. These means of transportation can be construed as similar only at a high level of generality. Any means of transportation has two primary purposes: the first is safety, and the second is transportation. (If you doubt that safety is primary, ask yourself if you would willingly ride with a cab driver who drives unsafely.)

Wilbur compared programmatic advertising to the Netflix video recommendation system, the Gmail spam filter, and the Waymo autonomous (self-driving) taxi service. All three analogies leverage automation, to be sure, but they also leverage statistical learning to algorithmically identify what combinations of factors optimize key and relevant outcomes, such as transport efficiency and safety, in the case of Waymo, and then automatically exploit those learnings to maximize objective functions. Netflix uses data from all users' recommendations and video consumption to refine future recommendations to maximize future video consumption. Gmail uses data from all users' messages and spam indications to improve future spam classifications to minimize unwanted message reception. And Waymo uses data from all vehicles' driving choices and traffic accidents to optimize all vehicles' future driving choices and minimize accidents.[18]

An autonomous taxi service is substantially different from a horse and cart because every autonomous taxi is operated by a central automated system that learns from the experiences of all the taxis in the fleet, then uses that information to modify all autonomous taxis' actions to increase safety and transportation performance. Meanwhile, every horse and every cart driver is an individual that can learn only from their own observations and experiences and, therefore, cannot realize the same performance improvements based on massive datasets. Here, the autonomous taxi service analogizes to programmatic advertising practices, and the horse and cart analogizes to nonprogrammatic advertising practices.

## Back to the Statute

We know that the statute taxes digital advertising services — a category broader than internet advertising — and specifically ads "on a digital interface," including "banner advertising, search engine advertising, interstitial advertising and other comparable advertising services." So far so good, but there is a major legal implication here. If a company earns gross receipts from placing a programmatic banner ad on an internet website, that company must pay the tax. But the tax also may apply if this programmatic digital banner is *not* transmitted over the internet. In such a case, the banner is not covered by the ITFA's prohibition on discrimination.[19] What can such a non-internet digital banner be? Past examples include digital advertisements distributed within satellite TV broadcasts,[20] broadcast radio signals,[21] and within video game cartridges.[22] Some offline digital ads may or may not be programmatic in nature. The ITFA concerns protecting commerce over the internet.[23] Thus, the Maryland tax is taxing digital ads, a category that is, at minimum, broader than internet ads.

The taxpayers have obfuscated distinctions between advertising types by arguing that "all advertising is advertising." This statement is a tautology; the existence of a category does not establish that all categorized elements are substantially similar in all relevant comparisons. It is like saying that "all lawyers are lawyers," and therefore hiring a criminal defense attorney is substantially similar to hiring a corporate general

[18] "Instead of calling Waymo a safer or better driver, we shifted to the world's most experienced driver. This put the focus on Waymo's millions of miles of testing and real-world experience, building confidence in their technology and propelling them ahead of competitors." Maslansky & Partners, "Waymo" (undated).

[19] ITFA section 1101(a)(2).

[20] Invidi, "DirecTv Eyes Local Ads on 50 Channels in 50 Cities" (undated); Matthew Keys,"Directv Wins Tech Emmy Awards for Signal Reliability, Pause Ads," TheDesk.net, Feb. 22, 2024; George Winslow, "DirecTV Brings Programmatic Ads to Satellite Inventory," TVTech, Jan. 10, 2025.

[21] Navteq, "NAVTEQ to Power Garmin Devices With Real-Time Traffic Through HD Radio™ Technology," PR Newswire, Dec. 21, 2011.

[22] Tim Parkin, "In-Game Advertising: A Marketer's Guide," MarTech, Mar. 10, 2023.

[23] ITFA section 1105(3): "The term 'electronic commerce' means any transaction conducted over the Internet or through Internet access, comprising the sale, lease, license, offer, or delivery of property, goods, services, or information, whether or not for consideration, and includes the provision of Internet access."

counsel. The principle can be illustrated hierarchically by extrapolating from "all advertising is advertising" to say that "all marketing is marketing," "all business services are business services," "all things are things," or "all concepts are concepts." The existence of a hierarchical classification (advertising, for example) does not establish similarities between co-classified objects (for example, newspaper advertising and search engine advertising). It establishes co-classification only within a hierarchy. Whales and mosquitoes are both living creatures; does that mean whales are similar to mosquitoes? Of course, it depends on the context and criteria for comparison, but most plainspoken people might point out significant differences in size or ecosystem or complexity. Among ads, yes, all ads are ads (tautology), but some ads are digital, some are not; some are delivered over the internet, and some are not; some ads are programmatic, some are not. The relevant distinctions must be resolved before similarity can be evaluated.

What about the catchall category "other comparable advertising services"? We acknowledge that there is room for better drafting here, but we should also note that the problem is fundamental. It appears that the Maryland Legislature did not want to treat comparable transactions differently and was aware of the rapid pace of technological change in this area, and thus it reasonably used a more flexible standard.

What do items subject to tax have in common so that regulators and taxpayers know how to continue the list? As Wilbur has explained, the common characteristic (programmatic) from the most important perspective (advertiser's) shared by banner advertising, search engine advertising, and interstitial advertising is the best basis by which to identify similarity with other advertising services. The comptroller of Maryland has adopted Wilbur's analysis without apparent modification.[24]

Recall that programmatic means that an ad campaign can be *optimized* and done so *automatically*.[25] To illustrate, consider wanting to get consumers to purchase one's mortgage product for their home purchase. Individual consumers rarely need information on such services, and so it is crucial to advertise to prospective borrowers within the narrow window of time when they are shopping for a mortgage, before they have signed a loan. No doubt, traditional advertisers try to figure this out, but they have limited data and limited ability to react to new information in real time. One can imagine placing an ad in a magazine about home repair but that is noisy — and slow. Now suppose having certain search terms, like "fixer upper," trigger an immediate ad. Indeed, the optimization would go further still, as more might be learned about how groups of similar consumers respond to particular advertising content, timing, and delivery choices. Thus, programmatic ads optimize automatically, and on the basis of an entire network, using measurable successes to learn profit-maximizing advertising strategies.

This distinction is sensible as a policy matter. Programmatic ads generate enormous returns from a whole network of users, and thus a state might think it right to tax the gross receipts because they reflect the "attentional prices" collected by the platform. Or a state might conclude that such ads are indicative of nominally free consumption or are part of a problematic business model. And we should emphasize that this distinction is clearly of internal relevance to the industry; it is not a product of litigation.

Note that the focus on programmatic ads implies that certain ads transmitted over the internet are *not* subject to tax because they are not programmatic. Consider a static job ad on Craigslist that is not optimized using data; such an ad would not be taxed. The claim that the DAGR discriminates against the internet in violation of the ITFA requires an odd notion of discrimination, because the DAGR taxes only *some* ads transmitted over the internet while also taxing some ads *not* transmitted over the internet. In short, this is not really a close case as to the

[24] Technical Bulletin No. 59, *supra* note 4.

[25] IAB glossary, *supra* note 14.

plain meaning of either statute but, if anyone were to think it close, that is why federalism concerns require a presumption against broad preemption.

## Response Round: From Waymo to Shoes to Petting Zoos

There are a few related arguments that Shanske has often heard in connection with why the DAGR should fail. We think that additional precision as to the industry clarifies their weaknesses.

### Waymo Cabs

Are not Waymo cabs still cabs? And if so, aren't programmatic ads still ads? Yes, programmatic ads are ads. But programmatic ads are different for advertisers than nonprogrammatic ads. First, from the perspective of a business, programmatic ads are different from nonprogrammatic ads. This is why those that pay for programmatic ads do not view them as generally comparable to other ads, regardless of how the ads may look to consumers. Or put another way, nonprogrammatic ads do not offer automated learning opportunities. Accordingly, the purchasers of programmatic ads pay different amounts in different ways for different services. Common programmatic advertising business models include publisher self-serve, programmatic guaranteed, preferred deals, private marketplace, and open exchange/RTB/ad network.[26] Such distinctions are common, normal, and expected in industry parlance and practice because they indicate important dissimilarities between business models of programmatic ads.

Second, if Waymo cabs provided haircuts *and* transportation services, the haircuts should still be taxable if for some reason Congress has preempted taxes on cab rides. Similarly, if platform companies are facilitating barters for data, the barters should be taxable even if the internet advertising may not be.

### Ambiguity

According to press reports, professor Richard Pomp asserted in the Maryland litigation concerning the ITFA that "no one would intend to create a statute to make ambiguity,"[27] and thus the ITFA should be interpreted maximally as to ads. Pomp has said something similar in his own voice at least once.[28] And so we will address this point.

First of all, legislation often is ambiguous whatever the legislators intend — that is just a limitation of language. Second, aware of this limitation, legislators often use broad language whenever possible. Aristotle recognized these issues.[29] There is at least one more recent kind of ambiguity that is arguably more newfangled, which is its strategic use to pass legislation.[30] It is helpful if different legislators all believe the legislation means what they plausibly think it does.

In the case of the ITFA, we have a poorly drafted statute[31] meant to capture an evolving area, one in which the issue of the preemption's scope was a live issue.[32] Thus the notion that this statute is ambiguous is not just true on its face but overdetermined by its drafting history. We think the best thing to be said for this argument is that Pomp understands well that if the statute were ambiguous, the presumption against broad preemption should win out. Or, even before that, the plain meaning of "discrimination" and the ordinary tools of statutory interpretation indicate that this particular statute, which taxes certain programmatic ads, does not discriminate against the internet. Hence the need for shortcircuiting these analyses with an implausibly maximalist version of discrimination.

[26] IAB, "2025 Digital Video Ad Spend & Strategy Full Report" (July 15, 2025).

[27] Browne, "Maryland Tax Court Mulls Testimonies in Digital Ad Tax Challenge," *Tax Notes State*, Aug. 4, 2025, p. 345.

[28] David D. Stewart, Lauren Loricchio, and Richard D. Pomp, "The Fight Over Maryland's Digital Advertising Tax, Part 2," *Tax Notes Talk* (Nov. 18, 2021).

[29] Aristotle, *Rhetoric*, Book I, ch. 13.

[30] Victoria Nourse, "Misunderstanding Congress: Statutory Interpretation, the Supermajoritarian Difficulty, and the Separation of Powers," 99 *Geo. L.J.* 1119, 1129 (2011) ("If legal ambiguity is the necessary cost of passing a crucial budget resolution, rational legislators will choose legal ambiguity.").

[31] See, e.g., the vestigial definition of a Bit tax at ITFA section 1105(1).

[32] *See* ITFA section 1101(b).

## Shoes

In *Trinova*, Justice Anthony M. Kennedy observed, citing a law professor: "A tax on sleeping measured by the number of pairs of shoes you have in your closet is a tax on shoes."[33] This clever thought seems to suggest that the value of ads, if used even in part as a proxy for something else, is really a tax on ads. Critics of digital services taxes love this quote because it suggests that taxing barters (or anything else) through taxing some ads is not permitted.[34]

There are many reasons not to get too carried away by the implications here. First, the quoted claim is false if taken to mean that there cannot be taxation by proxy. Such taxation is common. Consider IRC section 274(n)(1), which grants only a 50 percent deduction for business expenses related to food and beverages. This reduction is a proxy for the fact that a share of many meals paid for by employers should be included as income because, among other things, we all have to eat anyway. Despite the substance here that this is about income, the legal analysis would start with the formal point that this is a deduction and deductions are a grace.[35] In tax, as in other areas of law, substance can trump form, but not usually.

Second, in context, the quotation is not really supportive of the taxpayer position that we should ignore the formal incidence of the tax. To be sure, Kennedy shares this observation about shoes to reject a formal argument by the state that the name of a tax should govern, but he also rejects the taxpayer's formal argument, namely, that the taxpayer knows where economic value is created. In fact, that is the key holding of the case. That is, even though a tax seems to tax property (through the property factor), when the state plausibly claims that property is instead a proxy for value (or income), then the state wins unless the taxpayer amasses formidable evidence that a gross distortion results.[36] Thus the actual holding of *Trinova* is that states can use reasonable proxies.

Third, interestingly, the source of this quotation, Elvin E. Overton, a professor at the University of Tennessee Law College, understood these points and others favorable to the DAGR.[37] Here is the underlying quotation in full:

> This leads to the third truism, which is that a tax is as much a tax on the measure as it is a tax on the so-called subject. A tax on sleeping measured by the number of pairs of shoes you have in your closet is a tax on shoes. A tax on doing something only because things are from outside the state is a tax on interstate commerce. But a tax on driving a car in Tennessee, even though the car was manufactured in Detroit, is not a tax on interstate commerce. You all know that. I even pay a tax on my British car, but that is not a tax on imports at all. But if I paid a tax a penny more because I was driving a British car, it would be a tax on imports.[38]

In other words, a tax that happens to coincide with a measure much of the time is not a tax on that measure. That is also the implication of Overton's second truism:

> A tax on selling is not a tax on interstate commerce unless it is because of interstate commerce. Therefore, I say a tax on eating is not a tax on butter, even though you happen to be eating butter. Of course, if the tax on eating is levied only because you eat butter, then it is a tax on butter.[39]

And so, again, a tax on programmatic ads is not a tax on internet ads even if many such ads are on the internet because it is not a tax on the internet.

[33] *Trinova Corp. v. Department of Treasury*, 498 U.S. 358, 374 (1991).

[34] *See, e.g.*, Stephen P. Kranz et al., "California Legislator Considers Digital Advertising Tax," McDermott, Will & Schulte (Mar. 29, 2024).

[35] *New Colonial Ice Co. Inc. v. Helvering*, 292 U.S. 435, 440 (1934).

[36] As Kennedy put it: "The Constitution does not require a formalistic analysis resulting in a penalty for Michigan's selection of an easier calculation method for its taxpayers." *Trinova*, 498 U.S. at 377.

[37] Erby Jenkins, "State Taxation of Interstate Commerce," 27 *Tenn. L. Rev.* 239, 242 (1960) (Jenkins was the coordinator of the State Taxation of Interstate Commerce panel, which included Elvin E. Overton.).

[38] *Id.*

[39] *Id.*

## And Petting Zoos

Another eminent law professor, Hayes R. Holderness, has challenged the notion that the taxpayers subject to the Maryland tax have a different business model than other advertisers.[40] Holderness makes at least three related claims in a *Tax Notes State* article.

1. There is only one model: "Radio and television providers collect information about their users, then process that information to provide advertising services that support the providers financially."
2. If anything, the digital ad model is less intrusive because customers can opt out.
3. Further, free attractions are offered all the time in return for attention and information. For example, consider "a gas station providing free access to a petting zoo to draw customers in. Customers do not engage in an exchange when the gas station observes the license plates and demographics of the customers to better understand its clientele."

These are all strained analogies. First, the key to the distinction is whether or not the ad is programmatic, not its medium. So, if DirecTV provides automatic and optimized digital advertising campaign management to its advertiser clients, it will be subject to Maryland's tax, including on signals transmitted from satellites. Thus, claim 1 is a red herring. Many digital ads — say, most radio ads — are not programmatic and therefore not taxed; if they are programmatic (and digital), they are taxed. This also disposes of argument 3, which relies on a business model that could hardly be less programmatic. Will the gas station automatically adjust the price of gas for customers who also interact with the petting zoo based on a more global dataset of gas station visitors? As for claim 2, as a principle of taxation and constitutional law, we do not see why states cannot rely on the fact that most consumers do not opt out and many apps use the data they collect.[41]

There also may be more consensus here than there appears. If Holderness is making the argument that taxing barters individually is thorny in theory and practice, then we and others agree.[42] However, in the end, the Maryland tax — and all other taxes or proposals that we know of — is a tax on advertising revenue in the *aggregate*. We think the argument that this aggregation is a reasonable proxy for aggregate value is pretty good.[43] Note that there is a strong argument that advertising revenue is too narrow a base on which to tax the value of the networked platforms,[44] and we agree that may be the case. But, if it is the case, does that mean that states should not or cannot tax a substantial portion of this broader base as a first step? We think it would be illogical to insist that as a matter of law and theory states cannot start with first steps.

## Conclusion

State legislatures operate under enormous pressure to provide and pay for frontline governmental services. The decentralized provision of many essential services is a defining characteristic of our federation and our constitutional law. We think that taxes on the gross receipts generated by programmatic ads is a good idea, but even if not, and even if

[40] Hayes R. Holderness, "Misconstruing Digital Advertising Taxes as Consumption Taxes," *Tax Notes State*, July 1, 2024, p. 7.

[41] Ivan Dimitrov, "Invasive Apps," pCloud, Mar. 5, 2021 (listing many invasive apps); Cisco, "Generation Privacy: Young Consumers Leading the Way," Consumer Privacy Survey (2023) (data that most consumers are not responding to data privacy concerns).

[42] *See, e.g.*, Amanda Parsons, "Taxing Social Data," University of Colorado Law Legal Studies Research Paper No. 25-20, at 36 n.182 (last revised Aug. 11, 2024).

[43] See Shanske and Kim, *supra* note 1, and especially David R. Agrawal and William F. Fox, "Taxing Goods and Services in a Digital Era," 74 *Nat'l Tax J.* 257 (2021).

[44] See Parsons, *supra* note 40, at 38, and generally see the following passage, which advocates for taxes on the volume of data:

> A data tax should be a component of any comprehensive efforts to tax social data value creation because data taxes recognize that social data and its resulting prediction value cannot be fully distilled in exchange value terms. Data taxes recognize that companies accrue economic value from social data even in the absence of income or revenues. This includes the many $0 transactions that occur in the digital economy when users are exchange their data for free goods and services. When a user runs a Google search, they do not pay Google cash, but they exchange data. Income and revenue taxes do not impose taxes on these economic gains, but data taxes do. This provides an important opportunity to raise revenues and redistribute economic resources from companies as they are chase growth over monetary income. [Internal citation omitted.] *Id.* at 42.

imperfectly executed, states should be allowed to persist and refine how they raise revenue unless Congress *clearly* prohibits their approach — and Congress has not. ■