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Constitutional Law: Permissibility of Differential Taxation of the Press Under the First Amendment

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CASE COMMENTS

CONSTITUTIONAL LAW: PERMISSIBILITY OF DIFFERENTIAL TAXATION OF THE PRESS UNDER THE FIRST AMENDMENT

Department of Revenue v. Magazine Publishers of America, Inc., 604 So. 2d 459 (Fla. 1992)*

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Appellees[1] filed suit to challenge the constitutionality of appellant's imposition of a sales tax on the retail sales of secular magazines.[2] Appellees alleged that Florida's taxation scheme violated their First Amendment rights because secular magazines were subject to a sales tax[3] while newspapers were exempt.[4] Granting the appellees' motion for summary judgment, the trial court held that the differential tax on the press was unconstitutional and struck down the tax on magazines.[5] Upon certification by the Florida First District Court of Appeal,[6] the Florida Supreme Court affirmed the trial court's holding that the tax was invalid, but concluded that eliminating the newspaper exemption was the proper remedy.[7] The

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** Dedicated to my husband, Robert, for his constant encouragement and unselfish love throughout law school, and to my parents, George and Sharon Shaw, for years of unwavering love and support.

1. Department of Revenue v. Magazine Publishers of Am., Inc., 604 So. 2d 459 (Fla. 1992). Appellees, the original plaintiffs, consisted of several companies: Magazine Publishers of America, Inc.; The Hearst Corporation; Time, Inc.; Golf Digest/Tennis, Inc.; and Meredith Corporation. *Id.* at 460. Also present as intervenors were the Miami Herald Publishing Company and the Florida Press Association. *Id.*

2. *Id.*

3. *Id.* Florida Statutes § 212.05(1)(i) provided: " '(1) . . . [A] tax is levied on each taxable transaction or incident, which tax is due and payable as follows: . . . (i) At the rate of 6 percent on the retail price of magazines sold or used in Florida.' " *Id.* at 462 n.1 (quoting FLA. STAT. § 212.05(1)(i) (Supp. 1988).

4. *Id.* Florida Statutes § 212.08(7)(w) provided the following miscellaneous exemption: " '(w) *Newspapers.*—Likewise exempt are newspapers.' " *Id.* (quoting FLA. STAT. § 212.08(7)(w) (Supp. 1988).

5. *Id.* at 460. The court also granted the intervenors' summary judgment motion to the extent that they asserted that the sales tax on magazines should be invalidated. *Id.*

6. *Id.* The First District Court of Appeal certified the question involved as one of great public importance that required immediate resolution by the Florida Supreme Court. *Id.* at 460-61.

7. *Id.* at 461; *see also* Department of Revenue v. Magazine Publishers of Am., Inc., 565 So. 2d 1304, 1310 (Fla. 1990), *vacated*, Miami Herald Publishing Co. v. Department of Revenue, 111 S. Ct.

United States Supreme Court granted review, vacated the judgment, and remanded for further consideration.[8] On remand, the Florida Supreme Court HELD, that the taxation scheme was unconstitutional because it made content-based distinctions between speakers without serving a compelling state interest.[9] The court maintained that under state law, striking the newspaper exemption rather than extending the exemption to magazines was the proper remedy.[10]

As evidenced by the Free Press Clause in the United States Constitution,[11] the founders of this country believed that the organized press should be afforded specific protection beyond that given by the Free Speech Clause.[12] The guarantee of a free press recognizes the important role of the press as a check on the government.[13] Although the Supreme Court has recognized government's power to impose generally applicable taxes on the press,[14] the government's power to differentially tax the press may operate as a censor, undercutting the press' role as a check on the government.[15] Recognizing these factors, the Supreme Court has, until recently, exercised broad discretion to identify and strike down discriminatory taxation schemes.[16]

In *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*,[17] the Supreme Court first developed a framework for evaluating differential taxation schemes involving the press.[18] The appellant in *Min-*

1614 (1991).

8. *Magazine Publishers*, 604 So. 2d at 461. The Court remanded for further consideration in light of the Court's recent decision in Leathers v. Medlock, 111 S. Ct. 1438 (1991). *Magazine Publishers*, 604 So. 2d at 461.

9. *Magazine Publishers*, 604 So. 2d at 462-63.

10. *Id.* at 463.

11. The First Amendment provides in pertinent part that "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. CONST. amend. I.

12. *See* Potter Stewart, *"Or of the Press,"* 26 HASTINGS L.J. 631, 633-34 (1975) (stating that the inclusion of both the Free Press Clause and the Free Speech Clause in the Constitution was redundant if the Free Press guarantee meant no more than freedom of expression).

13. *Id.* at 634.

14. Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 583 (1983) (recognizing that the Court has long upheld economic regulation of the press where that regulation is generally applicable to all businesses).

15. *Id.* at 585.

16. *Compare id.* (stating that differential taxation of the press burdens interests protected by the First Amendment and is presumptively unconstitutional) *with Leathers*, 111 S. Ct. at 1445 (holding that intermedia or intramedia discrimination alone does not violate the First Amendment).

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

18. *See generally id.* (establishing a framework for evaluating differential taxation schemes involving the press). The Supreme Court first encountered a differential tax on the press in Grosjean v. American Press Co., 297 U.S. 233 (1936). However, the *Minneapolis Star* Court noted that the *Minneapolis Star* case presented a different situation from that in *Grosjean*. *Minneapolis Star*, 460 U.S. at 580. In *Grosjean*, the Court held the tax invalid because it was seen as a deliberate attempt by the state to limit the circulation of information. *Id.* However, the *Minneapolis Star* Court found no evi-

neapolis Star, a newspaper publisher, challenged a state-imposed use tax as a violation of the Free Press Clause.[19] The tax applied to paper and ink used to produce publications, but exempted the first $100,000 worth of ink and paper consumed by any publication in a calendar year.[20]

Employing a two-step analysis, the Court first determined that the differential taxation scheme created a discriminatory effect on the press.[21] The Court reasoned that the tax was discriminatory because it singled out the press for special treatment rather than being generally applicable.[22] The Court also found the $100,000 exemption to be discriminatory.[23] Since the exemption caused only a few publishers to pay any tax at all, the Court reasoned that the tax discriminated by targeting a small group of newspapers within the press.[24]

In the second step of the analysis, the Court considered whether the State had a compelling interest that it could not achieve without the differential tax.[25] The Court held that the State's asserted interest in raising revenue did not justify singling out the press for special treatment; the State could raise revenue by taxing businesses generally rather than differentially.[26] Thus, the Court invalidated the tax[27] and concluded that a differential taxation scheme involving the press violates interests protected by the First Amendment because of the resulting discriminatory effects.[28]

The Supreme Court expanded the scope of the first step in the differential taxation analysis in *Arkansas Writers' Project, Inc. v. Ragland*.[29] The *Ragland* Court identified content-based regulation as another type of

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dence that the state had imposed the tax with the intent to penalize a selected group of newspapers. *Id.* Concluding that there was no indication of censorial motive on the part of the legislature, the Court stated that it "must analyze the problem anew under the general principles of the First Amendment." *Id.*

19. *Minneapolis Star*, 460 U.S. at 579.

20. *Id.* at 577-78.

21. *Id.* at 581.

22. *Id.* at 581-82. The Court reaffirmed, however, that states and the federal government may levy generally applicable taxes on the press without infringing First Amendment rights. *See id.* at 581.

23. *See id.* at 591.

24. *Id.* Only 11 publishers, producing 14 of the 388 newspapers in the state, incurred a tax liability during the first year that the $100,000 exemption was allowed. *Id.* at 578. The appellant was one of the 11 publishers, and it paid $608,634 of the $893,355 total revenue the tax raised during that year. *Id.* The Court recognized that a tax which targets a few members of the press presents great potential for abuse by the state. *Id.* at 592.

25. *Id.* at 585.

26. *Id.* at 586.

27. *Id.* at 593.

28. *Id.* at 585. However, the Court noted that a differential taxation scheme involving the press might withstand constitutional scrutiny if the scheme furthered a compelling state interest that the State could not otherwise achieve. *Id.*

29. 481 U.S. 221 (1987).

discrimination that would invoke strict scrutiny review.[30] The appellant in *Ragland*, a publisher of a general interest magazine, challenged the constitutionality of the exemption scheme of a generally applicable Arkansas sales tax.[31] The appellant's magazine was not exempt from the tax, but all newspapers and magazines categorized as religious, professional, trade, or sports-related were exempt.[32]

Using the approach developed in *Minneapolis Star*,[33] the *Ragland* Court concluded that the taxation scheme was discriminatory because it targeted only a few magazines for taxation.[34] The Court also found discrimination because the scheme differentiated between magazines based entirely on the publications' content.[35] Finding no compelling state interest,[36] the Court invalidated the tax based on the State's selective application of the tax to certain magazines.[37] However, the Court refused to address whether differential intramedia taxation would be an additional basis for finding discrimination.[38]

Four years later, in *Leathers v. Medlock*,[39] the Supreme Court retreated from its position that differential taxation of the press is presumptively unconstitutional.[40] Instead, the Court stated that a tax which discriminates among members of the press is unconstitutional when it threatens to suppress the expression of particular ideas or viewpoints.[41] The *Leathers* Court stated that the situations identified in *Minneapolis Star* and *Ragland* demonstrated circumstances in which differential taxation of the press

30. *Id.* at 229, 231.

31. *Id.* at 224-25.

32. *Id.* at 226.

33. *Id.* at 228; *see supra* text accompanying notes 21, 25.

34. *Ragland*, 481 U.S. at 229. Appellant maintained that it was the only publication that paid the tax, while the Commissioner contended that two other periodicals also paid the tax. *Id.* n.4. Regardless of whether one publication or three publications paid the tax, the Court reasoned that the effect of the tax exemption scheme was that only a few Arkansas magazines paid any sales tax at all. *Id.* at 229.

35. *Id.* The Court noted that " 'above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.' " *Id.* (quoting Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95 (1972)).

36. *Id.* at 231-32. The Commissioner asserted several state interests: general interest in raising revenue, encouragement of fledgling publishers, and the need to foster communication. *Id.*

37. *Id.* at 233.

38. *Id.* Intermedia refers to different groups of the press such as newspapers, magazines, and television; whereas, intramedia refers to members within the same group such as different types of magazines. *See id.* at 232-33.

39. 111 S. Ct. 1438 (1991).

40. *See id.* at 1442, 1445; Gregory S. Asciolla, Note, Leathers v. Medlock: *Differential Taxation of the Press Survives Under the First Amendment*, 41 CATH. U. L. REV. 507, 509 (1992) ("It is presumed that evidence of differential taxation of the press is violative of the nondiscrimination principle and that such taxation is thus an unconstitutional interference with the press as an institution protected by the First Amendment.") (footnote omitted).

41. *Leathers*, 111 S. Ct. at 1443.

threatened to suppress the expression of certain viewpoints.[42]

In *Leathers*, the cable television industry brought a class action to challenge an Arkansas sales tax that applied to cable television, but exempted newspapers and magazines.[43] Applying the three tests derived from *Minneapolis Star* and *Ragland* to the facts in *Leathers*,[44] the Court concluded that the tax neither singled out the press for special treatment[45] nor differentiated between speakers based on the content of the medium.[46] The Court also stated that the Arkansas tax did not target a small number of speakers because the tax applied to approximately one hundred cable systems throughout the state.[47] The Court found that there was no evidence of any effect on the expression of particular ideas or viewpoints.[48] Thus, the Court rejected the contention that intermedia and intramedia discrimination alone constituted an additional basis to find that the tax violated the First Amendment.[49] Accordingly, the Court held that the Arkansas taxation scheme did not violate rights protected by the First Amendment.[50]

In the instant case, the Florida Supreme Court invalidated Florida's differential tax on the press after applying the reasoning of the United States Supreme Court in *Leathers*.[51] The instant court analyzed whether the differential taxation scheme singled out the press, targeted a small group of speakers, or distinguished based on the content of the speech.[52] First, the instant court stated that the tax did not single out the press for special treatment because it was generally applicable to the sales of all tangible personal property.[53]

Second, following the *Leathers* Court's interpretation of *Ragland*, the

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42. *See id.* at 1442-43. The dissent expressed a different view about what these cases demonstrated: "If *Minneapolis Star*, *Arkansas Writers' Project*, and *Grosjean* stand for anything, it is that the 'power to tax' does *not* include 'the power to discriminate' when the press is involved." *Id.* at 1452-53 (Marshall, J., dissenting).

43. *Id.* at 1441.

44. *Id.* at 1444-45.

45. *Id.* at 1444.

46. *Id.* at 1445.

47. *Id.* at 1444. According to the dissent, the majority's intepretation of the discriminatory effect prong of a differential taxation scheme analysis reduced its application to an absolute numbers evaluation. *See id.* at 1451 (Marshall, J., dissenting). By holding that 100 cable companies constituted a sufficiently large number for the tax not to be considered as targeting the press, the majority left in question the exact cut-off number that would be permissible. *Id.*

48. *Id.* at 1445.

49. *Id.* The dissent disagreed, stating that "[b]y imposing tax burdens that disadvantage one information medium relative to another, the State can favor those media that it likes and punish those that it dislikes." *Id.* at 1449-50 (Marshall, J., dissenting); *see supra* note 38 and accompanying text.

50. *Leathers*, 111 S. Ct. at 1447.

51. *Magazine Publishers*, 604 So. 2d at 461.

52. *Id.* at 461-62.

53. *Id.* at 461.

instant court concluded that the tax did not target a small group of speakers.[54] Even though all newspapers were exempt, the tax applied evenly to all secular magazines.[55] Thus, unlike the tax scheme in *Ragland* where the tax burden fell on only a few publishers, the court found that Florida's tax applied to a large number of publishers.[56]

Third, the instant court considered whether the tax discriminated by making content-based distinctions.[57] The instant court examined the Florida Department of Revenue's criteria, as stated in the Florida Administrative Code, for determining whether a publication qualified as a newspaper.[58] One of the elements listed in the code[59] required that the Department of Revenue examine the content of the publication for specific qualities.[60] Thus, the Department of Revenue looked to content-based criteria to determine if a publication was a tax-exempt newspaper or a taxable nonnewspaper.[61] Accordingly, the instant court applied a strict scrutiny test and concluded that the tax violated the First Amendment because the tax's application depended on the content of the particular medium.[62]

After invalidating the taxation scheme because the State failed to show a compelling interest,[63] the court addressed the proper remedy in the in-

54. *Id.*; *see supra* note 47 and accompanying text.

55. *Magazine Publishers*, 604 So. 2d at 461.

56. *Id.*

57. *Id.* at 461-62.

58. *Id.* at 462. The court reviewed Florida Administrative Code Rule 12A-1.008(1)(b) which listed the elements required for a publication to constitute a newspaper. *Id.*

59. Florida Administrative Code Rule 12A-1.008(1)(b)(5) provided:

> "(b) In order to constitute a newspaper, the principal purpose of the publication must be to disseminate news and contain at least the following elements:
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> . . . .
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> 5. It must routinely contain reports of current events and matters of general interest which appeal to a wide spectrum of the general public. If the publication is intended for general circulation to the public and is devoted primarily to matters of specialized interests such as legal, mercantile, political, religious, or sporting matters, and it contains in addition thereto general news of the day, information of current events, and news of importance and of current interest to the general public, it is entitled to be classed as a newspaper."

Id. at 462 n.2 (quoting FLA. ADMIN. CODE R. 12A-1.008(1)(b)).

60. *Id.* at 462. The deposition of the Assistant Executive Director of the Department indicated that the Department reviewed a publication's content to determine whether the publication qualified for the newspaper exemption. *Id.*

61. *See id.*

62. *Id.* at 462-63. To pass strict scrutiny, a tax must serve a compelling state interest and be narrowly drawn to achieve that interest. *Id.* at 462.

63. *Id.* at 462-63. The instant court rejected two arguments advanced by the State. *Id.* First, the court concluded that the tax was not narrowly tailored to achieve the legitimate state interest of encouraging the literacy of Florida's citizens. *Id.* Second, the court rejected as insufficient the argument that the exemption for newspapers furthered the environmental goal of recycling. *Id.* at 463.

stant case.[64] The instant court noted that in a similar case where the United States Supreme Court found that a state's tax exemption was impermissible under the First Amendment,[65] the Court held that state law should determine the proper remedial action.[66] Thus, turning to Florida law, the instant court examined the Florida statutory provision declaring the legislative intent for the taxation chapter.[67] The court concluded that the legislature intended for the tax to prevail when choosing between imposing the tax or granting an exemption.[68] Therefore, the instant court struck down the newspaper exemption rather than extend the exemption to all magazines.[69]

In the instant case, the Florida Supreme Court failed to recognize the one factor that the *Leathers* Court considered definitive in a differential taxation scheme analysis: whether the tax threatened to suppress the expression of particular ideas or viewpoints.[70] In its mechanical application of *Leathers* to the instant facts,[71] the instant court did not address whether the threat of suppression existed under Florida's taxation scheme. Instead, the instant court stopped one step short of completing the analysis.

The *Leathers* Court discussed three situations, derived from *Minneapolis Star* and *Ragland*, that had previously led the Court to strike down taxation schemes which applied differentially to the press.[72] Impermissi-

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64. *Id.*

65. *Id.* The court cited Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989) (holding that when a state tax exemption is found to be unconstitutional, the proper corrective action is a matter of state law).

66. *Magazine Publishers*, 604 So. 2d at 463. The Supreme Court stated: "It is not for us 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." *Texas Monthly*, 489 U.S. at 8.

67. *Magazine Publishers*, 604 So. 2d at 463. The instant court looked to § 212.21, Florida Statutes, which provided in part:

> "(2) It is hereby declared to be the specific legislative intent to tax each and every sale . . . set forth in this chapter . . . . [and] that should 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 such sale . . . exempted or attempted to be exempted from the tax . . . shall be subject to the tax . . . to the same extent as if such exemption or attempted exemption had never been included herein.
>
> (3) It is further declared to be the specific legislative intent to exempt from the tax . . . only such sales . . . to the extent that such exemptions are in accordance with the provisions of the constitutions of the state and of the United States."

Id. (quoting FLA. STAT. § 212.21 (1987)).

68. *Id.*

69. *Id.* at 464.

70. *See Leathers*, 111 S. Ct. at 1443, 1447; *supra* notes 41-42 and accompanying text.

71. *Magazine Publishers*, 604 So. 2d at 461-62.

72. *Leathers*, 111 S. Ct. at 1442-43.

ble discrimination of the press existed when the taxation scheme either singled out the press, targeted a small group of speakers, or discriminated entirely on content-based criteria.[73] However, the *Leathers* Court did not indicate that the identification of one of these situations in a particular case replaced the need to consider whether the tax in fact threatened to suppress the expression of certain ideas.[74] Instead, the *Leathers* Court emphasized that this threat existed in both *Minneapolis Star* and *Ragland*.[75]

Furthermore, the *Leathers* Court did not imply that these three situations formed an all-inclusive list of when differential taxation of the press would be impermissible. This was demonstrated by the *Leathers* Court's willingness, after determining that none of these three situations were present,[76] to consider whether an additional basis existed for suspecting that the tax violated the media's constitutionally protected rights.[77] After stating that intermedia or intramedia discrimination alone did not violate the First Amendment,[78] the *Leathers* Court concluded that there was no reason to suspect the constitutionality of the tax.[79]

In contrast to the *Leathers* Court, the instant court stopped short in its analysis of the taxation scheme. Like the *Leathers* court, the instant court examined the tax scheme for the three constitutionally suspect situations, finding that the tax scheme was, in fact, content-based.[80] However, unlike the *Leathers* Court, the instant court failed to consider whether the differential tax threatened to suppress particular ideas.[81] Thus, the instant court failed to complete the analysis set forth in *Leathers*.

If the instant court had proceeded to evaluate whether the content-based differentiation actually threatened to suppress particular ideas or viewpoints, the holding in the instant case might have been different. The content-based discrimination prong of the differential taxation scheme analysis originated in *Ragland*.[82] The situation in the instant case differed significantly from that in *Ragland*. The *Ragland* tax scheme made distinctions between magazines entirely on the basis of their content.[83] Only if a

73. *Id.* at 1443-44.

74. *See id.*

75. *Id.* at 1447; *see supra* note 42 and accompanying text.

76. *Leathers*, 111 S. Ct. at 1445 (stating that "the Arkansas sales tax present[ed] none of the First Amendment difficulties that have led us to strike down differential taxation in the past").

77. *See id.*

78. *Id.*; *see supra* note 49 and accompanying text.

79. *Leathers*, 111 S. Ct. at 1445, 1447.

80. *Magazine Publishers*, 604 So. 2d at 461-62.

81. *Leathers*, 111 S. Ct. at 1443, 1445, 1447.

82. *Ragland*, 481 U.S. at 229-30 (stating that "official scrutiny of the content of publications as the basis for imposing a tax is entirely incompatible with the First Amendment's guarantee of freedom of the press"); *see supra* note 35 and accompanying text.

83. *Ragland*, 481 U.S. at 229.

magazine's contents were confined to religious, professional, trade, or sports-related speech would the magazine be exempt from the tax.[84] Magazines which included other types of speech were subject to the tax.[85]

In contrast, the purpose of the Florida administrative rule[86] at issue in the instant case was to distinguish newspapers from other types of media.[87] The one provision in the applicable statutes and administrative rules which directed the Department to review a publication's content required only that reports of current events and general interest news be present for the publication to qualify as a newspaper.[88] Unlike the provision in *Ragland* which only allowed an exemption for certain categories of speech,[89] Florida's administrative rule did not prevent the inclusion of particular ideas or viewpoints. A Florida newspaper could express any number of viewpoints and still qualify for the sales tax exemption. Therefore, Florida's taxation scheme might not violate the First Amendment if the court found that the scheme did not to threaten to suppress the expression of particular ideas or viewpoints, regardless of the content-based nature of the scheme.[90]

Because the press serves the American people as a vital source of information about their government,[91] the press should be carefully guarded from governmental intrusion.[92] The Supreme Court initially ac-

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84. *Id.* at 224.

85. *Id.*

86. *See supra* note 59.

87. *See Magazine Publishers*, 604 So. 2d at 462. The dissent in the instant case emphasized that the format and frequency of the publication were the primary factors in determining whether a publication qualified for the newspaper exemption. *Id.* at 464 (Harding, J., dissenting). The dissent concluded that the Florida taxation scheme did not violate First Amendment rights because "[s]uch form and frequency focused rules do not pose the type of censorial threat that a content-based classification does." *Id.* at 465.

88. *See supra* note 59.

89. *See Ragland*, 481 U.S. at 224. Although the Arkansas taxation scheme also exempted newspapers, the Court decided the case based on the State's selective application of the tax to magazines. *Id.* at 233. The Court declined to decide "whether a distinction between different types of periodicals presents an additional basis for invalidating the sales tax." *Id.*

90. *See supra* text accompanying notes 80-81.

91. *Grosjean*, 297 U.S. at 250 (stating that an untrammeled press is a vital source of public information).

92. *Id.* The Court stated:

> [N]ewspapers, magazines and other journals . . . have shed and continue to shed, more light on the public and business affairs of the nation than any other instrumentality of publicity; and since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern.

Id. The Court also noted that "[a] free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves." *Id.*; *see supra* text accompanying notes 13-15 (discussing the role of the press as an additional check on the power of the United States Government).

knowledged the special threat that the government could pose through taxation by holding that any differential taxation scheme involving the press was invalid because of the resulting discriminatory effects.[93] However, the Supreme Court in *Leathers* opened the door for harmful discrimination by allowing differential taxation of the media absent evidence of the intent or the effect of suppressing particular ideas.[94] Under the *Leathers* test, the government possesses the potential to exert a great deal of influence on the press.[95] First, states have leverage over press receiving subsidies through an exemption under a differential taxation scheme.[96] Second, the government has the ability to distort speech by allowing different types of media to be taxed differentially.[97] Thus, by striking down the differential tax on the press in Florida, perhaps the instant court reached the "best" result for Florida citizens, even if the court reached the result incorrectly.

93. *Minneapolis Star*, 460 U.S. at 585.

94. *See Leathers*, 111 S. Ct. at 1445.

95. *See* Benjamin Lombard, Note, *First Amendment Limits on the Use of Taxes to Subsidize Selectively the Media*, 78 CORNELL L. REV. 106, 138 (1992) (noting that the *Leathers* Court "relied on the general principle that government has no First Amendment obligation to subsidize a person's speech" and stating that "[t]his sharp line between subsidies and burdens fails to comport with the realities of the Court's past analysis or with the requirements of the First Amendment"); *supra* note 49.

96. Lombard, *supra* note 95, at 138 (stating that "the continuing state leverage over the entities receiving subsidies under [a] differential tax" is a problem with differential taxes that the *Leathers* test fails to solve).

97. *See id.*; *supra* note 49.