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CONSTITUTIONAL LAW—TAXATION—INTRAMEDIA DIFFERENTIAL TAX SCHEME UPHeld. *Leathers v. Medlock*, 111 S. Ct. 1438 (1991).

The Arkansas Legislature adopted Act 188¹ in 1987.² Act 188 amended Arkansas' Gross Receipts Act (GRA)³ to include a sales tax on cable television services.⁴ The amended GRA continued to expressly exempt receipts from subscription and over-the-counter newspaper sales and subscription magazine sales.⁵ Prior to the adoption of Act 188, the GRA made no mention of cable television or satellite broadcast services.⁶

Consequently, Daniel L. Medlock, a cable television subscriber, along with a cable operator and a cable organization (cable petitioners),⁷ brought a class action in Arkansas Chancery Court "to challenge the extension of the sales tax to cable television services."⁸ The cable petitioners argued that the taxation of cable services, when compared with the tax exemptions and exclusions granted to newspapers, magazines, and satellite broadcast services, violated their constitutional rights under the First Amendment⁹ and the Equal Protection Clause of the Fourteenth Amendment.¹⁰

The chancery court noted the inherent necessity in cable television of using public rights-of-way to lay its cables.¹¹ The court found this distinction sufficient to justify different treatment between cable televi-

1. 1987 Ark. Acts 409 (codified at ARK. CODE ANN. § 26-52-301 (Michie 1991)).

2. *Leathers v. Medlock*, 111 S. Ct. 1438, 1441 (1991).

3. *Id.* The GRA had imposed a 4% sales tax on tangible personal property and specified services. *Id.*

4. The services to be taxed included (1) "all service charges and rental charges whether for basic service, or premium channels or other special service . . . (2) installation and repair service charges, and (3) any other charges having any connection with the providing of cable television services." *Medlock v. Pledger*, 301 Ark. 483, 484, 785 S.W.2d 202, 203 (1990).

5. 111 S. Ct. at 1441.

6. *Id.*

7. Aside from *Medlock*, this action was brought by Community Communications Co., a cable television operator, and the Arkansas Cable Television Association, Inc., a trade organization consisting of approximately 80 cable operator members. *Id.*

8. *Id.*

9. U.S. CONST. amend. I. The amendment reads in relevant part, "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."

10. U.S. CONST. amend. XIV, § 1. The section reads in relevant part "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

11. 111 S. Ct. at 1441.

sion and other forms of media that were exempt from the sales tax.¹² Thus, the court upheld the constitutionality of Act 188.¹³ Shortly after this decision, Arkansas adopted Act 769¹⁴ extending the sales tax to satellite television and similar services.¹⁵

Despite the adoption of Act 769, cable petitioners appealed to the Arkansas Supreme Court claiming that Act 188 unconstitutionally discriminated against cable television.¹⁶ The court rejected the chancery court's conclusion that differential tax treatment is justified because of cable television's use of public rights-of-way.¹⁷ The court reasoned that although the First Amendment does not prohibit differential taxation of different media, it does prohibit differential taxation among members of the same medium.¹⁸ The court found that cable and satellite services were essentially the same.¹⁹ Therefore, the court concluded that "Arkansas' sales tax was unconstitutional under the First Amendment for the period during which cable television but not satellite broadcast services were subject to the tax."²⁰

The United States Supreme Court granted certiorari upon the petition of the Arkansas Commissioner of Revenues and the cable petitioners.²¹ The Court held that Act 188 was not unconstitutional under the First Amendment.²² The Court reasoned that a "generally applicable" tax which extended to cable television services but exempted other media was not unconstitutional differential taxation.²³ In coming to this conclusion, the Court recognized that the Arkansas Legislature's adoption of Act 188 revealed no intent to discriminate against a particular medium on the basis of the ideas conveyed by the medium.²⁴ Additionally, the effect of the tax was unlike constitutionally suspect content-based regulation because it did not operate to suppress a small number of particular speakers.²⁵ *Leathers v. Medlock*, 111 S. Ct. 1438 (1991).

12. *Id.*

13. *Id.*

14. 1989 Ark. Acts 769 (codified at ARK. CODE ANN. § 26-52-301 (Michie 1991)).

15. 111 S. Ct. at 1441-42.

16. *Id.* at 1442.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.* Certiorari granted in 111 S. Ct. 41, 42 (1990).

22. *Leathers v. Medlock*, 111 S. Ct. at 1447. The case was decided by a 7-2 majority.

23. *Id.* at 1447.

24. *Id.*

25. *Id.* at 1444-45.

For the past 200 years, the First Amendment has been largely interpreted as if it read "freedom of speech, *including* freedom of the press."²⁶ Actually, the two phrases are coordinate.²⁷ Although the press has recently begun to assert rights arising specifically from the Press Clause,²⁸ "[t]hus far the Supreme Court has declined to give independent significance to the phrase 'freedom of the press.'"²⁹ Additionally, the Court has refused to find in the Free Speech and Press Clauses any special privileges or protections for the institutional press.³⁰ Although the distinctive function of the press in the First Amendment scheme is generally recognized by the courts, the press receives no more protection because of the Press Clause than does an individual under the Speech Clause.³¹

Through the first quarter of the twentieth century, courts interpreted First Amendment restrictions as extending to the federal government, but not to the states.³² This changed, however, with such cases as *Gitlow v. New York*³³ and *Near v. Minnesota*.³⁴ In these cases, the Supreme Court determined that the First Amendment's protection of free speech extended to the states. The First Amendment was gradually "incorporated" into the liberties protected by the Fourteenth

26. David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455, 456 (1983).

27. *Id.* For the relevant language of the First Amendment, see *supra* note 9.

28. *Id.* These rights have included "the right to maintain the confidentiality of sources, the right of access to prisons and courtrooms, the right to keep police from searching newsrooms, and the right to prevent libel plaintiffs from inquiring into journalists' thought processes." *Id.*

29. Anderson, *supra* note 26, at 456.

30. Margaret A. Blanchard, *The Institutional Press and Its First Amendment Privileges*, 1978 SUP. CT. REV. 225, 226.

31. Anderson, *supra* note 26, at 456.

32. *Prudential Ins. Co. v. Cheek*, 259 U.S. 530 (1922). This is apparent from the following language of the Court: "[N]either the Fourteenth Amendment nor any other provision of the Constitution of the United States imposes upon the States any restrictions about 'freedom of speech' . . ." *Id.* at 543.

33. 268 U.S. 652 (1925). In *Gitlow* a 7-2 majority of the Court upheld the conviction of a New York Communist under a state criminal anarchy statute for distributing pamphlets advocating the overthrow of the United States Government. Out of this apparent defeat for free speech, however, came a victory in the form of Justice William Sanford's language that "freedom of speech and of the press . . . are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States." *Id.* at 666.

34. 283 U.S. 697 (1931). In *Near* a reluctant Court was for the first time asked to void a state law restricting press freedom under the First Amendment as incorporated into the Fourteenth Amendment. By a 5-4 vote they did so, stating: "It is no longer open to doubt that the liberty of the press, and of speech, is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action." *Id.* at 707.

Amendment.³⁵

Arguably, since the late nineteenth century, licenses and taxes have served as economic impediments to a free press.³⁶ The Court first addressed this issue in the landmark case of *Grosjean v. American Press Co.*³⁷ In *Grosjean* the State of Louisiana attempted to impose a special tax of two percent on gross advertising revenues of newspapers with circulations over 20,000 copies per week.³⁸ Of the 165 newspapers in the state, only 13 were affected by the tax, and it was no coincidence that 12 of those had in the Court's own words "ganged up" on the powerful demagogic governor, Huey Long.³⁹

The Supreme Court was apparently influenced by the legislative history of the measure, which showed that it was passed at the behest of Governor Long as a way of punishing his enemies in the press.⁴⁰ In declaring the tax unconstitutional, Justice Sutherland found that the tax scheme was "bad" because it was actually a tool, though disguised as a tax, for limiting "the circulation of information to which the public is entitled in virtue of the constitutional guaranties."⁴¹

While determining the intent of the Framers in drafting constitutional protections such as the First Amendment is an extremely difficult task,⁴² the Supreme Court made an attempt to do so in *Grosjean*.⁴³ The Court recognized that one of the instigations of the American Revolution was the act of the British government in enforcing stamp duties imposed upon newspapers in the colonies, supposedly for the purpose of repressing libels.⁴⁴ These duties were known as "taxes on knowledge" and were extremely unpopular with the colonists who considered their primary aim to be the prevention of "the acquisition of knowledge by the people in respect of their governmental affairs."⁴⁵

The Framers were aware of this situation when they included free-

35. WALTER F. MURPHY ET AL., *AMERICAN CONSTITUTIONAL INTERPRETATION* 575 (1986) [hereinafter MURPHY].

36. See, e.g., *City of Norfolk v. Norfolk Landmark Publishing Co.*, 28 S.E. 959 (Va. 1898); *Cowan v. Fairbrother*, 24 S.E. 212 (N.C. 1896); *In re Jager*, 7 S.E. 605 (S.C. 1888).

37. 297 U.S. 233 (1936).

38. *Id.* at 240-41.

39. *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 579-80 (1983).

40. *Id.*

41. 297 U.S. at 250.

42. MURPHY, *supra* note 35, at 303-04. See also *Minneapolis Star*, 460 U.S. at 583 n.6.

43. 297 U.S. at 248-49.

44. *Id.* at 246-48.

45. *Id.* at 246-47.

dom of speech and freedom of the press in the First Amendment to the Constitution.⁴⁶ Their intent was that such "taxes on knowledge" would be restricted by these First Amendment protections.⁴⁷ As *Grosjean* involved a similar attempt by the Louisiana legislature to limit the acquisition of knowledge, the Court held the tax scheme void under the Constitution.⁴⁸

Grosjean was used by media plaintiffs to challenge state tax schemes over the next forty-seven years.⁴⁹ Based upon *Grosjean*, lower courts recognized the legitimacy of two arguments.⁵⁰ First, state tax schemes which either "intended to coerce or had the inevitable effect of coercing the press" violate the First Amendment.⁵¹ Second, the media receives no constitutional immunity from the application of a state's general tax laws.⁵²

During this same period, another case, unrelated to free speech, arose to indirectly support the imposition of taxes on the media. In *Madden v. Kentucky*⁵³ the Court ruled that state legislatures have broad discretion in determining taxation classifications.⁵⁴ The Court suggested a special status for tax laws, stating "in taxation, even more than in other fields, legislatures possess the greatest freedom in classification."⁵⁵ Furthermore, in order to overcome the presumption of constitutionality, a challenger must show that the tax is "a hostile and oppressive discrimination against particular persons and classes," and that no conceivable basis exists that might support it.⁵⁶

Although the Court considered a state's right to tax so important as to necessitate staunch protection, it later recognized that First Amendment protections were at least equally important. In 1943, the

46. *Id.* at 248.

47. *Id.* at 247.

48. *Id.* at 249-51.

49. Todd F. Simon, *All the News That's Fit to Tax: First Amendment Limitations on State and Local Taxation of the Press*, 21 WAKE FOREST L. REV. 59, 62 (1985). In his article, Simon recognizes the evolution of what he refers to as a "tripartite first amendment doctrine" in reference to "non-media first amendment cases." *Id.* at 64. This doctrine apparently arose from the tax challenges which constituted the aftermath of *Grosjean*. *Id.*

50. *Id.* at 62-64.

51. *Id.* at 62. *See, e.g.*, *City of Baltimore v. A.S. Abell Co.*, 145 A.2d 111 (Md. 1958).

52. Simon, *supra* note 49, at 62. *See, e.g.*, *Giragi v. Moore*, 64 P.2d 819 (Ariz. 1937).

53. 309 U.S. 83 (1940). This case concerned a Fourteenth Amendment due process challenge to a state imposed tax on deposits in Kentucky banks. *Id.* at 84-85.

54. *Id.* at 87-88.

55. *Id.* at 88 (footnote omitted).

56. *Id.* (footnotes omitted).

Court held in *Murdock v. Pennsylvania*⁵⁷ that taxes on "the enjoyment of a right granted by the federal constitution," such as "[a] license tax applied to activities guaranteed by the First Amendment," were not within the state's power to impose.⁵⁸ This principle has been used by newspapers in challenging government control of distribution methods⁵⁹ and by broadcasters in challenging government restrictions on the broadcast media.⁶⁰

The prohibition against direct taxation of First Amendment activities was to represent part of "First Amendment doctrine."⁶¹ Another part of this doctrine arose from an innovative method of analysis known as First Amendment equal protection.⁶² First Amendment rights are fundamental.⁶³ Consequently, classifications regulating when and where one may exercise those rights are subject to strict judicial scrutiny.⁶⁴

In *Police Department of Chicago v. Mosley*⁶⁵ the Supreme Court invalidated a statute prohibiting pickets and demonstrations within 150 feet of local schools, but exempting "peaceful picketing" caused by a labor dispute within the school.⁶⁶ Although the Court based its decision on Fourteenth Amendment equal protection grounds, the opinion spoke of "first amendment values and primarily cites first amendment cases as authority."⁶⁷ In addressing the relationship between the equality principle and the First Amendment, the Court observed that "[t]here is an 'equality of status in the field of ideas,' and government must afford

57. 319 U.S. 105 (1943). This case concerned not only freedom of speech, but also freedom of religion. *Id.*

58. *Id.* at 113.

59. Simon, *supra* note 49, at 64. See, e.g., *Southern New Jersey Newspapers, Inc. v. New Jersey Dep't of Transp.*, 542 F. Supp. 173 (D.N.J. 1982).

60. Simon, *supra* note 49, at 64. See, e.g., *Weaver v. Jordan*, 411 P.2d 289 (Cal. 1966), *cert. denied*, 385 U.S. 844 (1966).

61. Simon, *supra* note 49, at 64.

62. Simon, *supra* note 49, at 65.

63. JOHN E. NOWAK ET AL., *CONSTITUTIONAL LAW* 816-17 (2d ed. 1983).

64. *Id.* Strict judicial scrutiny is a standard imposed upon measures which adversely affect a fundamental right. The government must demonstrate that the law is justified by a compelling state interest and that the distinctions it creates "are necessary to further some governmental purpose." *BLACK'S LAW DICTIONARY* 1422 (6th ed. 1991). The Court has applied this standard to state laws which interfere with the exercise of fundamental rights and liberties protected by the Constitution. See *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 17-42 (1973).

65. 408 U.S. 92 (1972).

66. *Id.* at 94.

67. Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 27 (1975).

all points of view an equal opportunity to be heard."⁶⁸

Two parts of the First Amendment doctrine—no taxes on purely First Amendment activities and equal protection of individual speakers and the press⁶⁹—came together in *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*.⁷⁰ The Court⁷¹ struck down a Minnesota tax scheme which favored small publishers over large ones.⁷² The Court stated that a general tax scheme including the media would be constitutionally sound, but held that this scheme constituted a special tax on certain publications, violating the First Amendment guarantee of free speech.⁷³

The majority found that Minnesota's tax scheme was passed without intent to censor or discriminate.⁷⁴ Nonetheless, the Court concluded that a tax may still violate the First Amendment even in the absence of improper legislative intent.⁷⁵ The Court also found that the Minnesota tax violated Fourteenth Amendment equal protection since it penalized large publishers and favored small ones.⁷⁶ Additionally, the majority noted the great "potential for abuse" in the tax scheme as a reason for striking it down.⁷⁷ Finally, the Court found that differential taxation of the media, "unless justified by some special characteristic of the press . . . is presumptively unconstitutional."⁷⁸

This was the first time the Court had ever "stated that First Amendment rights were presumptively infringed by a statute [or] tax."⁷⁹ The challenging party had previously been required to prove

68. *Mosley*, 408 U.S. at 96 (quoting ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 27 (1948)).

69. Simon, *supra* note 49, at 68.

70. 460 U.S. 575 (1983). The case concerned a 1971 amendment to a sales tax law adding a use tax on the value of ink and paper used by any publishing business. An additional amendment in 1974 exempted the first \$100,000 of ink and paper used annually from the tax—thereby favoring small publishers at the expense of those who published in large volume. As a result of the exemption, only 14 of 388 newspapers in the state incurred a tax liability in 1974. *Id.* at 577-79.

71. Justice O'Connor wrote for the majority. *Id.* at 576.

72. *Id.* at 593.

73. *Id.* at 581. For a general discussion of the immediate impact left by the decision, see Rowland L. Young, *Tax that Soaks Big Newspapers Violates First Amendment*, 69 A.B.A. J. 805 (June 1983).

74. 460 U.S. at 580.

75. *Id.* at 592.

76. *Id.* at 591-92.

77. 460 U.S. at 592.

78. *Id.* at 585.

79. Simon, *supra* note 49, at 72.

either "discriminatory intent or . . . an infringing effect" of the tax.⁸⁰ In *Minneapolis Star* no party presented evidence of either.⁸¹ Once it was established that the tax operated to differentially burden the press, state officials were required to justify it with "a counterbalancing interest of compelling importance."⁸² The state interest was to be balanced against the constitutional burden of "singling out the press for taxation."⁸³

In *Minneapolis Star* the Court appeared to adopt a "special status for the press" approach regarding taxation.⁸⁴ The Court seemed to follow this approach two months later in a nonpress case, *Regan v. Taxation with Representation of Washington*,⁸⁵ in which it "explicitly allowed differential treatment of expression under the Internal Revenue Code."⁸⁶ While veterans' organizations were allowed to lobby and still retain their tax-exempt status, other tax-exempt organizations lost their exemptions if they engaged in lobbying.⁸⁷ The Court held that this differential treatment did not violate the First Amendment or principles of equal protection.⁸⁸ The Court explained its holding by returning to the *Grosjean* requirement of improper censorial motive which in this case was missing.⁸⁹ The Court did not bother to cite *Minneapolis Star*, in which differential tax treatment of the press had been held inherently suspect.⁹⁰

In *Arkansas Writers' Project, Inc. v. Ragland*⁹¹ the Supreme Court, rather than utilizing the *Minneapolis Star* presumption of un-

80. Simon, *supra* note 49, at 72.

81. Simon, *supra* note 49, at 72.

82. *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 585 (1983).

83. *Id.* at 585 n.7.

84. Simon, *supra* note 49, at 74.

85. 461 U.S. 540 (1983). This case concerned a nonprofit organization which applied for tax-exempt status under the Internal Revenue Code and was turned down because it was engaged in lobbying activity. The Code denied such status to some nonprofit organizations engaged in lobbying, while allowing it to others. Petitioners challenged the constitutionality of the tax-exemption statute. *Id.* at 541-43.

86. Simon, *supra* note 49, at 74 n.134 (citing *Regan*, 461 U.S. at 548).

87. Simon, *supra* note 49, at 74 n.134 (citing *Regan*, 461 U.S. at 543).

88. *Regan*, 461 U.S. at 548-51.

89. *Id.* at 548 (citing *Cammarano v. United States*, 358 U.S. 498, 513 (1959); *Speiser v. Randall*, 357 U.S. 513, 519 (1958)).

90. 461 U.S. at 540.

91. 481 U.S. 221 (1987). This case concerned a magazine publisher who brought suit to challenge an Arkansas sales tax scheme which exempted newspapers and "religious, professional, trade, and sports journals," but not magazines of general interest. *Id.* at 224-25.

constitutionality to invalidate a state tax on the media, relied upon another argument. The Court held that an Arkansas sales tax scheme, which taxed general interest magazines but exempted newspapers and certain professional journals, violated the First Amendment.⁹² In doing so, it stated that the sales tax scheme was content-based and discriminated against a small group of magazines.⁹³ Evidence of "improper censorial motive" was held unnecessary to establish a constitutional violation where the tax scheme posed "a particular danger of abuse by the State."⁹⁴ Content-based tax classifications, it was determined, present such a danger and thus violate the First Amendment's guarantee of freedom of the press.⁹⁵

During this development period in the law of media taxation, cable television was recognized as an important conduit of First Amendment free speech.⁹⁶

In 1991, the Court addressed First Amendment taxation of the Arkansas cable industry in *Leathers v. Medlock*.⁹⁷ The Court⁹⁸ affirmed that cable television constitutes speech protected under the First Amendment.⁹⁹ Additionally, the operation of cable television is part of the press.¹⁰⁰ However, the Court also stated that First Amendment concerns are not raised merely because cable is taxed differently from other media.¹⁰¹ Special circumstances must be present before a tax discriminating among speakers is deemed constitutionally suspect.¹⁰²

Relying upon *Minneapolis Star* and *Arkansas Writers'*, the Court concluded that proof of discriminatory legislative intent is not necessary to invalidate a differential tax on First Amendment grounds.¹⁰³

92. *Id.* at 234.

93. *Id.* at 229-30.

94. *Id.* at 228.

95. *Id.* at 229-30 (citing *Regan v. Time, Inc.*, 468 U.S. 641 (1984)).

96. See *Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 (1986). In *Preferred Communications*, the Court found that cable operators serve the same core press function of communication of ideas as do traditional communications media such as newspapers, books, and public speakers, and thus are to be entitled the same First Amendment protections. *Id.* at 494.

97. 111 S. Ct. 1438 (1991).

98. The majority opinion was written by Justice O'Connor and joined by Chief Justice Rehnquist and Justices White, Stevens, Scalia, Kennedy, and Souter. *Id.* at 1440.

99. *Id.* at 1442.

100. *Id.* See also *Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494 (1986).

101. 111 S. Ct. at 1442.

102. *Id.*

103. *Id.* at 1442-43.

The tax, however, must not single out the press for special treatment or target a small, narrowly defined group.¹⁰⁴ Narrowing the principle expressed in *Minneapolis Star*, the Court stated that differential taxation of speakers is constitutionally suspect only where it threatens to suppress the expression of particular ideas or viewpoints, or where it targets a small group to shoulder the entire tax burden.¹⁰⁵ In such cases, the Court reasoned, the tax resembles a penalty for that group.¹⁰⁶

The Court found that the Arkansas sales tax scheme met neither of these criteria.¹⁰⁷ It represented merely the extension of a tax of general applicability, and this type of tax had been repeatedly upheld by the courts.¹⁰⁸ Furthermore, the Arkansas tax did not single out the press and thus threaten to hinder it as a "watchdog of government activity."¹⁰⁹ In addition, the Court determined the tax was not a purposeful attempt to target cable television by interfering with its First Amendment activities.¹¹⁰ Nor did it select a narrow base to wholly shoulder the tax burden.¹¹¹

The primary danger that the Court recognized was the threat of state censorship.¹¹² In determining whether state legislation violates the First Amendment, the Court concluded that an important factor is whether the legislation distorts the market for ideas.¹¹³ Two examples would be a tax imposed on a small number of speakers who represent a limited range of views and regulations justified by and based upon the content of the "spoken" material.¹¹⁴ In *Leathers*, neither of the above were present since the Arkansas tax affected many cable operators operating throughout the state who offered a wide variety of programming.¹¹⁵

As there was no evidence that the material on cable differs systematically in its message from that conveyed by other communications

104. *Id.* at 1443.

105. *Id.* at 1442-43.

106. *Id.* at 1443.

107. *Id.* at 1444.

108. *Id.* (citing as an example, *Swaggart Ministries v. Board of Equalization of California*, 493 U.S. 378 (1990)).

109. 111 S. Ct. at 1444.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* at 1445.

media, the Court found that cable television is not unique, but instead "offers subscribers a variety of programming that presents a mixture of news, information, and entertainment."¹¹⁶ Therefore, the tax on cable was not content-based.¹¹⁷ Neither did it act to suppress a narrow range of ideas.¹¹⁸

The Court held that an "additional basis" must be present to conclude that the state has violated cable petitioners' First Amendment rights.¹¹⁹ Cable petitioners argued that such a basis existed since intermedia and intramedia discrimination existed for a time.¹²⁰ The Court, however, rejected the argument that this discrimination presented an "additional basis" sufficient to create a First Amendment violation.¹²¹

Citing *Regan v. Taxation with Representation*,¹²² the Court ruled that in order for a discriminatory tax scheme to implicate the First Amendment, it must discriminate on the basis of ideas.¹²³ Furthermore, by its very nature, the power to tax also yields the power to make discriminatory classifications.¹²⁴ The Court then recognized the broad latitude legislatures have in making classifications in tax statutes.¹²⁵

So long as it is included in a generally applicable tax, speech may be taxed within the bounds of the Constitution.¹²⁶ The Court additionally concluded that First Amendment concerns are not raised by a mere showing that a burden affects speakers differently.¹²⁷

The Court determined that Arkansas' tax constituted the extension of a generally applicable sales tax to cable television services.¹²⁸ Fur-

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* (citing *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987)).

120. 111 S. Ct. at 1445.

121. *Id.*

122. 461 U.S. 540 (1983).

123. 111 S. Ct. at 1445-46.

124. *Id.* at 1446. The Court cited *Regan* as support for the proposition that "inherent in the power to tax is the power to discriminate in taxation." *Id.*

125. *Id.* The Court relied upon *Madden v. Kentucky* to show that in taxation, local legislatures "possess the greatest freedom in classification" so that the presumption of constitutionality which attaches to the tax schemes they impose may be overcome only by an explicit showing that the discrimination is hostile and oppressive. *Id.* (quoting *Madden v. Kentucky*, 309 U.S. 83, 87-88 (1940)).

126. *Id.*

127. *Id.* (citing *Mabee v. White Plains Publishing Co.*, 327 U.S. 178 (1946); *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186 (1946)).

128. *Id.* at 1447.

thermore, the Court found that the tax was broad-based and content-neutral, with no record indicating it was either intended for, or would have the likely effect of, stifling the free exchange of ideas.¹²⁹ As a result, the Court concluded that the tax did not violate the First Amendment guarantee of free speech or free press.¹³⁰

The dissent¹³¹ relied more on recent case law, especially *Minneapolis Star*.¹³² Justice Marshall contended that freedom of the press was designed to prohibit the "government from using the tax power to discriminate against individual members of the media or against the media as a whole."¹³³ Consequently, media actors must be treated equally in terms of taxing.¹³⁴ Justice Marshall argued that the majority ignored equal treatment among information mediums when stating that it is constitutionally permissible to treat some media actors differently "so long as the more heavily taxed medium is not too 'small' in number."¹³⁵

Next, the dissent argued that the Court's decisions on selective taxation in the past have established a nondiscrimination principle for similarly-situated members of the press.¹³⁶ Such differential treatment is presumptively unconstitutional unless justified by a sufficiently compelling state interest.¹³⁷ Justice Marshall stated that the nondiscrimination principle has previously been applied in two contexts: (1) to "prohibit[] the State from imposing on the media tax burdens not borne by like-situated nonmedia enterprises"¹³⁸ and (2) to "prohibit[] the State from taxing individual members of the press unequally."¹³⁹ The issue is "whether the nondiscrimination principle prohibits the State from singling out a particular information medium for tax burdens not borne by other media."¹⁴⁰ The same "principles [which] animate [the] selective-taxation cases [in the past] clearly condemn this form of

129. *Id.*

130. *Id.*

131. *Id.* (Marshall, J., dissenting). The dissent was written by Justice Marshall and joined by Justice Blackmun. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.* at 1447-48.

136. *Id.* at 1448.

137. *Id.*

138. *Id.* See, e.g., *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 583-86 (1983).

139. 111 S. Ct. at 1448 (Marshall, J., dissenting). See also *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 229 (1987).

140. 111 S. Ct. at 1448 (Marshall, J., dissenting).

discrimination."¹⁴¹

The dissent stated that cable television deserves the same First Amendment protection as other members of the press.¹⁴² Moreover, the nondiscrimination principle is designed to "protect[] the press from [covert] censorship . . . [by] condemning any selective-taxation scheme that presents the '*potential* for abuse' by the State."¹⁴³ Justice Marshall found that by granting the government the power "to discriminate among like-situated media," such a risk was created.¹⁴⁴

The dissent continued, stating that "differential taxation *within* an information medium distorts the marketplace of ideas" since not all intermedia competitors share the same burdens.¹⁴⁵ Consequently, where the differential taxation occurs *across* different media, but those media compete in the same information market, the marketplace of ideas is distorted for the same reasons.¹⁴⁶ In *Leathers*, the relevant media did compete in the same information market.¹⁴⁷ Justice Marshall argued that the Arkansas tax, therefore, distorted the marketplace of ideas.¹⁴⁸ Consumer preferences were also distorted since the tax impaired "the widest possible dissemination of information from diverse and antagonistic sources."¹⁴⁹

The dissent argued that the burden of proof was on the State to prove that the "'differential treatment' of cable television [was] justified by some 'special characteristic' . . . or by some other 'counterbalancing interest of compelling importance that [the State] cannot achieve without differential taxation.'"¹⁵⁰ There was no evidence that the taxing scheme was related to any social cost of cable television or to any special characteristics of cable television service.¹⁵¹ The only justification given by the State was "its interest in raising revenue."¹⁵² Justice Marshall concluded that "[t]his interest is not sufficiently compel-

141. *Id.* at 1449.

142. *Id.* (citing *Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494 (1986)).

143. *Id.* (quoting *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 592 (1983)).

144. 111 S. Ct. at 1449 (Marshall, J., dissenting).

145. *Id.* at 1450 (citing *Grosjean v. American Press Co.*, 297 U.S. 233 (1936)).

146. 111 S. Ct. at 1450 (Marshall, J., dissenting).

147. *Id.*

148. *Id.*

149. *Id.* (quoting *Associated Press v. United States*, 326 U.S. 1, 20 (1945)).

150. 111 S. Ct. at 1450 (Marshall, J., dissenting) (quoting *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 585 (1983)).

151. 111 S. Ct. at 1450 (Marshall, J., dissenting).

152. *Id.*

ling to overcome the presumption of unconstitutionality under the nondiscrimination principle."¹⁵³

Contrary to the majority, the dissent found that cable television does offer unique contributions to the public which cannot be found in other media, such as religious programming and the Spanish-language network.¹⁵⁴ Therefore, there was a risk in the Arkansas tax scheme, similar to that of direct content-based regulation, of suppressing only a limited range of views.¹⁵⁵

Justice Marshall argued that the majority ignored the great potential for abuse inherent in granting the State power to discriminate based on medium identity so long as the medium is sufficiently large and does not single out too few actors.¹⁵⁶ A tax scheme imposing differential burdens on like-situated members of the press violates the First Amendment, even when structured in a manner that is content-neutral, because it poses the risk that the State might abuse this power.¹⁵⁷

Justice Marshall argued that the majority's reliance on *Regan*, for the proposition that a discriminatory tax scheme must discriminate on the basis of ideas in order to implicate the First Amendment, ignored the fact that *Regan* did not deal with the press or take into account its special status in the eyes of the law.¹⁵⁸ Such reliance, moreover, "would essentially annihilate the nondiscrimination principle"¹⁵⁹ since *Grosjean*, *Minneapolis Star*, and *Arkansas Writers'* stand for the principle "that the 'power to tax' does *not* include 'the power to discriminate' when the press is involved."¹⁶⁰

Finally, the dissent found the majority's reliance on *Mabee* and *Walling* to be misplaced since these two cases justified differential treatment of the press by a state policy unrelated to speech, and such a policy was not present in this case.¹⁶¹ Justice Marshall concluded that the taxing scheme of both Act 769 and Act 188 violated the First Amendment by singling out a particular medium for disproportionate taxation and was therefore unconstitutional.¹⁶²

153. *Id.* (citing *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987)).

154. 111 S. Ct. at 1451 (Marshall, J., dissenting).

155. *Id.*

156. *Id.* at 1452.

157. *Id.*

158. *Id.* at 1453.

159. *Id.* at 1452.

160. *Id.* at 1452-53.

161. *Id.* at 1453-54 n.4.

162. *Id.* at 1448.

The decision in *Leathers*, while unlikely to result in the full-scale government abuse apparently predicted by the dissent,¹⁶³ has dealt a blow to those who had high hopes for the *Minneapolis Star* decision. The *Leathers* Court has disappointed those hopes by basically ignoring the *Minneapolis Star* presumption of unconstitutionality inherent in differential taxation of the press.¹⁶⁴ The growth of this doctrine was stunted by the Court's refusal to extend the presumption to differential taxation of different media.¹⁶⁵

The nondiscrimination principle, discussed in such detail by the dissent, appears to have lost a good deal of its potency by the majority's refusal to extend it to the singling out of a particular medium in the press.¹⁶⁶ Equally emasculated is the principle of First Amendment equal protection.¹⁶⁷ The Court virtually ignores the principle.¹⁶⁸ The conclusion seems to be that equal protection applies only on a small scale, becoming irrelevant once that scale significantly expands.¹⁶⁹

This decision was a victory for general tax schemes. Apparently, any tax which operates to differentially burden some media more than others may escape the strict scrutiny of the Court by being labelled a tax of general application.¹⁷⁰ A question arises as to the consequences

163. *Id.* at 1452. The dissent appears to predict that the "potential for abuse inherent in the State's power to discriminate based on *medium identity*" will allow it to single out a medium for higher taxes simply because the state doesn't like it or because it wishes "to confer an advantage upon the medium's competitors." *Id.*

164. *Id.* at 1442-43. The Court instead focused on the fact that the Minnesota tax singled out a small group of newspapers. From this it concluded that the tax scheme must threaten to suppress particular ideas becoming constitutionally suspect. *Id.* at 1443-44.

165. *Id.* at 1443, 1448. Although the Court pays lip service to the presumption by citing the relevant language in *Minneapolis Star*, it never addresses whether it should or should not be applied in this case. *Id.* at 1443.

166. *Id.* at 1452. The dissent appears to recognize this when it concludes that the majority's interpretations of certain cases "would essentially annihilate the nondiscrimination principle." *Id.*

167. The fact that the Court has allowed one communications medium to be taxed more heavily than others, thereby making the ideas derived from that medium relatively more expensive than those attained from other media, appears inconsistent with the statement: "government must afford all points of view an equal opportunity to be heard." *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 96 (1972).

168. "The majority never develops any theory of the State's obligation to treat like-situated media equally, except to say that the State must avoid discriminating against too 'small' a number of media actors." 111 S. Ct. at 1451 (Marshall, J., dissenting).

169. While the Court condemns differentially taxing small groups with a limited range of views, it has allowed the differential taxation of an entire medium where that medium "offer[s] a wide variety of programming." 111 S. Ct. at 1444-45. The number of affected actors is also important, so that at some level between three and 100, differential taxation is no longer constitutionally suspect. *Id.* at 1451.

170. *Id.* at 1444. The Court sees no risk in such taxes since they do not constitute "a pen-

of a legislature imposing a "general tax" exempting all media except one. It seems, from the majority opinion, that this tax would be constitutionally permissible so long as no discriminatory intent could be found on the part of the legislature, and the tax does not burden too small a number of actors with too limited a set of views.¹⁷¹ Although perhaps workable in theory, this appears much more difficult to apply than the general "per se" rule of *Minneapolis Star*.¹⁷²

Although the practical short-term effect of the decision should be slight, the long-term implications may be a different matter. As the dissent vehemently argues, the potential now exists for state legislatures to suppress the dissemination of certain ideas and viewpoints.¹⁷³ If the Court continues along the path forged by the majority, the communication of new and unique ideas may become substantially more expensive in the future.

The refusal to extend First Amendment protections to a growing communications medium portends danger for other up and coming communication media. To name a few, satellite television, computer bulletin boards, CD ROM, fax machines, and video access technology are all in various early stages of growth. Each is a separate medium of communication capable of expressing certain ideas and viewpoints distinct from those expressed through other media. Where these viewpoints offend legislators or their constituencies, legislators now have a tool, the "generally applicable" tax scheme, to deal with them.¹⁷⁴

Another adversely affected group may be the small, cable-dependent broadcasters which often provide quality educational, creative, and specialized programming.¹⁷⁵ These broadcasters, due to their rela-

alty for a few." *Id.* (quoting *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 592 (1983)).

171. *Id.* at 1444-47.

172. This "per se" rule indicates that "differential tax treatment of the media is inherently suspect." Simon, *supra* note 49, at 76.

173. 111 S. Ct. at 1452 (Marshall, J., dissenting). The State may extend general taxes, which previously did not affect any media, to cable television. By doing so, rates would presumably rise, and certain people (without the discretionary income to afford the rate hikes) would be discouraged from receiving into their homes such viewpoints as may be gained by religious programming, foreign language programming, etc. *See id.* at 1451.

174. In such a scenario, a "generally applicable" tax scheme could be extended to all disfavored media while exempting newspapers, network television stations, and other media transmitting more politically popular material. The only caveat is that the medium must be large enough so that the tax does not resemble a "penalty for a few." *Id.* at 1444.

175. Some well-known examples include the Public Broadcasting System (PBS), Arts and Entertainment (A&E), and the Discovery Channel.

tively small audiences, may find it difficult to bring in heavy advertising revenues. They are therefore likely to operate close to the break-even point, relying heavily upon viewer donations to stay in business.

Once cable companies are taxed, those taxes are certain to be passed along in some way not only to subscribers, but also to the broadcasters which the cable companies carry, perhaps through smaller payment schedules. It will be the financially strained stations that find this burden most difficult to bear. Such stations are likely to be the broadcasters described above, including those presenting narrowly focused entertainment or viewpoints without great popular appeal. Burdening such information sources through government action, unshared by their competitors, would surely be an anathema to the Framers of our Constitution.

This decision represents a turning point in a long line of cases determining just how far the state may go in taxing the press without violating the First Amendment. While *Minneapolis Star* appeared a victory for those who would expand First Amendment protections, *Leathers* demonstrated that those hopes were built on a young and fragile foundation. *Leathers* has simultaneously eroded that foundation and taken the law in a new direction, unfavorable to those benefitted by a broad reading of the First Amendment. By checking the development of *Minneapolis Star* and its progeny, the states have advanced one step further into the ranks of the First Amendment protections of the press.

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