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LEATHERS v. MEDLOCK: DIFFERENTIAL TAXATION OF THE PRESS SURVIVES UNDER THE FIRST AMENDMENT

Three provisions in the United States Constitution specifically address communications. The first provision authorizes Congress to establish post offices and the second espouses copyright protections. Both of these provisions facilitate the propagation of information through direct government activism. The third, guaranteeing freedom of speech and of the press, seeks similar ends but through different means. Instead of furthering the spread of knowledge through active intervention, the government promotes the ideals of the First Amendment by restraining its actions. Government intervention in this arena is inimical to the very principles sought to be protected, those of freedom of speech and of the press, because the institutions

1. U.S. CONST. art. I, § 8, cl. 7. This provision enabled the federal government to enter into the common carrier business. ITHIEL DE SOLA POOL, TECHNOLOGIES OF FREEDOM 17 (1983).

2. U.S. CONST. art. I, § 8, cl. 8. The so-called Copyright Clause gives Congress the power “To promote the Progress of Science . . . by securing for limited Times to Authors . . . the exclusive Right to their respective Writings.” Id. This provision represents the Founders’ recognition of intellectual property and their desire to shield it from censorship or mass reproduction. POOL, supra note 1, at 16-17.

3. POOL, supra note 1, at 18.

4. The First Amendment to the Constitution provides in pertinent part that “Congress shall make no law . . . abridge the freedom of speech, or of the press.” U.S. CONST. amend. I. This amendment was a direct rejection, by the newly-formed U.S. government, of several British attempts to impose restrictive authority over the American press. POOL, supra note 1, at 16. The term “press” as used in the context of this Note refers to the “institutional press”—newspapers, magazines, radio, television, and any other member of the mass media that reports the news. See Archibald Cox, Freedom of the Press, 1983 U. ILL. L. REV. 3, 3.

The distinction between the dual guarantees of “speech” and “press” has long been a subject of debate among legal scholars. Compare Potter Stewart, “Or of the Press,” 26 HASTINGS L.J. 631 (1975) (stating that it is a constitutional redundancy if the free press guarantee means no more than the freedom of expression, and suggesting that it is this unifying principle that underlies the Supreme Court’s ideology when deciding First Amendment cases dealing with the organized press) with Melville B. Nimmer, Introduction—Is Freedom of the Press A Redundancy: What Does It Add To Freedom of Speech?, 26 HASTINGS L.J. 639 (1975) (pointing out the many instances where the Supreme Court failed to discern or articulate a distinction between the freedoms of speech and the press when a distinction of that sort was possible).

5. POOL, supra note 1, at 18; see also GILES J. PATTERSON, FREE SPEECH AND A FREE PRESS (1939).
that are founded on these principles often serve as important restraints on government.\textsuperscript{6}

Both state and federal governments have successfully pierced the veil of constitutionally-imposed First Amendment protections by using their power to levy and collect taxes. Regarding the press, these taxes generally take the form of sales and use taxes.\textsuperscript{7} While it is not uncommon for a state to grant a specific tax exemption to certain members of the press, thus mitigating potential First Amendment conflicts,\textsuperscript{8} even those exemptions are subject to the principles of the Free Press Clause.\textsuperscript{9} Recognizing that First Amendment tensions continue to exist as states impose new taxes and exemptions on the press, the Supreme Court has established the standard that the burden imposed by a particular piece of tax legislation on the press must be necessary to serve a "compelling" or "overriding" governmental interest in order to be held constitutional.\textsuperscript{10}

Before this "strict scrutiny" standard is applied, however, the Court first requires proof that the tax has in fact substantially burdened the press.\textsuperscript{11} The Supreme Court has never suggested that the press is immune from the general forms of taxation necessary to sustain the operations of the government.\textsuperscript{12} Instead, it has identified four specific factors which, if present in a

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\textsuperscript{6} See Stewart, supra note 4, at 634.


\textsuperscript{8} See, e.g., Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221 (1987) (exempting newspapers and certain magazines from a state sales tax); Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575 (1983) (exempting newspapers from the first $100,000 spent by publishers on an ink and paper use tax).

\textsuperscript{9} See, e.g., Minneapolis Star, 460 U.S. at 592 (holding that the tax scheme was unconstitutional because the combined effect of the tax and exemption on the press was discriminatory); Arkansas Writers', 481 U.S. at 233 (same).

\textsuperscript{10} Minneapolis Star, 460 U.S. at 582. This standard is generally referred to as the "strict scrutiny" standard. The Supreme Court has applied this standard in several different types of cases involving infringements upon First Amendment freedoms. See generally Hernandez v. Commissioner, 490 U.S. 680 (1989) (stating that a compelling governmental interest must justify the burden on the Free Exercise Clause of a disallowance of a federal income tax deduction for certain payments to a religious organization); Arkansas Writers', 481 U.S. at 221 (stating that differential taxation of the press within the same medium may only be justified by a compelling governmental interest); United States v. Lee, 455 U.S. 252 (1982) (stating that the imposition of social security taxes upon a member of the Amish faith may be a justifiable limitation on religious liberty if it meets the strict scrutiny standard).

\textsuperscript{11} Minneapolis Star, 460 U.S. at 582-83. While any tax is a burden, the Court has "long upheld economic regulation of the press." Id. at 583.

state's tax scheme, raise the presumption of unconstitutionality because of the substantial burden placed upon the press. This two-prong analysis—identification of the discrimination and application of the strict scrutiny standard—has become the test to quash unconstitutional means of abridging the freedom of the press through discriminatory tax treatment.

The nondiscrimination principle provides that discriminatory tax treatment of the press is presumptively unconstitutional unless the state proves it has a compelling governmental interest. Whether a particular tax scheme is discriminatory is determined by distinguishing between a generally applicable tax and a “differential” or “selective” tax. Differential taxation of the press is generally defined as taxing members of the media in a manner different than that customarily accorded non-media businesses. It is presumed that evidence of differential taxation of the press is violative of the nondiscrimination principle and that such taxation is thus an unconstitutional interference with the press as an institution protected by the First Amendment. If properly employed, the nondiscrimination principle, exemplified by the two-prong analysis, maintains an equitable balance between a government's privilege to tax and the press' guaranteed freedoms under the Free Press Clause.

The nondiscrimination principle has enjoyed most of its development in our legal system within the last six decades. is the most recent Supreme Court decision examining this doctrine. The

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13. See Grosjean, 297 U.S. at 250-51 (identifying illicit legislative intent and “targeting” as unconstitutional types of tax discrimination on the press); Minneapolis Star, 460 U.S. at 583 (identifying special taxes applicable to the press alone as unconstitutional types of tax discrimination on the press); Arkansas Writers', 481 U.S. at 231 (identifying content-based regulation as an unconstitutional type of tax discrimination on the press). Evidence of any of these four types of discrimination raises a presumption of unconstitutionality in a tax scheme unless the state satisfies a strict scrutiny review. See supra note 10 and accompanying text.


15. Id. at 582-85.


17. See Minneapolis Star, 460 U.S. at 585.

18. The first case to deal directly with this issue was decided in 1936. See Grosjean v. American Press Co., 297 U.S. 233 (1936).

19. 111 S. Ct. 1438 (1991). Justice O'Connor delivered the opinion of the Court, which was joined by Chief Justice Rehnquist and Justices White, Stevens, Scalia, Kennedy, and Sou-
Court addressed the claim of a group of cable television operators who argued that a State's sales and use tax violated the operators' First Amendment right to freedom of the press. Prior to Leathers, the Supreme Court decided three cases that set out to define the scope of differential taxation as it applies to the press. Through these cases, the Court articulated the extent to which taxes that are selectively applied to different members within the same medium are permissible under the First Amendment.

First in Grosjean v. American Press Co., the Court struck down a license tax based on a newspaper's circulation because it was a deliberate attempt to limit the circulation of information by placing a tax upon a select group of newspaper publications. In Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue, the Court held a special use tax on ink and paper to be an impermissible violation of freedom of the press not only because it targeted a small group of newspapers, but also because it singled out the press as an institution for differential treatment. This result was reaffirmed four years later in Arkansas Writers' Project, Inc. v. Ragland, where the Court invalidated a sales tax that selectively targeted one particular group of magazines by exempting other classes of magazines based solely upon their content.

ter. Id. at 1440. Justice Marshall filed a dissenting opinion which was joined by Justice Blackmun. Id. at 1447.

20. Id. at 1441. Not only is the federal government prohibited from regulating the press under the First Amendment, but the states have also been subject to this restriction under the Fourteenth Amendment's Due Process Clause, U.S. Const. amend. XIV, which was held to have extended the First Amendment restrictions to the states in Gitlow v. New York, 268 U.S. 652, 666 (1925).

21. Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 233 (1987) (holding the selective application of the state's sales tax to only certain magazines unconstitutional); Minneapolis Star, 460 U.S. at 591-93 (holding a special tax on the use of ink and paper unconstitutional); Grosjean, 297 U.S. at 250 (holding a license tax based on a publication's advertising and circulation unconstitutional).

22. The license tax in Grosjean burdened only those newspapers with a circulation over 20,000, and not those newspapers with a circulation of less than 20,000. Grosjean, 297 U.S. at 244-45. The Minnesota ink and paper tax burdened only those newspapers outside of a $100,000 exemption. Minneapolis Star, 460 U.S. at 591. The Arkansas sales tax was applied to only a select group of magazines. Arkansas Writers', 481 U.S. at 233. Though the issue was raised in Arkansas Writers' that the tax was also discriminatory because it exempted all newspapers but only some magazines, the Court did not decide that issue because it found the tax unconstitutional for distinguishing between different members of the same medium of magazines. Id. at 232-33.

24. Id. at 251.
26. Id. at 591.
28. Id. at 233.
At the time the Arkansas Writers’ case was decided in 1987, the Supreme Court had identified four types of discrimination which would satisfy the first prong of its analysis: illicit legislative intent, targeting, special taxation, and content-based regulation.\(^\text{29}\) Once the significant discriminatory burden was identified, then the tax scheme would be struck down under the nondiscrimination principle unless there was a compelling interest asserted by the State under the second prong of the Court’s analysis.\(^\text{30}\) Prior to Leathers, the Court applied this principle in two contexts. First, it held that the principle prohibited tax legislation that imposed burdens on the press not borne by similar nonmedia organizations.\(^\text{31}\) Second, the Court recognized that the principle prohibited tax legislation that discriminated among individual members of the same medium.\(^\text{32}\)

In Leathers, the Supreme Court addressed the constitutionality of a generally applicable tax that was evenly applied to one member of the press, as opposed to its earlier considerations of taxes applied selectively within one medium.\(^\text{33}\) Cable television was singled out of the press industry and subjected to Arkansas’ general sales and use tax in a 1987 amendment to the Arkansas Gross Receipts Act (AGRA).\(^\text{34}\) Representatives of the Arkansas

\(^{29}\) See supra note 13 and accompanying text.

\(^{30}\) See supra note 10.


\(^{33}\) 111 S. Ct. at 1442. More specifically, the Court ruled on the legitimacy of a state’s extension of its general sales tax to one member of the press, cable television, while exempting other members of the media such as newspapers, magazines, and temporarily direct broadcast satellite services. Id. at 1441. The Arkansas sales tax was not applied to the “like-situated” media institution of direct broadcast satellite services, nor was it applied to such “dissimilar” media institutions as newspapers or certain magazines. Id.

\(^{34}\) Id. at 1441. The Arkansas Gross Receipts Act (AGRA) imposes a 4% excise tax on the gross proceeds for sales of all tangible personal property and of several specified services. Ark. Stat. Ann. §§ 26-52-301, 26-52-302 (Michie 1987 & Supp. 1991). An additional 1% tax is levied by the counties within Arkansas, while cities may impose a further one-half or 1% tax on those same goods and services subject to taxation under AGRA. Id. §§ 26-74-307, 26-74-222 (Michie 1987 & Supp. 1991). AGRA expressly exempts various products and services from the sales tax, including newspapers and “[r]eligious, professional, trade, and sports journals and publications printed and published within this state and sold through regular subscriptions.” Id. § 26-52-401(4), (14) (Supp. 1991).

Prior to 1987, neither cable television nor scrambled satellite broadcast television were listed among those services subject to the 4% sales tax under AGRA. See id. § 26-52-301 (Michie 1987). These services were also not listed among the items specifically exempted from the tax. See id. § 26-52-401. In 1987, Arkansas added Cable television services provided to subscribers or users to the list of services subject to the sales tax. Act of Mar. 12, 1987 Ark. Acts No. 188, § 1(4) (codified at Ark. Code Ann. § 26-52-301(3)(D)(j) (Supp. 1991)). It defined these services as “includ[ing] all service charges and rental charges whether for basic service or premium
cable industry filed a class action suit in an Arkansas chancery court, contending that the extension of the tax to cable services alone violated the First Amendment’s Free Press Clause and the Fourteenth Amendment’s Equal Protection Clause. The trial court upheld the tax extension. The Arkansas state legislature subsequently extended the tax to include comparable direct broadcast satellite services, while maintaining the exemption for newspapers and certain magazines.

Two issues involving differential taxation and the press arose in *Leathers* that had yet to be reviewed by the Supreme Court. First, during one period, cable services were taxed after the passage of Act 769 while direct broadcast satellite services that were deemed “substantially the same” were not taxed. This raised the issue of whether it was permissible to tax like-situated media differently. In addition, both cable and direct broadcast satellite services were taxed after the passage of Act 769 while members of the print media were specifically exempted. Thus, there was a second issue of whether it was permissible to differentially tax similar members of the media over other distinctly different members of the media.

On appeal, the Arkansas Supreme Court reversed the chancery court’s holding and ruled that the tax was unconstitutional for the period during which it applied to cable services alone. The state court held, however, that the tax was valid after it was extended by Act 769 to include direct

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Service of cable television, community antenna television, and any and all other distribution of television, video, or radio services with or without the use of wires provided to subscribers or paying customers or users, including all service charges and rental charges, whether for basic service, premium channels, or other special service, and including installation and repair service charges and any other charges having any connection with the providing of the said services.


36. *Id.* The chancellor ruled that Act 188 did not unconstitutionally discriminate against cable television. Noting that cable television is a unique medium because it requires the use of public property, the chancellor found it distinguishable from other types of media. *Id.*

37. See supra note 34 and accompanying text.

38. See supra note 34 and accompanying text. This period was from the enactment of the Act 188 in 1987 to the enactment of Act 769 in 1989. *Medlock*, 785 S.W.2d at 203.

39. *Id.*

40. *Id.*

41. *Id.*
broadcast satellite services. The United States Supreme Court granted certiorari to review these issues.

The Court held that the tax was constitutional as applied to cable services alone or to both cable and similar services together even though it exempted all other members of the press. The majority saw no need to find a compelling justification for the tax scheme because it determined that the tax as applied to the press was free from any of the difficulties it had identified as discriminatory in the past. This decision was based upon First Amendment grounds, and the Court remanded the case in order to allow the parties to develop arguments on the equal protection issue.

42. *Id.* The court found no Supreme Court holding stating that the First Amendment would be violated by the failure to tax one member of the press (e.g., newspapers) in the same manner as another (e.g., radio broadcasts). *Id.* The court reasoned that "[i]t would be impossible to impose a tax which would have the same effect on broadcast television, the delivery of which produces no direct 'gross proceeds,' and cable television." *Id.*


45. *Id.* at 1444.

46. *Id.* The Supreme Court of Arkansas permitted the appellants to brief the equal protection issue, as mandated by the Supreme Court, as well as the issue concerning federal legislation and the Supremacy Clause which was raised but not considered in the first appeal. *Medlock v. Pledger*, 809 S.W.2d 822 (Ark. 1991).

The Supreme Court of Arkansas delivered an opinion upon a similar set of issues just two months after the U.S. Supreme Court remanded the equal protection issue in *Leathers*. *Bosworth v. Pledger*, 810 S.W.2d 918 (Ark.), cert. denied, *Bosworth v. Leathers*, 112 S. Ct. 617 (1991). In *Bosworth*, the court considered the constitutionality of the 1987 Arkansas enactment of Act 27, which had extended the state sales tax to include all "regular" long distance telecommunications services while exempting both private line and wide-area telecommunications services (WATS). *Id.* at 919. Telephone subscribers subject to the tax claimed that Act 27 violated the equal protection provisions of both the Arkansas and U.S. Constitutions. *Id.* at 920. Appellants also argued that the court should apply a higher "strict scrutiny" standard of review instead of the minimum "rational basis" analysis traditionally applied to a state's taxation powers because the Act abridged their guaranteed rights under the First Amendment. *Id.* at 921.

The court did not agree. *Id.* at 922. It found no evidence of the types of discrimination that invalidated the tax schemes in *Minneapolis Star and Arkansas Writers*. *Id.* In fact, the court reasoned that the tax scheme was analogous to that in *Leathers* because it did not "threaten to suppress the expression of particular ideas or viewpoints, . . . target a small group of speakers or discriminate on the basis of the content of taxpayers' speech." *Id.* Therefore, because Act 27 did not violate First Amendment rights, the court held that the stricter standard of review was inapplicable. *Id.* In applying the "rational basis" analysis—the test customarily employed in an equal protection examination—the court upheld the tax scheme because it hypothesized a "legitimate governmental purpose" for which the state could impose its classification scheme upon long distance telephone services. *Id.* at 923. The Supreme Court's denial of certiorari in this case is a strong indication that the *Leathers v. Medlock* equal protection issue now before the Arkansas Supreme Court on remand will be analyzed in a similar fashion and the tax ultimately upheld by the Arkansas Supreme Court as constitutional on all grounds.
The dissent in *Leathers* stated that the majority ignored precedent that clearly justified the extension of the nondiscrimination principle to include prohibiting a state from burdening one particular information medium with a tax not borne by other media. Recognizing that the central concern underlying the need for a strong nondiscrimination principle is to prevent covert censorship of the press, Justice Marshall admonished the majority for abandoning an established principle explicitly designed to thwart the potentially abusive effects of differential tax treatment of the press. Both the majority and dissent acknowledged that the press could not be singled out for taxation absent a compelling justification by a state legislature. While the majority found the tax nondiscriminatory and the need for the State to show a compelling justification unnecessary, the dissent found several reasons why the tax scheme violated the First Amendment’s Free Press Clause. The dissent concluded that there was no compelling justification in the State’s assertion that the differential tax treatment was required to raise revenue.

This Note analyzes the United States Supreme Court’s decision on differential taxation and the press in *Leathers v. Medlock*. It first examines the historical basis of the Court’s concern in instances where a legislature seeks to impose burdensome taxes on the press. It then traces the development of the nondiscrimination principle and the Court’s application of this doctrine in the three main cases that set the stage for the Court’s holding in *Leathers*. This Note then analyzes the *Leathers* opinion in light of precedent and discusses its impact on the nondiscrimination principle. Finally, this Note concludes that the Supreme Court’s new restrictive reading of the nondiscrimination principle continues to preclude government infringement of the rights guaranteed the press under the First Amendment while more effectively allowing for equitable and efficient taxation schemes via a certain degree of differential taxation of the press.

48. *Id.* at 1449.
49. *Id.* at 1443.
50. *Id.* at 1450.
51. *Id.*
I. DEVELOPMENT OF THE NONDISCRIMINATION PRINCIPLE

A. Evolution of the Free Press Clause

The First Amendment to the United States Constitution guarantees that Congress shall not pass any law that abRIDGES THE freedom of the press. Since the ratification of the Fourteenth Amendment, the free press guarantee is also binding upon state legislatures. A major catalyst behind the adoption of the First Amendment was the Framers' concern over England's "taxes on knowledge." Initially, both the church and the state in England closely supervised and censored dissenting views, and this intensified with the introduction of the printing press in 1476. When Henry VIII denied the authority of the Pope over the Church of England and bestowed it upon himself, the Crown took over most of the responsibility in restraining the press. In his desire to regain full control of printing, Henry enacted the Proclamation of 1538 to establish a censorship system through state licensing of all books printed in English.

The insufficiency of the Proclamation in curtailing criticism led to the enactment of the Star Chamber Decree in 1586, a comprehensive system of government licensing of the press which restricted the right to print, the location of the print shops, and the total number of presses permitted throughout the country. Following the demise of the Star Chamber in 1641, Parliament, when it took power from the Crown, attempted to control printing by stricter licensing of the press, prosecution of critics for criminal
libel, and differential taxation of the press. The primary means of taxation was the Stamp Act, which imposed duties on paper, on all advertisements in a newspaper, and on newspapers themselves. Each of these three controls was systematically abolished by the legislature and judiciary in the United States. Indeed, it was Parliament's attempt in 1765 to levy the stamp tax on the American colonies that precipitated the incorporation of an express guarantee of freedom of the press in the Constitution.

**B. Grosjean v. American Press Co.: A Foundation is Established**

In 1936 the Supreme Court heard its first challenge to the constitutionality of a tax imposed upon the press. Nine Louisiana newspaper publishers brought an action to enjoin the enforcement of a state law imposing a two percent license tax upon the gross receipts of advertising in any publication.
with a circulation greater than 20,000 copies per week. Of the 120 newspapers in the state, the only ones subjected to the tax were the thirteen newspapers published by the plaintiffs. There was strong evidence that the tax was an apparent attempt to penalize the larger newspapers for opposing certain Louisiana politicians. The statute was challenged as a violation of the Free Press Clause and as a denial of equal protection as required of the states under the Fourteenth Amendment.

In *Grosjean v. American Press Co.*, the Supreme Court invalidated the Louisiana tax because it abridged the freedom of the press as guaranteed by the First Amendment. The Court based its holding on three grounds. First, after analyzing the impact of the tax on the press, the Court concluded that it not only curtailed advertising revenues but also restricted the circulation of certain publications. Second, the Court likened Louisiana’s license tax to the odious stamp taxes, and held it to be a “deliberate” attempt by the legislature to impede the flow of information to the general public.  

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67. Id. at 240. More specifically, the statutory provision required:
That every person, firm, association, or corporation, domestic or foreign, engaged in the business of selling, or making any charge for, advertising or for advertisements, whether printed or published, or to be printed or published, in any newspaper, magazine, periodical or publication whatever having a circulation of more than 20,000 copies per week . . . in the State of Louisiana, shall, in addition to all other taxes and licenses levied and assessed in this State, pay a license tax for the privilege of engaging in such business in this State of two per cent. (2%) of the gross receipts of such business.

Act No. 23, July 12, 1934.


69. Id. at 238. A note bearing the signatures of Senator Huey P. Long and Louisiana Governor Oscar Allen that was circulated among members of the legislature prior to final passage of the tax bill provided strong evidence that the tax was in fact a retaliatory measure:
The lying newspapers are continuing a vicious campaign against giving the people a free right to vote. We managed to take care of that element here last week. A tax of 2 per cent on what newspapers take in was placed upon them. That will help their lying some. Up to this time they have never paid any license to do business like everyone else does. It is a system these big Louisiana newspapers tell a lie every time they make a dollar. This tax should be called a tax on lying, 2 cents a lie.


70. *Grosjean*, 297 U.S. at 242-43.

71. Id. at 251. The Court found it unnecessary to find further grounds for invalidating the tax under the equal protection clause of the Fourteenth Amendment. Id.

72. 297 U.S. 233, 244-45 (1936).

73. See generally id. at 245-49 (reviewing the history of the Stamp Act and its effect on American jurisprudence).

74. Id. at 250; see supra note 69 and accompanying text. It is difficult to discern from the Court’s opinion the extent to which it relied upon the improper motives of the legislature in passing this law. Leila Sadat-Keeling, Note, Constitutional Law — Supreme Court Finds First Amendment A Barrier to Taxation of the Press, 58 Tul. L. Rev. 1073, 1075 (1984). The Court referred to illicit intent when it described the tax as “bad because, in the light of its history and
Lastly, the Court asserted that the form of the tax was "suspicious" because its basis on circulation tended to target a "selected group of newspapers." Although the Court did not invoke or develop any particular test for future cases, it endorsed the principle that any action by the government that impeded the flow of information to the public was a potential "evil" to the freedom of the press. The Court carefully pointed out, however, that regardless of this principle, newspapers were not immune from the "ordinary forms of taxation" necessary to support the government.

The Court reasoned that the meaning of "freedom of the press" was not restricted to the narrow view of merely "immunity from previous censorship." The Court argued in broader terms that it was meant to preclude "any form of previous restraint" upon the press. It was upon this broader premise that the Court invalidated the Louisiana license tax as one "single in kind" because of its invidious nature of being applicable only to advertisements in publications with circulations greater than 20,000. The Court recognized that any action by the government which might prevent a free and open public forum for the exchange of ideas was an invitation for special concern on the part of the courts.

of its present setting, it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the constitutional guarantees." Grosjean, 297 U.S. at 250 (emphasis added).

The Court also declared that the tax had "the plain purpose of penalizing the publishers and curtailing the circulation of a selected group of newspapers." Id. at 251 (emphasis added). The Court's failure to elaborate more directly on the legislative history behind the enactment of this tax, coupled with its lengthy discourse in the opinion on the history behind the First Amendment, suggests that the decision is based on broader First Amendment principles. Sadat-Keeling, supra, at 1075.

Subsequent cases have not been consistent in their reading of Grosjean on the relevance of illicit legislative purpose. Compare United States v. O'Brien, 391 U.S. 367, 382-85 (1968) (stating that legislative purpose was irrelevant to the outcome in Grosjean) with Houchins v. KQED, Inc., 438 U.S. 1, 9-10 (1978) (plurality opinion) (suggesting that the purpose was relevant in Grosjean). The issue on the relevance of illicit legislative intent was finally resolved in Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575 (1983).

75. Grosjean, 297 U.S. at 251.
76. Id. at 249-50.
77. Id. at 250. The Court distinguished the Louisiana tax as "one single in kind, with a long history of hostile misuse against the freedom of the press." Id.
78. Id. at 248 (emphasis added).
79. Id. at 249 (emphasis added).
80. Id. at 250.
81. Id.
C. Minneapolis Star: Developing A Reliable Analysis

In Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue, the Supreme Court again confronted the scope of permissible taxation of the press. In 1967, the Minnesota legislature established a system of sales and use taxes that included an exemption for newspapers from the sales tax and from the use tax for the ink and paper used in publication production. The exemption of ink and paper from the use tax was eliminated in 1971, but was subsequently amended in 1973 to exempt the first $100,000 of ink and paper consumed each year in the production of a publi-


83. Following Grosjean, two courts invalidated tax statutes that were unconstitutionally burdensome upon the freedom of the press. Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 314 N.W.2d 201, 206 (Minn. 1981). First, a Florida court struck down a business license tax which increased dramatically with circulation, concluding that Grosjean invalidated any license tax "based on volume of circulation and graduated by scale." City of Tampa v. Tampa Times Co., 15 So. 2d 612, 613 (Fla. 1943). Second, a Maryland court invalidated Baltimore municipal taxes imposed upon buyers of advertising in newspapers, radio, and television. City of Baltimore v. A. S. Abell Co., 145 A.2d 111, 119 (Md. 1958).

Taxes on the press upheld in the wake of Grosjean included a privilege tax on the gross proceeds of sales or gross income of the business of publishing newspapers, periodicals, and other publications, the court ultimately finding that the tax was part of the general sales tax without hostility to the press. Giragi v. Moore, 64 P.2d 819, 821 (Ariz.), appeal dismissed, 301 U.S. 670 (1937). A tax that was part of general revenue measures imposed upon all advertisers, including newspapers, was also upheld. Lee Enters., Inc. v. Iowa State Tax Comm'n, 162 N.W.2d 730 (Iowa 1968); accord Territory of Alaska v. Journal Printing Co., 135 F. Supp. 169 (D. Alaska 1955) (upholding business license tax on printing shops and publishers of newspapers); City of Corona v. Corona Daily Indep., 252 P.2d 56 (Cal. 1953) (upholding nominal annual business license tax); Donnelly Corp. v. City of Bellevue, 140 S.W.2d 1024 (Ky. 1940) (sustaining occupational license tax); Steinbeck v. Gerosa, 151 N.E.2d 170 (N.Y.) (sustaining general gross receipts tax), appeal dismissed, 358 U.S. 39 (1958).

During the time between Grosjean and Minneapolis Star, the Supreme Court was involved in roughly three lines of cases relating to First Amendment issues and the press. Sadat-Keeling, supra note 74, at 1076-77. The Court found in one category of cases that press freedoms were not constitutionally abridged by generally applicable federal economic regulations such as the Sherman Anti-Trust Act or the National Labor Relations Act. Id. at 1077 nn.21-24. In the second category of cases, involving the taxation of individuals as opposed to the institutional press, the Court consistently held that ordinances imposing licensing requirements on individuals exercising First Amendment freedoms were unconstitutional. Id. at 1078 n.25. Finally, in the third group of cases, the Court explored the First Amendment limits on government regulation of the press. Id. at 1079-80.


85. Id. § 25(1)(i), 1967 Minn. Laws Spec. Sess. 2143, 2186 (codified as amended at MINN. STAT. ANN. § 297A.14, .25(i)(West 1991)).

Star Tribune was one of eleven publishers, together producing fourteen of the 388 circulation newspapers within the State that incurred a tax liability in the first year. Star Tribune alone paid out over two-thirds of the total revenue raised by the tax. The numbers were roughly the same the following year. Star Tribune contended that the use tax on ink and paper violated interests protected by the First Amendment's Free Press Clause and the Fourteenth Amendment's Equal Protection Clause.

Star Tribune urged the Court to summarily invalidate the use tax on ink and paper based upon the precedent set in *Grosjean*. The Court distinguished *Grosjean*, however, because in that case the legislature's intent to willfully penalize a small group of newspapers was in part attributable to the tax being defeated. In *Minneapolis Star*, there was no evidence of a censorial motive from the legislature. The Court, therefore, resolved itself to ascertain whether a state's enactment of a special tax on the press violated general First Amendment principles. In reaching the conclusion that the Minnesota use tax violated the First Amendment's Free Press Clause, the Court also settled *Grosjean*'s legislative intent controversy by explicitly stat-

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87. Act of May 24, 1973, ch. 650, art. XIII, § 1, 1973 Minn. Laws 1606, 1637 (codified at MINN. STAT. ANN. § 297A.14 (West 1991)). After the amendment, the use provision read in relevant part:

For the privilege of using, storing or consuming in Minnesota tangible personal property, . . . there is hereby imposed on every person in this State a use tax at the rate of four percent of the sales price of sales at retail of any of the aforementioned items . . . . Notwithstanding any other provisions of section 297A.01 to 297A.44 to the contrary, the cost of ink and paper products exceeding $100,000 in any calendar year, used or consumed in producing a publication . . . is subject to the tax imposed by this section.

*Id.* The $100,000 exemption amounted to a $4,000 tax credit to newspapers and other publishers. Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 314 N.W.2d 201, 203 (Minn. 1981).

88. Minneapolis Star, 314 N.W.2d at 203-04 n.4. Of the $893,355 collected by the state in 1974, Star Tribune paid $608,634. *Id.*

89. *Id.* Thirteen publishers, producing 16 of 374 circulation newspapers, incurred a tax in 1975. *Id.* at 204 n.5. Star Tribune paid $636,113, again over two-thirds of the total $944,055 collected by the State. *Id.*


91. *Id.*

92. *Id.* at 580.

ing that illicit motive is not an indispensable condition to assert a violation of the First Amendment.\textsuperscript{94}

The \textit{Minneapolis Star} Court reached its conclusion by employing a two-prong analysis. First, the Court determined that the tax provision was “facially discriminatory.”\textsuperscript{95} The Court reasoned that the state, instead of applying its general sales and use tax to newspapers, created a special tax scheme that singled out certain publications.\textsuperscript{96} The Court then contended that this “differential” treatment of the press placed such a burden on rights guaranteed by the Free Press Clause that the tax scheme would be upheld only if the State asserted a “counterbalancing interest of compelling importance” that it could not attain without differential treatment.\textsuperscript{97} The Court held that special treatment of the press was not justified by Minnesota’s interest in generating revenue because the State could have realized the same result by taxing businesses generally, and thus avoided singling out the press.\textsuperscript{98}

Additionally, the Court found the tax on the press discriminatory because it “targeted” a small group of newspapers.\textsuperscript{99} The Court did not find compelling Minnesota’s claim that the treatment was an equitable means by which “to give favorable tax treatment to smaller enterprises.”\textsuperscript{100} Justice White, concurring, found that this “target” criterion alone would have been sufficient grounds for striking down the Minnesota tax.\textsuperscript{101} He contended that the Court needlessly tackled the issue of whether a state may impose a use

\begin{itemize}
  \item \textsuperscript{94} \textit{Id.} at 591-92; see supra notes 69, 74 and accompanying text.
  \item \textsuperscript{95} \textit{Id.} at 581.
  \item \textsuperscript{96} \textit{Id.} The Court was skeptical of Minnesota’s “unique” use tax for two reasons. First, unlike an ordinary use tax, the Minnesota tax did not serve a complementary function to the sales tax. \textit{Id.} at 581. Second, Minnesota taxed the intermediate transaction of ink and paper purchases rather than the finished products purchased by the ultimate user. \textit{Id.} at 581-82.
  \item \textsuperscript{97} \textit{Id.} at 585.
  \item \textsuperscript{98} \textit{Id.} at 586.
  \item \textsuperscript{99} \textit{Id.} at 591.
  \item \textsuperscript{100} Minneapolis Star & Tribune Co. v. Minnesota Comm’r of Revenue, 314 N.W.2d 201, 209 (Minn. 1981). The Court found the State’s pronouncement that it was favoring an “equitable” tax system unconvincing because “there are no comparable exemptions for small enterprises outside the press.” \textit{Minneapolis Star}, 460 U.S. at 591 (emphasis added); see also Jerry R. Parkinson, Note, Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue: \textit{Differential Taxation of the Press Violates the First Amendment, 69 IOWA L. REV. 1103, 1113-14} (1984) (stating that Minnesota’s position was seriously undermined by the absence of any other evidence indicating the importance of the State’s professed policy of an equitable tax scheme); cf Mabee v. White Plains Publishing Co., 327 U.S. 178, 183, 184 (1946) (holding that the exemption of small weekly and semi-weekly newspapers from the Fair Labor Standards Act was constitutional where the State’s motive was “to put those papers more on a parity with other small town enterprises”).
  \item \textsuperscript{101} \textit{Minneapolis Star}, 460 U.S. at 593 (White, J., concurring in part and dissenting in part).
\end{itemize}
tax that applied even-handedly to all publishers. He disagreed with the majority's assertion that the Court was "poorly equipped" to weigh the relative burdens of particular tax schemes with any precision. Justice White maintained that the Court frequently evaluated the burdensome effects of a tax on a particular entity. In agreeing with Justice Rehnquist's theory that a differential tax could actually benefit the press, Justice White departed from the majority's belief that the First Amendment barred a state from choosing one method of taxation over another.

Justice Rehnquist argued in dissent that differential treatment of newspapers in Minnesota's sales and use tax scheme did not, in and of itself, unconstitutionally infringe upon First Amendment freedoms. Thus, a strict scrutiny review was unnecessary. Justice Rehnquist demonstrated, using a relatively simple mathematical analysis, that the special Minnesota use tax vis-à-vis the generally applicable sales tax was significantly less burdensome to Star Tribune. He reasoned that if there was no "infringement" of First Amendment rights, then there was no "abridgement" of those rights as forbidden by the First Amendment.

Justice Rehnquist defined "infringement" as a significant burden on a specially protected right. He reasoned that because the Minnesota use tax

102. Id. The Minnesota State Supreme Court addressed the issue of "whether the State of Minnesota may . . . impose a use tax on consumption of ink and paper which, due to an exemption in the law, is paid by some newspapers and publications but not by all." Minneapolis Star, 314 N.W.2d at 202 (emphasis added). It is evident that this was Star Tribune's primary concern because it only challenged the tax in 1974 after the $100,000 exemption provision was enacted. Id. at 203. Star Tribune did not challenge the fact that from 1971 to 1973 the press in general was treated differently by the use tax. See supra notes 86, 87 and accompanying text; see also Parkinson, supra note 100, at 1114-26 (analyzing the portion of the Court's opinion that effectively invalidated the use tax even if it applied in an even-handed manner to all publishers).

103. Minneapolis Star, 460 U.S. at 594 (White, J., concurring in part and dissenting in part).

104. Id. at 594-96; see, e.g., United States v. County of Fresno, 429 U.S. 452 (1977) (comparing the burden of two different taxes relating to state taxation of the federal government).


106. Id. at 596 (White, J., concurring in part and dissenting in part). The fact that the exemption targets only a few newspapers alone is sufficient reason to invalidate the Minnesota tax, and thus Justice White concurred in Part V of the Court's opinion and in the judgment. Id. at 593.

107. Id. at 600 (Rehnquist, J., dissenting).

108. Id. at 598.

109. Id. at 597-98. Both the majority and the dissent agreed that the application of the general sales tax on the press would be sanctioned. Id. at 586-87 n.9, 597. The majority, however, did not concede that Minnesota's tax was generally applicable and took exception to Justice Rehnquist's analysis on two grounds. Id. at 590-91 n.14.

110. Id. at 600; see Branzburg v. Hayes, 408 U.S. 665 (1972).

111. Minneapolis Star, 460 U.S. at 600 (Rehnquist, J., dissenting).
did not significantly burden the freedom of the press, it did not justify a strict scrutiny review. Instead, the State need only show a "rational basis" for the tax scheme. The State satisfied this, according to Justice Rehnquist, by demonstrating the impracticality of applying a sales tax on such small business transactions given the various methods by which newspapers are sold. Justice Rehnquist also rejected the majority's second ground for invalidating the tax in that it targeted a small group of newspapers. He described the $100,000 exemption in effect as "a $4000 credit which benefits all newspapers," and which thus could not be construed as targeting specific publications within the press.

In Minneapolis Star, the Court finally developed a definite framework by which to approach differential taxation problems involving the press. The Minneapolis Star "test" is a two-prong analysis. First, courts should scrutinize the tax to determine if it has a discriminatory effect on the press by imposing a substantial burden. Second, if a substantial burden is identified, a strict scrutiny review should then be undertaken to determine if the state has an overriding governmental interest for imposing the differential tax.

In determining whether Minnesota's special use tax imposed a substantial burden on the press, the Court identified two types of discrimination. The Court stated first that the tax was a special tax which "singled out the press" for selective treatment, and second that the tax targeted a select group of newspapers. Both types of discrimination were held to constitute such a
burden on the press as to require the state to demonstrate that the burdens were necessary to achieve overriding governmental interests.\(^2\)

The application of the strict scrutiny standard is the second prong of the Court's new approach as formulated in Minneapolis Star.\(^2\)\(^5\) If the tax "burdens" the press, for example by singling out the press for selective taxation, then the tax will survive only if the government successfully presents an "overriding" or "compelling" interest underlying its application of the tax.\(^2\)\(^6\) If the State cannot meet this heavy burden, the tax will be invalidated as an unconstitutional abridgment of the freedom of the press.\(^2\)\(^7\)

Justices White and Rehnquist criticized this analysis because it presumed that a tax that singled out the press was always more burdensome and never beneficial.\(^2\)\(^8\) The Court was reluctant to adopt the dissent's position. It recognized that once the courts allowed differential treatment, it created the possibility of "subsequent differentially more burdensome treatment" that the courts would be fraught to identify and abolish.\(^2\)\(^9\) The majority also rejected the dissent's proposition because it believed the courts were not equipped to evaluate with precision the relative burdens of various methods of taxation.\(^3\)\(^0\)

Although Justice Rehnquist's mathematical hypothetical demonstrated that Star Tribune would have paid more taxes under the generally applicable sales tax than under the special use tax,\(^3\)\(^1\) the Court correctly pointed out that these calculations failed to consider the indirect economic ramifications that affect the amount of taxes paid by a person or institution.\(^3\)\(^2\) The majority believed Justice Rehnquist's propositions only magnified the possibility that the courts would make an error in their calculations when examining the validity of the tax scheme. The Court recognized that this increased threat of error could not be tolerated when such fundamental rights as those guaranteed by the First Amendment were involved.

\(^{124}\) Minneapolis Star, 460 U.S. at 582-83.
\(^{125}\) Id. at 582, 586-88.
\(^{126}\) Id. at 588.
\(^{127}\) Id.
\(^{128}\) Id. at 596 (White, J., concurring in part and dissenting in part); Id. at 596 (Rehnquist, J., dissenting).
\(^{129}\) Id. at 588, 589 n.11, 590 n.13 (majority opinion).
\(^{130}\) Id. at 589.
\(^{131}\) Id. at 597-98 (Rehnquist, J., dissenting).
\(^{132}\) Id. at 590-91 n.14 (majority opinion).
D. Arkansas Writers' Project, Inc. v. Ragland:
   An Addition to the Analysis

        Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue \(^{133}\) established that, regardless of legislative purpose, differential taxation of the press—either by singling out the press as a whole or by targeting individual members of the press—would not be tolerated unless the State asserted a compelling interest to justify the burden it had placed on a specially guaranteed right.\(^{134}\) In *Arkansas Writers' Project, Inc. v. Ragland*,\(^ {135}\) the Court applied this analysis to a sales tax exemption on certain magazines\(^ {136}\) and held that the tax violated the Free Press Clause.\(^ {137}\)

        Under the Arkansas Gross Receipts Act (AGRA), Arkansas imposed a four-percent sales tax on the gross receipts from the sales of all tangible personal property and certain specified services.\(^ {138}\) AGRA exempted numerous items from the general sales tax, including newspapers\(^ {139}\) and certain magazines.\(^ {140}\) The magazine exemption, applying only to "religious, professional, trade and sports journals,"\(^ {141}\) was challenged by the Arkansas Writers' Project, publisher of a general interest monthly magazine.\(^ {142}\) Arkansas Writers' Project contended that its First and Fourteenth Amendment guarantees to freedom of the press and equal protection were violated because its publication was subjected to the sales tax while other magazines and newspapers were specifically exempted from the tax.\(^ {143}\)

        The State argued that its sales tax was a "generally applicable economic regulation."\(^ {144}\) It justified exemptions to the tax because the sales tax itself was indiscriminately imposed on the receipts from sales of all tangible personal property.\(^ {145}\) Nevertheless, the Court held the tax invalid under the First Amendment because the State advanced no compelling justification for

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\(^{133}\) 460 U.S. 575 (1983).
\(^{134}\) Id. at 592-93.
\(^{135}\) 481 U.S. 221 (1987).
\(^{136}\) See supra note 34 and accompanying text.
\(^{137}\) *Arkansas Writers*, 481 U.S. at 234.
\(^{138}\) ARK. CODE ANN. §§ 26-52-301, 26-52-302 (Michie 1977 & Supp. 1991); see supra note 34 and accompanying text (discussing AGRA). The section of the tax statute under review in *Arkansas Writers* is part of the same general sales tax statute (AGRA) that contains the section under review in *Leathers*.
\(^{139}\) Id.
\(^{140}\) Id.
\(^{141}\) Id.
\(^{142}\) Arkansas Writers' Project v. Ragland, 481 U.S. 221, 224 (1987).
\(^{143}\) Id. at 225.
\(^{144}\) Id. at 228-29.
\(^{145}\) Id. at 229.
a facially discriminatory differential tax that targeted a select group of magazines based upon their content.\footnote{Id. at 234.}

In pursuing the "target" criterion as set forth in \textit{Minneapolis Star}, the \textit{Arkansas Writers'} Court characterized Arkansas' sales tax scheme as discriminatory because it was "not evenly applied to all magazines."\footnote{Id. at 229.} The Court went one step further and found another criterion on which to deem a tax discriminatory: whether the tax classification is content-based.\footnote{Id. n.4.} The Arkansas tax scheme was based upon the subject-matter of the articles contained within a magazine. The Court recognized that the tax did not restrict particular views expressed within specific magazines or prevent other members of the media from publishing similar discussions. However, the Court relied upon precedent and rationalized that the official scrutiny required to determine which magazines would be subject to the tax was "entirely incompatible" with the Free Press Clause.\footnote{Id.} Once the Court established the existence of the two types of discrimination of targeting and content-based regulation, thereby signifying that a significant burden was placed upon the press, the Court then applied the second prong of its analysis to determine if the State had a compelling justification for its differential treatment.\footnote{Id. at 229-30.} The foundation upon which the Court relied in determining the validity of content-based discrimination was couched in the following cases: \textit{Regan v. Time, Inc.}, 468 U.S. 641 (1984) (holding unconstitutional the "purpose" requirement of 18 U.S.C. § 504(1) that was used to determine the conditions for which the printing or publishing of any obligation or other U.S. security was allowable); \textit{FCC v. League of Women Voters}, 468 U.S. 364 (1984) (striking down a ban on editorializing broadcast speech because it was based solely on content); \textit{Carey v. Brown}, 447 U.S. 455 (1980) (invalidating an Illinois statute that made a content-based distinction as to which type of peaceful picketing was permitted); \textit{Consolidated Edison Co. v. Public Serv. Comm'n}, 447 U.S. 530 (1980) (stating that content-based regulations that not only restricted particular viewpoints but also prohibited public discussion of an entire topic violated the First Amendment); \textit{Police Dep't of Chicago v. Mosley}, 408 U.S. 92 (1972) (holding that city ordinance prohibiting all but labor picketing within 150 feet of a school violated the equal protection clause because it made an impermissible distinction based on content).

\textit{Arkansas Writers'}, 481 U.S. at 230; \textit{see League of Women Voters}, 468 U.S. at 383; \textit{Time, Inc.}, 468 U.S. at 648.

\textit{Arkansas Writers'}, 481 U.S. at 231. The test specifically states that "[d]ifferential taxation of the press . . . places such a burden on the interests protected by the First Amendment that we cannot countenance such treatment unless the State asserts a counterbalancing interest of compelling importance that it cannot achieve without differential taxation." \textit{Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue}, 460 U.S. 575, 585 (1983); \textit{cf. Laura V. Farthing}, Note, \textit{Arkansas Writers' Project v. Ragland: The Limits of Content Discrimination Analysis}, 78 GEO. L.J. 1949, 1956 (1990) (arguing that content-based regulations should be
The State advanced three interests to support its differential taxation scheme. First, the State argued that it had a general interest in raising revenue. The Court followed the reasoning of *Minneapolis Star* and held that revenue raising was not a valid explanation for selective taxation because the State could tax businesses generally. Second, the State contended that it wanted to encourage "fledgling publishers" with limited audiences. The Court held that the exemption was not narrowly tailored to achieve that end because the specified magazines were exempt regardless of whether they were fledgling. Lastly, the State maintained that it aspired to "foster communication" within its borders. The Court rejected this final argument because the tax scheme only fostered communications in the areas enumerated as exemptions by the statute.

In holding that there was no compelling justification for the tax, the Court acknowledged that state tax schemes could not be selectively applied to different members of the same medium. The Court did not address whether there was an "additional basis" for invalidating the sales tax scheme with regard to the differential treatment between different types of periodicals. It left open the issue of whether a state can differentially tax between different members of the media, such as between newspapers and magazines. The Court granted certiorari in *Leathers v. Medlock* in order to resolve that issue. *Arkansas Writers'* reaffirmed the two-prong analysis as a workable means for striking down tax schemes that unconstitutionally burdened the press. Significantly, the Court expanded the scope of its approach to subject to strict scrutiny only if illicit intent or targeting is present, intermediate scrutiny if viewpoint differential effects are present, and rational basis scrutiny in the absence of any of those three factors).

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151. *Arkansas Writers*, 481 U.S. at 231.
152. Id. at 231-32.
153. Id. at 232.
154. Id.
155. Id.
156. Id.
157. Id.
158. Id. at 234.
161. Id. at 1442.
identifying differential taxation of the press by advancing content-based regulation as a new type of discrimination that invokes strict scrutiny review.

Justice Stevens concurred with the majority that the State failed in its burden to justify its content-based discrimination. In resisting the Court's traditional position regarding content-based discrimination, however, Justice Stevens proffered an alternative to an intermediate scrutiny test on which to judge such discrimination. Justice Scalia in his dissent, also disagreed that a strict scrutiny test was necessary in this case. He objected to the majority's premise equivocating, for First Amendment purposes, the denial of a tax exemption to a direct regulation. Justice Scalia argued that unlike direct restriction, denial of participation in a tax exemption or other

162. *Arkansas Writers*, 481 U.S. at 235 (Stevens, J., concurring in part and concurring in judgment).

163. *Id.* at 229-30. The majority relied on the proposition that "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Id.* at 229 (alteration removed) (quoting *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972)). See generally *Farthing*, supra note 150, at 1955 n.23.

164. *Arkansas Writers*, 481 U.S. at 234-35 (Stevens, J., concurring in part and concurring in judgment). "As long as government does not wholly suppress protected speech and is completely neutral with respect to the viewpoint expressed, Justice Stevens would permit content-based regulation of 'marginal' speech in order to protect other interests." Note, *Content Regulation and the Dimensions of Free Expression*, 96 Harv. L. Rev. 1854, 1860 (1983).

Justice Stevens referred to his separate opinions in a string of cases in which he proposed an alternative to an intermediate scrutiny test. See *Regan v. Time*, Inc., 468 U.S. 641, 692 (1984) (Stevens, J., concurring in part and dissenting in part) (arguing government can validly inquire into purpose of currency reproduction); *FCC v. League of Women Voters*, 468 U.S. 364, 408 (1984) (Stevens, J., dissenting) (arguing for validity of statute preventing editorializing by management of public television stations); *Widmar v. Vincent*, 454 U.S. 263, 277 (1981) (Stevens, J., concurring) (arguing that universities can allocate resources on basis of content when there is no viewpoint discrimination); *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 544 (1980) (Stevens, J., concurring) (arguing that time, place, or manner may be based on content of speech). See generally *Farthing*, supra note 150, at 1956 n.24 (providing background material on two other alternatives to an intermediate scrutiny approach).

165. *Arkansas Writers*, 481 U.S. at 236 (Scalia, J., dissenting, joined by Rehnquist, C.J.).

166. *Id.* Justice Scalia relies upon precedent that has long recognized, even in First Amendment contexts, that "tax exemptions, credits, and deductions are 'a form of subsidy that is administered through the tax system,,' and the general rule that 'a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny.'" *Id.* (quoting *Regan v. Taxation with Representation*, 461 U.S. 540, 544, 549 (1983)). Justice Rehnquist argued similarly in *Minneapolis Star* that "this Court has never subjected governmental action to the most stringent constitutional review solely on the basis of 'differential treatment' of particular groups." *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 598 (1983) (Rehnquist, J., dissenting). Justice Rehnquist asserted that because the Minnesota tax scheme's classifications did not "significantly burden" a fundamental right under the First Amendment, the State is required to show only that it has a rational basis for its tax scheme. *Id.* at 600-02.
subsidy scheme generally has no "significant coercive effect." He contended that denial of participation in a subsidy scheme does not justify a strict scrutiny review because it does not necessarily infringe upon a fundamental right. He therefore concluded that a "rational basis" review was the appropriate standard. Under this standard, Justice Scalia found the Arkansas tax scheme valid because it was "reasonably related to the legitimate goals" of encouraging the growth of fledgling publishers and of reducing the number of instances where tax proceeds did not cover the administrative costs of obtaining them.

II. LEATHERS v. MEDLOCK

Leathers v. Medlock involved the constitutionality of a sales and use tax imposed under the Arkansas Gross Receipts Act (AGRA). Prior to 1987, AGRA did not subject cable television to the tax. In that year the legislature adopted Act 188, thereby extending the tax to include cable television subscription services. In response to Act 188, a cable television subscriber, a cable television operator, and a trade organization consisting of approximately eighty cable operators filed a class action suit in an Arkansas chancery court. The plaintiffs contended that the exclusion from the list of services subject to the tax such as the print media and such comparable services as scrambled broadcast television violated the First Amendment's Free Press Clause and the Fourteenth Amendment's Equal Protection Clause.

167. Arkansas Writers', 481 U.S. at 237 (Scalia, J., dissenting, joined by Rehnquist, C.J.). Justice Scalia maintained that it was implausible that the generally applicable Arkansas sales tax, together with its enumerated exemptions, was meant to inhibit any particular magazine publication. Id.

168. Id. Justice Scalia pointed out a variety of tax preferences and subsidies based upon subject matter—special bulk rates for certain nonprofit organizations granted by the United States Postal Service, Kennedy Center subsidizations for only certain art genres, and government research grant programs. Id. at 237-38. He concluded by stating that there was no justification for distinguishing the subsidization of speech in these areas from the taxation scheme struck down by the majority in Arkansas Writers'. Id. at 238.

169. Id. at 235-36.

170. Id.


172. Id. at 1441. In general, AGRA imposes a 4% tax on receipts from the sales of all tangible personal property and specified services. Ark. Code Ann. §§ 26-52-301, 26-52-302 (Michie 1987 & Supp. 1989). For the specific language of the relevant parts of AGRA, see supra note 34 and accompanying text.

173. See id.

174. See id.


176. Id. at 485.
The chancery court upheld the constitutionality of Act 188, concluding that cable television was distinguishable for constitutional purposes from other media because of its necessary use of public rights-of-way. 177 Shortly thereafter, the Arkansas legislature adopted Act 769. 178 This Act extended the scope of the sales tax to include all television services with paying customers, thereby bringing direct broadcast satellite television within the realm of taxable services. 179 Notwithstanding Act 769, cable petitioners appealed to the Arkansas Supreme Court, arguing that the sales tax continued to unconstitutionally discriminate against cable television. 180

In part one of a two-part holding, the court ruled that the tax was valid after the passage of Act 769 and the inclusion of all related television subscription services to general taxation. 181 The court believed, however, that the First Amendment did prohibit selective taxation among members of comparable media enterprises. 182 Finding that the evidence supported the contention that cable television and direct broadcast satellite services were primarily the same, 183 the court held in the second part of its decision that the sales tax was unconstitutional during the period when cable services alone were subject to the tax. 184 The Supreme Court granted certiorari 185 to define the degree of allowable differential taxation on the press. 186

A. The Majority

Justice O'Connor delivered the majority opinion in a three-part ruling that further delineated the scope of the nondiscrimination principle with regard

177. Id.
178. Id. at 484.
179. See supra note 34 and accompanying text.
180. Medlock, 301 Ark. at 485. Petitioners challenged Act 188 as a violation of freedom of speech and freedom of the press, the right to equal privileges and immunities, and the right to equal protection under the law. Id.
181. Id. at 487. After Act 769 was enacted, both cable and satellite services were subjected to the sales tax. See supra note 34 and accompanying text. The constitutionality of Act 769 was not before the court in this case. Id. Therefore, the court declined to invalidate Act 769 on the grounds that it discriminated between members of different media by exempting newspapers and magazines from the sales tax and not cable and satellite services. Id. The court stated that it was "unwilling to hold that all mass communications media must be taxed in the same way. It would be impossible to impose a tax which would have the same effect on broadcast television, the delivery of which produces no direct 'gross proceeds,' and cable television." Id.
182. Id.
183. Id. This evidence included similarities in both the cost of the two services and the mode of dissemination of information via decoders for unscrambling broadcasts. Id.
184. Id. Thus, the court invalidated Act 188 which extended the sales tax to cable services alone. Id.
to differential taxation when entangled with the constitutional guarantee of freedom of the press. First, the Court reversed the state supreme court's decision that the Arkansas sales tax was unconstitutional when it was applied only to cable television services.\textsuperscript{187} The Court then affirmed that the sales tax did not violate the Free Press Clause when applied to both cable and satellite television subscription services.\textsuperscript{188} Finally, the Court remanded the equal protection question in order to have the parties develop arguments on the constitutionality of the state's temporary tax distinction between related television broadcast services.\textsuperscript{189}

1. Tax on the Press Upheld

The \textit{Leathers} Court began its examination\textsuperscript{190} by employing the two-prong analysis developed in \textit{Minneapolis Star \\& Tribune Co. v. Minnesota Commissioner of Revenue}\textsuperscript{191} and amplified in \textit{Arkansas Writers' Project, Inc. v. Ragland}.\textsuperscript{192} The first prong of the analysis considers whether the statute is substantially discriminatory.\textsuperscript{193} This step consists of identifying such types of discrimination as illicit legislative intent, special taxation, targeting, and content-based regulation.\textsuperscript{194} Once discrimination is judged to exist, the second prong of the test is applied to consider whether there is a compelling governmental interest in the state's differential tax scheme.\textsuperscript{195}

To determine if there was significant discrimination, the \textit{Leathers} Court first concluded that the tax scheme was not a "special" one designed to "single out the press."\textsuperscript{196} It reasoned that the Arkansas sales tax was a tax of "general applicability" because it applied to the sale of all tangible personal property as well as a broad range of services.\textsuperscript{197} Unlike the tax invalidated in \textit{Minneapolis Star}, the Arkansas sales tax was not a special tax directed

\textsuperscript{187.} \textit{Id.} at 1447.
\textsuperscript{188.} \textit{Id.} In this part of the holding the Court also concluded that the tax was constitutional even when not imposed upon different members of the press such as newspapers and magazines. \textit{Id.}
\textsuperscript{190.} \textit{Leathers}, 111 S. Ct. at 1443-47.
\textsuperscript{191.} 460 U.S. 575 (1983).
\textsuperscript{192.} 481 U.S. 221 (1987).
\textsuperscript{193.} \textit{Leathers}, 111 S. Ct. at 1444-45.
\textsuperscript{194.} See \textit{supra} note 13 and accompanying text.
\textsuperscript{195.} \textit{Minneapolis Star}, 460 U.S. at 582.
\textsuperscript{196.} \textit{Leathers}, 111 S. Ct. at 1444. "Singling out the press" as an indication of discrimination was first identified in \textit{Minneapolis Star}. See \textit{Minneapolis Star}, 460 U.S. at 581-85.
\textsuperscript{197.} \textit{Leathers}, 111 S. Ct. at 1444. The Court reiterated its position that the press could be validly subjected to a generally applicable tax without offending its freedoms under the First Amendment. \textit{Id.}; see \textit{supra} note 12 and accompanying text.
solely at the press.\textsuperscript{198} The Court found, therefore, that the tax was not discriminatory on this basis.\textsuperscript{199}

The second consideration involved ascertaining whether the tax scheme "targeted" a small group of speakers.\textsuperscript{200} The Court, basing its decision primarily on two factors, found no evidence of discrimination by targeting.\textsuperscript{201} The Court initially found no indication of illicit censorial motive on the part of the Arkansas state legislature to deliberately burden a narrow group of speakers by the tax.\textsuperscript{202} Unlike the license tax in \textit{Grosjean}, the Arkansas tax was not intentionally structured to function as a "penalty" on the free press rights of a few.\textsuperscript{203}

The Court then distinguished the "target" effect of the tax scheme in \textit{Arkansas Writers}' from the facts at issue in \textit{Leathers}. While the tax scheme in \textit{Arkansas Writers}' burdened at most three magazines,\textsuperscript{204} the sales tax in \textit{Leathers} applied uniformly to each of the approximately 100 cable franchises within Arkansas.\textsuperscript{205} The Court acknowledged that a tax targeting a small number of speakers ran the risk of endangering only a limited range of views.\textsuperscript{206} Therefore, in \textit{Arkansas Writers'}, the tax was invalidated because it was structured to encumber only a limited range of views from a select group of magazines subject to the tax. The \textit{Leathers} Court, however, concluded that the Arkansas sales tax affected a large number of cable operators.\textsuperscript{207} It reasoned that those operators offered the public a wide range of views throughout the state via its programming.\textsuperscript{208}

\textsuperscript{198} Minneapolis Star, 460 U.S. at 581.
\textsuperscript{199} Leathers, 111 S. Ct. at 1444.
\textsuperscript{201} Leathers, 111 S. Ct. at 1444-45.
\textsuperscript{202} Id. at 1444.
\textsuperscript{203} See supra notes 69, 74 and accompanying text.
\textsuperscript{204} \textit{Arkansas Writers'}, 481 U.S. at 229 & n.4.
\textsuperscript{205} Leathers, 111 S. Ct. at 1445.
\textsuperscript{206} Id. at 1444. The Court compared this risk to that of content-based regulation, concluding that both would "distort the market for ideas." \textit{Id}.
\textsuperscript{207} Id. at 1445. Under Act 188, approximately 100 cable operators were subjected to the state sales tax scheme. \textit{Id} at 1444. At that time, only seven satellite broadcast services were available in Arkansas, none of which were taxed until Act 769 became effective. \textit{Id}; see supra note 34 and accompanying text.
\textsuperscript{208} Id. at 1445.
Furthermore, the Court was unmoved by the Arkansas Supreme Court’s finding that cable and satellite television services were essentially the same medium. The Court concluded that even if it accepted the determination that satellite television services were the same medium as cable, the Arkansas tax structure still did not penalize a narrow group of speakers or ideas. Consequently, the Court did not find the Arkansas tax scheme discriminatory on the basis of targeting, despite the fact that the tax did not apply evenly to all the members within a similar medium.

The Court’s third consideration in determining the existence of discrimination was whether the Arkansas tax was content-based prejudiced. First, the Court examined the specific language of the relevant statutory provisions and found that the content of the services provided by cable television was not a determinative factor in its being subjected to the general sales tax. Second, the record contained no evidence showing that the variety of programming offered by cable services differed materially “in its message” from that of other informational institutions such as newspapers, magazines, or direct broadcast satellite services. Therefore, given that the tax scheme did not differentiate among enterprises subject to the tax on the basis of content, the Court concluded that it was not discriminatory.

The *Leathers* Court found that the Arkansas tax scheme withstood the first prong of its analysis. Specifically, the Court did not detect a substantial discriminatory burden on the press on any of the following grounds: special taxation applicable to the press alone, illicit legislative censorial intent, targeting of a small group of speakers, and content-based regulation. As a result, because the Court did not find proof of a substantial burden imposed upon the press, it was not required to address the second prong of the test (i.e., to determine whether there was a compelling governmental interest for the general burden of the Arkansas sales tax on the press).

209. Id.
210. Id.
211. Id.
212. Id. For an analysis arguing for limitations on the application of the strict scrutiny standard to content-based classifications, see Farthing, supra note 150, at 1955 n.23.
214. Id.
215. Id.
216. Id.
217. *Contra* Minneapolis Star & Tribune Co. v. Minnesota Comm’r of Revenue, 460 U.S. 575, 582 (1983) (requiring strict scrutiny review because two types of discrimination were identified); Arkansas Writers’ Project Inc. v. Ragland, 481 U.S. 221, 231 (1987) (same).
2. The "Additional Basis" Analysis

The two-prong analysis as employed by the Court thus far has identified unconstitutional tax treatment among members of the same medium. The Court's result after applying that analysis in *Leathers* was two-fold. First, the Court upheld the Arkansas sales tax when it was applied only to cable television services. Moreover, even if satellite broadcast services were found to be the same medium as cable, the Court held that the Arkansas sales tax was still valid when applied to cable services alone. The two-prong analysis was not, however, equipped to resolve whether a tax scheme could discriminate between different members of the press. In response to this deficiency, the *Leathers* Court expanded its analysis by determining whether there was an "additional basis" for striking down tax legislation that differentiated between different members of the press.

The cable petitioners claimed that an additional basis for nullifying the legislation was the intermedia and intramedia discrimination imposed by the Arkansas tax scheme, which exempted the similar medium of satellite broadcast television and the different media of newspapers and magazines. Petitioners argued that there was an additional basis in these discriminations regardless of whether the Court found any evidence of intent to suppress speech or particular ideas. The *Leathers* Court dismissed that argument, holding instead that distinguishing between types of media for tax purposes is not an additional basis for striking down a tax scheme unless it "is directed at, or presents the danger of suppressing, particular ideas."

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218. See supra note 22 and accompanying text.
220. Id.
221. Id.
222. Id. The "additional basis" concept was initially introduced as a possible means for invalidating the sales tax scheme in *Arkansas Writers'* because of the distinction made between two different members of the press—newspapers and magazines. *Arkansas Writers' Project*, Inc. v. Ragland, 481 U.S. 221, 233 (1987). However, the *Arkansas Writers' Court* invalidated that tax scheme by applying the standard two-prong test from *Minneapolis Star*, and thus the issue remained whether this "additional basis," or distinction between different types of media, was a valid means by which to strike down a tax as violative of the First Amendment. *Id.*

*Leathers* provided the Court with an opportunity to resolve whether a state is forbidden under the Free Press Clause to impose a generally applicable sales tax on only selected segments of the media. *Leathers*, 111 S. Ct. at 1442. Because the Court did not find any of the types of discrimination which would invalidate differential tax schemes under the two-prong analysis, it determined that "cable petitioners can prevail only if the Arkansas tax scheme presents 'an additional basis' for concluding that the State has violated petitioners First Amendment rights." *Id.* at 1445.

224. *Id.*
225. *Id.*
The Court supported its conclusion by relying on the general principle that legislatures are not required to subsidize First Amendment rights through special deductions or exemptions.\textsuperscript{226} The Court recognized the broad latitude that legislatures have customarily been granted in creating classifications and distinctions in tax statutes.\textsuperscript{227} Thus, the Court refused to find a particular tax scheme constitutionally suspect under the First Amendment simply because the tax scheme did not exempt all speech or exempted only some speech from a generally applicable tax.\textsuperscript{228} The Court maintained that there must be some "explicit demonstration" that a classification is a "hostile and oppressive discrimination" aimed at specific persons or ideas in order for the First Amendment to be implicated.\textsuperscript{229}

The \textit{Leathers} Court determined under its additional basis analysis that the Arkansas sales tax scheme did not present the danger of suppressing particular ideas.\textsuperscript{230} It held that the tax scheme constituted a permissible act by the legislature to exempt certain media from a generally applicable tax.\textsuperscript{231} The Court decided that there was no "additional basis" for striking down the

\textsuperscript{226} \textit{Id.} at 1445; see \textit{Cammarano v. United States}, 358 U.S. 498 (1959) (upholding the Internal Revenue Code's disallowance of a tax deduction on monies expended to promote or defeat pending legislation); \textit{Regan v. Taxation with Representation}, 461 U.S. 540 (1983) (upholding the Internal Revenue Code's distinction for tax deduction purposes between nonprofit organizations engaged in lobbying activities and those that are not).

\textsuperscript{227} \textit{Leathers}, 111 S. Ct. at 1446 (citing \textit{Taxation with Representation}, 461 U.S. at 547); see also \textit{Madden v. Kentucky}, 309 U.S. 83, 87-88 (1940) (placing a heavy burden on parties challenging tax statutes because the courts traditionally allow for broad discretion due to the legislature's familiarity with local concerns).

\textsuperscript{228} \textit{See Cammarano}, 358 U.S. at 513; \textit{Taxation with Representation}, 461 U.S. at 545-46.

\textsuperscript{229} \textit{Leathers}, 111 S. Ct. at 1446 (citing \textit{Madden}, 309 U.S. at 87-88). First, the \textit{Leathers} Court reasoned that, absent discrimination aimed at particular ideas, the \textit{Madden-Cammarano-Taxation with Representation} line of cases established a standard that favored duly enacted tax schemes even if they differentially taxed speakers. \textit{Id.} at 1445-46.

This same standard was recognized in a similar line of cases which involved government economic regulations affecting the press as opposed to taxation. \textit{See Mabee v. White Plains Publishing Co.}, 327 U.S. 178 (1946); \textit{Oklahoma Press Publishing Co. v. Walling}, 327 U.S. 186 (1946). In each of those cases, the Supreme Court held that the exemption of certain small newspapers from the requirements of the Fair Labor Standards Act of 1938 was constitutional and therefore did not unduly burden the papers' First Amendment rights. \textit{Mabee}, 327 U.S. at 184; \textit{Oklahoma Press}, 327 U.S. at 192-94. The Court reasoned that the exempting of small newspapers from a regulation that applied generally to all businesses was not singling out members of the press for special treatment or deliberately penalizing a certain group of newspapers. \textit{Mabee}, 327 U.S. at 184; \textit{Oklahoma Press}, 327 U.S. at 194.

Taken together, the Court concluded that these two lines of cases established that speakers, \textit{including members of the press}, could be differentially taxed unless the tax scheme threatened the suppression of particular ideas. \textit{Leathers}, 111 S. Ct. at 1447.

\textsuperscript{230} \textit{Id.} The Court found no evidence that the tax would stifle the free exchange of ideas or censor the expressive activities of cable television. \textit{Id.}

\textsuperscript{231} \textit{Id.}
Arkansas tax scheme as it applied to the press. The Court concluded that under both the traditional two-prong analysis and the new additional basis analysis, the First Amendment was not violated by Arkansas' extension of its generally applicable sales tax to only cable services, or to both cable and satellite services, while exempting the print media.

B. The Dissent's Reproach

The dissent in Leathers perceived the majority's outcome as a narrowing of the principles developed in prior differential taxation cases. Led by Justice Marshall, the dissent condemned the Arkansas sales tax scheme for differentially discriminating among members of the media. Justice Marshall analyzed three factors in reaching his conclusion. First, he accentuated the extensive and unrefuted proof that consumers regarded the services provided by cable television as generally interchangeable with those services provided by other members of the media. Thus, by only taxing cable services, the tax scheme inflicted a competitive disadvantage upon cable which triggered the "risk of covert censorship." Justice Marshall asserted that it was the risk of censorship which required the State to meet a heavy burden in order to justify its differential treatment by some "compelling governmental interest." Though the majority did not apply this strict scrutiny standard because it found the tax scheme even-handed, Justice Marshall's analysis would necessitate this showing for the tax to be upheld. According to Justice Marshall, the State failed in this undertaking because the only interest raised by the State was its desire to increase revenues, and the Court

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232. Id.
233. Id.
234. Id. at 1448 (Marshall, J., dissenting, in which Blackmun, J., joined).
235. Id. at 1448-49. Specifically, the dissent stated that "under Arkansas' general sales tax scheme, cable operators pay a sales tax on their subscription fees that is not paid by newspaper or magazine companies on their subscription fees or by television or radio broadcasters on their advertising revenues." Id.
236. Id. at 1449.
237. Id. It is that risk, Justice Marshall contended, that underlay the main cases cited by the majority and found by them to be uncontrolling. Id. Unlike the tax in Grosjean, where there was clear legislative intent to censor newspapers, Justice Marshall maintained that the Leathers tax scheme was more akin to the tax in Minneapolis Star, in which there was no evidence of explicit censorial motive on the part of the legislature. See Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 591-92 (1983). Under those circumstances, the Court then turned its attention to the fact that Minnesota's power to single out the press presented such a "potential for abuse" that it could not be justified by any interest the State put forth. Id. at 592 (emphasis added).
238. Leathers, 111 S. Ct. at 1450 (citing Minneapolis Star, 460 U.S. at 585).
239. Id.
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has traditionally held this to be an insufficient justification for overcoming the strict scrutiny standard.\(^2\)

The dissent's second contention was that the majority's approach to the "targeting" issue was an "overly simplistic" and "unresponsive" misapplication of an analysis that the Court had employed in similar situations in the past to reach contrary holdings.\(^2\) Justice Marshall refuted the majority's claim that because 100 cable operators were subjected to the tax instead of only a "few,"\(^2\) there was a diminished chance of adversely affecting a limited range of views.\(^2\) He contended that the majority's new restrictive reading of this test provided no meaningful guidance as to what will constitute a sufficiently large group.\(^4\) Justice Marshall argued that the majority's "small versus large" analysis was founded on a mistaken belief that a large group intrinsically offered such a wide range of programming that there was no inherent risk of the tax affecting only a limited range of views.\(^4\) To support this contention, Justice Marshall referred to evidence in the record that most communities were serviced by only one cable operator, and that many cable operators offered unique programming contributions to their customers.\(^6\) Justice Marshall concluded there was ample possibility for a limited range of ideas to be unconstitutionally stifled by the Arkansas tax scheme.\(^4\)

Finally, Justice Marshall claimed that the majority had misinterpreted the precedent it relied upon in its "additional basis" analysis.\(^4\) Those cases, Justice Marshall argued, involved infringements upon the freedom of speech

\(^{240}\) Id.; see Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 231-32 (1987) (holding that neither the State's general interests in raising revenues, encouraging "fledgling" publishers, nor fostering communication within its borders could overcome the burden necessary to validate its tax exemption for certain magazines). This same interest in raising revenue was proffered in Minneapolis Star, where the Court stated that [s]tanding alone... [the interest in raising revenue] cannot justify the special treatment of the press, for an alternative means of achieving the same interest without raising concerns under the First Amendment is clearly available: the State could raise the revenue by taxing businesses generally, avoiding the censorial threat implicit in a tax that singles out the press.

Minneapolis Star, 460 U.S. at 586 (footnotes omitted).

\(^{241}\) Leathers, 111 S. Ct. at 1451. Under the "target" analysis, developed by the Court in Grosjean, Minneapolis Star, and Arkansas Writers', a generally applicable tax on nonmedia enterprises offends the First Amendment when applied to the media if it burdens only a small group within the press. Arkansas Writers', 481 U.S. at 229.

\(^{242}\) See supra note 200 and accompanying text.

\(^{243}\) Leathers, 111 S. Ct. at 1451.

\(^{244}\) Id.

\(^{245}\) Id.

\(^{246}\) Id. at 1451-52.

\(^{247}\) Id. at 1452.

\(^{248}\) Id. at 1452-53.
generally, and thus should not have been so heavily relied upon in a case involving freedom of the press.\textsuperscript{249} Instead, Justice Marshall endorsed the notion that the government has a special obligation to protect the press from discrimination.\textsuperscript{250} This obligation includes striking down all forms of differential taxation to “avoid disrupting the integrity of the information market.”\textsuperscript{251} Justice Marshall concluded that differential taxation of the press violated the government’s obligation of evenhandedness by interfering with a citizen’s freedom to choose his preferred information format.\textsuperscript{252}

III. \textsc{Differential Taxation and the Press: The Scope Delimited}

\textit{Leathers v. Medlock} has significantly impacted the law on differential taxation and the press. The Supreme Court effectively narrowed the scope of when it will strike down a particular tax scheme as violative of the Free Press Clause. The \textit{Leathers} Court tailored the means by which to uphold impartial tax legislation as applied to the press. In doing so, the Court has not diminished the principles established by precedent.\textsuperscript{253} The Court’s two-prong analysis remains the definitive test by which to identify unconstitutional tax regimes on the press.\textsuperscript{254}

After \textit{Leathers}, it is still impermissible under the two-prong analysis to tax the press by means not generally accorded nonmedia businesses.\textsuperscript{255} A special tax engineered to apply solely to members of the press will not survive

\begin{itemize}
\item \textsuperscript{249} \textit{Id.} at 1453. Justice Marshall contended that \textit{Taxation with Representation} stands for the principle that the Free Speech Clause is not violated if the government “selectively subsidizes one group of speakers according to content-neutral criteria.” \textit{Id.} at 1453. In contrast, he maintained that the Free Press Clause guaranteed members of the press protection from discrimination. \textit{Id.}
\item \textsuperscript{250} \textit{Id.}
\item \textsuperscript{251} \textit{Id.} Justice Marshall based this obligation on the Framers’ specific intent “to preserve an untrammeled press as a vital source of public information.” \textit{Id.} (quoting Grosjean v. American Press Co., 297 U.S. 233 (1936)).
\item \textsuperscript{252} \textit{Id.} at 1453.
\item \textsuperscript{253} It remains unconstitutional to impose tax schemes on members of the press by means that have led the Court to strike down differential taxation in the past—illicit legislative intent, “special” taxes, targeting, or content-based classifications—unless there is a compelling governmental interest. \textit{See id.} at 1443, 1445. It also remains clear that a generally applicable tax imposed upon the press does not infringe upon First Amendment guarantees. \textit{Id.} at 1444.
\item \textsuperscript{254} \textit{Id.} at 1443-44.
\item \textsuperscript{255} \textit{Id.} at 1443. The Arkansas sales and use tax applies to a broad range of nonmedia services, including utility, communication, lodging, maintenance, printing, and ticket distribution. \textsc{Ark. Code Ann.} \textsection \textsc{26-52-301} (Michie Supp. 1989); \textit{see} Globe Newspaper Co. v. Comm’r of Revenue, 571 N.E.2d 617 (Mass. 1991) (applying the two-prong analysis to invalidate a sales tax scheme which subjected newspaper publishers to different tax treatment than other manufacturers).
\end{itemize}
under the First Amendment absent a compelling governmental interest. Likewise, the two-prong analysis prevails as a viable test for determining the constitutionality of differential taxation upon individual members of the same medium. Thus, if the Court encounters sufficient evidence of discrimination among members of the same medium, the tax scheme will be struck down absent a compelling government interest.

Prior to Leathers, the Court only utilized its two-prong analysis in tax schemes which applied differently to members within the same medium. One of the novel problems posed in Leathers was that the tax scheme was not evenly applied to members of similar media—cable and satellite television. The Leathers Court responded by holding that, under the two-prong analysis, the Arkansas sales tax did not discriminate among members of similar media. The Court reasoned that, regardless of whether it accepted the Arkansas Supreme Court's decision that cable and satellite television were the same medium, its analysis and results under the two-prong test would not change. In effect, the Court has held that members of the same or similar media can be taxed differently without violating the Free Press Clause.

This result provides meaningful insight into the two-prong analysis as a test developed to strike down discriminatory tax schemes within a single medium of the press. The two-prong analysis was designed to guarantee individual members of the press freedom from infringement of their First Amendment rights by invalidating discriminatory tax legislation. It was not developed to "equalize" tax treatment of the press in the sense that each member of a particular medium be treated in exactly the same manner in order to satisfy government obligations under the First Amendment.

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256. Leathers, 111 S. Ct. at 1444. The Minneapolis Star Court was the first to identify "special" taxes on the press as a type of discrimination impermissible under the Free Press Clause. Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 591 (1983).

257. Leathers, 111 S. Ct. at 1443, 1445.

258. See supra note 22 and accompanying text.

259. Leathers, 111 S. Ct. at 1444-45. Until Act 769 was enacted, 100 cable service operators were subjected to the Arkansas sales tax while seven scrambled satellite broadcast services were not. Id. at 1444. The Arkansas Supreme Court accepted the proffered evidence that cable and satellite services were the same medium. See supra note 183 and accompanying text.

260. Leathers 111 S. Ct. at 1445.

261. Id.

262. Previous differential tax regimes were struck down by the Court because of the discriminatory "means" by which they were imposed upon the press—illicit legislative intent, "special" taxes, targeting, or content-based classifications—and not because the "end" result was unequal taxation among members of the group. See Grosjean v. American Press Co., 297 U.S. 233, 251 (1936) (stating that it is the "form in which the tax is imposed" that raises First Amendment concerns); see also Minneapolis Star & Tribune Co. v. Minnesota Comm'r of
Leathers Court maintained that members within the same medium or similar media can be taxed unequally as long as the tax scheme survives the two-prong analysis.263

The second significant impact of the Leathers holding was the development of the "additional basis" test. Under this separate analysis, the Court held that taxing differently within a single medium or among different media was not, in and of itself, evidence of discrimination.264 The Supreme Court narrowed the nondiscrimination principle by declining to recognize generally disparate tax treatment among members of the press as prima facie evidence of unconstitutional discrimination.

The Court realized its primary objective by these results—it maintained the equilibrium between the press' guaranteed protections under the First Amendment from unconstitutional infringements and the state's power to tax the press. First, the Court followed precedent by remaining focused upon the identification of definitive types of discrimination.265 The Court remained steadfast in its belief that a tax scheme on the press is constitutionally suspect and subject to a strict scrutiny review only upon identification of one of the four conclusive types of discrimination. Second, the Court enhanced a state's power to tax the press by specifically tailoring the nondiscrimination principle to combat the problem of overinclusiveness in its determination of unconstitutional tax schemes. The Leathers Court accomplished this by applying judicially-accepted tax principles to situations involving the press that allow for broad latitude in a state's power to create distinctions in tax legislation.266 Thus, a state need not fear First Amendment repercussions from unequal tax treatment both among and between members of the press.

Leathers exemplifies the type of case that will arise in the future. In past differential taxation cases, the Court's two-prong analysis resulted in the identification of several types of discrimination in each case.267 Three of these types of discrimination—illicit legislative intent, special "singling out"

Revenue, 460 U.S. 575, 592 (1983) (recognizing that it is the very act of selecting the press for special treatment or tailoring a tax to single out a few members of the press that warrants a strict scrutiny review to protect First Amendment guarantees); Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 231 (1987) (stating that it is the "content-based approach to taxation" that invokes the strict scrutiny review).

263. Leathers, 111 S. Ct. at 1445.
264. Id. at 1447. This reiterated the result under the two-prong analysis that members of the same or similar media are not entitled to identical tax treatment under the First Amendment. Id.
265. Id. at 1444-45.
266. Id. at 1446.
267. See supra note 13 and accompanying text.
taxes, and content-based regulation—are more explicit and thus easier to recognize in a particular tax scheme. The fourth, that of targeting, is a more precarious type of discrimination which is not so easily identifiable. Leathers presented a tax scheme that was clearly generally applicable, void of illicit legislative intent and free of content-based discrimination. 268 The Court therefore relied heavily upon identifying discrimination on the sole basis of targeting, the most difficult type of discrimination to delineate. 269 While the Leathers Court correctly drew the conclusion that there was no targeting of a few members of the press in the Arkansas sales tax scheme, 270 future cases relying solely upon this basis may be more questionable.

Justice Marshall's dissent centered upon this predicament, charging that the majority's approach to targeting amounted to nothing more than a mere numbers game. 271 This allegation found little support in the majority's opinion. Barring the discovery of another type of discrimination, courts may be asked in future cases to judge the constitutionality of a tax scheme solely upon whether it targets a select few members of the press. This analysis, however, is not the simple numbers game Justice Marshall interprets it to be. Though the size of the group of affected media members has been a major consideration when identifying targeting, 272 the Court has also considered whether the tax resembled a "penalty for a few" as well as the breadth of information offered by the affected group. 273 In its analysis of targeting, the majority was therefore making a much broader evaluation than that alleged by Justice Marshall.

Justice Marshall's alternative proposal would find discriminatory targeting whenever there is evidence of an uneven application among individuals of a particular medium. 274 This oversimplified approach to targeting would be overinclusive in its identification of discrimination, and it would lead to the striking down of any tax scheme regardless of the number of affected actors. The majority has taken a bold step by recognizing that within the spectrum of "targeting" there are reliable means by which to classify some unevenly applied tax schemes as nondiscriminatory.

The Leathers Court's holding allowing the imposition of a state sales tax on only selected segments of the media was a victory for Chief Justice Rehnquist and Justice Scalia. Each vigorously dissented in past differential taxa-

268. Leathers, 111 S. Ct. at 1444-45.
269. Id.
270. Id.
271. Id. at 1451 (Marshall, J., dissenting).
272. Id. at 1445.
273. Id.
274. Id. at 1452, 1453 (Marshall, J., dissenting).
tion decisions because the majority disregarded the principle that exemptions from government subsidies or benefits did not generally infringe upon fundamental rights. Prior to Leathers, however, the Court was not invalidating tax schemes because of the disparate treatment in the granting of particular exemptions to certain members of the press. The Court was instead striking down differential tax legislation because it significantly burdened a small group within the press, thus potentially threatening the suppression of a particular viewpoint or idea.

Leathers did not present the types of repressive discrimination that beleaguered the freedom of the press in past cases. The Court therefore incorporated expansive tax policies into its analysis of differential taxation of the press. Most notably, these policies included allowing for broad latitude in the creation of classifications in tax statutes and recognizing that the First Amendment is not implicated unless the statute presents the danger of suppressing particular ideas. The Leathers decision perpetuates a dual policy. First, it rigorously protects First Amendment guarantees by striking down onerous types of discrimination in tax schemes within the same medium. Simultaneously, it fosters broad government benefit allocation princi-

275. See Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 600 (1983) (Rehnquist, J., dissenting) (arguing Minnesota's tax scheme was constitutional because the State's use of tax classifications did not significantly burden a fundamental right); Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 236 (1987) (Scalia, J., dissenting, joined by Rehnquist, C.J.) (arguing Arkansas' tax scheme was constitutional because the tax distinctions did not infringe upon the exercise of a fundamental right); see also Gary A. Winters, Note, Unconstitutional Conditions as “Nonsubsidies” When Is Deference Inappropriate?, 80 GEO. L.J. 131 (1991) (arguing that a broad portion of governmental speech-related subsidies do not violate the First Amendment because private funding alternatives are available).

276. See supra note 13 and accompanying text.

277. See id.

278. Leathers, 111 S. Ct. at 1446. The Court stated that “[L]egislatures have especially broad latitude in creating classifications and distinctions in tax statutes,” and quoted from an earlier case involving the constitutionality of tax legislation: “Since the members of a legislature necessarily enjoy a familiarity with local conditions which this Court cannot have, the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes.” Regan v. Taxation with Representation, 461 U.S. 540, 547 (1983) (quoting Madden v. Kentucky, 309 U.S. 83, 87 (1940)).

Since Leathers was handed down, lower courts have applied the Court’s “additional basis” rationale to uphold expansive tax schemes that differentially treat dissimilar members of the press. See Maryland Pennysaver Group, Inc. v. Comptroller of the Treasury, 594 A.2d 1142 (Md. 1991) (upholding state sales tax that applied to pennysavers while exempting newspapers because it did not threaten to censor particular ideas or viewpoints); Sacramento Cable Television v. City of Sacramento, 234 Cal. App. 3d 232 (1991) (upholding utility users tax on the use of cable television and other common utility services because there was no evidence of intent to suppress ideas).
bles by upholding generally applicable tax schemes that appropriate exemptions in a disparate manner between different media.

IV. CONCLUSION

The government's capacity to tax differentially gives it a powerful weapon against the taxpayer. This issue becomes even more acute when that taxpayer is a member of the press and has specially guaranteed rights protected under the First Amendment. Nevertheless, the Supreme Court's ruling in *Leathers v. Medlock* makes it clear that the press can be taxed differentially without abridging its freedom of the press. The Court remains dedicated, however, to imposing a rigorous scrutiny of any tax scheme that may encroach upon that right. The Court's two-prong analysis has evolved into a comprehensive test designed to identify specific types of discrimination and to subject them to a strict scrutiny review in order to ultimately determine the constitutionality of a challenged tax scheme. Furthermore, under the Court's new additional basis analysis, legislatures now possess the wherewithal to tax different media enterprises on the most equitable and efficient grounds possible according to individual characteristics of each institution. *Leathers v. Medlock* has effectively delimited the scope of differential taxation without adversely infringing upon the freedom of the press.

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