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Communications Law: Differential Taxation of the Media: *Leathers v. Medlock*: Prejudicial Or Profitable?

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NOTES

Communications Law: Differential Taxation of the Media: *Leathers v. Medlock*: Prejudicial or Profitable?

I. Introduction

Today, the First Amendment[1] and taxation are rarely associated with one another. However, concerns over taxation gave birth to the doctrines protected by the First Amendment.[2] The American Revolution began, in part, because of British governmental stamp duties imposed on newspapers.[3] These so called "taxes on knowledge"[4] prompted the Framers of the Constitution to provide for freedom of speech and for freedom of the press in the First Amendment.[5]

While the press is not insulated from taxation under the First Amendment,[6] taxes imposed must be equitably applied[7] and generally applicable[8] to various enterprises. Since the inception of the Constitution, a complete and comprehensive standard regarding equal taxation of the press has evaded the United States Supreme Court.

This note focuses on the current approach taken by the Supreme Court on media taxation. First, the background and facts surrounding *Leathers v. Medlock*[9] will be examined. Second, the *Leathers* opinion and its constitutional repercussions will be analyzed. Third, the possible effects of *Leathers* on Oklahoma media taxation policies will be considered. Finally, this note concludes that *Leathers* is not consistent with the prior decisions on media taxation. In fact, *Leathers* provides a vehicle for the government to discriminate at will.

II. Development of Media Taxation

A. The Trilogy of Media Taxation Cases

Throughout history, taxes and licenses have impeded the press.[10] However, not

1. U.S. CONST. amend. I ("Congress shall make no laws respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

2. Grosjean v. American Press Co., 297 U.S. 233, 248 (1936).

3. *Id.* at 246-48.

4. *Id.* at 246.

5. *Id.* at 246-48.

6. *Id.* at 249.

7. *See, e.g.*, OKLA. CONST. art. 10, § 5; PA. CONST. art. 8, § 1.

8. *See, e.g.*, Swaggart Ministries v. Board of Equalization, 493 U.S. 378, 390 (1990); Citizens Publishing Co. v. United States, 394 U.S. 131, 139 (1969) (antitrust laws); Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 192-93 (1946) (Fair Labor Standards Act); Mabee v. White Plains Publishing Co., 327 U.S. 178, 184 (1946) (Fair Labor Standards Act).

9. 499 U.S. 439 (1991).

10. *See, e.g.*, City of Norfolk v. Norfolk Landmark Publishing Co., 28 S.E. 959 (Va. 1898); Cowan

until *Grosjean v. American Press Co.*[11] did the United States Supreme Court address whether differential media taxation[12] is constitutionally valid under the First Amendment.[13] Specifically, *Grosjean* questioned the validity of a tax directed at the larger newspapers in Louisiana, while providing exemptions for the smaller newspapers.[14] The Louisiana legislature imposed the tax to suppress certain viewpoints.[15] The Court in *Grosjean* declared the tax unconstitutional because it was deliberately directed at stifling particular ideas.[16] Consequently, the Court left undecided whether mere differential media taxation provided separate grounds to strike down the tax.

Where *Grosjean* stopped, *Minneapolis Star and Tribune Co. v. Minnesota Commissioner of Revenue*[17] continued. The tax reviewed in *Minneapolis Star* was a generally applicable use tax[18] because it applied to numerous enterprises for the privilege of using, storing, or consuming tangible personal property in Minnesota.[19] However, the tax exempted the first one hundred thousand dollars worth of ink and paper consumed annually by a publication.[20] The exemption resulted in eleven publishers, producing fourteen of the 388 paid circulation newspapers, incurring the entire burden of the use tax.[21]

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v. Fairbrother, 24 S.E. 212 (N.C. 1896); *In re* Jager, 7 S.E. 605 (S.C. 1888).

11. 297 U.S. 233 (1936).

12. Differential media taxation occurs when a tax is placed on one part of the media but not the entire media. The discrimination that results is manifested in two different forms: intramedia discrimination or intermedia discrimination.

Intramedia discrimination refers to a tax that discriminates within a particular information medium, such as newspapers, broadcast television, radio, magazines, or cable television. A tax producing differential intramedia taxation would tax a group of newspapers for example differently than other newspapers, or tax some magazines differently than other magazines.

Intermedia discrimination refers to a tax that discriminates between different information media. A tax producing differential intermedia taxation would tax magazines for example differently than broadcast television, or tax cable television differently than newspapers.

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

14. *Id.* at 240-41.

15. The tax originated as an attempt by Sen. Huey Long (D.-La.) to control the large newspapers. MARC A. FRANKLIN & DAVID A. ANDERSON, CASES AND MATERIALS ON MASS MEDIA LAW 125 (4th ed. 1990). Two percent of the gross receipts on advertising sold by newspapers with a weekly circulation of 20,000 or more were subject to the tax. *Id.* Oddly enough, only 13 of the 124 newspapers in the state suffered from the tax, and 12 of those opposed Senator Long's views. *Id.* Therefore, Long proposed the tax to the legislature as "a tax on lying." *Id.*

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

17. 460 U.S. 575 (1983).

18. This is important because a tax that is generally applicable to a variety of enterprises is not viewed as discriminatory and will not trigger the highest standard of constitutional review, strict scrutiny. A generally applicable tax normally falls under a rational basis test for constitutional analysis.

19. Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 578 (1983).

20. *Id.* at 578.

21. *Id.* Despite the fact that the tax was generally applicable to numerous enterprises, the Court followed a strict scrutiny analysis because the tax produced a discriminatory result for newspaper publishers.

The result in *Grosjean* was attributable, at least in part, to an improper, censorial legislative motive.[22] Because the tax scheme in *Minneapolis Star* lacked any improper legislative motive, the Court distinguished *Grosjean*.[23]

The *Minneapolis Star* Court decided to reevaluate the approach used in addressing differential media taxation issues.[24] The Court concluded that illicit legislative intent need not be the driving force behind differential media taxation before a First Amendment violation occurs.[25] The Court reasoned that an analysis on the constitutionality of differential media taxation begins with a presumption that the tax is unconstitutional.[26] The Court's rationale stemmed from a fear that unequal taxation on the media would serve as a censor, stifling particular ideas or viewpoints.[27]

In *Minneapolis Star*, the Supreme Court held that singling out the press for differential treatment under a general tax, or singling out individual members of the press for taxation, requires the State to assert "a counterbalancing interest of compelling importance that it cannot achieve without differential taxation"[28] before the tax can be held constitutional. Finally, the Court held, on independent grounds, that the tax was unconstitutional because the effect of the exemption singled out a small number of speakers.[29]

The United States Supreme Court in *Arkansas Writers' Project v. Ragland*[30] subsequently addressed a sales tax scheme that discriminated between magazines and newspapers (different media) as well as among magazines (the same medium). The Arkansas statute provided a tax exemption for (1) newspapers; (2) religious, professional, trade, and sports journals; and/or (3) publications printed and published within the state.[31] The result of the sales tax left some magazines burdened by a tax, while other magazines were freed by the exemption. The case presented a similar dilemma as *Minneapolis Star*: differential taxation of similarly situated media (intramedia discrimination).

However, the Court in *Arkansas Writers' Project* faced a more disturbing use of selective taxation than the Court in *Minneapolis Star*.[32] Arkansas legislators allowed exemptions on certain magazines based on the publication's content. As a result, the Court determined that the tax discriminated on the basis of content and declared the tax unconstitutional under the First Amendment.[33]

22. Grosjean v. American Press Co., 297 U.S. 233, 250 (1936).
23. FRANKLIN & ANDERSON, *supra* note 15, at 126.
24. *Minneapolis Star*, 460 U.S. at 580.
25. *Id.* at 592.
26. *Id.* at 585.
27. *Id.*
28. *Id.*
29. *Id.* at 591-92. A speaker refers to a single "voice" within the media, such as the *New York Times*.
30. 481 U.S. 221 (1987).
31. Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 224 (1987).
32. *Id.* at 229.
33. *Id.* at 233.

Arkansas Writers' Project also reviewed a second form of discrimination. The Arkansas tax scheme provided exemptions for newspapers but not for certain magazines (intermedia discrimination). Choosing not to focus on the differential taxation between Arkansas' magazines and newspapers (intermedia discrimination), the Supreme Court accordingly declined to address whether differential taxation between different types of media (intermedia discrimination) provided a basis for invalidating the tax.[34]

B. The Nondiscrimination Principle

The trilogy of media taxation cases discussed above established the nondiscrimination principle.[35] Under this principle, differential media taxation is constitutionally suspect and must be struck down unless it is justified by a special characteristic of the medium or the state offers a counterbalancing compelling interest so important that the interest cannot be achieved without differential taxation.[36] When dealing with an issue on differential media taxation, a court generally begins its analysis presuming the tax is unconstitutional, and the State has the burden to justify the tax.[37]

III. Facts of Leathers v. Medlock

The adoption of Act 188[38] created the controversy reviewed in *Leathers*. Act 188 amended Arkansas' Gross Receipts Act[39] to include the sale of cable television services within the purview of the state sales tax. However, exemptions from the amended sales tax still existed for newspapers, magazines, and satellite broadcast services,[40] thereby resulting in differential media taxation.

A trio[41] joined together to fight the inequality resulting from Act 188. The group filed a class action suit to challenge the constitutionality of the tax extension to cable television services.[42] The United States Supreme Court set out to resolve the

34. *Id.*

35. This principle expresses the government's general First Amendment obligation not to interfere with the press as an institution. Leathers v. Medlock, 499 U.S. 439, 449 (1991) (Marshall, J., dissenting).

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

37. *See, e.g.*, Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221 (1987); Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575 (1983); Grosjean v. American Press Co., 297 U.S. 233 (1936). *But see* Leathers v. Medlock, 449 U.S. 439 (1991).

38. 1987 ARK. ACTS 188, § 1.

39. Arkansas' Gross Receipts Act levies a 4% tax on receipts from the sale of all tangible personal property and specified services. ARK. CODE ANN. §§ 26-52-301, -302 (Michie 1987 & Supp. 1989). The Gross Receipts Act exempts the sale of certain goods and services from taxation. *Id.* § 26-52-401 (Michie Supp. 1989). Under this Act counties impose a further 1% tax on the same goods and services. *Id.* §§ 26-74-222, -307 (Michie 1987 & Supp. 1989). Cities may also tax the same goods and services an additional .5% or 1%. *Id.* § 26-75-307 (Michie 1987).

40. ARK. CODE ANN. §§ 26-52-401(4), -401(14) (Supp. 1989).

41. The trio consisted of Daniel Medlock, a cable subscriber, Community Communications Co., a cable television operator, and the Arkansas Cable Television Association, Inc., a trade organization comprised of Arkansas cable system operators.

42. The Arkansas Chancery Court first heard the dispute. The cable petitioners argued their services

question left open in *Arkansas Writers' Project*: Does the First Amendment prevent a state from imposing a tax on only select media?

IV. Opinions of Leathers v. Medlock

A. The Majority Opinion

The Court in *Leathers* declared that Act 188 constituted the extension of a generally applicable sales tax[43] to cable television services.[44] Based on the above finding, the Court made four conclusions. First, the tax scheme did not single out cable television in particular; therefore, the watchdog function of the press was not hindered.[45] Second, the Arkansas legislature failed to show a propensity towards censorship of cable television.[46] Third, the tax focused on a large enough number of cable operators, thereby preventing the risk to the Constitution similar to content-based regulation.[47] Fourth, the free exchange of ideas was not stifled by the tax.[48] The majority thus concluded that none of the First Amendment concerns presented in *Grosjean*, *Minneapolis Star*, or *Arkansas Writers' Project* were present in *Leathers*.[49] As a result, Act 188 did not violate the First Amendment.[50]

Finding *Leathers* outside the scope of the previous decisions on media taxation, the majority addressed the constitutionality of the media taxation issue presented

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are protected by the First Amendment, like the services of the newspapers, magazines and satellite broadcast services that were exempt from the GRA tax. Leathers v. Medlock, 499 U.S. 439, 442 (1991). The petitioners contended their rights were violated by the differential tax treatment of Act 188 under the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 442-43.

The chancery court concluded the use of the public rights-of-way distinguished the cable operators from other media. *Id.* The chancery court held this distinction supported the disparity in the taxation produced by Act 188, and the act was constitutionally upheld. *Id.*

Shortly after the chancery court issued its decision, Arkansas adopted 1989 ARK. ACTS 769, § 1 (Act 769). *Id.* Act 769 extended the GRA tax to include the distribution of television, video or radio transmissions with or without the use of wires. *Id.* at 1441-42. In effect the exemption for the satellite broadcast services was abolished.

The cable petitioners appealed to the Arkansas Supreme Court continuing to challenge the constitutionality of Act 188, despite the adoption of Act 769. *Id.* at 1442. However, the Arkansas Supreme Court reasoned, *ipse dixit*, that the Constitution does not prohibit the differential taxation of different media. Medlock v. Pledger, 785 S.W.2d 202, 204 (Ark. 1990). Although, the Arkansas Supreme Court considered differential taxation of the same media unconstitutional. *Id.*

43. The services taxed included: natural gas, water, electricity, ice, and steam utility services; telephone, telecommunications, and telegraph service; the furnishing of rooms by hotels, apartment hotels, lodging houses, and tourist camps; alteration, addition, cleaning, refinishing, replacement, and repair services; printing of all kinds; tickets for admission to places of amusement or athletic, entertainment, or recreational events; and fees for the privilege of having access to or use of amusement, entertainment, athletic, or recreational facilities. ARK. CODE ANN. § 26-52-301 (Michie Supp. 1989).

44. Leathers v. Medlock, 449 U.S. 439, 453 (1991).

45. *Id.* at 447.

46. *Id.* at 448.

47. *Id.* at 448-49.

48. *Id.* at 453.

49. *Id.* at 449.

50. *Id.* at 453.

with three cases not involving media taxation issues: *Regan v. Taxation with Representation of Washington*,[51] *Mabee v. White Plains Publishing Co.*,[52] and *Oklahoma Press Co. v. Walling*.[53] The *Leathers* majority relied on these three cases to support its holding that differential taxation of selected media is, by itself, insufficient to raise First Amendment concerns.[54]

Citing *Regan*,[55] the majority stated that a tax scheme that discriminates among speakers does not implicate the First Amendment unless it discriminates on the basis of ideas.[56] The government need not exempt speech from a generally applicable tax.[57] *Regan* announced that a tax scheme does not become suspect simply because it exempts only some speech.[58]

The majority gained further support by relying on *Mabee* and *Oklahoma Press*. While those cases did not involve taxation, each did involve governmental action that placed differential burdens on the press.[59] In both cases, the Fair Labor Standards Act of 1938 provided an exemption for smaller newspapers, which the larger newspapers argued was an unconstitutional, differential burden that violated the First Amendment.[60] The exemption was upheld because there was no indication that the government had singled out the press for special treatment,[61] or that the exemption was a "deliberate and calculated device" to penalize a certain group of newspapers.[62]

Taken together, *Regan*, *Mabee*, and *Oklahoma Press* establish that differential taxation of speakers, including the media, does not implicate the First Amendment unless "the tax is directed at, or presents the danger of suppressing, particular ideas."[63] The tax schemes in *Grosjean*, *Minneapolis Star*, and *Arkansas Writers' Project* resulted in threats to particular ideas or viewpoints; consequently, the First Amendment was implicated.[64] However, the tax reviewed in *Leathers* lacked any threats to particular ideas or viewpoints because it applied to a broad range of

51. 461 U.S. 540 (1983).

52. 327 U.S. 178 (1946).

53. 327 U.S. 186 (1946).

54. *Leathers*, 499 U.S. at 453.

55. In *Regan*, a nonprofit, nonmedia organization brought suit after it was denied tax exempt status for its lobbying activities. Regan v. Taxation with Representation of Washington, 461 U.S. 540, 541-42 (1983). The Court viewed tax exemptions as subsidies that are administered by the tax system. *Id.* at 544. The key issue in *Regan* was not whether the plaintiff must be permitted to lobby, but whether Congress was required to provide the plaintiff with public money to support the plaintiff's lobbying activities. *Id.* at 551.

56. *Leathers*, 499 U.S. at 450.

57. *Id.* at 451 (citing Cannarano v. United States 358 U.S. 498 (1959)).

58. *Id.*

59. *Id.* at 452.

60. *Id.* 452-53.

61. *Id.* at 452 (citing Oklahoma Press Pub. Co. v. Walling, 327 U.S. 186, 194 (1946)).

62. *Id.* at 452-53 (quoting Mabee v. White Plains Publishing Co., 327 U.S. 178, 184 (1946)).

63. *Id.* at 453.

64. *Id.*

services.[65] The Arkansas legislature simply chose to exclude certain media from a generally applicable tax.[66]

B. The Dissenting Opinion

The dissent argued that the First Amendment prohibits singling out a particular information medium for tax burdens not borne by other media.[67] A nondiscrimination principle, which was established by the previous media taxation cases, should have been the basis for invalidating Arkansas' tax scheme.[68] Because cable operators compete in the information market with the print, electronic, and broadcast media, the power to discriminate between the different media raises concerns underlying the nondiscrimination principle: the risk of covert censorship.[69]

Justice Marshall asserted, "The nondiscrimination principle protects the press from censorship prophylactically, condemning any selective-taxation scheme that presents the 'potential for abuse' by the State . . . independent of any actual 'evidence of an improper censorial motive.'"[70] The potential that the government could abuse its taxing power to prevent the free exchange of ideas justifies the condemnation of a selective tax scheme under the nondiscrimination principle.

V. Analysis of Leathers v. Medlock

A. Threats to Suppress Expression

"There is an 'equality of status in the field of ideas' and government must afford all points of view an equal opportunity to be heard."[71] The majority in *Leathers* at best overlooks this fundamental proposition, and at worst ignores it. The decision handed down in *Leathers* fails to adequately protect an underlying First Amendment concern, the free marketplace of ideas.[72]

The result in *Leathers* offends equality. The First Amendment protection granted to the press includes cable television.[73] "The First Amendment guarantees freedom

65. *Id.*

66. *Id.*

67. *Id.* at 454 (Marshall, J., dissenting).

68. *Id.* at 454-55.

69. *Id.* at 458.

70. *Id.* at 458 (quoting Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue, 460 U.S. 575, 592 (1983) and Arkansas Writers' Project v. Ragland, 481 U.S. 221, 228 (1987)).

71. Police Dep't v. Mosley, 408 U.S. 92, 96 (1972) (quoting ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 27 (1948)).

72. In *Houchins v. KQED, Inc.*, the Court stated:

> The preservation of a full and free flow of information to the general public has long been recognized as a core objective of the First Amendment to the Constitution. It is for this reason that the First Amendment protects not only the dissemination but the receipt of information and ideas.

Houchins v. KQED, Inc., 438 U.S. 1, 30 (1978) (Stevens, J., dissenting). Furthermore, the First Amendment, said Judge Learned Hand, "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all." United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943).

73. *See* Los Angeles v. Preferred Communications, Inc., 476 U.S. 488, 494 (1986) (stating that cable

of the press — not just the printed press."[74] The *Leathers* decision allows segregation of the media and applies differential, discriminatory taxation to a particular information medium, cable television.[75]

The Court in *Leathers* relied on *Regan* for the proposition that the power to discriminate in taxation is inherent in the power to tax.[76] However, if the trilogy of media cases provided stand for anything, it is that the government cannot discriminate when taxing the media.[77] Protection of individual views is paramount to protecting the First Amendment.[78]

The risk of the government selectively favoring one medium and taxing another violates the principles established in the First Amendment.[79] The basis behind taxing the media with equality is preserving the dissemination of information to the public through an unfettered marketplace of ideas. Selective taxation provides a tool for the government to suppress particular viewpoints.[80] "An unlimited power to tax involves, necessarily, a power to destroy; because there is a limit beyond which no institution and no property can bear taxation."[81] If the government is allowed to tax cable operators differently than other media, then the government would have the potential to destroy cable television.

The tax scheme in *Leathers* may apply to a wide range of services making it a generally applicable tax, which usually proves valid under constitutional scrutiny.[82] However, the tax is not generally applicable to the media.[83] Act 188 provides exemptions for newspapers and magazines but not for cable television services. Based on the trilogy of media taxation cases this should be considered unconstitutional.[84]

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operators deserve the same First Amendment Protection as newspapers and magazines).

74. Oklahoma Broadcasters Ass'n v. Oklahoma Tax Comm'n, 789 P.2d 1312, 1316 (Okla. 1990).

75. Leathers v. Medlock, 499 U.S. 439, 454 (1991) (Marshall, J., dissenting).

76. *Id.* at 451.

77. *Id.* at 464 (Marshall, J., dissenting).

78. *Id.* at 458 (Marshall, J., dissenting); *see, e.g.*, Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, 425 U.S. 748, 765 (1976); Garrison v. Louisiana, 379 U.S. 64, 77 (1964); New York Times Co. v. Sullivan, 376 U.S. 254, 266-70 (1964).

79. *Leathers*, 499 U.S. at 458 (Marshall, J., dissenting).

80. *Id.*

81. McCulloch v. Maryland, 17 U.S. 316, 327 (1819).

82. If a tax is considered generally applicable then the First Amendment is not implicated. Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 581 (1983).

83. The *Minneapolis Star* Court stated:

> A power to tax differentially, as opposed to a power to tax generally, gives a government a powerful weapon against the taxpayer selected. When the State imposes a generally applicable tax, there is little cause for concern. We need not fear that a government will destroy a selected group of taxpayers by burdensome taxation if it must impose the same burden on the rest of its constituency.

Id. at 585.

84. "This Court has long recognized that the freedom of the press prohibits government from using the tax power to discriminate against individual members of the media or against the media as a whole." Leathers v. Medlock, 499 U.S. 439, 454 (1991) (citing Grosjean v. American Press Co., 297 U.S. 233 (1936)); Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221 (1987); Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue, 460 U.S. 575 (1983). "The Framers of the First

Three dangers exist that may suppress information making the trilogy of media cases applicable. First, Act 188 hinders the watchdog function of the media.[85] The newspapers and magazines exempt from Act 188 remain unhindered to serve their checking function on the government.[86] These publications are free to speak out against the government without fear of retaliation in the form of raised taxes.[87] Cable television services, however, fall under Act 188. Therefore, cable operators become subject to greater governmental control, which is an unconstitutional result.[88]

Second, the threat of content-based regulation exists by allowing an exemption for newspapers and magazines, but not cable television.[89] Cable television provides services, including Spanish-language information networks, religious programming, and broadcasts of local city council meetings, all of which remain unavailable through other media.[90] The tax borne by cable television, and not other media, risks affecting these cable specific views, which stifles or distorts the free marketplace of ideas in a manner akin to content-based discrimination.[91] A tax discriminating on the basis of content will trigger a heightened scrutiny under the

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Amendment, we have explained, specifically intended to prevent government from using disparate tax burdens to impair the untrammeled dissemination of information." *Id.*; *see also* Speiser v. Randall, 357 U.S. 513, 518, *reh'g denied* 358 U.S. 860 (1958) (holding the discriminatory denial of tax exemptions can impermissibly infringe free speech).

85. The *Minneapolis Star* Court stated:

> When the state singles out the press, though, the political constraints that prevent a legislature from passing crippling taxes of general applicability are weakened, and the treat of burdensome taxes becomes acute. That threat can operate as effectively as a censor to check critical comment by the press, undercutting the basic assumption of our political system that the press will often serve as an important restraint on government.

Minneapolis Star, 460 U.S. at 585.

86. "The press plays a unique role as a check on government abuse, and a tax limited to the press raises concerns about censorship of critical information and opinion." Leathers v. Medlock, 499 U.S. 439, 447 (1991).

87. In *Whitney v. California*, Justice Louis Brandeis stated:

> [O]rder cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; . . . Recognizing the occasional tyrannies of governing majorities, . . . the Constitution [was amended] so that free speech . . . should be guaranteed.

Whitney v. California, 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring).

88. In *Cohen v. California*, the Court stated:

> The constitutional right of free expression is . . . intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us . . . in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.

Cohen v. California, 403 U.S. 15, 24 (1971).

89. *Leathers*, 499 U.S. at 461-62 (Marshall, J., dissenting).

90. *Id.* at 461.

91. *Id.* at 462.

First Amendment.[92] Reviewing Act 188 under a heightened scrutiny reveals the tax scheme is unconstitutional.

Third, the tax creates an unfair economic market in which the media compete for the public's attention. The tax levied on the cable operators will probably be passed on to the consumers or subscribers of cable television. Arguably, the increased subscription fee could result in a decreased market share for the cable companies. Cable subscribers may be outraged at the increased rates and cancel their subscription; or cable subscribers may be unable to afford the increased rates and be forced to cancel their subscription. Regardless, Arkansas cable operators become disadvantaged by the unequal tax, which could possibly lead to the unconstitutional result of decreased dissemination of views to the public.[93]

B. Special Characteristics Justifying Taxation

States have an obligation to treat the media equally.[94] Since the United States Supreme Court has previously recognized that differential taxation *within*[95] an information medium interferes with the market of ideas by imposing costs disproportionately, logic dictates that the same conclusion apply to differential taxation *across*[96] different media. The same interference to the market of ideas results from both situations.[97]

Special characteristics of a medium may justify imposing disproportionate taxes. However, the state must offer a compelling reason under the nondiscrimination principle to justify a differential tax.[98] Cable television must use public rights-of-way to distribute its signal. Arguably, use of city streets could qualify as a "special characteristic" justifying differential taxation. However, cable operators must pay a franchise fee to the city,[99] and in Arkansas, the fee is expressly designed to defray costs associated with cable's use of any public rights-of-way.[100]

The only justification given by Arkansas for the differential tax on cable was raising revenue.[101] Raising revenue, however, is not considered a compelling reason to overcome the presumption that a tax is unconstitutional.[102]

If the *Leathers* Court had made the wiser choice and followed the nondiscrimination principle, Act 188 would have been considered unconstitutional. The Court could have either removed the exemption and applied the tax evenly to all media

92. Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 229-31 (1987).

93. Subjecting the media to competitive disadvantages violates the First Amendment "command that the government . . . shall not impede the free flow of ideas." Associated Press v. United States, 326 U.S. 1, 20 (1945).

94. *Leathers*, 499 U.S. at 460 (Marshall, J., dissenting).

95. *Id.* at 458.

96. *Id.*

97. *Id.* at 458-59 (Marshall, J., dissenting).

98. *Id.* at 454-55 (Marshall, J., dissenting) (citing Minneapolis Star & Tribune Co. v. Minnesota Comm'n of Revenue, 460 U.S. 575, 585 (1983)).

99. 47 U.S.C.A. § 542 (West 1992).

100. *Leathers*, 499 U.S. at 459 (Marshall, J., dissenting).

101. *Id.*

102. *Id.*

or provided an exemption for cable services. Since Arkansas was interested in raising revenue, the profitable choice would have been removal of the exemption. Instead, Arkansas chose the prejudicial path of unjustified differential taxation.

C. Problems with Applying the Leathers Decision

1. Classification

Even if the *Leathers* decision is accepted, the problems associated with its application make it unworkable. One problem with the holding in *Leathers* is the difficulty of placing the press into categories, which must occur if differential intermedia taxation is to be successful. The majority fails to provide any guidance for placing different media into defined groups: How many groups should there be? What are the qualities of a medium that subject it to one category over another? Since complete answers to the questions raised by *Leathers* were not provided, enlightenment from future courts will be necessary to clarify when permissible "classification" becomes impermissible "targeting."[103]

2. Scope

The dissent points out another problem: The majority's approach supplies no guidance to the scope of the *Leathers* decision.[104] When a generally applicable tax applies selectively to the media, the First Amendment is only offended if the tax affects a small number of speakers within a medium.[105] Solely under those circumstances does selective taxation resemble a penalty for particular ideas.[106] The majority's "small versus large" test rests on the theory that a tax levied on a large number of cable operators offering a wide variety of programming throughout Arkansas would not pose the risk of affecting a limited range of views.[107] The majority's reasoning begs review.

An intermedia tax scheme was constitutionally upheld because "enough" cable operators were being taxed. Whether a million cable operators are taxed or only one, the danger of preventing the dissemination of information remains when the media are segmented and differential treatment results. In fact, the greater the number of cable operators taxed under Act 188 increases the chances that cable specific views will be affected.

The tax may never actually affect the cable operators' abilities to provide the public with information. This is irrelevant. What is relevant is the *potential* for a

103. Walter Hellerstein, *Supreme Court Settles Some Tax Issues While Creating Other Problems*, 75 J. TAX'N 180, 183 (1991).

104. *Leathers*, 499 U.S. at 460 (Marshall, J., dissenting).

105. *Id.* at 448-49.

106. *Id.* at 449.

107. *Id.* at 460 (Marshall, J., dissenting).

"chilling effect"[108] on the dissemination of information provided by cable operators. Therefore, differential media taxation cannot be tolerated.

Furthermore, an inference exists in the majority opinion that the First Amendment is offended when three speakers within a medium are taxed;[109] but, taxing one hundred speakers within a medium fails to trigger First Amendment problems.[110] In other words, three is a "small" enough number to warrant First Amendment protection from taxation while one hundred is "large" enough to forego protection.

The majority suggests that a line exists which separates the sheltered from the vulnerable. However, the majority fails to articulate where the line for First Amendment protection should be drawn. Maybe the Constitution should be rewritten on an Etch-A-Sketch. Then, the Supreme Court could continue to divide the First Amendment providing lines of arbitrary protection. If the Court wanted to draw lines, it should have provided a bright line and ruled that either intermedia tax discrimination is constitutional or unconstitutional. The wiser choice would have been to declare differential taxation of the media unconstitutional.

3. Future Application

The fundamental nature of First Amendment principles demand that standards provide clear, unambiguous direction for consistent application.[111] *Leathers* presented the Court with an opportunity to resolve an issue that had evaded review. However, the Court bypassed its chance to provide a clear, broad standard that would completely resolve the issue at bar. Consequently, many questions were left unresolved.[112] The effect of the *Leathers* decision leaves an unnecessary burden on future courts.[113]

The Court should have provided a *per se* rule to subsequently enable courts to resolve similar issues easily. The cases following *Leathers* are nothing short of baffling[114] because of the inconsistent approach on differential media taxation issues.[115]

108. "The deterrent effect of governmental action that falls short of a direct prohibition against the exercise of First Amendment rights. To constitute an impermissible chilling effect the constrictive impact must arise from the present or future exercise or threatened exercise of coercive power." BLACK'S LAW DICTIONARY 240 (6th ed. 1991).

109. *Leathers*, 499 U.S. at 448.

110. *Id.*

111. Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 235 (1987) (Scalia, J., dissenting).

112. For example, the *Leathers* court failed to address whether differential taxation of members of the same medium could violate the equal protection clause of the Fourteenth Amendment. Globe Newspaper Co. v. Commissioner of Revenue, 571 N.E.2d 617, 622 n.1 (Mass. 1991).

113. Helerstein, *supra* note 103, at 183.

114. *Id.*

115. *Compare* Globe Newspaper Co. v. Comm'r of Revenue, 571 N.E.2d 617, 622 (Mass. 1991) (recognizing the *Leathers* decision, but failing to apply it to a tax treating newspaper publishing differently than all other manufacturing enterprises) *with* Gallacher v. Comm'r of Revenue Servs., 602 A.2d 996, 1005 (Conn. 1992) (following *Leathers* and concluding that exempting newspapers from the generally applicable use tax while not exempting other media does not violate the First Amendment) *and* Sacramento Cable Television v. City of Sacramento, 234 Cal. App. 3d 232, 241, 286 Cal. Rptr. 470, 475-76 (1991) (following *Leathers* and holding that the extension of a state's generally applicable sales tax

Department of Revenue v. Magazine Publishers of America Inc.,[116] for example, illustrates problems applying the *Leathers* decision. The Florida legislature imposed a sales tax on magazines while exempting newspapers.[117] The discriminatory nature of the tax prompted a lawsuit.[118] The Florida Supreme Court struck down the newspaper exemption.[119] Consequently, the media were taxed equally.[120] This, however, violated the legislature's intent to provide an exemption for newspapers.[121]

Shortly after the *Leathers* decision, the United States Supreme Court vacated the Florida Supreme Court's judgment, remanding it for consideration pursuant to *Leathers*.[122] As a result of the vacated judgment, Florida's tax administrators were uninformed on the steps they should take.[123] *Leathers* presented a dilemma: Should the Department of Revenue follow the mandate of the Florida Supreme Court and collect a tax from the newspapers, violating legislative intent; or should the Department refuse to enforce the tax, violating the Florida Supreme Court's decision?[124] Regardless of the Florida tax administrators' decision, the problems with applying the *Leathers* decision remain for future tax administrators and legislators.[125]

D. The Danger of the Leathers Decision

The Court in *Leathers* set out to resolve the question of whether a tax scheme discriminating between different media is constitutional. By failing to provide a definitive answer to this question, the Court allowed the possibility for the government to discriminate at will. After *Leathers*, legislators have the potential to tax a particular medium, while excluding other media, provided the tax is a generally applicable tax and the number in the medium being taxed is considered "large" enough.

The government cannot be allowed to influence the process by which its citizens' preferences for information formats evolve.[126] *Leathers* demonstrates the Court's unwillingness to grant full First Amendment protection to cable television, a relatively new medium. Questions remain concerning even newer communications technologies, such as multipoint multichannel distribution services (wireless cable),

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to cable television, while exempting the print media, does not violate the First Amendment).

116. 565 So. 2d 1304 (Fla. Dist. Ct. App. 1990).

117. Department of Revenue v. Magazine Publishers of Am., Inc., 565 So. 2d 1304, 1304-05 (Fla. Dist. Ct. App. 1990).

118. *Id.* at 1304-05.

119. *Id.* at 1310.

120. *Id.*

121. *Id.*

122. Helerstein, *supra* note 103, at 183.

123. *Id.*

124. *Id.*

125. *See, e.g.*, Hearst Corp. v. Iowa Dep't of Fin. & Revenue, 461 N.W.2d 295 (Iowa 1990); Newsweek, Inc. v. Celauro, 789 S.W.2d 247 (Tenn. 1990); Southern Living, Inc. v. Celauro, 789 S.W.2d 251 (Tenn. 1990).

126. Leathers v. Medlock, 499 U.S. 439, 465 (1991) (Marshall, J., dissenting).

direct broadcast satellite, satellite master antenna television, and electronic publishing. When the viewpoints offered through these new technologies offend legislators or their constituents, *Leathers* provides a vehicle for governmental regulation.[127]

VI. Effects of Leathers v. Medlock on Oklahoma Media Taxation

Dow Jones v. Oklahoma Tax Commission[128] illustrates Oklahoma's application of the nondiscrimination principle to media taxation issues. Dow Jones and Company, Inc. publish and distribute the *Wall Street Journal.* Most of the publications are sold by subscription and delivered by mail.[129] Dow Jones challenged the constitutionality of an Oklahoma use and sales tax scheme that allowed a tax exemption for publications costing less than seventy-five cents and for publications that are not delivered by mail.[130] The exemption resulted in differential treatment of the media since publications costing more than seventy-five cents or publications delivered by mail were not exempt from the tax.

Relying on *Minneapolis Star* and *Arkansas Writers' Project*[131] the Oklahoma Supreme Court struck down the inequitable media tax scheme.[132] The Oklahoma court placed the burden of proof on the state and held when the burden cannot be met, a ruling must favor the taxpayer.[133]

In order to remedy the differential flaw in the statutory scheme, the *Dow Jones* court moved to rescind the tax instead of extending an exemption to the previously discriminated media.[134] However, the Oklahoma Supreme Court recognized that nothing would prevent the legislature from reenacting the tax without the unconstitutional exemption.[135]

One year previous to the *Leathers* decision, the Oklahoma Supreme Court in *Oklahoma Broadcasters v. Oklahoma Tax Commission*[136] reviewed a differential intermedia tax scheme. The court, in *Oklahoma Broadcasters*, applied the nondiscrimination principle.

The Oklahoma Broadcasters Association (corporations and partnerships licensed to broadcast in television and radio), Griffin Television Inc. (an Oklahoma Corporation broadcasting as KWTV), and Gentry Broadcasting Inc. (an Oklahoma Corporation engaged in radio broadcasting as KGVE), sought a declaratory

127. Tax exemptions may not "afford latitude to government officials to pass judgment on the content and quality of an applicant's views and, therefore, to discriminate against those engaged in protected First Amendment activities." 16B C.J.S. *Constitutional Law* § 608 (1985) (citing Big Mama Rag, Inc. v. United States, 631 F.2d 1030 (D.C. Cir. 1980)).

128. 787 P.2d 843 (Okla. 1990).

129. Dow Jones v. Oklahoma Tax Comm'n, 787 P.2d 843, 843-44 (Okla. 1990).

130. *Id.* at 844.

131. *Id.* at 845.

132. *Id.* at 847-48.

133. *Id.* at 847.

134. *Id.* at 847-48.

135. *Id.* at 848.

136. 789 P.2d 1312 (Okla. 1990).

judgment in an Oklahoma district court. The three wanted the following issue settled: whether a tax structure that exempts some, but not all, of the media from use and sales taxes impermissibly burdens the rights protected by the First Amendment.[137] The tax structure in question provided exemptions for publishers while not providing similar exemptions for broadcasters.[138]

Finding the tax invalid under the nondiscrimination principle,[139] the *Oklahoma Broadcasters* court decided the best way to rectify the constitutionally invalid tax was not to extend the exemption to the broadcasters, but to repeal the tax.[140] The court stated in dicta that the Oklahoma legislature may decide to modify the tax code without imposing differential burdens on the media.[141]

Differential treatment of the media remains in one area of the Oklahoma tax code. Ad valorem taxes applying to manufacturing facilities currently provide an exemption for newspapers while neglecting to provide exemptions for other media.[142]

Following *Oklahoma Broadcasters* and *Dow Jones*, Oklahoma should strike the exemption for the newspapers. However, *Leathers* arguably abandons the nondiscrimination principle relied upon by Oklahoma, allowing differential tax treatment of the media. Should Oklahoma, in light of *Leathers*, rethink its approach to media taxation issues?

Oklahoma's state constitution provides for equality of taxation among the "same class of subjects."[143] *Dow Jones* and *Oklahoma Broadcasters* illustrate Oklahoma's view that the different medium that make up the media are the same class of subjects. Accordingly, Oklahoma courts, despite the *Leathers* decision, should strike down any tax scheme treating the media differently.[144] Any judiciary or commentator should not fault a state for adhering to the mandate of its constitution and highest court.

VII. Conclusion

By nature, the tax collector searches for every opportunity to tax. Alternatively, the taxpayer seizes every exemption possible. Consequently, conflicts arising from differential taxation of the media may appear a natural struggle. However, First Amendment concerns exist. Therefore, the struggle shifts from being between the taxpayer and the tax collector to a struggle between the free speaker and the speech regulator.

137. Oklahoma Broadcasters Ass'n v. Oklahoma Tax Comm'n, 789 P.2d 1312, 1313 (Okla. 1990).
138. *Id.* at 1314-15.
139. *Id.* at 1317-18.
140. *Id.* at 1317.
141. *Id.* at 1317-18.
142. *See* 68 OKLA. STAT. § 2902 (Supp. 1993).
143. OKLA. CONST. art. 10, § 5.
144. *See* Globe Newspaper Co. v. Commissioner of Revenue, 571 N.E.2d 617, 621-22 (Mass. 1991) (illustrating the striking of a differential media tax scheme after *Leathers*).

Arkansas asserted raising revenue to justify its tax. The state wanted to profit from the delivery of information to the public, but such a tax scheme can only be viewed as prejudicial. By allowing the government to exempt select media from a generally applicable tax, the *Leathers* court has established a vehicle for at-will discrimination.

Leathers is clearly a victory for those who seek governmental regulation of the press. The threat of such suppression of information tears against the fabric of the First Amendment.

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