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Differential Taxation of the Press: The Modern Taxes on Knowledge?

Ana J. del Cristo

COMMENT

DIFFERENTIAL TAXATION OF THE PRESS: THE MODERN TAXES ON KNOWLEDGE?

I. INTRODUCTION

The first amendment liberty of the press guarantee[1] not only manifests the teachings of many great legal philosophers,[2] but also embodies a wisdom earned over countless generations of suppression at the hands of tyrannical European governments. Driven by

1. The first amendment of the United States Constitution provides, in relevant part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press; . . . ." U.S. CONST. amend. I.

2. The Framers of the United States Constitution considered William Blackstone "the oracle of the common law." L. LEVY, LEGACY OF SUPPRESSION 13 (1960). Blackstone asserted that "[t]he liberty of the press is indeed essential to the nature of a free state." COMMENTARIES *151-52. Blackstone argued, however, that this freedom "consist[ed] in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published." *Id.* Many considered the common law view of freedom of the press, prohibiting prior restraints but permitting later prosecution, futile because few men were willing to express their opinions if they ran the risk of subsequently being jailed. L. LEVY, LEGACY OF SUPPRESSION 15 (1960).

John Milton and John Locke were among the most respected libertarians of the Framers' era. In Milton's famous *Areopagetica*, he stated that a free government results from "free writing and free speaking." L. LEVY, EMERGENCE OF A FREE PRESS 95 (1985) (quoting THE WORKS OF JOHN MILTON 346 (1931-38)). Locke similarly proclaimed that we should be "more busy and careful to inform ourselves than contain others." *Id.* at 97.

the then-recent memories of the infamous British taxes on knowledge,[3] which attempted to censor colonial newspapers and thereby control American political opinion, the drafters of the press clause expressly banned any governmental abridgments of this fundamental liberty in the newly-founded democratic Republic.[4] The American patriarchs were firm in their conviction that a free press was essential to the creation and preservation of a true democratic society. These men knew that without an unfettered press to inform and educate the people to effectively exercise the right to self-government, the American democratic machine, ingeniously assembled under the Constitution, would rapidly lose its luster and rust away in idleness.

American history has illustrated that the Framers were men of exceptional foresight. Even the most prophetic among them, however, could not have envisioned the social and technological changes democratic American society would come to endure. Over two centuries ago, when Thomas Jefferson and Benjamin Franklin spoke of the "press," they were undoubtedly referring to a handful of weekly newspapers which were usually no more than three or four pages in length.[5] Today, however, the press is no longer limited to newspapers, magazines, or other printed publications. Modern technology has added the marvels of radio, television, and other forms of electronic communication to this constitutionally protected industry.[6]

Although our heritage is undeniably one of fervid opposition to taxation of the press,[7] in our modern, economically-driven society the liberty concerns that were once foremost in the minds of

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3. In 1643, Parliament enacted the Licensing Act, which prohibited the publication of any book unless first approved and licensed by a person appointed by Parliament. The demise of this Act left the Crown with little power to punish audacious writers. In 1712, Queen Anne urged Parliament to find a remedy for this evil. In response to her request, Parliament implemented a tax on all newspapers and advertisements. The purpose of this tax was to censor the press by suppressing the publication of newspapers. *See* Grosjean v. American Press Co., 297 U.S. 233 (1936); G. PATTERSON, FREE SPEECH AND A FREE PRESS 54-58 (1939).

4. The press clause of the first amendment is made applicable to the states through the fourteenth amendment. See *Grosjean*, 297 U.S. at 243-44 (citing Gitlow v. New York, 268 U.S. 652, 666 (1925); Near v. Minnesota, 283 U.S. 697, 707 (1931)). *See also supra* note 1 and accompanying text.

5. *See* Kalinka, *Freedom of the Press in America, The Pennsylvania Gazette 1787-1791*, 24 WAKE FOREST L. REV. 599, 605 (1989).

6. *See* Los Angeles v. Preferred Communications, Inc., 476 U.S. 488, 494 (1986); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 386 (1969); United States v. Paramount Pictures, Inc., 334 U.S. 131, 166 (1948). *See generally* THE FIRST AMENDMENT—THE CHALLENGE OF NEW TECHNOLOGY (S. Mickelson & E. Mier Y Teran eds. 1989) [hereinafter THE FIRST AMENDMENT].

7. *See infra* notes 33-61 and accompanying text.

the Framers and colonial Americans have gradually been displaced by fiscal ones.[8] Growing economic pressures are forcing an ever increasing number of state legislatures to seek out new sources of revenue. The press, being one of the few remaining untapped sources, has inevitably become the quarry of these predatory taxes.[9] Consequently, at least ten states have already implemented a tax on the sale of newspapers.[10]

The Supreme Court has consistently denounced taxes on the press which have censorial purposes,[11] target the press in a discriminatory manner,[12] or make content-based distinctions.[13] The Court, however, has maintained that the press, like any other business enterprise, is not immune from generalized, non-discriminatory taxation.[14]

Thus, unlike the odious taxes on knowledge of the past, the goal of recent tax legislation directed at newspapers, magazines, and certain members of the broadcast media, has not been to censor the press. Instead, these tax statutes have sought what the Supreme Court has repeatedly declared to be the constitutionally permissible objective of raising revenue for the support of government.[15]

Balancing modern economic interests against the preservation of a free and unbridled press has not been an easy task for lawmakers. In many states where the printed press has customarily been exempted from taxation, fiscal concerns have prompted reluctant legislators to revoke these traditional exemptions or, in the alternative, expand their general sales tax laws to reach certain segments of the press.[16] Magazines, in particular, have undeniably been among the hardest hit by these new taxes. Newspapers, by

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8. THE FIRST AMENDMENT, *supra* note 6, at 39-40.

9. *See* L.A. Times, July 11, 1990, at A17, col. 1. Although later defeated, the California legislature considered a sales tax proposal on newspapers and magazines as part of an effort to close the state's $3.6 billion budget gap. *Id.*

10. Tofel, *Is Differential Taxation of Press Entities by States Constitutional?*, J. TAX'N, July, 1990, at 42, 44 nn.1, 5 (citation omitted); *see infra* note 18.

11. Grosjean v. American Press Co., 297 U.S. 233, 243 (1936).

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

13. Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221 (1987).

14. See *Grosjean*, 297 U.S. at 250; *Minneapolis Star*, 460 U.S. at 581; *Arkansas Writers' Project*, 481 U.S. at 226.

15. In *Grosjean*, the Supreme Court rejected a tax scheme targeted at certain newspapers that operated as a prior restraint, but explained that the Court's invalidation of the tax statute was not intended to "suggest that the owners of newspapers are immune from any of the ordinary forms of taxation for support of the government." *Grosjean*, 297 U.S. at 250.

16. See N.Y.L.J., June 12, 1990, at 1; N.Y. Times, May 2, 1990, at 2B, col. 1.

contrast, have continued to escape the grasp of these statutes.[17] Currently, at least sixteen states and the District of Columbia levy a tax on the retail sale of magazines, but continued to exempt newspapers.[18]

Legislation imposing a tax on magazines, while continuing to spare its brothers and sisters in the press industry, has resulted in a bitter sibling rivalry. Consequently, in several of the states which have implemented differential taxation of the press, major magazine publishers have zealously challenged this disparate legislation.[19] These magazines have persistently asserted that these differential tax laws flagrantly violate their first amendment rights.

This heated controversy has already reached the highest courts in Missouri, Tennessee, Florida, and Iowa.[20] All but one of these states have rejected differential taxation of the press as incompatible with first amendment liberty of the press guarantees.[21] Missouri, Tennessee, and Florida have held that these statutes impermissibly restrict a fundamental right.[22] Consequently, under strict review, these states have failed to demonstrate the existence of a governmental interest sufficiently compelling to override the

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17. California Daily Rep. Exec. (BNA) DER No. 140, at H1 (July 20, 1990); Christian Sci. Monitor, Sept. 25, 1990, at 14.

18. Tofel, *supra* note 10, at 42. Colorado, Florida, Indiana, Iowa, Maryland, Mississippi, Nevada, New Mexico, North Dakota, South Carolina, South Dakota, Utah, Vermont, Washington, West Virginia, and Wisconsin tax the retail sale of magazines, but not newspapers. *Id.* at 44 n.1.

19. *See* Department of Revenue v. Magazine Publishers of America, 565 So. 2d 1304 (Fla. 1990), *vacated*, 59 U.S.L.W. 3723 (Apr. 22, 1991); Hearst Corp. v. Iowa Dep't of Revenue, 461 N.W.2d 295 (Iowa 1990), *cert. denied*, 59 U.S.L.W. 3724 (U.S. Apr. 22, 1991); Newsweek v. Celauro, 789 S.W.2d 247 (Tenn. 1990), *cert. denied*, 59 U.S.L.W. 3724 (U.S. Apr. 22, 1991); Southern Living, Inc. v. Celauro, 789 S.W.2d 251 (Tenn. 1990), *cert. denied*, 59 U.S.L.W. 3724 (U.S. Apr. 22, 1991); Hearst Corp. v. Director of Revenue & Fin., 779 S.W.2d 557 (Mo. 1989); Louisiana Life, Ltd., v. McNamara, 504 So. 2d 900 (La. Ct. App. 1987).

20. *See Magazine Publishers*, 565 So. 2d 1304 (Fla. 1990), *vacated*, 59 U.S.L.W. 3723 (U.S. Apr. 22, 1991); Hearst Corp. v. Iowa Dep't of Revenue, 461 N.W.2d 295 (Iowa 1990), *cert. denied*, 59 U.S.L.W. 3724 (U.S. Apr. 22, 1991); *Newsweek*, 789 S.W.2d 247 (Tenn. 1990), *cert. denied*, 59 U.S.L.W. 3724 (U.S. Apr. 22, 1991); *Southern Living*, 789 S.W.2d 251 (Tenn. 1990), *cert. denied*, 59 U.S.L.W. 3724 (U.S. Apr. 22, 1991); Hearst Corp. v. Director of Revenue, 779 S.W.2d 557 (Mo. 1989).

21. *See Magazine Publishers*, 565 So. 2d 1304 (Fla. 1990), *vacated*, 59 U.S.L.W. 3723 (Apr. 22, 1991); *Newsweek*, 789 S.W.2d 247 (Tenn. 1990), *cert. denied*, 59 U.S.L.W. 3724 (U.S. Apr. 22, 1991); *Southern Living*, 789 S.W.2d 251 (Tenn. 1990), *cert. denied*, 59 U.S.L.W. 3724 (U.S. Apr. 22, 1991); Hearst Corp. v. Director of Revenue, 779 S.W.2d 557 (Mo. 1989); *but see* Hearst Corp. v. Iowa Dep't of Revenue, 461 N.W.2d 295 (Iowa 1990), *cert. denied*, 59 U.S.L.W. 3724 (U.S. Apr. 22, 1991).

22. See *Magazine Publishers*, 565 So. 2d at 1310; *Newsweek*, 789 S.W.2d at 248; *Southern Living*, 789 S.W.2d at 252.

fundamental right at stake.[23]

In contrast to the majority position of rejecting differential taxation of newspapers and magazines, the Iowa Supreme Court has recently upheld an analogous tax statute by relabeling the newspaper exemption as a permissible government subsidy.[24] The Iowa court maintained that the legislature's decision to subsidize newspapers did not restrict the fundamental rights of magazines.[25] Under this approach, the contested tax statute did not merit strict scrutiny review, but rather, only satisfaction of a rational basis standard.[26]

The magazine publishers' primary goal in launching tax-protesting litigation was to regain their previous tax exempt status. Ironically, where the state courts have invalidated these taxes, the remedy has not always been an automatic reinstatement of the exemption previously enjoyed by the magazines. In fact, the Florida Supreme Court, which rejected differential taxation of the press, opted to revoke the newspaper exemption instead of repealing the magazine tax. Consequently, both types of publications are subjected to taxation.[27]

Because the modern press is not limited to newspapers and magazines,[28] the confusion over the scope of the first amendment's protection of the press from taxation has inevitably affected members of the radio, television, and cable industry.[29] Legislative attempts to selectively tax particular segments of the press have recently been sanctioned by the Supreme Court and threaten unprecedented governmental control of this constitutionally protected institution,[30] which serves as a "vital source of public infor-

23. See *Magazine Publishers*, 565 So. 2d 1304 (Fla. 1990), *vacated*, 59 U.S.L.W. 3723 (April 22, 1991); *Newsweek*, 789 S.W.2d 247 (Tenn. 1990), *cert. denied*, 59 U.S.L.W. 3724 (U.S. Apr. 22, 1991); *Southern Living*, 789 S.W.2d 251 (Tenn. 1990), *cert. denied*, 59 U.S.L.W. 3724 (U.S. Apr. 22, 1991); Hearst Corp v. Director of Revenue & Fin., 779 S.W.2d 557 (Mo. 1989).

24. Hearst Corp. v. Iowa Dep't of Revenue, 461 N.W.2d 295 (Iowa 1990), *cert. denied*, 59 U.S.L.W. 3724 (U.S. Apr. 22, 1991).

25. *Id.* at 308.

26. *Id.* at 309.

27. *Magazine Publishers*, 565 So. 2d at 1306. On appeal to the United States Supreme Court, the Florida ruling was vacated and remanded for further consideration in light of Leathers v. Medlock, 59 U.S.L.W. 4281 (U.S. Apr. 16, 1991), which upheld differential taxation of the press. *See infra* notes 170-90 and 229-301.

28. *See supra* text accompanying note 6.

29. Oklahoma Broadcasters Ass'n v. Oklahoma Tax Comm'n., 789 P.2d 1312 (Okla. 1990); Leathers v. Medlock, 59 U.S.L.W. 4281 (U.S. April 16, 1991), *aff'g in part, rev'g in part, and remanding* Medlock v. Pledger, 301 Ark. 483, 785 S.W.2d 202 (1990).

30. Leathers v. Medlock, 59 U.S.L.W. 4281, 4288 (U.S. Apr. 16, 1991) (Marshall, J., dissenting) (citing Stewart, *Or of the Press*, 26 HASTINGS L.J. 631, 633 (1975)).

mation"[31] and facilitates the democratic process.[32]

II. An Historical Overview of Freedom of the Press in America

Freedom of expression can only exist where governments are sufficiently stable to withstand political criticism, and where the "people [are] considered the source of sovereignty, the masters rather than the servants of the government."[33] In medieval England and throughout Europe, many feared that religious and political expression would ultimately lead to revolutions, thereby dethroning kings and crippling the Church. In 1275, Parliament enacted a statute[34] criminalizing "any false news or tales whereby discord or occasion of discord or slander may grow between the king and his people."[35]

With the introduction of printing to England in 1476, efforts to suppress dissenting views intensified. The Church began outlawing books and imprisoning or executing authors.[36] In 1538, Henry VIII parted with the Catholic Church and proclaimed himself as head of the Church of England.[37] He established an elaborate licensing system which originally affected only books.[38] Queen Elizabeth's Royal Injunctions of 1559 expanded the system to include pamphlets, plays and reprints of earlier works.[39]

When it became evident that the licensing system was not severe enough to control the publication of material criticizing the government and the Church, the Crown created the infamous Star Chamber Court.[40] Established by decree in 1586, this specialized tribunal, which acquired its name from the stars painted on its courtroom ceiling, had jurisdiction over cases of seditious libel. In secret hearings of the Star Chamber Court, the King's ministers served the multiple functions of prosecutors, judges, and even executioners of the accused.[41] The punishment for publishing writ-

31. *Grosjean*, 297 U.S. at 250.

32. *See id.* at 249-50.

33. L. Levy, Legacy of Suppression 6 (1960).

34. *See* M.L. Stein, Free Press in A Free Society 13 (1966).

35. L. Levy, *supra* note 33, at 7 (quoting Van Vechten Veeder, *History of the Law of Defamation*, in Select Essays in Anglo-American Legal History (1909)).

36. *See* Neisser, *Charging for Free Speech: User Fees and Insurance in the Marketplace of Ideas*, 74 Geo. L.J. 257 (1985).

37. *Id.* at 261.

38. *Id.*

39. *Id.*

40. G. Patterson, *supra* note 3, at 27-28.

41. M.L. Stein, *supra* note 34, at 13.

ings deemed seditious was severe and, in some instances, was punishable by death.[42]

After the abolition of the Star Chamber Court in 1641, Parliament responded by enacting stricter controls.[43] Finally, the notorious Licensing Act of 1662 granted the English government full control over printing. These new laws prohibited all publications without a license and limited the number of master printers to twenty. Under the Licensing Act, crimes of sedition also carried harsh penalties, which, in extreme cases, included mutilation, quartering and even hanging.[44]

In 1695, Parliament declined to reenact the Licensing Act.[45] Subsequently, Blackstone argued that the expiration of this odious Act, in effect, liberated the press.[46] To Blackstone and other seventeenth-century libertarians, freedom of the press simply meant the absence of prior restraints formerly imposed by the licensing system.[47] Although the cessation of these laws did remove prior restraints on publications, comments and criticisms objectionable to the British government were still prosecutable under seditious libel laws.[48]

In spite of fervent resistance by the people, the English Crown remained creative in devising new ways to suppress dissenting views. In 1765, at Queen Anne's behest, Parliament implemented the Stamp Act in the American colonies.[49] These invidious excises, paradoxically termed "taxes on knowledge," imposed burdensome duties on newspapers and had the effect of curtailing their circulation and obstructing the dissemination of information to the people.[50] The Supreme Court has noted that "the [American] Revolution really began when . . . the [English] Government sent the

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42. *Id. See also* Neisser, *supra* note 36, at 262.

43. *Id.*

44. M.L. STEIN, *supra* note 34, at 13-17; Neisser, *supra* note 36, at 262 (citing 2 T. MAY, THE CONSTITUTIONAL HISTORY OF ENGLAND SINCE THE ACCESSION OF GEORGE THE THIRD 1760-1860, at 97 (London 1865); D. MEDLEY, A STUDENT'S MANUAL OF ENGLISH CONSTITUTIONAL HISTORY 447-48 (1902); F. SIEBERT, FREEDOM OF THE PRESS IN ENGLAND 1476-1776, at 88-104 (1952); TASWELL-LANGMEAD'S ENGLISH CONSTITUTIONAL HISTORY 661 (T. Plucknett, 11th ed. 1960)).

45. *See* Neisser, *supra* note 36, at 262.

46. *See* COMMENTARIES, *supra* note 2, at *151-52.

47. L. LEVY, EMERGENCE OF A FREE PRESS 100-01 (1985).

48. *Id.*

49. The British monarchy extended the Stamp Act, first enacted in England in 1712, to the American colonies to raise revenue needed after the costly Seven Years War. *See* L. LEVY, *supra* note 47, at 87-88.

50. *See Grosjean*, 297 U.S. at 246-47 (1936); L. Levy, *supra* note 33, at 7.

stamps for newspaper duty to the American colonies."[51] The Stamp Act ignited the American revolutionary movement against Britain, and continued to fuel it until the colonies achieved their independence.[52] Although many scholars suggest that Parliament imposed the newspaper tax primarily to offset the costs of the Seven Years War,[53] the Supreme Court has argued that the true "aim [of the Stamp Act] was to prevent, or curtail the opportunity for, the acquisition of knowledge by the people in respect to their governmental affairs."[54] The Court has emphasized that, when Parliament implemented the duties on newspapers, "revenue was of subordinate concern."[55]

Profoundly concerned with a recurrence of the taxes on knowledge once imposed by the English Crown in the newly-emancipated nation, the Antifederalists championed an express guarantee of freedom of the press in the Constitution.[56] In an effort to prevent federal overreaching, these visionary Framers of the first amendment urged that an express bill of rights was necessary.[57] The Antifederalists feared that without specific constitutional limitations and guarantees, the new government could easily exceed its authority at the expense of the people.[58] Dreading a possible encore of the Stamp Act, they argued that without an express constitutional guarantee, "the liberty of the press may be restricted by duties."[59] It was not until over 150 years later that the Supreme Court encountered and invalidated what it found to be the first contemporary "tax on knowledge."[60] This tax was imposed by Louisiana Governor Huey Long's administration to silence press criticism of his government.[61]

III. THE SUPREME COURT PRECEDENT ON TAXATION OF THE PRESS

In light of the American struggle for freedom of political expression, the first amendment meaning of freedom of the press is

51. *Grosjean*, 297 U.S. at 246.

52. *Id.*

53. L. Levy, *supra* note 47, at 87; Neisser, *supra* note 36, at 263.

54. *Grosjean*, 297 U.S. at 247.

55. *Id.*

56. L. LEVY, *supra* note 47, at 235-49.

57. *Id.*

58. *See generally* THE ANTIFEDERALISTS (C. M. Kenyon ed. 1966); *see also* L. LEVY, *supra* note 47, at 235-49.

59. Neisser, *supra* note 36, at 265 (citation omitted).

60. *See Grosjean*, 297 U.S. 233 (1936).

61. *See* H. NELSON, FREEDOM OF THE PRESS FROM HAMILTON TO THE WARREN COURT 247-54 (1967); M. KONVITZ, FUNDAMENTAL LIBERTIES OF A FREE PEOPLE 203-04 (1957).

not exclusively intended to prevent censorship of the press. This provision also prevents any actions by the government which may prevent public access to information and inhibit the people's right to the intelligent exercise of self-government.[62] Informed public opinion is attainable only through liberty of the press and "is the most potent of all restraints upon misgovernment."[63]

However, the Supreme Court has never interpreted the right to a free press "to suggest that the owners of newspapers are immune from any of the ordinary forms of taxation for support of the government."[64] In fact, the Court has repeatedly asserted that both "the States and the Federal Government can subject newspapers to generally applicable economic regulations without creating constitutional problems."[65] Nonetheless, any tax on the press must be scrutinized to detect unlawful obstructions of this protected medium. Impermissible restrictions of the press "cannot be regarded otherwise than with grave concern."[66]

During the 1930s, Louisiana Governor Huey Long's dictatorial politics encountered marked opposition from that state's most important newspapers. The Louisiana legislature, which was largely controlled by Long, enacted a special tax on the gross advertising income of those publications which had a weekly circulation of over 20,000.[67] Out of the more than 120 newspapers in Louisiana, only thirteen were affected by the tax.[68] Coincidentally, twelve of the thirteen publications were fervid critics of the Governor.[69] Nine of the newspapers targeted by the tax scheme challenged its constitutionality in *Grosjean v. American Press Co.*[70]

Justice Sutherland delivered the Court's opinion in this landmark case. The opinion recapitulated the history of the dreaded taxes on knowledge, stressing that their purpose was to reduce "the circulation of newspapers, and particularly the cheaper ones whose readers were generally found among the masses of the people. . . ."[71] The primary aim of these abominable taxes was "to

62. *Grosjean*, 297 U.S. at 249-50 (citing 2 COOLEY'S CONSTITUTIONAL LIMITATIONS 886 (8th ed.).

63. *Id.* at 250.

64. *Id.*

65. Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 581 (1983) (citations omitted).

66. *Grosjean*, 297 U.S. at 250.

67. *Id.* at 240.

68. *Id.* at 240-41.

69. *Minneapolis Star*, 460 U.S. at 579-80.

70. 297 U.S. 233 (1936); *see also* H. NELSON, *supra* note 61, at 247-54.

71. *Grosjean*, 297 U.S. at 246.

prevent, or curtail the opportunity for the acquisition of knowledge by the people in respect of their governmental affairs."[72] No state had attempted "to impose a tax like that . . . in question," since the adoption of the first amendment.[73]

A unanimous Court explained that it would be absurd to concede that the Framers intended the words "freedom of the press," to embrace the limited English view which "consisted only in immunity from previous censorship."[74] The Court noted that by the time the Framers drafted the first amendment these abuses had already been abolished from English law.[75] The Framers fought to achieve a freedom greater than that which they already had—a liberty of the press unfettered by those governmental restrictions which "might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens."[76] The Supreme Court did not invalidate the tax enacted by Long's supporters in the Louisiana legislature because it took money out of the pockets of the newspaper owners. The tax was invalidated because it was deemed "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 guaranties."[77]

The Court based its decision in *Grosjean*, in part, upon the Louisiana legislature's impermissible censorial purposes. Almost fifty years later, the United States Supreme Court in *Minneapolis Star & Tribune v. Minnesota Commissioner of Revenue*[78] clarified that "[i]llicit legislative intent is not the *sine qua non* of a violation of the [f]irst [a]mendment."[79] The Court conceded that even certain regulations aimed at proper governmental functions could, nevertheless, unduly restrict the exercise of first amendment rights.

In *Minneapolis Star*, a use tax implemented by the Minnesota legislature was designed to protect the state's sales tax.[80] The special use tax effectively eliminated any incentive for residents to travel to states with lower sales taxes to purchase their goods.[81]

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72. *Id.* at 247.
73. *Id.* at 251.
74. *Id.* at 248.
75. *Id.*
76. *Id.* at 249-50 (quoting 2 COOLEY'S CONSTITUTIONAL LIMITATIONS 886 (8th ed.)).
77. *Id.* at 250.
78. 460 U.S. 575 (1983).
79. *Id.* at 592.
80. *Id.* at 577.
81. *Id.*

From 1967 until 1971, Minnesota newspaper publishers enjoyed a general exemption from both the sales and use tax.[82] In 1971, the legislature modified the scheme and implemented a use tax on ink and paper products used in the publishing business.[83] These products became the only items employed in the manufacturing of goods to be sold at retail which were subject to the use tax.[84] The Minnesota statute, in effect, targeted the press exclusively.[85]

In 1974, the Minnesota legislature again amended this tax provision to exempt the first $100,000 worth of ink and paper consumed by a publication within any given calendar year.[86] As a result of this revision, only fourteen of the 388 paid circulation newspapers in Minnesota had to pay use taxes.[87] In fact, the Minneapolis Star & Tribune Company, which challenged the constitutionality of the Minnesota use tax, paid over two-thirds of the revenue raised by the amended statute.[88]

In *Minneapolis Star*, the Supreme Court reiterated that "the [f]irst [a]mendment does not prohibit all regulation of the press."[89] Consequently, any business enterprise, including the press, may be subjected to "generally applicable economic regulations."[90] Where the constitutionality of economic regulations of the press have been upheld, the Court has "emphasized the general applicability of the challenged regulation to all businesses."[91] In *Minneapolis Star*, however, the use tax at issue only affected the newspaper industry.[92] Thus the press was singled out for special treatment. Further, because the challenged Minnesota statute exempted the first $100,000 of paper and ink products from the use tax,[93] only the largest newspapers in the state incurred any liability.[94] The Supreme Court held that the use tax was doubly discriminatory since it not only singled out the press for taxation, but also targeted selected members within this industry.[95]

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82. *Id. See* MINN. STAT. § 297A.25(1)(i) (1982).
83. *Minneapolis Star*, 460 U.S. at 577. *See* MINN. STAT. §§ 297A.14, A.25(1)(i) (1982).
84. *Minneapolis Star*, 460 U.S. at 578.
85. *Id.* at 582.
86. *Id.* at 578. *See* MINN. STAT. § 297A.14 (1982).
87. *Minneapolis Star*, 460 U.S. at 578.
88. *Id.* at 579.
89. *Id.* at 581.
90. *Id.*
91. *Id.* at 583 (citations omitted).
92. *Id.* at 582.
93. *Id.* at 579-80.
94. *Id.* at 591.
95. *Id.* at 581, 591.

Historical evidence corroborates the proposition that the Framers of the first amendment were concerned about the dangers of differential taxation of the press.[96] The Antifederalists, who stressed the necessity of a bill of rights outlining the limitations of the government as well as the rights of the people, were particularly concerned about Congress' power to tax the press and impose "particularly heavy [duties] on certain pieces printed. . . ."[97] The government cannot destroy a particular group through a general tax because the burden falls equally on all of its constituents.[98] "A power to tax differentially . . . [however] gives a government a powerful weapon against the taxpayer selected."[99] If the government is allowed to target the press and subject it to crippling taxes, then the latter will be subdued and impaired in its function as an unbiased intercessor and advocate of the people.[100] Governmental control over the reigns of public opinion subjects the democratic process as a whole to a heightened risk of deterioration.[101]

Because Minnesota's discriminatory use tax "burden[ed] rights protected by the [f]irst [a]mendment [it could] not stand unless the burden [was] necessary to achieve an overriding governmental interest."[102]

The state attempted to justify the use tax as a method to promote equity by placing the greatest liability on the larger publications, which were more likely than the smaller newspapers to be able to pay a tax.[103] The Court flatly rejected this argument by noting that Minnesota had not attempted to grant similar benefits to other small businesses.[104] In addition, the Court argued, "when the exemption selects such a narrowly defined group to bear the full burden of the tax, the tax begins to resemble more a penalty for a few of the largest newspapers than an attempt to favor struggling smaller enterprises."[105] Concluding that Minnesota had failed to offer a satisfactory justification for its use tax, the Court invali-

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96. *See supra* notes 56-61 and accompanying text.

97. *Minneapolis Star*, 460 U.S. at 584 (quoting Lee, *Observation Leading to a Fair Examination of the System of Government, Letter IV, reprinted in* 1 B. SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 466, 474 (1971)).

98. *Id.* at 585.

99. *Id.*

100. In *Grosjean*, Justice Sutherland asserted that "[a] free press stands as one of the great interpreters between the government and the people." 297 U.S. at 250.

101. *Id.* at 250.

102. *Minneapolis Star*, 460 U.S. at 582.

103. *Id.* at 592.

104. *Id.*

105. *Id.*

dated the statute.[106]

In a powerful dissenting opinion, Justice Rehnquist agreed that Minnesota was constitutionally permitted to impose general sales and use taxes on the press.[107] In Justice Rehnquist's view, however, the state's efforts to limit the press' liability only to use taxes, and the grant of an additional exemption of the first $100,000, did not constitute an abridgement of first amendment rights. Instead, Justice Rehnquist argued, Minnesota "structure[d] its taxing system to the advantage of newspapers."[108] He disagreed with the majority's proposition that if a state chose to tax the press, then it would have to subject it to the same rigorous taxes imposed on all other businesses.[109] Rehnquist further stressed that this constraint would "subject newspapers to millions of additional dollars in sales tax liability."[110] This result, he added, was not intended by the Framers of the first amendment.[111]

Just four years after *Minneapolis Star*, the Supreme Court, reaffirmed its position on differential taxation of the press in *Arkansas Writers' Project v. Ragland*[112] when it invalidated an Arkansas sales tax scheme exempting certain publications based on their content.[113] For over fifty years, the State of Arkansas assessed a general tax on the sale of tangible property.[114] The contested provisions of the statute exempted "religious, professional, trade and sports journals and/or publications,"[115] as well as newspapers from the tax.[116] Arkansas Writers' Project, a publisher of a monthly general interest magazine with a circulation of approximately 28,000, challenged the constitutionality of the tax. [117]

The Arkansas statute involved a generally applicable sales tax which was not targeted directly at the press, but rather "treat[ed] some magazines less favorably than others."[118] The Court stated

106. *Id.* at 593.
107. *Id.* at 597 (Rehnquist, J., dissenting).
108. *Id.* at 596.
109. *Id.* at 597.
110. *Id.* at 604.
111. *Id.*
112. 481 U.S. 221 (1987).
113. *Id.* at 234.
114. *Id.* at 224. *See* ARK. STAT. ANN. § 84-1903 (1980) (three percent); ARK. STAT. ANN. § 84-1903.1 (Supp. 1985) (additional one percent).
115. *Arkansas Writers' Project*, 481 U.S. at 224. *See* ARK. STAT. ANN. § 84-1904(f) (1980).
116. *Arkansas Writers' Project*, 481 U.S. at 224. *See* ARK. STAT. ANN. § 84-1904(j) (1980).
117. *Arkansas Writers' Project*, 481 U.S. at 224.
118. *Id.* at 229.

that the challenged tax scheme "involve[d] a more disturbing use of selective taxation than *Minneapolis Star*."[119] The Arkansas statute, which differentiated between magazines based on their content, created a distinction that was "particularly repugnant to [f]irst [a]mendment principles."[120] The government is constitutionally precluded from restricting expression "because of its message, its ideas, its subject matter, or its content."[121]

In order for the Supreme Court to uphold the statute's content-based classifications, Arkansas was required to show that the tax was "necessary to serve a compelling state interest and that [it was] narrowly drawn to achieve that end."[122] The state claimed that the tax exemption for religious, professional, trade, and sports journals was aimed at supporting publications which do not have the large audiences or the advertising revenues that general interest magazines enjoy.[123] The Supreme Court, however, rejected this argument characterizing it as both overinclusive and underinclusive.[124] The Court maintained that the tax failed to achieve its purpose since it exempted even the most lucrative religious, professional, trade, and sports magazines, while struggling general interest journals were denied the same favorable treatment.[125]

The magazine publishers in *Arkansas Writers' Project* also advanced the broader issue of whether "content based distinctions between different members of the media are also impermissible, absent a compelling justification."[126] Although this question had been raised in the lower state courts, Arkansas' highest court failed to address it directly.[127] Consequently, the Supreme Court was not compelled to resolve the issue.[128] The majority opinion further stressed that its holding declaring the Arkansas content-based tax statute unconstitutional was sufficient;[129] therefore, it "need not decide whether a distinction between different types of periodicals present[ed] an additional basis for invalidating the tax."[130]

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119. *Id.* at 229.
120. *Id.*
121. *Id.* (quoting Police Dept. of Chicago v. Mosley, 408 U.S. 92, 95 (1972)).
122. *Id.* at 231.
123. *Id.* at 232.
124. *Id.*
125. *Id.*
126. *Id.* at 233.
127. *Id.* at 233 n.5.
128. *Id.* at 233.
129. *Id.*
130. *Id.*

IV. Differential Taxation of the Press in the State Courts

Traditionally, legislatures have been prudent with respect to tax laws which threaten to transgress first amendment press rights. As a result, the newspaper industry has customarily enjoyed a general exemption from state sales and use taxes. Soaring state budget deficits, which have now reached unprecedented levels throughout the country, have pressured lawmakers to search for new ways to increase revenues.[131] Although legislators remain reluctant to implement widespread taxation of the news industry, there is an effort to reach an acceptable middle ground. Many states have extended their sales tax statutes to reach certain members of the press, while still preserving the traditional exemption for newspapers.[132]

This good-faith effort by legislators to limit the tax liability of the press industry by singling out only a few of its members for taxation has encountered fierce opposition from its contemplated victims. Magazine publishers, which have been singularly targeted by these selective taxes, have vehemently denounced these provisions in the state courts.[133] The legal war engaged by several major magazines against state tax collectors who execute these discriminatory practices proclaim that differential taxation of magazines burdens rights protected by the press clause. In essence, this controversial litigation has sought to resolve the very issue deliberately "sidestepped" by the Supreme Court in *Arkansas Writers' Project*—whether differential taxation between newspapers and magazines, or between other members of the media, abridges first amendment liberties.[134]

A. The Controversy Within the Print Media: The Majority View

Almost two months prior to the Supreme Court decision in *Arkansas Writers' Project*,[135] the First Circuit Court of Appeals of Louisiana addressed the legality of a statute that assessed a tax on the retail sale of all magazines, but granted newspapers an exemption.[136] In *Louisiana Life, Ltd. v. McNamara*,[137] the publishers of

131. *See supra* note 9 and accompanying text.
132. *See supra* note 18 and accompanying text.
133. *See supra* notes 19-27 and accompanying text.
134. *Arkansas Writers' Project*, 481 U.S. at 233.
135. *Id.*
136. *See* La. Rev. Stat. Ann. §§ 47:305, 47:305(D)(1)(e) (West 1986).
137. 504 So. 2d 900 (La. Ct. App. 1987).

the general interest magazine "Louisiana Life—Magazine of the Bayou State" contended that the tax statute "constitute[d] an impermissible prohibition or restraint of the free exercise of the right of freedom of speech and press guaranteed by the [f]irst and [f]ourteenth [a]mendments."[138]

The Louisiana court asserted that "[n]o one particular form of 'protected' speech is entitled to or may be accorded a greater or lesser degree of protection than another."[139] Citing *Minneapolis Star*,[140] the Louisiana court distinguished between the two types of discriminatory taxes on press. The first type involves "the imposition of a special tax on [f]irst [a]mendment entities."[141] The second type involves the "exemption of certain members of the press and not others, resulting in 'differential treatment' . . . among members of the press."[142]

The case before the Louisiana court concerned the second type of discrimination because it arose from a general sales tax rather than a special use tax, as in *Minneapolis Star*.[143] Exempting newspapers from the sales tax, the court argued, "produces the same discriminatory result between newspaper publishers and magazine publishers in this state that the Minnesota statute created between small periodical publishers and large newspapers."[144] The Louisiana court stated that where constitutionally-protected speech is involved, the state cannot discriminate against it either because of the form in which it is published or because of its content. The court further rejected the state's contention that the tax was a general sales tax, rather than a specific tax on publishing, because "where a general sales tax applies unequally to different forms of speech protected by the Constitution, the name used by the state is irrelevant and immaterial."[145] The court concluded that exempting some publications constituted an infringement of first and fourteenth amendment rights.

Shortly after *McNamara*, the Supreme Court decided *Arkansas Writers' Project*.[146] While declining to address the constitutionality of differential taxation between newspapers and

138. *Id.* at 902.

139. *Id.* at 903.

140. The Louisiana appellate court relied on *Minneapolis Star*; *Arkansas Writers' Project* had not yet been decided.

141. *McNamara*, 504 So. 2d at 905.

142. *Id.*

143. *See supra* notes 80-111 and accompanying text.

144. *McNamara*, 504 So. 2d at 905.

145. *Id.* at 906.

146. 481 U.S. 221 (1987); *see supra* notes 112-130 and accompanying text.

magazines, the Court's ruling, at least facially, appeared to lend support to the position taken by the Louisiana court.[147] Soon thereafter, the controversy gained momentum and began to spread quickly to other states.

In Missouri, newspapers had enjoyed a fifty-five year tax exemption, while magazines had been exposed to the state's sales tax. In an effort to attain a similar exempt status for magazines, the Hearst Corporation, a major magazine publisher, challenged the constitutionality of Missouri's application of its general sales tax to magazines. However, Hearst's strategy backfired and resulted instead in no gain to the magazines and in the newspapers' loss of their long-held tax privileges.[148] In *Hearst Corp. v. Director of Revenue*,[149] the Missouri Supreme Court did not have to reach the magazine publisher's constitutional challenge. The Missouri court simply pointed out that since the administrative regulations[150] relied upon by Missouri to exempt newspapers from the sales tax were inconsistent with the exemptions granted by the statutes,[151] the regulations were void and the exemptions invalid. Although the voided administrative regulations provided an exemption for "newspapers," the statutes enacted by the legislature only extended such privileges to "newsprint." The court held that the regulations, which were adopted by administrative agencies, could not be interpreted to create an exemption from taxation that the General Assembly of the Missouri legislature had not authorized.[152] The court's ruling was grounded solely upon the defects contained in the regulations and did not resolve the constitutional questions raised by the press.

In *Newsweek, Inc. v. Celauro*[153] and *Southern Living, Inc. v. Celauro*,[154] the Supreme Court of Tennessee did address the constitutionality of differential taxation of newspapers and magazines.[155] Both cases involved statutes which imposed a tax on magazines while exempting newspapers.[156] The court decided both cases simultaneously, holding that the magazines' grievance was of

147. *See Arkansas Writers' Project*, 481 U.S. at 226-32.

148. Hearst Corp. v. Director of Revenue, 779 S.W.2d 557 (Mo. 1989); *see also* Editor & Publisher, June 16, 1990, at 68; 10 Springfield Bus. J., Jan 22, 1990, at 1.

149. 779 S.W.2d 557 (Mo. 1989).

150. *See* Mo. Code Regs. tit. 12, §§ 10-3.110, -3.114(1), -3.112 (1986).

151. *See* Mo. Rev. Stat. §§ 144.010, 144.021, 144.030.2(8), 144.610 (1986).

152. *Hearst*, 779 S.W.2d at 559.

153. 789 S.W.2d 247 (Tenn. 1990), *cert. denied*, 59 U.S.L.W. 3724 (U.S. Apr. 22, 1991).

154. 789 S.W.2d 251 (Tenn. 1990), *cert. denied*, 59 U.S.L.W. 3724 (U.S. Apr. 22, 1991).

155. The plaintiffs challenged § 67-6-101 *et seq.* of the Tennessee code.

156. *Newsweek*, 789 S.W.2d at 249; *Southern Living*, 789 S.W.2d at 252-53.

the second type enumerated in *Minneapolis Star* because although the Tennessee tax statute did not target the press exclusively, it nevertheless singled out certain members of the press.[157] These taxes, the court urged, "pose[] a particular danger of abuse by the State"[158] and the court must, therefore, "place a heavy burden on the [state] to justify its action."[159]

Tennessee contended that the exemption of newspapers furthered the vital interest of rapid dissemination of information to the public.[160] The state further argued that the electronic media, which includes radio and television, also serves to accomplish this purpose, but is normally not subject to sales and use taxes because their transmissions do not usually involve transfers of tangible personal property.[161] The court noted that, in order to qualify for the newspaper exemption in Tennessee, a publication had to "contain matters of general interest and reports of current events."[162] Finding that these requirements were not content-neutral,[163] the court emphasized that the first amendment "prohibits not only restrictions on particular viewpoints, it extends to prohibition of public discussion in its entirety."[164]

Moreover, the immediate dissemination of news did not qualify as a compelling state interest,[165] since "[t]here [was] nothing to suggest that newspapers require[d] an exemption in order to furnish such immediacy in bringing the news to the public."[166] In addition, some of the newspapers that enjoyed the exemption published just as often as the weekly magazines.[167] Consequently, the court found no evidence that the magazines' " 'news' [was any] more stale than that of newspapers publishing weekly."[168] The court further stressed that it was not the function of the legislature to decide whether immediate news, or less speedy methods of dissemination, "accompanied by more deliberative analysis or com-

157. The use tax imposed by the challenged statute in *Minneapolis Star* failed on two distinct grounds. First, it targeted the press exclusively, and second, it singled out a small group of newspapers for taxation. 460 U.S. at 582-85.

158. *Newsweek*, 789 S.W.2d at 249.

159. *Id.* at 250.

160. *See Newsweek*, 789 S.W.2d at 249; *Southern Living*, 789 S.W.2d at 253.

161. *Id.*

162. *Newsweek*, 789 S.W.2d at 249.

163. *Id.*

164. *Id.* (citation omitted).

165. *Id.* at 250.

166. *Id.*

167. *Id.*

168. *Id.*

mentary,"[169] would better serve the public interest. The Tennessee court invalidated the tax scheme because the state had failed to advance a compelling interest for its selective and content-based taxation of publications.[170]

Although the Tennessee court declared the discriminatory tax distinctions between newspapers and magazines unconstitutional, it declined to impose a remedy by judicial fiat.[171] Relying on the Supreme Court's decision in *Texas Monthly, Inc. v. Bullock*,[172] the court explained that it was "not for the court to decide whether the correct response as a matter of State law to a finding that a state tax exemption is unconstitutional is to eliminate the exemption, to curtail it, to broaden it, or to invalidate the tax altogether."[173] The court declared that function to be legislative in nature.

The Florida Supreme Court, however, has not been as deferential. In *Department of Revenue v. Magazine Publishers of America*,[174] the Supreme Court of Florida held that a sales tax that applied to the magazines but provided an exemption for newspapers, was impermissible under the first amendment.[175] As part of its ruling, the Florida court also carried out the legislative intent of the challenged tax statutes by revoking the exemption, allowing the tax to apply generally to all publications, including newspapers.[176]

As the Florida court correctly pointed out in *Grosjean*,[177] the Supreme Court invalidated the newspaper tax imposed by the Louisiana legislature because of its censorial aims.[178] The Louisiana tax was only applicable to publishers with a certain volume of circulation. Consequently, even if the Supreme Court had stricken the exemption for newspapers with lower circulations, the statute would not have been rectified as long as it continued to impermis-

169. *Id.*

170. *Id.*

171. *Id.*

172. 489 U.S. 1 (1989).

173. *Southern Living*, 789 S.W.2d at 253.

174. 565 So. 2d 1304 (Fla. 1990), *vacated*, 59 U.S.L.W. 3723 (Apr. 22, 1991). On appeal to the United States Supreme Court, the Florida ruling was vacated and remanded for further consideration in light of Leathers v. Medlock, 59 U.S.L.W. 4281 (U.S. April 16, 1991), which upheld differential taxation of cable television services. *See infra* notes 233-301 and accompanying text.

175. *Magazine Publishers*, 565 So. 2d at 1310.

176. *Id.*

177. 297 U.S. 233 (1936).

178. *Id.* at 251.

sibly target the press.[179]

Similarly, in *Minneapolis Star*,[180] the tax created by the Minnesota legislature was a special use tax which had the effect of singling out the press.[181] The Florida court argued that removal of the exemption for the first $100,000 of ink and paper used by newspaper publishers would not have made the tax one of general applicability.[182]

In *Arkansas Writers' Project*,[183] the challenged scheme taxed general interest magazines, but specifically exempted newspapers, as well as all religious, trade, professional, and sports magazines.[184] In that case, the Supreme Court opted to revoke the tax rather than the exemption provision, stressing that "the State's selective application of its sales tax to magazines [was] unconstitutional and therefore invalid."[185] The Florida court explained that although the Supreme Court in *Arkansas Writers' Project*[186] "struck the tax rather than eliminate the exemptions, no language in the decision indicate[d] that such a result [was] always constitutionally mandated."[187]

The court also acknowledged the Supreme Court's ruling in *Texas Monthly*,[188] which held that upon finding that a state tax exemption is unconstitutional, the correct response is a matter of state law not to be decided by the court.[189] Nevertheless, the Florida court contended that since the legislative intent was explicitly expounded in the text of challenged sales tax statutes,[190] it was within the court's judicial authority to interpret the statute and determine the proper remedy.[191] The court concluded that, based

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179. *Magazine Publishers*, 565 So. 2d at 1309.
180. 460 U.S. 575 (1983).
181. *Id.* at 581.
182. *Magazine Publishers*, 565 So. 2d at 1309.
183. 481 U.S. 221 (1987).
184. *Id.* at 224.
185. *Id.* at 233.
186. *Id.* at 221.
187. *Magazine Publishers*, 565 So. 2d at 1309.
188. 489 U.S. 1 (1989); *see supra* notes 172-73 and accompanying text.
189. *Texas Monthly*, 489 U.S. at 8.
190. The statute at issue provides, in part:

> [S]hould any exemption or attempted exemption from the tax or the operation or imposition of the tax or taxes be declared to be invalid, ineffective, inapplicable, unconstitutional, or void for any reason, such declaration shall not affect the tax or taxes imposed herein, but . . . shall be subject to the tax or taxes and the operation and imposition thereof to the same extent as if such exemption or attempted exemption had never been included herein.

FLA. STAT. § 212.21(2) (1987).
191. *Magazine Publishers*, 565 So. 2d at 1310.

on the language of the statute, "it [is] unmistakably clear that as between the imposition of the tax or the granting of an exemption, the tax shall prevail."[192]

B. *Iowa's Minority View*

In *Hearst Corp. v. Iowa Department of Revenue*,[193] the Supreme Court of Iowa boldly proposed an alternative to the position embraced by the Florida, Tennessee, and Missouri courts.[194] Relying on *Regan v. Taxation with Representation of Washington*,[195] Iowa's highest tribunal suggested that a tax exemption is nothing more than a form of governmental subsidy granted by the legislature within its broad discretion in the area of taxation, and is, therefore, not subject to strict scrutiny.

The legislature may choose to subsidize newspapers, and not magazines, "as long as it has a rational non-content basis for doing so."[196] The Iowa tax statute[197] examines the "content . . . rather than the form and frequency of a publication."[198] As stated by the Supreme Court in *Regan*,[199] the 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."[200] Consequently, the Iowa court applied a rational basis standard in determining the constitutionality of the statutory scheme.[201]

The state argued that because child carriers sold the majority of Iowa's newspapers, "[i]t would be uneconomical and highly impractical if the tax department was forced to monitor, regulate and audit"[202] these children. While Iowa has a legitimate state interest in maintaining administrative economy,[203] the court concluded that this interest would be better served by exempting these par-

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192. *Id.*

193. 461 N.W.2d 295 (Iowa 1990), *cert. denied*, 59 U.S.L.W. 3724 (U.S. Apr. 22, 1991). The United States Supreme Court later partly adopted a similar argument to uphold the constitutionality of differential taxation of cable television services in Leathers v. Medlock, 59 U.S.L.W. 4281 (U.S. April 16, 1991). *See infra* notes 229-301 and accompanying text.

194. *See supra* notes 148-192 and accompanying text.

195. 461 U.S. 540 (1983).

196. *Hearst*, 461 N.W.2d at 304.

197. *See* IOWA CODE §§ 422.43, 422.45(9), 423.4(4) (1977).

198. *Hearst*, 461 N.W.2d at 303.

199. 461 U.S. 540 (1983).

200. *Id.* at 549.

201. Under such a standard, a legislative classification must bear a rational relation to a legitimate governmental aim. *See Regan*, 461 U.S. at 547.

202. *Hearst*, 461 N.W.2d at 306.

203. *Id.*

ticular sales.[204] More importantly, however, the newspaper exemption "encourag[ed] the reading of newspapers and thereby enhanc[ed] the general knowledge and literacy of its citizenry."[205] Moreover, by subsidizing the price of newspapers, "the State made newspapers available to those of even moderate to low means."[206] The Iowa exemption would thus help newspapers "remain an inexpensive source of public information which most people will be able to afford."[207]

C. *The Controversy Spreads to the Broadcast Media*

The growing confusion over the constitutionality of differential taxation of the printed press quickly spread to the broadcast and cable media. In *Oklahoma Broadcasters Association v. Oklahoma Tax Commission*,[208] television and radio broadcasters challenged three Oklahoma tax provisions which favored members of the printed press over their counterparts in the broadcast media.[209] The Supreme Court of Oklahoma concurred with the trial court in noting that radio, television, and the print media were all members of the "publishing" industry.[210] Consequently, a tax that favored one member of this industry over another was subject to a showing that such a distinction served a compelling state interest.[211] The Oklahoma court concluded that "a tax structure that exempts some but not all 'members' of the press from use and sale taxes impermissibly burdens rights protected by the [f]irst and [f]ourteenth [a]mendments."[212]

In response to the court's strict scrutiny challenge, the state argued that "neither the statutes nor the Constitution recognize a 'publishing' classification."[213] The Oklahoma "legislative classification for taxation purposes [was], therefore, a reasonable basis for

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204. *Id.*
205. *Id.*
206. *Id.*
207. *Id.*
208. 789 P.2d 1312 (Okla. 1990).
209. OKLA. STAT. tit. 68, § 1354 (R) (1990), imposed a tax on television broadcasters' gross receipts from licensing agreements, but exempted newspapers and radio broadcasters from the tax. OKLA. STAT. tit. 68, § 1304(i) (1990) imposed a sales tax on broadcasters' gross receipts from advertising sales, but exempted newspapers, magazines, and billboards from the tax. OKLA. STAT. tit. 68, § 1305 (n)1 (1990) imposed a tax on the sale of broadcasting equipment, but exempted most manufacturing equipment used in the production of newspapers.
210. *Oklahoma Broadcasters*, 789 P.2d at 1315.
211. *Id.*
212. *Id.* at 1313.
213. *Id.* at 1316.

such differential tax exemptions."[214] The Oklahoma court rejected this reasoning, stating that, without justification, it could not approve preferential treatment of the print media over the broadcast media because both are members of the press.[215] The court added that the first amendment "guarantees freedom of the press—not just the *printed* press."[216]

The controversial case of *Medlock v. Pledger*[217] presented the Arkansas Supreme Court with a similar question. At issue in *Medlock* was the constitutionality of a sales tax[218] imposed by the state legislature on cable television which did not extend to other similar communication services, such as the unscrambling of satellite signals.[219] Although the sales tax statute before the Arkansas court[220] was later amended to correct the disparity between cable television and satellite unscrambling services,[221] taxpayers nevertheless demanded a refund of the taxes unlawfully collected by the state before the modification.[222] The Arkansas Supreme Court held that the tax provision, as originally drafted, violated the first amendment, and ordered a refund of the over eight million dollars unconstitutionally levied by the state.[223]

The Arkansas court limited the applicability of its holding to taxation of the press which "discriminate[s] between mass commu-

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214. *Id.*

215. *Id.*

216. *Id.*

217. 301 Ark. 483, 785 S.W.2d 202 (1990), *aff'd in part, rev'd in part, and remanded sub nom.* Leathers v. Medlock, 59 U.S.L.W. 4281 (U.S. April 16, 1991).

218. *See* ARK. STAT. ANN. § 26-52-301(3)(D)(i) (Supp. 1989).

219. *Medlock*, 301 Ark. at 487, 785 S.W.2d at 204.

220. Act 188 of 1987 subjected the following additional services to the state sales tax:

> Cable television services provided to subscribers or users. This shall include all service charges and rental charges whether for basic service or premium channels or other special service, and shall include installation and repair service charges and any other charges having any connection with the providing of cable television services.

Medlock, 301 Ark. at 484, 785 S.W.2d at 203.

221. By Act 769 of 1989, the language of Act 188 of 1987 was amended as follows:

> 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 services, premium channels, or other special service, and including installation and repair service charges and any other charges having any connection with the providing of said services.

Medlock, 301 Ark. at 484, 785 S.W.2d at 203. Act 769 was codified at ARK. STAT. ANN. § 26-52-301(3)(D)(i) (Supp. 1989).

222. *Medlock*, 301 Ark. at 484, 785 S.W.2d at 203.

223. *See* Wash. Post, Oct. 2, 1990, at D3.

nicators delivering substantially the same service."[224] It explained that it would be impossible to impose a similar tax on broadcast television because its delivery does not produce gross proceeds.[225] In closing, however, the Arkansas Supreme Court declared that it was "unwilling to hold that all mass communications media must be taxed in the same way."[226]

Both parties to the Arkansas cable television litigation appealed and were granted review by the United States Supreme Court.[227] While the state sought to avoid the enormous tax refund ordered by the state court,[228] the taxpayers, on the other hand, aspired to expand the Arkansas ruling to embrace all members of the press, including the broadcast, cable, and print segments of the media.[229]

V. *LEATHERS v. MEDLOCK:* THE SUPREME COURT CONFRONTS SELECTIVE TAXATION OF THE MEDIA

Since 1987, when the Supreme Court ruled in *Arkansas Writers' Project*[230] that discriminatory taxation of the press burdened first amendment liberties, the law had been unclear as to the constitutionality of differential taxation of distinct segments of the media. Although several cases involving disparate taxation of newspapers and magazines had sought the Court's attention,[231] it was *Medlock v. Pledger*[232] that finally piqued the interest of the Court.

Christened with the new name of *Leathers v. Medlock*,[233] this Arkansas case presented the Court with a complex and sensitive first amendment issue. In *Medlock*, the Court revisited over forty-five years of precedent on taxation of the press. The Court first

224. *Medlock*, 301 Ark. at 487, 785 S.W.2d at 204.

225. *Id.*

226. *Id.*

227. Medlock v. Pledger, 301 Ark. 483, 785 S.W.2d 202 (1990), *cert. granted*, 111 S. Ct. 41 (1990).

228. Wash. Post, Oct. 2, 1990, at D3.

229. Medlock v. Pledger, 301 Ark. 483, 785 S.W.2d 202 (1990), *cert. granted*, 111 S. Ct. 41 (1990).

230. 481 U.S. 221 (1987).

231. Hearst Corp. v. Iowa Dep't of Revenue, 461 N.W.2d 295, *cert. denied*, 59 U.S.L.W. 3724 (U.S. Apr. 22, 1991); Newsweek v. Celauro, 789 S.W.2d 247, *cert. denied*, 59 U.S.L.W. 3724 (U.S. Apr. 22, 1991), Southern Living v. Celauro, 789 S.W.2d 251, *cert. denied*, 59 U.S.L.W. 3724 (U.S. Apr. 22, 1991).

232. 301 Ark. 483, 785 S.W.2d 202 (1990), *cert. granted*, 111 S. Ct. 41 (1990).

233. Leathers v. Medlock, 59 U.S.L.W. 4281 (U.S. April 16, 1991), *aff'g in part, rev'g in part, and remanding* Medlock v. Pledger, 301 Ark. 483, 785 S.W.2d 202 (1990).

pointed out that unlike *Grosjean*,[234] the Arkansas tax on cable television at issue did not threaten to censor particular ideas or viewpoints.[235] The Court noted that, in fact, there was no evidence to suggest that "Arkansas . . . targeted cable television in a purposeful attempt to interfere with its [f]irst [a]mendment activities."[236]

Because of the " 'basic assumption of our political system that the press will often serve as an important restraint on government,' . . . exclusive taxation of the press could operate 'as effectively as a censor to check critical comment.' "[237] Unlike the special paper and ink use tax at issue in *Minneapolis Star*,[238] which "singled out the press for special treatment,"[239] Arkansas' sales tax statute applied to all tangible personal property, as well as to a broad range of services.[240] The general applicability of a tax burden, in turn, "insure[s] that [the tax] will be met with widespread opposition."[241] If, on the other hand, the obligation had applied "only to a single constituency, . . . [then it would have been] insulated from this political constraint."[242] Because "the press plays a unique role as a check on government abuse, . . . a tax limited to the press raises concerns about censorship of critical information and opinion."[243]

The majority also stressed that in contrast to *Grosjean*,[244] *Minneapolis Star*,[245] and *Arkansas Writers' Project*,[246] where only a narrow group of taxpayers bore the entire burden of the tax, the challenged statute in this case applied "uniformly to the approximately 100 cable systems then operating in [Arkansas]."[247] The Court explained that a tax that "targets a small number of speak-

234. 297 U.S. 233 (1936). *See also supra* notes 66-76 and accompanying text. In *Grosjean*, the Louisiana legislature imposed the contested tax exclusively on the press as a form of censorship "intended to curtail the circulation of newspapers and thereby prevent the people from acquiring knowledge of government activities." *Leathers*, 59 U.S.L.W. at 4282 (citing *Grosjean*, 297 U.S. at 246-251).

235. *Id.*

236. *Id.* at 4283.

237. *Id.* at 4282 (quoting *Minneapolis Star*, 460 U.S. at 585).

238. 460 U.S. 575 (1983). *See also supra* notes 80-111 and accompanying text.

239. *Leathers*, 59 U.S.L.W. at 4283.

240. *See* ARK. STAT. ANN. § 26-52-301 (Supp. 1989).

241. *Leathers*, 59 U.S.L.W. at 4283.

242. *Id. See also Minneapolis Star*, 460 U.S. at 585.

243. *Id.*

244. 297 U.S. at 240-241.

245. 460 U.S. at 592.

246. 481 U.S. at 229.

247. *Leathers*, 59 U.S.L.W. at 4283.

ers runs the risk of affecting only a limited range of views."[248] This form of taxation is akin to content-based restrictions in that it risks distorting the market for ideas. However, there is no such risk from a tax that applies to a "large number of cable operators offering a wide variety of programming throughout the State."[249] In the majority's view, the Arkansas tax, regardless of its narrow applicability within the press, did not "resemble[] a penalty for particular speakers or particular ideas."[250]

In addition, the Supreme Court acknowledged that cable television offers a "variety of programming that presents a mixture of news, information, and entertainment."[251] Accordingly, the Court did not find that cable television programming differed systematically in its content from that of satellite broadcast programming, newspapers, or magazines.[252] Consequently, a tax that applies exclusively to one of these segments of the media, does not per se establish a content-based distinction. Moreover, unlike the statute in *Arkansas Writers' Project*,[253] which expressly exempted certain types of magazines from taxation based solely on their content, there is nothing in the language of the statute in the present case that indicates that the tax is in any way content-based.[254]

Since the challenged statute did not present any of the first amendment issues which resulted in the invalidation of discriminatory taxes in *Grosjean*,[255] *Minneapolis Star*,[256] and *Arkansas Writers' Project*,[257] the majority opinion stressed that petitioners could succeed in their plight only if the tax presented " 'an additional basis' for concluding that the State ha[d] violated petitioners' [f]irst [a]mendment rights."[258] The "additional basis" advanced by petitioners was that the suspect tax's intermedia and intramedia[259] discrimination, even in the absence of evidence of in-

248. *Id.* at 4283-84.

249. *Id.* at 4284.

250. *Id.*

251. *Id.*

252. The dissent does point out the evidence presented to the Court regarding special programming available to the public only through cable television services. *See infra* notes 292-296.

253. 481 U.S. 221 (1987).

254. *Leathers*, 59 U.S.L.W. at 4284.

255. 297 U.S. 233 (1936).

256. 460 U.S. 575 (1983).

257. 481 U.S. 221 (1987).

258. *Leathers*, 59 U.S.L.W. at 4284 (citation omitted).

259. The Arkansas sales tax statute, as originally drafted, applied to the sale of all tangible personal property and a wide range of services which included cable television. The statute was later amended to include satellite unscrambling services. These two segments of

tent to suppress speech or of any effect on the expression of particular ideas, transgressed the first amendment.

The Court vehemently rejected this contention. Predicating its position on *Regan v. Taxation with Representation of Washington*,[260] the Court emphasized that "a tax scheme that discriminates among speakers does not implicate the [f]irst [a]mendment unless it discriminates on the basis of ideas."[261] In *Regan*, the Court examined Internal Revenue Code provisions which allowed deductions for contributions to certain lobbying organizations. The disputed tax scheme in that case involved one section of the Code which exempted certain nonprofit organizations that did not engage in lobbying, and allowed a deduction for contributions to these organizations. A separate section of the Code also granted an exemption to other organizations which did lobby, but contributions to these groups were not tax deductible. However, contributions to veterans' organizations were deductible regardless of these groups' lobbying activities.

As the Court had previously explained in *Regan*, "a legislature is not required to subsidize [f]irst [a]mendment rights through a tax exemption or tax deduction."[262] In fact, "[l]egislatures have especially broad latitude in creating classifications and distinctions in tax statutes."[263] The Court also stressed that "[i]nherent in the power to tax is the power to discriminate in taxation."[264] Thus, absent any evidence of invidious discrimination aimed at the "suppression of dangerous ideas,"[265] the fact that Congress chose to exempt contributions to veterans' organizations but did not extend the same privilege to other groups, did not render the tax scheme in *Regan* suspect "simply because it exempt[ed] only some speech."[266]

In addition, the Court emphasized that a differential burden

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the media were later declared by the Arkansas Supreme Court to be offering "substantially the same service." Medlock v. Pledger, 301 Ark. at 487-488, 785 S.W.2d at 204-205. *See also supra* notes 220-23 and accompanying text.

260. 461 U.S. 540 (1983).

261. *Leathers*, 59 U.S.L.W. at 4284.

262. *Id.* In Cammarano v. United States, 358 U.S. 498 (1959), the Court examined an Internal Revenue regulation which denied a deduction for publicity programs which were directed at pending state legislation. The Court concluded that since the regulation did not discriminate on the basis of who was financing the publicity or what views were being advocated, it was not "aimed at the suppression of dangerous ideas." *Id.* at 513 (citation omitted).

263. *Leathers*, 59 U.S.L.W. at 4284 (citing *Regan*, 461 U.S. at 547).

264. *Id.*

265. *Regan*, 461 U.S. at 548.

266. *Leathers*, 59 U.S.L.W. at 4284.

on speakers is insufficient by itself to raise first amendment concerns. In *Mabee v. White Plains Publishing Co.*[267] and *Oklahoma Press Publishing Co. v. Walling*,[268] both decided in 1946, the Court had examined the legality of government imposed requirements which applied to newspapers and other businesses, but exempted certain small papers. Although the publishers of larger newspapers maintained that such differential burdens violated their first amendment rights, the Court upheld the exemption, pointing out that "there was no indication that the government had singled out the press for special treatment."[269]

The *Leathers* majority concluded that based on the precedent established in *Regan*, *Mabee*, and *Oklahoma Press*, "differential taxation of speakers, even members of the press, does not implicate the [f]irst [a]mendment unless the tax is directed at, or presents the danger of suppressing particular ideas."[270] Although such a danger was clearly present in *Grosjean*,[271] *Minneapolis Star*,[272] and *Arkansas Writers' Project*,[273] there was nothing in the record of this case to "indicate that Arkansas' broad-based, content-neutral sales tax [was] likely to stifle the free exchange of ideas."[274] Consequently, the Court held that the contested extension of the Arkansas general sales tax to cable television or satellite unscrambling services, while exempting the print media, did not run afoul of the first amendment.[275]

In his dissent, Justice Marshall denounced what he considered to be a blatant disregard by the majority of the intent of the Framers of the first amendment, which was "to prevent government from using disparate tax burdens to impair the untrammeled dissemination of information."[276] Sharply criticizing the manner in which this decision "unwisely cut back on the principles that inform our selective-taxation precedents,"[277] Justice Marshall questioned whether, after this ruling, "any general obligation to treat media actors evenhandedly"[278] had survived.

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267. 327 U.S. 178 (1946).
268. 327 U.S. 186 (1946).
269. *Id.* at 194.
270. *Leathers*, 59 U.S.L.W. at 4285.
271. 297 U.S. 233 (1936).
272. 460 U.S. 575 (1983).
273. 481 U.S. 221 (1987).
274. *Leathers*, 59 U.S.L.W. at 4285.
275. *Id.*
276. *Id.* (Marshall, J., dissenting).
277. *Id.*
278. *Id.*

Over forty-five years ago, when the Supreme Court first declared in *Grosjean*, that "the purpose of the Free Press Clause 'was to preserve an untrammeled press as a vital source of public information,' "[279] cable television was neither technologically feasible nor in the minds of the justices which then composed the Supreme Court. It was not until over four decades later in *Los Angeles v. Preferred Communications, Inc.*,[280] that the Court officially afforded cable television first amendment protection. Cable television currently "partakes of some of the aspects of speech and the communication of ideas as do the traditional enterprises of newspaper and book publishers, public speakers and pamphleteers."[281]

Since cable presently competes with other segments of the media in the information market, "the power to discriminate between these media triggers . . . the risk of covert censorship."[282] Were the state to have the power to "impose tax burdens that disadvantage one information medium relative to another, . . . [it could] favor those media that it like[d] and punish those that it dislike[d]."[283] Increases in the cost of the public's access to a certain medium "distorts consumer preferences for the . . . [affected] information formats, and thereby impairs 'the widest possible dissemination of information from diverse and antagonistic sources.' "[284]

Justice Marshall argued that selective taxation of cable operators "triggers the concerns that underlie the nondiscrimination principle"[285] and places the burden on the State to show that such differential taxation of cable television services is justified by either a "special characteristic" of this medium, or by a compelling state interest which cannot otherwise be achieved. The only justification raised by the State in support of the discriminatory tax was the State's interest in raising revenue. This interest, however, has repeatedly failed to "overcome the presumption of unconstitutionality under the nondiscrimination principle."[286]

Justice Marshall also dismissed as simplistic the majority's contention that the Arkansas tax scheme does not create a risk of

279. *Id.* (quoting *Grosjean*, 297 U.S. at 250).

280. 476 U.S. 488 (1986).

281. *Leathers*, 59 U.S.L.W. at 4286 (citation omitted) (Marshall, J., dissenting).

282. *Id.*

283. *Id.*

284. *Id.* (citation omitted).

285. *Id.*

286. *Id. See Arkansas Writers' Project*, 481 U.S. at 231-232; *Minneapolis Star*, 460 U.S. at 586.

governmental abuse because the number of cable operators exposed to the tax is "large."[287] The majority explained that in the past, where differential taxation of the press has failed, it had been limited to "a small number of speakers,"[288] and thus "resemble[d] a penalty for particular speakers or particular ideas."[289] Marshall challenged the utility of this approach since the majority failed to draw any useful guidelines or reveal the "magic number" at "which discriminatory taxation can be accomplished without impunity."[290] Moreover, as Justice Marshall accurately pointed out, because most communities are serviced by only one cable operator, "in any given locale, Arkansas' discriminatory tax may disadvantage a *single* actor, a 'small' number even under the majority's calculus."[291]

Perhaps the most important issue raised by the dissent, however, is its acknowledgement of cable television's "unique contributions to the information market."[292] The evidence before the Court revealed that cable offers a wide range of programming otherwise unavailable to the public through other competing media.[293] Researchers and critics suspect that cable may well be the communications system of the future.[294] Cable television has the capacity to expand "the political and cultural marketplace of ideas, and new opportunities for freedom of expression."[295] Consequently,

> to the extent that selective taxation makes it harder for Arkansas' 100 cable operators to compete with . . . [other members of the media] Arkansas' discriminatory tax *does* 'risk affecting only a limited range of views' and may very well 'distort the market for ideas' in a manner akin to direct 'content-based regulation.'[296]

As noted by the dissent, this decision accents the potential for governmental control of the media based on their identities.[297] Justice Marshall further warns that, according to the majority's proposed test, nothing would "prevent[] the State from singling out a

287. *Leathers*, 59 U.S.L.W. at 4287.

288. *Id. See also Grosjean*, 297 U.S. 233 (1936); *Minneapolis Star*, 460 U.S. 575 (1983); *Arkansas Writers' Project*, 481 U.S. 221 (1987).

289. *Leathers*, 59 U.S.L.W. at 4287.

290. *Id.*

291. *Id.* (emphasis in original).

292. *Id.*

293. Cable offers unique programming, such as certain religious services, Spanish-language information and local city council meetings. *Id.*

294. P. PARSONS, CABLE TELEVISION AND THE FIRST AMENDMENT 39-44 (1987).

295. *Id.* at 40.

296. *Id.* (citations omitted) (emphasis in original).

297. *Leathers*, 59 U.S.L.W. at 4287 (Marshall, J., dissenting).

particular medium for higher taxes, either because the State does not like the character of the services that the medium provides or because the State simply wishes to confer an advantage upon the medium's competitors."[298] Justice Marshall further stated: "[F]or all we know, the legislature's initial decision selectively to tax cable may have been prompted by a similar plea from traditional broadcast media to curtail competition from the emerging cable industry."[299]

Justice Marshall also charges the majority with confusing its cases on differential taxation of the press and with its cases on subsidization of speech, by mistakenly embracing the proposition that "a tax scheme that discriminates among speakers does not implicate the [f]irst [a]mendment unless it discriminates *on the basis of ideas.*"[300] The dissent vehemently argues that "[e]ven when structured in a manner that is content neutral, a scheme that imposes differential burdens on like-situated members of the press violate[s] the [f]irst [a]mendment because it poses *the risk* that the State might abuse this power."[301]

VI. Conclusion

History has proven that liberty of the press is vital to the existence of a true democracy. Without it, the government would self-servingly prescribe what we know and think. Eventually, we would become nothing more than puppets of a self-perpetuating tyranny. As Americans, we are the heirs of a legacy of freedom. If we take this gift for granted, however, we may one day lose it. Beyond our borders, dictatorial governments endure around us, generation after generation, by keeping their people uninformed and thereby oblivious to their own physical and intellectual slavery.

Although our society has undergone great transformations in its 200-year history, the Constitution's wisdom has proven transcendental. The Framers of the first amendment certainly did not contemplate the technological changes that have transformed the American press from a handful of newspapers to a world-wide network of satellite communications. The basic freedoms they set out to protect, however, remain the same.

There is always some risk in asking the Supreme Court to modernize the definition of our constitutional rights to reflect the

298. *Id.*
299. *Id.* at 4288 (Marshall, J., dissenting).
300. *Id.* (emphasis in original).
301. *Id.* (citation omitted).

advances of today's rapidly changing world. Perhaps when the Court avoided confronting the issue of differential taxation between newspapers and magazines in *Arkansas Writers' Project*,[302] it did so because it anticipated that resolution of this issue might permanently curtail the constitutional protections afforded by the press clause. In fact, when the Court could no longer sidestep the question without risking further confusion in the state courts, their ruling in *Leathers v. Medlock*[303] finally punctured the press' already rusty first amendment shield.

Taxation of the press—whether it is generalized to all its members or confined to certain characteristically similar segments—would either force the industry to absorb the additional costs or, in the alternative, pass them along to the public. If the press is forced to assimilate the increased costs of taxation, its ability to conduct its usual policing of government, "whereby oppressive officials are shamed or intimidated into more honorable and just modes of conducting affairs,"[304] will be significantly curtailed. If, on the other hand, these expenses are passed along to the consumer, vital information necessary to the achievement of an informed citizenry, capable of exercising its constitutionally guaranteed right to self-government, will cease to be available to those of low economic means.[305] Ironically, this particular social group is usually at a political disadvantage and has the greatest stake in remaining well-informed if it is to benefit from the democratic process.

Pandora's box was inadvertently reopened by the press when it challenged tax laws that threatened its traditional exempt status. A reconciliation of the press clause with contemporary socio-economic interests and technological advances, however, may continue to curtail, rather than expand, this industry's constitutionally protected liberties.

*Ana J. del Cristo**

302. 481 U.S. 221 (1987).

303. 59 U.S.L.W. 4281 (U.S. April 16, 1991).

304. G. PATTERSON, *supra* note 3, at 113.

305. W. HACHTEN, THE SUPREME COURT ON FREEDOM OF THE PRESS: DECISIONS AND DISSENTS 76 (1968); *see Grosjean*, 291 U.S. 233 (1936).

* J.D., 1991, University of Miami School of Law.