



Summer 6-1-1992

Leathers V. Medlock: The Supreme Court Changes Course On Taxing The Press

Robert M. Howie

Follow this and additional works at: <https://scholarlycommons.law.wlu.edu/wlulr>



Part of the [Communications Law Commons](#)

Recommended Citation

Robert M. Howie, *Leathers V. Medlock: The Supreme Court Changes Course On Taxing The Press*, 49 Wash. & Lee L. Rev. 1053 (1992).

Available at: <https://scholarlycommons.law.wlu.edu/wlulr/vol49/iss3/8>

This Note is brought to you for free and open access by the Washington and Lee Law Review at Washington and Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Washington and Lee Law Review by an authorized editor of Washington and Lee University School of Law Scholarly Commons. For more information, please contact christensena@wlu.edu.

LEATHERS V. MEDLOCK: THE SUPREME COURT CHANGES COURSE ON TAXING THE PRESS

On April 16, 1991, the United States Supreme Court decided *Leathers v. Medlock*.¹ *Leathers* drastically changed the landscape of the First Amendment's Freedom of the Press Clause in the area of taxation of the media.² In *Leathers*, the Court held that an Arkansas sales tax could tax cable television differently from other members of the media, thus severely narrowing, if not implicitly reversing, several prior cases.³ The newspaper, magazine, broadcast television and cable industries, as well as state legislatures and state courts, will all feel the impact of *Leathers*.⁴ The result of *Leathers* is that the Court essentially has tossed the matter of differential taxation of the press back to the states with an important warning to avoid certain types of media discrimination.⁵ Considering the direction that the Court had been heading in this area—toward mandating tax equality for all the media—*Leathers* represents an important shift in Court policy.⁶

1. 111 S. Ct. 1438 (1991).

2. See Timothy B. Dyk & Laura A. Kulwicki, *Taxing the Media: An Examination of Leathers v. Medlock*, ST. TAX NOTES, Apr. 9, 1991, at 54, 54 (observing that *Leathers* substantially limited earlier taxation of press decisions). After *Leathers*, First Amendment restraints on states' ability to tax the press were eased. *Id.*

The First Amendment states, "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. CONST. amend. I. Because of the language of the First Amendment, some belief exists that the press enjoys special status under the First Amendment. See David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455, 460-61 (1983) (discussing opposing views on whether press clause gives media special status). Justice Potter Stewart was a leading advocate of the view that the press clause gives the media special status not accorded to other businesses. *Id.* at 460. Professor William Van Alstyne argued against special status for the press, noting that special status would invite additional regulation of the press. *Id.* at 461.

3. See Dyk & Kulwicki, *supra* note 2, at 54 (stating that *Leathers* amounts to substantial limitation of holdings of previous taxation of press cases); see *infra* notes 48-53 and accompanying text (discussing *Leathers* narrowing of previous press taxation cases' holdings).

4. See Eugene G. Sayre, *Media Taxation: An Abrupt Change in Course*, J. MULTISTATE TAX'N, Sept./Oct. 1991, at 148-52 (discussing impact of *Leathers* on states and different media segments). Sayre argues that the result of *Leathers* will be decreased litigation. *Id.* at 152. It is of interest to note that Sayre was the attorney for the cable petitioners in *Leathers*. *Id.* at 148. But see Dyk & Kulwicki, *supra* note 2, at 54 (stating that *Leathers* impact will lead to increasing litigation as state, media, and courts struggle with decision).

5. See *Leathers v. Medlock*, 111 S. Ct. 1438, 1443 (1991) (holding that absent suppression of ideas, states may extend generally applicable taxes to press). The *Leathers* Court discussed the remaining three categories of protection: Content discrimination, taxing a small number of media members, and singling out the press from other businesses. *Id.* at 1443-44; see *infra* notes 116-26 and accompanying text (discussing policy reasons for giving states discretion on taxing press and noting that giving states more discretion is positive step).

6. See *infra* notes 86-114 and accompanying text (discussing shift in Court policy toward taxation of press); see also Dyk & Kulwicki, *supra* note 2, at 54 (noting far-reaching impact of *Leathers* decision).

Before discussing *Leathers* more fully, however, an understanding of the Court's previous doctrine is necessary.⁷

I. PREVIOUS CASE LAW

The Supreme Court's first foray into the field of taxation of the media occurred in 1936.⁸ In *Grosjean v. American Press Co.*⁹ the Court decided that a Louisiana tax on newspapers violated the Fourteenth Amendment.¹⁰ The Louisiana legislature had imposed a two percent license tax on publications that charged for advertising.¹¹ The legislature exempted newspapers with circulations less than 20,000.¹² The Court noted that the Louisiana legislature likely imposed the tax out of censorial motives, but the Court did not restrict its holding to taxes imposed only from censorial motive.¹³ Until the early 1980s *Grosjean* was the only major case decided in this taxation of the press area.¹⁴

7. See *infra* notes 8-32 and accompanying text (reviewing Supreme Court's prior taxation of media cases); see also Todd F. Simon, *All the News That's Fit to Tax: First Amendment Limitations on State and Local Taxation of the Press*, 21 WAKE FOREST L. REV. 59, 68 (1985) (stating Supreme Court's infrequency of addressing issue of constitutionality of taxation of press). Simon stated that "[t]he Supreme Court had not considered a challenge to a state tax on first amendment grounds in almost forty-seven years." *Id.* (citation omitted). *Grosjean v. American Press Co.*, 297 U.S. 233 (1936), was the only major case decided on the issue until the 1980s. Simon, *supra*, at 68 n.82.

8. See *Grosjean v. American Press Co.*, 297 U.S. 293, 245-49 (1936) (discussing history of taxes on press or knowledge taxes); David L. Medford, Note, 13 OKLA. CITY U. L. REV. 401, 403-05 (1988) (reviewing history of knowledge taxes prior to *Grosjean*). See generally WILLIAM L. CHENEREY, *FREEDOM OF THE PRESS* (providing background on free press and its role in United States) (1955); LEONARD LEVY, *EMERGENCE OF A FREE PRESS* (1985) (same).

9. 297 U.S. 233 (1936).

10. *Grosjean v. American Press Co.*, 297 U.S. 233 (1936) (holding that Louisiana tax on newspaper advertising abridged freedom of press). The First Amendment was incorporated into the due process clause of the Fourteenth Amendment; therefore, its restrictions against abridging press freedoms were applicable to the State of Louisiana. See *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (stating that "[t]he fundamental concept of liberty embodied in that Amendment [14th] embraces the liberties as guaranteed by the First Amendment" (citation omitted)).

11. *Grosjean*, 297 U.S. at 240.

12. *Id.*

13. See *id.* at 251 (noting that Louisiana tax was of suspicious nature and purposefully penalized certain newspapers). The *Grosjean* Court noted that the Louisiana tax was suspicious because "in the light of its history and of its present setting, it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information." *Id.* at 250. The Court observed that if the tax merely had "take[n] money from the pockets of the [newspapers]" the result may have been different, but the Court did not answer that question. *Id.*

See Simon, *supra* note 7, at 61 (noting that Louisiana legislature passed tax during Huey Long's tenure as political boss as way of punishing Long's enemies). See generally T. HARRY WILLIAMS, *HUEY LONG* (1969) (discussing Huey Long and his career).

14. See Simon, *supra* note 7, at 68 n.82 (noting that *Grosjean* was only taxation of press case decided until 1980s). Another case of the *Grosjean* era addressed a crucial press question. *Cf.* *Near v. Minnesota*, 283 U.S. 697, 713 (1931) (reviewing history of First Amendment and holding that First Amendment was designed principally to protect press from censorship of prior restraints).

Then, in the 1983 landmark case of *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*,¹⁵ the Supreme Court ruled that a Minnesota special use tax on paper and ink violated the principles of the First Amendment.¹⁶ In *Minneapolis Star*, although the Court could detect no evidence of censorial motive in the Minnesota legislation, the Court found that singling out the press through differential treatment made the Minnesota law unconstitutional.¹⁷ The suspicion of mere differential treatment articulated in *Minneapolis Star* was a new and sweeping First Amendment doctrine.¹⁸ *Minneapolis Star* created two categories in which state taxation of the press may run afoul of the First Amendment. One arises when a state singles out the press from other businesses and the other arises when a state singles out and taxes only a few members of the press.¹⁹ The Court acknowledged that while the press is not immune from a generally applicable tax, the potential for abuse is present in differential taxation of the press.²⁰ Justice Rehnquist dissented in *Minneapolis Star*, arguing that

15. 460 U.S. 575 (1983).

16. See *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983) (holding that Minnesota use tax on paper and ink imposed burden on press and was unconstitutional).

17. *Id.* at 580, 591. The *Minneapolis Star* Court found that evidence of censorial motive was not necessary to strike down a state statute that burdened the press unconstitutionally. *Id.* at 585. The Court found *Grosjean* not to be controlling. *Id.* at 580. The Court noted that previous Supreme Court decisions had reached different interpretations of *Grosjean* with regard to the issue of legislative censorial motive. *Id.* See *United States v. O'Brien*, 391 U.S. 367, 384 (1968) (reasoning that legislative purpose was not relevant in *Grosjean*). But see *Houchins v. KQED*, 438 U.S. 1, 9 (1978) (hinting that legislative purpose was relevant in *Grosjean*).

18. See Jerry R. Parkinson, Comment, *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue: Differential Taxation of the Press Violates the First Amendment*, 69 IOWA L. REV. 1103, 1124 (1984) (observing that scope of decision in *Minneapolis Star* was disturbingly wide and that court had pronounced "broad" and "unwarranted" rule).

19. See *Minneapolis Star*, 460 U.S. at 592-93 (noting two grounds for holding tax unconstitutional, singling out press and tailoring tax to single out few members of press); *Arkansas Writers Project v. Ragland*, 481 U.S. 221, 228 (1987) (noting two dangerous distinctions in *Minneapolis Star*, singling out press and singling out few members of press); *Leathers v. Medlock*, 111 S. Ct. 1438, 1443 (1991) (noting two possible reasons for tax unconstitutionality, singling out press and singling out members of press, and focusing on these reasons as penalty or burden on press).

20. See *Minneapolis Star*, 460 U.S. at 588 (observing that selection of press for differential treatment threatens it with possibly burdensome treatment). In *Minneapolis Star* Justice O'Connor noted, "We would be hesitant to fashion a rule that automatically allowed the State to single out the press for a different method of taxation as long as the effective burden was no different from that on other taxpayers or the burden on the press was lighter than that on other businesses." *Id.* at 588. O'Connor continued, "One reason for this reluctance is that the very selection of the press for special treatment threatens the press not only with the current differential treatment, but with the possibility of subsequent differentially more burdensome treatment." *Id.* O'Connor also stated that "we think that recognizing a power in the State not only to single out the press but also to tailor the tax so that it singles out a few members of the press presents such a potential for abuse that no interest suggested by Minnesota can justify the scheme." *Id.* at 592 (emphasis added).

while unfavorable treatment violates the First Amendment, mere differential treatment does not violate the First Amendment.²¹

In 1987, the Supreme Court revisited the subject of taxation of the media in *Arkansas Writers Project v. Ragland*.²² In *Ragland*, an Arkansas gross receipts tax on sales of tangible personal property exempted from taxation newspapers as well as religious, sports, trade, or professional journals.²³ The Court held that the Arkansas tax failed the second part of the *Minneapolis Star* test, because the Arkansas statute singled out some members of the press for taxation.²⁴ The Court also noted that the exemption was content-based because it identified certain subjects that a periodical could contain to qualify for an exemption.²⁵ Because the Arkansas statute was content-based, Justice Marshall's majority opinion in *Ragland* subjected the tax to a strict scrutiny test that Arkansas failed to meet.²⁶

Justices Scalia and Rehnquist dissented in *Ragland*, arguing that instead of applying a strict scrutiny test to the Arkansas tax at issue the majority should have applied a rational basis test.²⁷ The dissenters argued that under a rational basis test the court would have upheld the tax.²⁸ Justices Scalia

21. See *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 598-601 (1983) (Rehnquist, J., dissenting) (observing that only burdensome differential taxation should be unconstitutional and arguing that Supreme Court is well-equipped to deal with eventualities). In *Minneapolis Star* Rehnquist noted that "[t]he 'differential treatment' standard that the Court has conjured up is unprecedented and unwarranted. To my knowledge this Court has never subjected governmental action to the most stringent constitutional review solely on the basis of 'differential treatment' of particular groups." *Id.* at 598. Justice Rehnquist argued that "the Minnesota taxing scheme which singles out newspapers for 'differential treatment' has benefited, not burdened" the freedom of the press. *Id.*

22. 481 U.S. 221 (1987).

23. See *Arkansas Writers Project v. Ragland*, 481 U.S. 221 (1987) (holding that Arkansas tax discriminated against small group of magazines and is content-based); ARK. CODE ANN. § 26-52-301(1) (Michie 1987 & Supp. 1989) (imposing tax on receipts from sale of tangible personal property).

24. See *Ragland*, 481 U.S. at 229 (noting that Arkansas tax targets small group within press). In *Ragland*, the Court held that because the tax was a generally imposed gross receipts tax, there was no argument that it violated the first prong of the *Minneapolis Star* test, which was singling out the press. *Id.*

25. See ARK. CODE ANN. § 26-52-401(14) (Michie 1987 & Supp. 1989) (exempting proceeds of certain magazines based on content). The Arkansas statute exempted "[g]ross receipts of gross proceeds derived from the sale of newspapers . . . [r]eligious, professional, trade and sports journals." *Id.* The *Ragland* Court observed that "this case involves a more disturbing use of selective taxation than *Minneapolis Star*, because the basis on which Arkansas differentiates between magazines is particularly repugnant to First Amendment principles: a magazine's tax status depends entirely on its content." *Ragland*, 481 U.S. at 229.

26. See Simon, *supra* note 7, at 80-82 (explaining strict scrutiny test application in taxation of media context).

27. See *Ragland*, 481 U.S. at 236-37 (Scalia, J., dissenting) (arguing that strict scrutiny test is not appropriate for tax exemptions absent viewpoint discrimination). In *Ragland*, Scalia and Rehnquist found the Arkansas tax met the rational basis test because it was "reasonably related to the legitimate goals of encouraging small publishers. . . ." *Id.* at 235.

28. See *id.* at 235-36 (observing that tax exemption was designed to avoid collection of taxes where tax proceeds were less than administrative costs).

and Rehnquist further contended that a denial of a tax exemption does not implicate fundamental First Amendment rights.²⁹

Although the *Ragland* decision answered the question whether differential taxation among similar types of media is constitutional, the Supreme Court intentionally left unanswered the issue whether different types of media, newspapers and television for instance, could be subject to differential taxation.³⁰ Justice Marshall expressly refused to address this issue by stating near the end of his opinion, "We need not decide whether a distinction between different types of periodicals presents an additional basis for invalidating the sales tax, as applied to the press."³¹ Four years later, however, in *Leathers v. Medlock* the Supreme Court tackled Marshall's unanswered question.³²

II. LEATHERS

Leathers developed from the 1987 Arkansas Sales Tax Act 188.³³ The state legislature adopted the Act that, for the first time, imposed a sales tax on cable operators.³⁴ The Arkansas Code explicitly exempted newspapers

29. See *id.* at 236 (noting that state failure to subsidize fundamental right does not amount to infringement of right). In *Ragland* Justice Scalia argues that the denial of an exemption does not have a coercive effect on the media. *Id.* at 237. This dissent echoes some of the same concerns that Justice Rehnquist voiced in *Minneapolis Star*. *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 597-600 (1983) (Rehnquist, J., dissenting). But see Lionel S. Sobel, *First Amendment Standards for Government Subsidies of Artistic and Cultural Expression: A Reply to Justices Scalia and Rehnquist*, 41 VAND. L. REV. 517, 517-34 (1988) (criticizing Scalia position on tax exemptions and supporting *Ragland* majority).

30. See *Arkansas Writers Project v. Ragland*, 481 U.S. 221, 233 (1987) (finding that resolution of case did not require answering question of differential tax between different segments of media).

31. *Id.* at 233. Because the *Ragland* Court already had invalidated the discrimination against magazines with certain content, it did not reach the next logical question of inter-media discrimination. *Id.*

32. See *Leathers v. Medlock*, 111 S. Ct. 1438, 1445 (1991) (answering question of differential taxation among different media segments). The *Leathers* Court actually went further than merely answering the question of taxing different kinds of media at different levels; it restricted the holdings of the previous cases. *Id.* at 1443; see *infra* notes 48-53 and accompanying text (discussing *Leathers* Court narrowing of prior taxation of media cases).

33. See ARK. CODE ANN. § 26-52-301, 26-52-302 (Michie 1987 & Supp. 1989) (imposing tax on sales receipts of all tangible personal property as well as some services). Arkansas first enacted a sales tax in 1941 and first enacted a use tax in 1949. Brief for Petitioners at 3, *Leathers v. Medlock*, 111 S. Ct. 1438 (1991) (No. 90-38). The current Arkansas sales tax rate is four percent. *Leathers*, 111 S. Ct. at 1441.

34. 1987 ARK. ACTS 188. Act 188 imposed the sales tax on "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." *Id.* § 1. Arkansas joined a significant number of states that tax cable services to some extent, including Connecticut, Iowa, Kentucky, Minnesota, Mississippi, Nebraska, New Mexico, Rhode Island, Tennessee, Texas, Vermont, West Virginia, and Wisconsin. See Dyk & Kulwicki, *supra* note 2, at 59 n.20 (describing variations of sales tax imposed on cable services in different states).

and magazines from the sales tax.³⁵ The state legislature also excluded from the sales tax scrambled satellite broadcasts, which the legislature did not mention in the act and which the state tax authorities considered excluded.³⁶ Some cable subscribers and cable operators brought suit against the State of Arkansas alleging, among other claims, a First Amendment violation.³⁷ In 1987, before an Arkansas state trial court ruled on the challenge, the Arkansas Legislature extended the sales tax to include scrambled satellite broadcasts.³⁸ The Arkansas Supreme Court held that the initial sales tax on cable television was unconstitutional between 1987 and 1989 because the law discriminated between members of the same medium, namely cable television and scrambled satellite broadcasts.³⁹ After the 1989 extension, however, the Arkansas Supreme Court found the tax constitutional because no bar existed against taxing different segments of the media differently.⁴⁰

Both the State Revenue Commissioner and the cable company and subscribers decided to appeal the case to the United States Supreme Court.⁴¹ On appeal, the State Revenue Commissioner argued that between 1987 and 1989 the sales tax was constitutional because of obvious differences between cable television and scrambled satellite broadcasting and because the legis-

35. See ARK. CODE ANN. § 26-52-401 (exempting newspapers from gross receipts tax). The *Ragland* decision judicially removed the distinction between different types of magazines. Arkansas Writers Project v. Ragland, 481 U.S. 221, 233 (1987). Although the result in *Ragland* was not acknowledged in the statutes, it was not contested either, implying that all magazines were exempt from the sales tax. Brief for Petitioners at 3, *Leathers v. Medlock*, 111 S. Ct. 1438 (1991) (No. 90-38).

36. See Brief for Petitioners at 3, *Leathers v. Medlock*, 111 S. Ct. 1438 (1991) (No. 90-38) (noting that state considered scrambled satellite service exempt after 1987 Act). Scrambled satellite services send signals directly to subscribers' satellite dishes. *Id.* See generally, ANTHONY T. EASTON AND SUSAN EASTON, *THE COMPLETE SOURCEBOOK OF HOME SATELLITE TV* (1988) (providing background information on types of satellite service).

37. See *Leathers v. Medlock*, 111 S. Ct. 1438, 1441 (1991) (describing cable petitioners' appeal arguments). The plaintiffs in *Leathers*—a cable television subscriber, a cable operator, and a trade association—also were alleging an equal protection violation under the Fourteenth Amendment. *Id.*

38. See 1989 ARK. ACTS 769 § 1 (expanding gross receipts tax to include scrambled satellite broadcasts). The inclusion of scrambled satellite broadcasts made the sales tax equal for members of the same segment of the media, in this case all video providers. *Leathers*, 111 S. Ct. at 1441-42. *Leathers* then involved two different actions, the tax acts before the 1989 change, and the subsequent tax structure. *Id.* at 1442.

39. See *Medlock v. Pledger*, 785 S.W.2d 202, 204 (Ark. 1990) (holding that satellite broadcast service and cable television were substantially similar services and therefore must be taxed at same rate), *rev'd in part, aff'd in part sub nom.* *Leathers v. Medlock*, 111 S. Ct. 1438 (1991). The Arkansas Court ruled that the *Ragland* decision applied in the present case because from 1987 to 1989, cable television was subject to the tax and therefore similar services were taxed differently. *Id.*

40. See *id.* at 204 (holding no Supreme Court precedent existed for invalidating differential tax on different segments of media). The Arkansas Supreme Court stated that "we are unwilling to hold that all mass communications media must be taxed in the same way." *Id.*

41. See *Leathers*, 111 S. Ct. at 1442 (noting that both parties in state action sought review in Supreme Court).

lature was unaware of the nature of satellite broadcasting.⁴² The opposing cable company and subscribers asked for review on the issue of differential taxation and argued that the distinction between cable television and other media segments, such as newspapers, was unconstitutional.⁴³ The cable petitioners essentially asked that the Supreme Court take the final step it did not take in *Ragland* and declare that all differential taxation of the press presumptively is unconstitutional and subject to a strict scrutiny test.⁴⁴

The Supreme Court first noted that the First Amendment protected cable television.⁴⁵ Immediately after this clarification, however, the Court stated that the fact that cable television is taxed differently from magazines or newspapers standing alone did not raise First Amendment concerns.⁴⁶ At the outset, therefore, the *Leathers* Court answered the question left open in *Ragland* and concluded that differential taxation of the press alone is not inherently suspect under the First Amendment.⁴⁷

42. See Brief for Appellant (State Revenue Commissioner) at 9, *Leathers v. Medlock*, 111 S. Ct. 1438 (1991) (No. 90-29) (arguing that cable television was distinct from other satellite television service because it used public air waves to provide service and because Arkansas Legislature was unaware of receipt producing satellite service). The argument that cable television's use of public air waves was significant was rejected by the Arkansas Supreme Court. *Medlock*, 785 S.W.2d at 203. The United States Supreme Court did not need to address either argument because the Court found that the State could tax even similar media members differently. *Leathers v. Medlock*, 111 S. Ct. 1438, 1445 (1991).

43. See Brief for Petitioners (cable company and subscribers) at 4-5, *Leathers v. Medlock*, 111 S. Ct. 1438 (1991) (No. 90-38) (asking Supreme Court to declare singling out of cable television for gross receipts tax unconstitutional).

44. See *id.* at 20-21 (asking Supreme Court to allow cable television to enjoy same First Amendment protection on taxation issues as other segments of mass communication media).

45. See *Leathers v. Medlock*, 111 S. Ct. 1438, 1442 (1991) (describing services provided by cable television). The *Leathers* Court noted that cable television was involved in speech and was a member of the press. *Id.* See PATRICK PARSONS, *CABLE TELEVISION AND THE FIRST AMENDMENT* 29-48 (1987) (providing background on cable television and its place in First Amendment); GEORGE H. SHAPIRO, *CABLESPEECH* 1-206 (1983) (same); Christine Gasser, Note, *Cable Television: A New Challenge For the "Old" First Amendment*, 60 ST. JOHN'S L. REV. 114, 139-43 (1985) (analyzing cable television through First Amendment); see also *Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494-95 (1986) (holding that cable companies' programming and communicating plainly implicated First Amendment). Although cable television is subject to regulation at greater levels than more traditional members of the media, this does not change the fact that cable is part of the press. *Id.* Justice Blackmun, however, concurring in *Preferred Communications*, noted that "[d]ifferent communications media are treated differently for First Amendment purposes." *Id.* at 496.

46. *Leathers*, 111 S. Ct. at 1442.

47. *Id.* at 1442. It is interesting that at the beginning of the opinion, the *Leathers* Court asserts that differential taxation did not raise First Amendment concerns alone, without citing any case law. *Id.* See Brief for Petitioner (cable company and subscribers) at 20-22, *Leathers v. Medlock*, 111 S. Ct. 1438 (1991) (No. 90-38) (demonstrating that cable petitioners certainly did not view this question in such straightforward manner). The cable petitioners pointed out that many state courts had concluded that all differential taxation between members of the media was subject to strict scrutiny. *Id.* It would seem that the open question from *Ragland* warranted a quick and simple answer from the Supreme Court. *Leathers*, 111 S. Ct. at 1442.

A review of *Minneapolis Star* and *Ragland* reveals that the *Leathers* Court framed those cases to allow the Court to change its standard on taxation of the media without explicitly rejecting its own precedents.⁴⁸ The *Leathers* Court stated, "These cases demonstrate that differential taxation of First Amendment speakers is constitutionally suspect when it threatens to suppress the expression of particular ideas or viewpoints."⁴⁹ Justice O'Connor, the author of the majority opinion, went beyond merely allowing taxation on different segments of the media and answering the *Ragland* question of the constitutionality of differential taxation.⁵⁰ Justice O'Connor set up a fundamentally new test, in which the courts analyze taxation of the media with less scrutiny.⁵¹ Under this new test, even the distinction between cable television and satellite broadcasts in the Arkansas Statute is permissible.⁵² In the future, the real problem would arise if evidence of

48. See Dyk & Kulwicki, *supra* note 2, at 54 (noting that *Leathers* decision has substantially limited Supreme Court's earlier taxation of press decisions). Dyk and Kulwicki also note that Justice O'Connor, who authored *Minneapolis Star* as well as *Leathers*, tried to reconcile these two decisions. *Id.* at 56. It is not unusual for the Supreme Court to limit previous cases to their facts without explicitly overruling them. *Cf. Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989) (limiting sharply protections of *Roe v. Wade*, 410 U.S. 113 (1973), while still adhering to prior decision in principle).

49. See *Leathers*, 111 S. Ct. at 1443 (redefining *Minneapolis Star* and *Ragland*). It is not at all clear that *Ragland* and *Minneapolis Star* were limited to the concept that viewpoint discrimination was the focus of the Court's examination of taxation of the press. See *Arkansas Writers Project v. Ragland*, 481 U.S. 221, 230 (1987) (noting that selective taxation does not avoid First Amendment difficulties merely because no burden on expression of viewpoint exists). In fact, in *Ragland*, Justice Marshall speaks much more broadly. *Id.*

See *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 592 (1983) (expressing concern about potential for abuse from taxation). One should note that Justice O'Connor also authored the *Leathers* opinion. *Leathers*, 111 S. Ct. at 1440.

See Richard A. Cordray & James T. Vradelis, Comment, *The Emerging Jurisprudence of Justice O'Connor*, 52 U. CHI. L. REV. 389, 451-52 (1985) (reviewing Justice O'Connor's jurisprudence and noting that O'Connor was most concerned with purpose for First Amendment protection of newspapers). It seems that Justice O'Connor underwent a shift between *Minneapolis Star* and *Leathers* in viewing the First Amendment as more concerned with viewpoint censorship and less with mere content distinction. *Leathers*, 111 S. Ct. at 1443-44. Justice O'Connor adopted much of the argument from Justice Scalia's dissent in *Ragland*. See *Ragland*, 481 U.S. at 235.

50. See *Leathers v. Medlock*, 111 S. Ct. 1438, 1442 (1991) (answering *Ragland* question of differential taxation between different segments of media). The *Leathers* Court had no choice but to answer the differential taxation question head on because it was faced with a clear tax differential between two different kinds of media members, cable television and magazines/newspapers. *Id.* at 1441.

51. See *id.* at 1445 (asserting that previous cases provide no support to idea that discrimination within medium violates First Amendment without evidence of viewpoint discrimination). Although the *Leathers* Court speaks about the special role of the press in the United States, the Court attributes no special treatment to the press, subjecting the Arkansas statute to a less heightened scrutiny under the First Amendment. *Id.* Unless the media member can show one of three specific types of discrimination, a compelling interest test will not be required. *Id.* See *infra* notes 137-66 and accompanying text (discussing requirements to fall into three areas of media protection articulated in *Leathers*).

52. See *Leathers*, 111 S. Ct. at 1447 (concluding that Arkansas tax on either cable

ensorship or, in Justice O'Connor's words, viewpoint discrimination is present, and hence the media's need for First Amendment protection increases.⁵³

Despite the *Leathers* Court's departure from the *Minneapolis Star* and *Ragland* standard, the Court did not totally abandon previous doctrine.⁵⁴ Three forms of protection remain that provide the media with some protection from discriminatory taxation.⁵⁵ A state that singles out the press for a special tax, as Minnesota did with its special use tax, implicates the first protection.⁵⁶ The second protection arises when a tax singles out a small number of speakers or members of the media.⁵⁷ Finally, a state could risk

television alone or cable television and satellite broadcasts is permissible under First Amendment). Under *Ragland* differential taxation between similar media members was impermissible, and the Arkansas Supreme Court ruled that scrambled satellite broadcasting and cable were substantially similar. *Medlock v. Pledger*, 785 S.W.2d 202, 204 (Ark. 1990), *rev'd in part, aff'd in part sub nom. Leathers v. Medlock*, 111 S. Ct. 1438 (1991). *Ragland* held that a tax exemption for only some magazines was unconstitutional. *Ragland*, 481 U.S. at 229. *Leathers* now holds that an exemption for some television services and not others is constitutional. *Leathers*, 111 S. Ct. at 1447. Justice Marshall's dissent questions whether the previous non-discrimination principle survives *Leathers*. *Id.* at 1452.

53. See *Leathers*, 111 S. Ct. at 1443 (arguing that only threat of viewpoint suppression makes tax constitutionally suspect under First Amendment). The *Leathers* analysis is similar to Justice Rehnquist's dissent in *Minneapolis Star* because legislation that benefits the media likely would not be evidence of censorship under the *Leathers* approach. *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 601-02 (1983). No longer does a concern exist with the potential for abuse; now the concern is with viewpoint discrimination. See *Leathers*, 111 S. Ct. at 1443-45 (discussing possible abuses of media and stressing importance of viewpoint discrimination when reviewing tax).

54. See *infra* notes 137-66 and accompanying text (discussing protections of media under *Leathers*).

55. See *Leathers v. Medlock*, 111 S. Ct. 1438, 1443-44 (1991) (mentioning three areas of discrimination where Supreme Court will apply strict scrutiny). If none of the three areas mentioned in *Leathers* is applicable, the complaining media member would need to show an "additional basis" for striking down the state statute. *Id.* at 1445. Because neither singling out the press, singling out a small number of media members, or content-based discrimination is present in the Arkansas statute, the facts of *Leathers* do not trigger heightened or strict scrutiny. *Id.* at 1444.

See *infra* notes 137-66 and accompanying text (discussing three areas of protection in detail). Although a first reading of *Leathers* appears to give the impression that state legislatures are free to tax the media with impunity, these three areas have a substantial amount of force and should provide necessary protection for the media against legislative censorial motives. *Leathers*, 111 S. Ct. at 1444.

56. See *Minneapolis Star*, 460 U.S. at 582 (noting that Minnesota tax was unique in creating special tax for media). The *Minneapolis Star* Court noted that singling out the press would pose increased danger because a legislature would be able to tax the media without having to burden other businesses or people. *Id.* at 585. Apparent safety exists in a gross receipts tax or a generally applicable sales tax. *Id.* See Randall P. Bezanson, *Political Agnosticism, Editorial Freedom, and Government Neutrality Toward the Press: Observations on Minneapolis Star and Tribune Co. v. Minnesota Commissioner of Revenue*, 72 IOWA L. REV. 1359, 1367-69 (1987) (discussing elements of Supreme Court's rule on singling out press).

57. See *Arkansas Writers Project v. Ragland*, 481 U.S. 221, 229 (1987) (noting that few Arkansas magazines paid sales tax). Singling out small groups of the press was a problem in

a constitutional challenge if the state resorts to content to differentiate between members of the media.⁵⁸ This last protection requires a definition of different types of content-based language and is difficult to clarify.⁵⁹ Because the Arkansas tax in question in *Leathers* violated none of these areas, the Court did not subject it to strict judicial scrutiny.⁶⁰

The Court went on to address the cable petitioner's argument that even when no intent to suppress ideas is evident, differential taxation between members of the media violates the First Amendment.⁶¹ The Supreme Court rejected this argument on differential taxation, and in rejecting the argument the Court relied on *Regan v. Taxation with Representation of Washington*.⁶² In *Regan*, the Court decided that an extension of a tax exemption to one group of taxpayers and not to others does not trigger strict scrutiny analysis under the First Amendment.⁶³ Justice O'Connor noted that *Regan* stands

Ragland. Id. Justice Marshall's dissent in *Leathers* pointed out that difficulty existed in quantifying the actual number of members which would qualify as a small group; after *Ragland* it is apparent that three or four qualifies as a small enough group. *Leathers*, 111 S. Ct. at 1444. Singling out a small group also was a problem for the Court in *Minneapolis Star* due to the small number of newspapers who paid use tax. *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 591 (1983).

58. See *Ragland*, 481 U.S. at 229 (noting that content is particularly disturbing basis of selective taxation); *infra* notes 157-66 and accompanying text (discussing content-based discrimination more fully); see also Geoffrey R. Stone, *Restrictions of Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. CHI. L. REV. 81, 83-84 (1978) (providing general background on content-based classifications and discussing standards and nature of content review). Stone divides content-based classifications into subject-matter and viewpoint. *Id.* Some confusion exists about the distinction between general content-based distinctions and more specific viewpoint-based distinctions. Justice O'Connor in *Leathers* expresses concern about censorship which implies viewpoint distinctions. *Leathers*, 111 S. Ct. at 1444. Justice Marshall in *Ragland* wrote that any content-based restriction is a problem. *Ragland*, 481 U.S. at 229. The post-*Leathers* era will be clearly more restrictive in interpreting content.

59. See *infra* notes 157-66 and accompanying text (attempting to explain shifting definition of content in context of taxation of press).

60. See *Leathers v. Medlock*, 111 S. Ct. 1438, 1445 (1991) (observing that Arkansas tax at issue presented no problems of censorial motive or viewpoint discrimination).

61. See *id.* (examining existence of any additional basis on which to strike down Arkansas tax).

62. 461 U.S. 540 (1983).

63. See *Regan v. Taxation with Representation of Washington*, 461 U.S. 540 (1983) (holding tax exemption for veterans' organization that engages in lobbying is constitutional although other organizations that engage in lobbying are not exempt). In *Regan* the Supreme Court considered a tax exemption for nonprofit groups which did not engage in lobbying activities. *Id.* at 542. The *Regan* Court also examined the fact that veterans' groups were tax exempt even though they engaged in lobbying activities. *Id.* at 546. The *Regan* Court found that a tax exemption merely was a form of subsidy. *Id.* at 543. Citing *Cammarano v. United States*, 358 U.S. 498 (1959), the *Regan* Court reasoned that Congress was not required by the First Amendment to subsidize rights such as lobbying. *Regan*, 461 U.S. at 546. The *Regan* Court also held that the exception made for veterans' groups was rational and a legitimate exercise of the government's taxing powers. *Id.* at 547. Finally, the *Regan* Court noted that the outcome might have been different if the tax subsidies were aimed at suppressing dangerous ideas or viewpoints. *Id.* at 548. Therefore, the *Regan* Court found the tax exemption constitutional. *Id.* at 551.

for the proposition that a tax statute discriminating among different speakers only implicates the First Amendment if discrimination on the basis of ideas is present.⁶⁴ The adoption of this rule is quite similar to Justice Scalia's argument in dissent in *Ragland*.⁶⁵ Scalia argued that the Court should not use strict scrutiny to analyze a tax that merely discriminated among types of speakers, while the Court should use the higher standard to look at a tax that discriminated among viewpoints.⁶⁶

Justice O'Connor, in her *Leathers* opinion, went on to add more support to the distinction between mere differential taxation and viewpoint discrimination taxation.⁶⁷ O'Connor cited *Mabee v. White Plains Publishing Co.*⁶⁸ and *Oklahoma Press Publishing Co. v. Walling*⁶⁹ for the contention that government action placing differential burdens on members of the press does not necessarily violate the First Amendment.⁷⁰ Both *Mabee* and *Walling* underscored the point that even when the Court places differential burdens on the press, some kind of suppression of ideas is necessary to trigger heightened scrutiny.⁷¹ Justice O'Connor's majority opinion in *Leathers* ended

64. See *Leathers*, 111 S. Ct. at 1445-46 (reviewing *Regan* and its reliance on viewpoint discrimination).

65. See *Arkansas Writers Project v. Ragland*, 481 U.S. 221, 236-37 (1987) (Scalia, J., dissenting) (arguing that use of strict scrutiny standard for denial of tax exemption is wrong because denial has no coercive effect).

66. See *id.* (Scalia, J., dissenting) (citing *Regan*, 461 U.S. at 549 for proposition that subsidies are not subject to strict scrutiny). Justice Scalia noted that "Our opinions have long recognized—in First Amendment contexts as elsewhere—the reality that tax exemptions, credits, and deductions are 'a form of subsidy that is administered through the tax system,' and the general rule that 'a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny.'" *Ragland*, 481 U.S. at 236. Justice Scalia also stated a point almost identical to Justice O'Connor's in *Leathers*, saying, "Perhaps a more stringent, prophylactic rule is appropriate, and can consistently be applied, when the subsidy pertains to the expression of a particular viewpoint. . . ." *Id.* at 237.

67. See *Leathers v. Medlock*, 111 S. Ct. 1438, 1446 (1991) (noting that differential burden on speakers alone does not raise First Amendment concerns).

68. 327 U.S. 178 (1946).

69. 327 U.S. 186 (1946).

70. See *Leathers*, 111 S. Ct. at 1446-47 (citing cases to support *Leathers* emphasis on viewpoint discrimination and not mere differential burdens). *Mabee* and *Walling* both dealt with regulation, not taxation, but they still serve as compelling support for *Leathers*. *Id.*

71. See *Mabee v. White Plains Publishing Co.*, 327 U.S. 178 (1946) (holding that Fair Labor Standards Act did apply to New York State newspaper and observing that suppression of ideas is necessary to trigger heightened scrutiny). In *Mabee*, a White Plains newspaper challenged the Fair Labor Standards Act because it granted exemptions for small weekly and semi-weekly newspapers. *Id.* at 184. According to the *Mabee* Court the exemption was designed to put small newspapers on equal footing with other small town enterprises. *Id.* The fact that the statute made distinctions between large and small newspapers was not dispositive. *Id.* The *Mabee* Court recognized that the exemption was not trying to penalize a group of newspapers, or lay a special tax on the press in violation of the First Amendment. *Id.* Finally the *Mabee* Court found this exemption to be a proper application of the Commerce Power of Congress. *Id.* The *Mabee* Court did note that the press had no special immunity from general laws or regulations directed at businesses. *Id.* Consequently, the Court upheld the Fair Labor Standards

by stating that the Arkansas decision to exclude certain media members from taxation did not implicate or violate the First Amendment.⁷²

Justice Marshall, joined by Justice Blackmun, dissented in *Leathers*.⁷³ Marshall largely reemphasized his *Ragland* opinion.⁷⁴ Besides rejecting the majority's new test, Marshall particularly was bothered by the majority's emphasis on censorial motive.⁷⁵ Marshall rejected the majority's reliance on *Regan* and also argued that by focusing on narrow viewpoint-based discrimination the majority opinion destroyed the nondiscrimination principle under the First Amendment.⁷⁶ Marshall concluded that although legislatures should not give the press special treatment, differential taxation is presumptively invidious and should be subjected to a strict scrutiny test.⁷⁷ In Marshall's view the Arkansas tax did not meet the strict scrutiny test.⁷⁸ Representing the former method of analysis, the Marshall opinion demonstrates the Court's significant change in analysis from the *Ragland* decision.⁷⁹

III. ANALYSIS OF *Leathers* Result

Leathers was both a necessary change from previous standards and a good result in its own right.⁸⁰ The previous test, set up by *Minneapolis Star*

Act as applied to the newspapers. *Id.* at 184-85.

See *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186 (1946) (holding wages and hours provisions of Fair Labor Standards Act applicable to newspapers). In *Walling*, the Supreme Court considered the application of a portion of the Fair Labor Standards Act dealing with wages and hours to newspapers. *Id.* at 189. The *Walling* Court held that the newspapers were not immune from government regulation of labor standards. *Id.* at 193. Although the newspaper had argued that First Amendment concerns made the enforcement impossible, the *Walling* Court dismissed this claim. *Id.* The exemption of small newspapers was also upheld by the *Walling* Court because the regulations did not single out the press, it applied to all larger businesses. *Id.* at 194. The *Walling* Court concluded that the small newspapers were exempted to place them on an equal footing with other small businesses. *Id.* Consequently, the *Walling* Court upheld the application of the Fair Labor Standards Act to newspapers against the First Amendment challenge. *Id.*

72. *Leathers v. Medlock*, 111 S. Ct. 1438, 1447 (1991).

73. *Id.*

74. *See Leathers*, 111 S. Ct. at 1447 (Marshall, J., dissenting) (arguing differential taxation of press should be unconstitutional between members of same media); *Arkansas Writers Project v. Ragland*, 481 U.S. 221 (1987) (holding differential taxation of press unconstitutional between members of same media).

75. *See Leathers*, 111 S. Ct. at 1452 (Marshall, J., dissenting) (rejecting emphasis on censorial motive and supporting potential for abuse test of *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983)).

76. *Id.* at 1452-53.

77. *Id.* at 1450.

78. *Id.* at 1453.

79. *See id.* at 1454 (observing that Supreme Court "unwisely" has thrown out prior teachings). In *Leathers* Marshall's dissent complains that "the majority so adamantly proclaims the irrelevance of this problem (equal treatment for the media) that its analysis calls into question whether any general obligation to treat media actors even-handedly survives today's decision." *Id.* at 1447-48. Marshall admits that the *Leathers* decision is a cutting back on "selective-taxation precedents," and in his opinion that move is unwise. *Id.* at 1448.

80. *See* *Medford*, *supra* note 8, at 431 (observing that *Ragland* standard is of questionable

and *Ragland*, was neither practical nor sensible.⁸¹ Instead of approaching the taxation of the press issue cautiously, the Supreme Court developed a test to examine differential taxation of the press that swept too broadly.⁸² Furthermore, the Court leapt from protecting newspapers against purposeful suppression of speech in *Grosjean* to disapproving of multiple variations of state taxing schemes in *Minneapolis Star*.⁸³ Although the *Leathers* test is a strong, effective result, one way exists in which the *Leathers* test can be improved.⁸⁴ The modification, a heightened rational basis test, will make the *Leathers* protections stronger.⁸⁵

The *Minneapolis Star* test essentially held that any differential taxation was inherently suspect and, therefore, subject to strict scrutiny review.⁸⁶ This put a heavy burden on states to justify parts of their taxation schemes, although in years past states had broad leeway to tax.⁸⁷ *Minneapolis Star*

effectiveness). Medford observed that *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983), and *Arkansas Writers Project v. Ragland*, 481 U.S. 221 (1987), ended up hurting the media because state legislatures were unable to tax media at lower levels than other businesses. *Id.* Therefore, the coercive effect on the media would be greater because states could tax the media fully under generally applicable sales taxes. *Id.* The result of *Minneapolis Star* and *Ragland* was counterproductive. *Id.*

See Simon, *supra* note 7, at 73 (describing flaws in Supreme Court's *Minneapolis Star* test). Simon noted that the Court's failure to distinguish between the press as information-gatherer and the press as a business was a "fatal flaw." *Id.* The *Minneapolis Star* decision disrupted state systems of exemptions and preferences. *Id.* at 73-74. Even preferences for First Amendment activities would be disallowed, to the detriment of diversity. *Id.* at 74.

81. See Simon, *supra* note 7, at 75 (discussing negative results of *Minneapolis Star* test). The Supreme Court adopted the *Minneapolis Star* test without really considering the effects. *Id.* at 75-76. No evidence of harm to the media existed to warrant a per se rule that differential treatment should be inherently suspect. *Id.* at 76. See Medford, *supra* note 8, at 431 (criticizing *Ragland* for being counterproductive).

See *supra* note 49 and accompanying text (discussing O'Connor shift in opinion from *Minneapolis Star* to *Leathers*). One should note the way the *Leathers* Court retreated from the *Minneapolis Star* standard even though Justice O'Connor wrote both opinions. *Id.*

82. See *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 591-92 (1983) (setting up potential for abuse test). *Minneapolis Star* tried to deter all taxes that had the potential for abuse but the vague scope of the opinion merely got the Court into more efforts to define the test. *Id.*

See *infra* notes 86-98 and accompanying text (reviewing criticism of *Ragland* and *Minneapolis Star*).

83. See Medford, *supra* note 8, at 415 (examining Supreme Court's leap in taxation of press issue from *Grosjean* to *Minneapolis Star*); see also Simon, *supra* note 7, at 73-74 (noting that many state tax codes had exemptions and preferences and havoc would be played on state systems).

84. See *infra* notes 167-76 and accompanying text (suggesting improvements in *Leathers* standard).

85. See *infra* notes 167-76 and accompanying text (suggesting *Leathers* test would be stronger if states were required to provide serious justifications for differential taxation).

86. See *Minneapolis Star*, 460 U.S. at 591 (stating potential for abuse test that made differential taxation suspect); Simon, *supra* note 7, at 70 (observing very fact of differential taxation was violation in *Minneapolis Star*).

87. See *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 599 (1983) (Rehnquist, J., dissenting) (noting that broad discretion in taxation matters

adopted parts of the First Amendment Speech Clause analysis and mixed those with the *Grosjean* Court's holding to create a new and far-reaching concept that the press is special and cannot be subject to differential taxation.⁸⁸ The *Minneapolis Star* Court, however, did not define precisely the scope of differential taxation, thus leaving this definition to later courts.⁸⁹ The *Minneapolis Star* Court seemed determined to use a broad sweep to protect against the potential for abuse.⁹⁰ No evidence existed, however, that differential taxation actually harmed the media or that the states harbored any intent to discriminate.⁹¹ Thus, there was no need to protect the media from theoretical harms that did not exist, namely burdensome discriminatory taxation.⁹²

Years later the *Ragland* Court took the broad *Minneapolis Star* test and made it even more sweeping.⁹³ Justice Marshall decided that because of its invidious nature, all content-based discrimination between members

are traditionally accorded to states); see also Simon, *supra* note 7, at 71 n.117 (stating general rule that states may tailor tax system as they wish). States had heavy burden under strict scrutiny test to justify their state tax systems in *Minneapolis Star*. *Id.* at 73.

88. See generally Potter Stewart, "Or Of the Press," 26 HASTINGS L. J. 631 (1975) (discussing concept of press having special status in First Amendment); see also Simon, *supra* note 7, at 73 (noting that *Minneapolis Star* took special status concept and applied to press as business). The *Minneapolis Star* Court twisted *Grosjean v. American Press Co.*, 297 U.S. 233 (1936), out of its context. Simon, *supra* note 7, at 73. *Minneapolis Star* applied First Amendment theory out of its usual context. *Id.* at 74.

89. See *Arkansas Writers Project v. Ragland*, 481 U.S. 221, 229-31 (1987) (defining differential taxation in terms of singling out press members); *Leathers v. Medlock*, 111 S. Ct. 1438, 1443 (1991) (defining differential taxation in terms of censorship).

90. See *Minneapolis Star*, 460 U.S. at 592 (defining potential for abuse as singling out press or few members of press).

See Bezanson, *supra* note 56, at 1374 (observing broad scope of *Minneapolis Star* decision). Bezanson noted that the Court's decision revealed an interest in the general relation between the media and the political system. *Id.* at 1375. This broad interest is perhaps a way to explain the scope of *Minneapolis Star*. *Id.*

91. See *Minneapolis Star*, 460 U.S. at 580-81 (noting that no censorial motive was found in Minnesota Legislature but none was needed for Court's invalidation of tax). *But cf.* *Washington v. Davis*, 426 U.S. 229 (1976) (holding that in Equal Protection challenges to racial discrimination, intent, not merely disproportionate impact, must be shown on part of state).

92. See *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 596 (1983) (White, J., concurring) (noting that Minnesota tax clearly benefitted press and no reason existed for tax to be struck down on those grounds); see also *id.* at 598-600 (Rehnquist, J., dissenting) (arguing that no harm existed and Minnesota tax posed no abridgement of press freedom). Justice Rehnquist argues in his dissent that the Supreme Court was capable of reviewing future tax schemes and looking for infringements of rights as well as actual abuses. *Id.* at 601. Justice Rehnquist found no reason for the Court to rely on the potential for abuse test when the press was benefitted. *Id.* at 600. See Simon, *supra* note 7, at 76 (arguing there is no need to prevent danger of abuse that does not exist).

93. See *Medford*, *supra* note 8, at 430-31 (observing that scope of protection for press has been continually enlarged). *But see* Bezanson, *supra* note 56, at 1360 (asserting that *Ragland* actually limited holding of *Minneapolis Star*).

of the media violated the First Amendment.⁹⁴ Because Justice Marshall applied the strict scrutiny test to the Arkansas law, the State of Arkansas could not show that its goals of encouraging fledgling publishers or raising revenue were rational because the State could not demonstrate a compelling interest.⁹⁵ However, Justice Marshall's failure to make any distinction between general content-based or subject-matter discrimination and more specific viewpoint-based discrimination further muddled the taxation of the press issue.⁹⁶ It is clear from Marshall's *Leathers* dissent that he made no distinction between the two types of discrimination because he believes that any differential taxation, regardless of legislative intent or motive, is violative of the First Amendment.⁹⁷ The definition of content for Justice Marshall virtually is a euphemism for any differentiation between media members.⁹⁸

Under this pre-*Leathers* application of the strict scrutiny test to taxation of the press, the Supreme Court was moving toward requiring equal taxation for all members of the media.⁹⁹ But for the *Leathers* decision, the use of the strict scrutiny test in this context additionally would have required the Court to define who qualified as a member of the media; a job made especially difficult by many new emerging technologies.¹⁰⁰ Accordingly, strict

94. See *Arkansas Writers Project v. Ragland*, 481 U.S. 221, 229 (1987) (discussing disturbing use of content-based discrimination). In *Ragland*, Justice Marshall cites *Police Dept. of Chicago v. Mosely*, 408 U.S. 92 (1972), to support the proposition that content discrimination is disfavored. *Ragland*, 481 U.S. at 229-30.

95. See *Ragland*, 481 U.S. at 231-32 (rejecting state justifications for differential taxation); *id.* at 235 (Scalia, J., dissenting) (discussing legitimate state goals of revenue and encouraging new publications). Scalia argues that differential taxation was reasonably related to the goals of encouraging small publishers, raising revenue, and crafting an administratively sensible tax. *Id.* at 235-36.

96. See *infra* notes 157-66 (discussing *Leathers* definition of content in terms of viewpoint discrimination); see also Medford, *supra* note 8, at 421-22 (noting that Justice Marshall's comparison of *Mosely* to *Ragland* is unfair because one case is legislative prohibition on expression and other is general sales tax with content definition). The *Mosely* court held that a statute which banned picketing within 150 feet of a school, unless the school was involved in a labor dispute, was an unconstitutional prohibition of messages based on subject matter. *Mosely*, 408 U.S. at 95.

97. See *Leathers v. Medlock*, 111 S. Ct. 1438, 1448-49 (1991) (Marshall, J., dissenting) (finding that principle of nondiscrimination compelled striking down Arkansas tax).

98. See *Ragland*, 481 U.S. at 230 (noting that merely because state does not discriminate between viewpoints does not necessarily avoid First Amendment problems).

99. See Brief for Petitioners at 20-21, *Leathers v. Medlock*, 111 S. Ct. 1438 (1991) (No. 90-38) (requesting Supreme Court to take final step and hold intermedia differential taxation presumptively unconstitutional); see also Simon, *supra* note 7, at 74 (observing that equal taxation for all members of media would be logical outcome of *Ragland* reasoning combined with potential for abuse discussion in *Minneapolis Star*); see also *supra* notes 86-98 and accompanying text (discussing taxation of press test developed from *Ragland* and *Minneapolis Star*).

100. See *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494 (1986) (discussing integration of cable television into First Amendment). The *Preferred Communications* Court spoke of cable television "implicating" First Amendment interests. *Id.* *Preferred Communications* demonstrates the Supreme Court's discomfort with finding a balance with the First Amendment. *Id.* The Supreme Court would have had to deal with this question

scrutiny would have forced the Supreme Court to define specifically content-based discrimination under the broad Marshall standard in *Ragland*.¹⁰¹ The test would have left states without flexibility for taxation—an essential element of an effective tax structure.¹⁰² In other words, states would be unable to give tax exemptions to minority broadcasters, new or small publications, or other media outlets that otherwise could flourish under favorable tax treatment.¹⁰³ If a state did exempt some of these publications, the law would force the state to exempt larger broadcast stations and magazines or to eliminate all exemptions.¹⁰⁴ Put simply, the *Ragland* standard would have put state governments in a straight jacket.¹⁰⁵ As the Supreme Court considered *Leathers*, therefore, they were confronted with the opportunity to take the last fateful step toward uniform taxation of the press, and the Court wisely declined to take that step.¹⁰⁶ Instead the Court chose to veer away from the previous test.¹⁰⁷ The Supreme Court developed a new test allowing states flexibility while still giving the media necessary protection.¹⁰⁸

of how to define the media if the *Ragland* standard had been extended to ban all intermedia discrimination, because no member of the media could have been taxed any differently than another. *Ragland*, 481 U.S. at 233.

Leathers engaged in a short test to see if cable television was part of the press. *Leathers*, 111 S. Ct. at 1442. The Court used a standard of providing “news, information, and entertainment.” *Id.* How other new technologies, such as data bases, would have fit into this definition is unclear.

101. See *Arkansas Writers Project v. Ragland*, 481 U.S. 221, 230 (1987) (defining content in terms broader than viewpoint discrimination).

102. See Simon, *supra* note 7, at 71 n.117 (discussing broad flexibility states are accorded with regards to tax structure); *Minneapolis Star & Tribune Co. v. Minnesota Comm’r of Revenue*, 460 U.S. 575, 599 (1983) (Rehnquist, J., dissenting) (noting that state legislatures are accorded great deference in setting up tax structures).

103. See *Ragland*, 481 U.S. at 235-36 (Scalia, J., dissenting) (discussing state justifications of Arkansas tax structure); see also Simon, *supra* note 7, at 87-89 (discussing various differential tax structures within media and their usefulness). In addition to Arkansas’ stated justifications, another useful exemption is one exempting newspapers from sales tax so that people can have easy access to information. *Id.* at 87. Some states exempt motion picture film or videotape. *Id.* at 89.

104. See *Minneapolis Star*, 460 U.S. at 604 (Rehnquist, J., dissenting) (noting that newspapers might be subject to millions in taxes because states will be forced to remove all exemptions).

105. See Simon, *supra* note 7, at 74 (observing that only daring legislatures would try to promote one member of media without promoting others). This drawback of the *Ragland* standard would have removed all flexibility and most legislatures would respond by doing nothing. *Id.*

See Case Note, *Arkansas Tax Exemption Structure Imposes an Unconstitutional Burden on The Press*, 65 U. DET. L. REV. 871, 879-82 (1988) (criticizing use of strict scrutiny test in *Ragland*).

106. See *supra* notes 45-47 and accompanying text (noting *Leathers* Court declining to adopt taxation of media approach that prohibited all differential taxation).

107. See *supra* notes 48-53 and accompanying text (noting that Supreme Court created fundamentally new test that drew back from broad approach of *Ragland* and *Minneapolis Star*).

108. See *Leathers v. Medlock*, 111 S. Ct. 1438, 1444 (1991) (describing new test for taxation of media and remaining protections).

Contrary to the beliefs of members of the media, many state tax structures actually benefit members of the media by treating them differently from both each other and other businesses.¹⁰⁹ The media is unharmed by taxation that applies generally to all businesses.¹¹⁰ Additionally, no reason exists why a tax that benefits the press should be unconstitutional under the First Amendment.¹¹¹ Accordingly, *Leathers* focused on the real harm to the media—censorship.¹¹² Members of the media are protected against censorship and unfair treatment.¹¹³ The First Amendment only prohibits abridgement of freedom of the press, not legislative assistance supporting information dissemination.¹¹⁴

Aside from sound constitutional grounds for the *Leathers* decision, additional reasons exist to support this new standard.¹¹⁵ From a public policy standpoint, the new *Leathers* test takes a sensible look at the taxation of the press issue.¹¹⁶ In addition to the obvious revenue-raising motivations, the practical goal of many legislatures is to give tax exemptions to certain

109. See *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 598 (1983) (Rehnquist, J., dissenting) (concluding that MINNEAPOLIS STAR & TRIBUNE paid less taxes under special use tax than under generally applicable tax). Newspapers were benefitted by being treated differently than other businesses. *Id.* Even though this Minnesota special use tax structure violated the First Amendment under the *Leathers* standard, differential taxation can be beneficial for the media. See *Leathers*, 111 S. Ct. at 1444 (retaining basic holding of *Minneapolis Star* that singling out press violates First Amendment). Although *Leathers* retained the *Minneapolis Star* holding, under the reasoning of the *Leathers* approach, one could argue that a special use tax would only be unconstitutional if it burdened the media more than a generally applicable tax. *Minneapolis Star*, 460 U.S. at 598.

110. See *Leathers*, 111 S. Ct. at 1444 (noting general applicability of Arkansas tax to all businesses). Because the Arkansas tax applied to all business generally, the role of the press as a watchdog was not hindered. *Id.* See *Minneapolis Star*, 460 U.S. at 600 (Rehnquist, J., dissenting) (noting that First Amendment prohibits abridging freedom of press, not assisting freedom of press).

111. See *Minneapolis Star*, 460 U.S. at 596 (Rehnquist, J., dissenting) (arguing that First Amendment protects press from abridging of press freedoms). Rehnquist notes that the majority in *Minneapolis Star* finds the use tax unconstitutional even though the press freedom involved was neither diminished nor curtailed. *Id.*

112. See *Leathers*, 111 S. Ct. at 1443 (observing that censorship is focus of Court's examination and censorship is real danger to media).

113. See *infra* notes 137-66 and accompanying text (discussing three *Leathers* protections of singling out press, taxing small number of press, and content/viewpoint based distinctions).

114. See *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 600 (1983) (Rehnquist, J., dissenting) (denying that First Amendment prohibits Congress from supporting information dissemination). *But see id.* at 583 (reasoning by majority that differential taxation of press would have troubled First Amendment framers). Justice O'Connor observed that the proponents of the Constitution believed that Congress had no power to control the press. *Id.* at 584. O'Connor continued that the mere power to tax differentially can operate as a threat of burdensome taxation. *Id.* at 585.

115. See *infra* notes 116-30 and accompanying text (discussing public policy support for *Leathers*).

116. See *Arkansas Writers Project v. Ragland*, 481 U.S. 221, 237 (1987) (Scalia, J., dissenting) (observing that banning differential taxation casts doubt on many tax preferences and was realistically impossible).

members of the media to increase dissemination of information to the public.¹¹⁷ Legislatures try to encourage new publishers and new technologies.¹¹⁸ Encouraging new publications can be an effective means of increasing the dissemination of information and can also expand the available spectrum of views.¹¹⁹ States also use their tax statutes to raise needed revenue for public expenditures.¹²⁰ The bottom line is that differential taxation may further many goals of taxation.¹²¹

States also need to ensure that their tax collection is administratively sensible.¹²² For instance, if the law forces a state to tax all members of the media equally, the state might have to collect one cent on a newspaper purchased on the street, inconveniencing both consumers, who would be forced to pay twenty-six cents instead of twenty-five cents for a newspaper, and publishers, who would have to collect the tax revenue from a multitude of sources.¹²³ By giving states flexibility under *Leathers*, the Court allowed the state to make creative, sensible and fair tax policy, such as exempting small fledgling publications or emerging new technologies.¹²⁴ From a policy

117. See Don Lively, *Affirmative Action and A Free Press: Policies and Problems in Promoting the First Amendment*, 65 PAC. L.J. 85, 92-94 (1979) (supporting concept of governmental support for new forms of media).

118. See Lively, *supra* note 117, at 92 (observing that assisting new forms of media would increase intermedia competition and further diversity); see also *supra* note 95 and accompanying text (discussing Arkansas' justification for tax scheme in *Ragland*).

119. See *infra* notes 127-30 and accompanying text (discussing *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), and role of diversity in First Amendment). *Tornillo* rejected the argument that increasing dissemination of information was enough to justify a mandatory right of access. *Tornillo*, 418 U.S. at 254. However, the Supreme Court gave the argument credibility and Chief Justice Burger credited the diversity view of the First Amendment with much accuracy. *Id.* at 247-53. The Supreme Court acknowledged that power in the media had been placed in very few hands. *Id.* at 250.

120. See *Ragland*, 481 U.S. at 231 (noting Arkansas Revenue Commissioner's defense of tax by asserting state's interest in raising revenue). The *Ragland* Court acknowledged the revenue raising interest as "important." *Id.* However, the Court concluded, revenue raising did not justify differential taxation. *Id.*

121. See *supra* notes 116-26 (discussing policy support for *Leathers*); *Times Mirror Co. v. City of Los Angeles*, 192 Cal. App. 3d 170, 183 (Cal. Ct. App. 1987) (noting that state power to classify differently for tax purposes is broad). The *Times Mirror* court observed that classifications and distinctions are rational and natural considering the differing methods and procedures used by businesses. *Id.* at 184. The *Times Mirror* court rejected the contention that government is powerless to use a variety of method of computing taxes for various businesses, including the press. *Id.* at 182.

122. See *Arkansas Writers Project v. Ragland*, 481 U.S. 221, 235-36 (1987) (Scalia, J., dissenting) (asserting that state goals of avoiding imposition and collection of administratively inefficient tax are legitimate).

123. See *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 602 (1983) (Rehnquist, J., dissenting) (describing administrative inconvenience of collecting small sales tax on newspapers bought on street or at vending machine). Justice Rehnquist noted that newspapers are often sold through different methods than other goods. *Id.*

124. See *Allied Stores of Ohio v. Bowers*, 358 U.S. 522, 526-27 (1959) (noting that states are given flexibility in tax matters). The Supreme Court often has noted that tax matters are given more flexibility with states than other matters. *Id.*

standpoint, *Leathers* is a good result and should lead to better tax policy.¹²⁵ One must always be aware, however, as was demonstrated in *Grosjean*, that legislative flexibility can be destructive as well as constructive.¹²⁶

The policy arguments that support *Leathers* rely to some extent on the First Amendment view that diversity is important to assist the dissemination of information.¹²⁷ The Supreme Court rejected this diversity argument in *Miami Herald Publishing Co. v. Tornillo*.¹²⁸ However, that rejection occurred in the context of right of reply statutes that forced newspapers to print responses or other articles to insure diversity.¹²⁹ In the context of taxation and exemptions, where the courts give legislatures more deference, states can point to important policy interests in fostering diversity and increased dissemination of information through their tax policy, including differential taxation of the media, which involves less intrusion than the right of reply statutes.¹³⁰

Justice Marshall's dissent in *Leathers*, however, brings up several good points that must be addressed in defense of the new taxation of the press test.¹³¹ Marshall remains concerned about the potential for abuse by state legislatures referred to in *Minneapolis Star*.¹³² Marshall also expresses concern that courts should treat the press differently than mere speech.¹³³ Marshall ignores the fact, however, that *Leathers* wisely left three significant protections for the media.¹³⁴ Although these protections were not sufficient for Justice Marshall, they do address Marshall's stated concerns.¹³⁵ The key

125. See *Minneapolis Star*, 460 U.S. at 603 (Rehnquist, J., dissenting) (observing that legislative classifications are means to fit tax programs to local needs to achieve equitable burdens).

126. See *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936) (discussing legislative abuse of tax power in order to punish press and limit dissemination of information).

127. See Lively, *supra* note 117, at 70-76 (arguing for government promotion of diversity within First Amendment); Thomas I. Emerson, *The Affirmative Side of The First Amendment*, 15 GA. L. REV. 795, 815-22 (1981) (describing use of government subsidies to promote diversity of expression).

128. 418 U.S. 241 (1974).

129. See *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 245 (1974) (noting that Florida right of reply statute affected choice of materials to be published and invaded editor's function).

130. See *supra* notes 116-29 and accompanying text (discussing policy arguments for differential taxation).

131. See *Leathers v. Medlock*, 111 S. Ct. 1438, 1447 (1991) (Marshall, J., dissenting) (criticizing majority opinion for leaving media largely unprotected from invidious taxation).

132. See *id.* at 1449-50 (discussing risk of power to discriminate between similar media members).

133. See *id.* at 1453 (rejecting majority's reliance on *Regan*). In *Leathers*, Marshall noted that "our cases on the selective taxation of the press struck a different position [than speech]." *Id.* Marshall observed that the press clause "imposes a special obligation on government." *Id.* See sources cited *supra* note 2 (reviewing argument for and against special press status under First Amendment).

134. See *Leathers*, 111 S. Ct. at 1443-44 (noting important media protections and noting focus on censorial motive).

135. See *id.* at 1452 (complaining nondiscrimination principle of First Amendment is essentially annihilated).

focus for all three protections is the search for state censorship.¹³⁶

The first Court protection of the media arises when a tax singles out the press.¹³⁷ Justice O'Connor stressed that the primary concern in this area is censorship of both information and opinion.¹³⁸ A tax that applies to the press as well as to other businesses is not dangerous to the dissemination of information.¹³⁹ The new *Leathers* test, therefore, looks at two factors to see if a tax violates this prohibition of censorship.¹⁴⁰ The first factor is the structure of the tax.¹⁴¹ If circumstances surrounding the enactment of a tax arouse suspicion, or if the legislature sets up the tax in such a way as to curtail First Amendment press activity, the Court will strike down the tax.¹⁴² The second factor is the impact of the tax.¹⁴³ Justice O'Connor noted that a tax that singles out the press may hinder the role of the press as a government watchdog.¹⁴⁴ The protection of a generally applicable tax exists because the whole state is subject to the legislature's action, while a special tax on the press lacks this safety.¹⁴⁵ This first protection for the media, which at first seems limited to extreme cases such as *Grosjean*, actually will protect the media against dangerous taxes while avoiding the overreaching of *Minneapolis Star*, which preemptively struck down taxes that merely have the potential for abuse, even though neither the structure nor the impact of the tax demonstrated any evidence of censorship.¹⁴⁶

The second protection of the *Leathers* test involves taxes that fall on a small number of the media.¹⁴⁷ Justice O'Connor stressed again that the

136. See *id.* at 1443-44 (emphasizing censorship as key factor to look for in testing whether state tax scheme will be required to meet strict scrutiny test).

137. *Id.* at 1443; see *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 585 (1983) (holding that singling out press for special tax is unconstitutional). But see *supra* note 21 and accompanying text (discussing Justice Rehnquist's argument that singling out press for beneficial tax can be constitutional).

138. *Leathers v. Medlock*, 111 S. Ct. 1438, 1443 (1991).

139. *Id.* at 1444.

140. *Id.*

141. *Id.*

142. *Id.* In *Grosjean*, the Louisiana tax was structured in a way to punish state newspapers. *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936). Although the *Minneapolis Star* tax did not have illicit censorial motive, the tax specifically singled out the press for a tax that no other member of the business community paid. *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 582 (1983).

143. *Leathers v. Medlock*, 111 S. Ct. 1438, 1444 (1991).

144. *Id.*

145. See *Minneapolis Star*, 460 U.S. at 588 (describing danger of tax singling out press).

146. See *Leathers*, 111 S. Ct. at 1444 (reviewing Arkansas tax to see if it singles out press). By prohibiting the state from singling out the press, *Leathers* forces states to subject all citizens to the taxes imposed on the press. *Id.*

See *McCullough v. Maryland*, 17 U.S. (3 Wheat.) 415, 433 (1819) (holding that tax on Bank of United States was unconstitutional). In *McCullough*, Chief Justice John Marshall noted that the power to tax is the power to destroy. *Id.* at 433. In that sense any tax on anyone or any entity has the potential for abuse and the potential to curtail any one of a number of fundamental rights. *Id.*

147. *Leathers*, 111 S. Ct. at 1444-45.

primary concern for the Court was evidence of censorship of certain ideas or viewpoints.¹⁴⁸ If a state taxed a small group of the media, the tax likely would affect a small range of views.¹⁴⁹ Although the Court gives no precise definition as to what constitutes a small number of speakers or media members, Justice O'Connor makes clear that a search for censorship will be conducted, and the smaller the number of taxed entities, the better the chance that the Court will find censorship present.¹⁵⁰ Like the first protection, the Court analyzes this second protection by looking at the structure of the tax.¹⁵¹ Under the new *Leathers* test, this analysis becomes more searching as the possibility of viewpoint discrimination increases, thereby providing substantial protection for the media when a danger of abridgement of First Amendment rights exists.¹⁵² When a large number of the media is taxed, little danger of viewpoint censorship exists and Court protection, therefore, is less necessary.¹⁵³ *Leathers* leaves open the question of exemptions for a small number of media members, as opposed to taxes on a small number of media members.¹⁵⁴ Under the Court's current analysis, it appears that exemptions for a small number of media members would not raise the same censorship concerns that a tax on a small number of media members would raise.¹⁵⁵ Although Justice Marshall himself will not likely be impressed by this protection, the examination of the number of media taxed adequately addresses most of Marshall's concerns.¹⁵⁶

148. *Id.* at 1444.

149. *Id.* In *Leathers*, O'Connor noted that the tax in *Ragland* affected less than five publications. *Id.* The tax in the *Leathers* case affected approximately 100 cable companies and so the "sales tax to cable television hardly resembles a 'penalty for a few.'" *Id.* (quoting *Minneapolis Star and Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 592 (1983)).

150. *See Leathers v. Medlock*, 111 S. Ct. 1438, 1444-45 (1991) (discussing danger of tax on small number of media members). Justice Marshall's dissent in *Leathers* raised the question of where the Court will draw a line in the number of speakers necessary to remove the risk of censorship. *Id.* at 1451. It really is unnecessary for the Court to answer this question because no precise number of speakers exists; instead a sliding scale is present where the fewer the media members taxed, the more likely the Court is to find censorship. *Id.* at 1444.

151. *Id.* at 1444.

152. *See id.* (noting danger of tax on small number of media members is that tax will affect limited range of views); *see also infra* notes 172-81 and accompanying text (noting suggested improvement in *Leathers* test to heightened rational basis test). This suggested revision actually fits in well with *Leathers*' protections because the revision allows closer scrutiny to search for censorship, which is the focus of the *Leathers* test. *Id.*

153. *See Leathers*, 111 S. Ct. at 1445 (observing that tax on larger number of media members is unlikely to affect limited range of viewpoints).

154. *See id.* at 1444-45 (failing to mention situation when only small number of media are exempt from generally applicable tax).

155. *See id.* (noting that if tax applies to general group no censorship concerns are raised).

156. *See id.* at 1451 (Marshall, J., dissenting) (rejecting majority analysis as overly simplistic and unresponsive to his concerns). Despite Marshall's suspicion, the protection of looking at the number of media taxed does address Marshall's concerns of the potential for abuse of taxation on the press because *Leathers* looks for that abuse. *Id.* at 1449.

The final protection given to the media is in the area of content-based discrimination.¹⁵⁷ As Justice O'Connor notes, *Ragland* is one example of legislative discrimination based on content.¹⁵⁸ For O'Connor, a search for content-based discrimination really is a search for viewpoint discrimination or censorial motive.¹⁵⁹ The *Leathers* test, however, appears to analyze the content area of the First Amendment differently from previous cases, in the sense that subject-matter distinction, one type of content-based distinction, may be constitutional.¹⁶⁰ Although O'Connor uses the language of *Ragland*, she defines the content area differently.¹⁶¹ The entire area of content discrimination has been hotly debated and the *Leathers* shift in emphasis is important.¹⁶² Under *Leathers* the media is protected against taxes that make distinctions based on ideas in a publication.¹⁶³ Protection is unlikely, however, if a legislature based a tax distinction on the presence of general interest news in a publication, or on the form or frequency of a member of the media, because that distinction is based more on subject-matter and less on viewpoint.¹⁶⁴ The issue of how to define content discrim-

157. *Id.* at 1445.

158. *Id.* (citing *Arkansas Writers Project v. Ragland*, 481 U.S. 221, 223 (1987), for example of content-based discrimination). *Ragland* involved a tax exemption for religious, trade, professional, or sports periodicals. *Ragland*, 481 U.S. at 226.

159. *Leathers v. Medlock*, 111 S. Ct. 1438, 1445 (1991).

160. *See id.* at 1443 (emphasizing viewpoint as focus of Supreme Court's search); Paul B. Stephan III, *The First Amendment And Content Discrimination*, 68 VA. L. REV. 203, 231-50 (1982) (discussing different possible formations of content discrimination rules). Stephan notes that viewpoint neutrality is one of five different conceptions of content definition that he discerns. *Id.* at 231. These possible definitions range all the way to absolute content neutrality where the government could never distinguish between any different kinds of speech. *Id.* at 232. The three other theories, hierarchical neutrality, equal-or-greater neutrality, and protected-speech neutrality are found at varying levels of a type of sliding scale of content. *Id.* at 231-33. Justice O'Connor in *Leathers* largely uses content in the viewpoint sense. *Leathers*, 111 S. Ct. at 1443.

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

162. *See Stone, supra* note 58, at 83-84 (noting that Supreme Court has had difficulty defining content in its cases). The Court has analyzed two types of content-based definitions. *Id.* at 82. The first deals with content in the sense of distinctions based on viewpoint or ideas. *Id.* This viewpoint area is always looked at with the strictest scrutiny by the Court. *Id.* Another area of content-based restriction deals with the "subject-matter" restrictions. *Id.* at 83. These subject-matter restrictions regulate content in a broad sense, but do so without regard to individual viewpoints. *Id.*

Justice O'Connor's approach in *Leathers* stresses that the first area of viewpoint discrimination would clearly invalidate a tax at issue. *Leathers*, 111 S. Ct. at 1443. However, since the Arkansas tax at issue distinguished between scrambled satellite broadcasts and cable television, but did not make reference to any content of the mediums, the Court did not have to address the issue of a state tax system that used the subject-matter definition to define content. *Id.*

See infra notes 191-202 and accompanying text (discussing *Hearst Corp. v. Iowa Dep't. of Revenue & Finance*, 461 N.W.2d 295 (Iowa 1990), and its definition of content).

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

164. *See Hearst Corp. v. Iowa Dep't. of Revenue & Finance*, 461 N.W.2d 295, 303 (Iowa 1990) (holding Iowa tax defining newspapers for tax exemption met constitutional test), *cert.*

ination is far too complex to be discussed adequately here, but the *Leathers* case could affect the way the Court views the content-based discrimination issue.¹⁶⁵ One should bear in mind, however, that the third area of protection will be available to the media, and the Supreme Court likely will look unfavorably on statutes that make any viewpoint distinctions.¹⁶⁶

Use of the rational basis test will assist courts in keeping states from abusing the flexibility that *Leathers* gives them.¹⁶⁷ The state still must show a rational reason for treating members of the media differently. The use of the rational basis test replaces the stricter compelling interest test which almost no state tax differential could meet.¹⁶⁸ Despite the positive change that *Leathers* has brought about, however, the test could be improved by use of a heightened rational basis test.¹⁶⁹

Although the *Leathers* test, as demonstrated above, is supportable on both First Amendment constitutional grounds and policy grounds, there is one improvement that would make the three *Leathers* protections even more meaningful.¹⁷⁰ If the Supreme Court modified *Leathers* and applied a heightened rational basis test to differential taxation of the press, then the media's protection from unfair and irrational taxation would be enhanced.¹⁷¹

denied, 111 S. Ct. 1639 (1991). The Iowa Supreme Court seemed to anticipate *Leathers*, defining the use of some content in a statute as form or frequency when no viewpoint discrimination was involved. *Id.* at 303. See *Leathers v. Medlock*, 111 S. Ct. 1438, 1443 (1991) (emphasizing viewpoint discrimination as focus of Supreme Court's approach). In *Leathers* cable television was contrasted with other members of the media. *Id.* at 1438.

165. See *Leathers*, 111 S. Ct. at 1443 (stressing viewpoint discrimination as focus of Supreme Court's search); *Hearst*, 461 N.W.2d at 303 (arguing Iowa tax did not scrutinize content of periodicals).

166. See *Leathers*, 111 S. Ct. at 1443-45 (finding Arkansas tax not content-based in terms of viewpoint discrimination).

167. See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985) (applying rational basis test with heightened level of scrutiny in certain contexts).

168. See *Arkansas Writers Project v. Ragland*, 481 U.S. 221, 231 (1987) (demonstrating difficulty of meeting compelling interest test).

169. See *infra* notes 170-76 and accompanying text (suggesting improvements in *Leathers* test).

170. See *supra* notes 99-108 (supporting *Leathers* test as superior to *Ragland* or *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983)).

171. See *Cleburne*, 473 U.S. at 446 (using rational basis test to overturn local zoning ordinance). *Cleburne* involved a zoning ordinance that required a special use permit for a home for the mentally retarded. *Id.* at 447. The Supreme Court decided that the mentally retarded would not be given special status as a suspect or quasi-suspect class under the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 446. Therefore, the local zoning ordinance was subject to a rational basis test. *Id.* The Court defined rational basis as legislation "rationally related to a legitimate governmental purpose." *Id.* In applying this rational basis test, the Court seemed to use heightened scrutiny by looking closely at the state purpose and the state means. *Id.* at 447-50. The Court used a heightened rational basis test because of concerns for discrimination against the mentally retarded. *Id.* at 442-47.

This same argument is valid in examining the taxation of the press question. The press plays a vital role and therefore a Court should look carefully at state taxes on part of the press. *Leathers v. Medlock*, 111 S. Ct. 1438, 1443 (1991). This careful look can most effectively be done in the context of a heightened rational basis test, which both protects the press and

The use of a more stringent rational basis test would add more to media protection and require the states to support differential taxation with legitimate reasons and detailed arguments.¹⁷² A good example of a more stringent look at state reasons can be found in *Hearst Corp. v. Iowa Department of Revenue & Finance*.¹⁷³ This heightened rational basis approach would be consistent with *Leathers* because if state interests were not rational after a close examination, an indication would exist of some ulterior or censorial motive, the very goal that *Leathers* tried to identify and prevent.¹⁷⁴ The heightened test would allow the Court to look more carefully at state justifications.¹⁷⁵ Although the *Leathers* opinion does not require a stronger version of rational basis, it is likely that state courts, in applying *Leathers*, will adopt this approach in an effort to provide media protection.¹⁷⁶

IV. IMPACT AND REACTION

The strong reaction to *Leathers* is a testament to the sweeping nature of the decision.¹⁷⁷ The media reaction generally has been that *Leathers* is an apocalyptic event.¹⁷⁸ This is not the case. *Leathers* represents a truly necessary and positive change from the *Ragland* standard.¹⁷⁹ If the Supreme Court had continued down the road it was traveling, the long term effect

gives states a chance to justify their tax schemes as legitimate. *Hearst Corp. v. Iowa Dep't of Revenue & Finance*, 461 N.W.2d 295, 306 (Iowa 1990).

172. See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 447-50 (1985) (detailing state motives and objectives in local zoning ordinance).

173. See *Hearst Corp. v. Iowa Dep't. of Revenue & Finance*, 461 N.W.2d 295, 306 (Iowa 1990) (looking seriously at state goals and means state chose of differential taxation), *cert. denied*, 111 S. Ct. 1639 (1991). Iowa justified its differential tax exemption for newspapers by asserting an interest in encouraging reading of newspapers and administrative economy and practicality in tax structure. *Id.*

174. See *Leathers*, 111 S. Ct. at 1443-45 (searching for censorial motive).

175. See *Hearst*, 461 N.W.2d at 306 (examining Iowa's justifications for differential tax); *Leathers*, 111 S. Ct. at 1447 (declaring Arkansas tax passed rational basis test). One criticism of *Leathers* is its failure to look more closely at the justifications offered by Arkansas. *Id.*

176. See *infra* notes 219-22 and accompanying text (noting that state courts will protect press by looking carefully at state justifications for differential taxation).

177. See Dyk & Kulwicki, *supra* note 2, at 54 (noting long-term consequences of *Leathers*). Dyk and Kulwicki note that *Leathers* is "unexpected in scope and far-reaching in consequence." *Id.* Justice Marshall's dissent in *Leathers* is an indication that the majority opinion is sweeping in nature and represents more than a mere incremental change. *Leathers v. Medlock*, 111 S. Ct. 1438, 1452 (1991) (Marshall, J., dissenting).

178. See Dyk & Kulwicki, *supra* note 2, at 60 (concluding that *Leathers* will have significant negative impact on media); see also David Westin, Remarks at the Meeting of the American Bar Association Forum on Communications Law (Sept. 25, 1991) (listing negative effects of *Leathers* on media). Westin argued that some less popular media such as cable television would be taxed more by state legislatures. *Id.* Westin also expressed federalism concerns that fifty different state tax schemes would have a chilling effect on the media. *Id.*

179. See *supra* notes 99-130 and accompanying text (supporting *Leathers* on both constitutional and policy grounds).

on the media would have been surprisingly negative.¹⁸⁰ Uniform taxation of the press would have done more to harm new technologies and fledgling publications.¹⁸¹ *Minneapolis Star* and *Ragland* swept too broadly, and *Leathers* was needed to steer a more sensible course.¹⁸² Under *Leathers*, the media have lost no crucial First Amendment protections because *Leathers* retains a structure in which the press will be protected from invidious or harmful taxation.¹⁸³ The new *Leathers* test, and it is new, will, in the long run, provide for a more reasonable view of taxation of the media and its impact on the First Amendment.¹⁸⁴ Additionally, room exists for improvement in the *Leathers* approach.¹⁸⁵ As courts apply *Leathers* they likely will move toward the aforementioned heightened rational basis test of their own volition.¹⁸⁶

A. State courts

Leathers certainly will have a great impact on state court decisions dealing with states' attempts to tax members of the press differently.¹⁸⁷ In the years immediately preceding *Leathers*, several state courts came down on opposite sides of the question left open by *Ragland*.¹⁸⁸ Before the *Leathers* change in course, most state courts read the Supreme Court's taxation of the media cases broadly and struck down any differential taxes on the media.¹⁸⁹ In 1987, for example, the Louisiana Court of Appeals found that a sales tax exemption given to newspapers and denied to other publications was unconstitutional under the First Amendment.¹⁹⁰ The Louisiana court

180. See *supra* notes 117-18 and accompanying text (noting that smaller publishers might have been hurt by uniform taxation).

181. See *supra* notes 117-18 and accompanying text.

182. See *supra* notes 86-98 and accompanying text (observing how *Minneapolis Star* and *Ragland* set standards too broadly for taxation of press).

183. See *supra* notes 137-66 and accompanying text (discussing protections for media in *Leathers* test).

184. See *supra* notes 109-30 and accompanying text (supporting *Leathers* test as sensible approach to state taxation of media).

185. See *supra* notes 170-76 and accompanying text (suggesting improved test for *Leathers* using heightened rational basis).

186. See *infra* notes 219-22 (discussing prospect that states will use form of heightened rational basis test while analyzing taxation of press questions).

187. See Dyk & Kulwicki, *supra* note 2, at 54 (noting that *Leathers* will lead to increasing state litigation as state courts struggle to deal with results of new test); see also *infra* notes 190-97, 199-202 and accompanying text (reviewing state court decisions in Tennessee, Florida, Iowa, Louisiana, and New York).

188. See *infra* notes 190-97, 199-202 and accompanying text (discussing taxation of press cases in Oklahoma, New York, Iowa, Louisiana, and Tennessee).

189. See Dyk and Kulwicki, *supra* note 2, at 58 (noting that state courts often gave taxation of media decisions broad meaning); see also Richard J. Tofel, *Is Differential Taxation of Press Entities by States Constitutional?*, 73 J. TAX'N 42, 43 (1990) (noting that state courts seemed to agree with *Ragland* that intermedia differential taxation is unconstitutional).

190. See *Louisiana Life, Ltd. v. McNamara*, 504 So. 2d 900, 906 (La. Ct. App. 1987) (holding that newspaper exemption from state sales tax not applying to magazines is constitutionally impermissible).

interpreted *Minneapolis Star* broadly and found that distinctions between any members of the media for tax purposes infringes on First Amendment rights.¹⁹¹ Two years later in New York, the State Appeals Court found that a franchise tax on advertising in magazines was invalid.¹⁹² The court held that treating the broadcast media differently from the print media violated the First Amendment.¹⁹³

In two companion cases in 1990, the Supreme Court of Tennessee ruled that a state sales tax on subscriptions that exempted newspapers and not magazines violated the First Amendment.¹⁹⁴ The Florida Supreme Court agreed with the Tennessee court and found a newspaper exemption unconstitutional because magazines' First Amendment rights were violated.¹⁹⁵ Florida's interest in promoting the immediate dissemination of news did not meet the court's strict scrutiny test.¹⁹⁶ The Oklahoma Supreme Court also decided two cases in 1990 that held differential taxes violative of the First Amendment.¹⁹⁷

191. *Id.* at 902. The *McNamara* Court noted that "[a]n exemption which exempts some publications but not all publications constitutes an infringement of First and Fourteenth Amendment rights." *Id.*

192. *See McGraw-Hill, Inc. v. State Tax Comm'n*, 541 N.Y.S.2d 252, 255 (N.Y. App. Div. 1989) (holding that state advertising regulation that differentiated between broadcast media and print media is unconstitutional).

193. *Id.* at 255. The New York Court noted that "the difference in treatment between the print and broadcast media under (the New York statute) violates the 1st Amendment guarantee of freedom of the press." *Id.* New York had failed to meet the compelling interest test required to uphold the regulation. *Id.*

194. *See Newsweek, Inc. v. Celauro*, 789 S.W.2d 247, 250 (Tenn. 1990); *Southern Living, Inc. v. Celauro*, 789 S.W.2d 251, 252 (Tenn. 1990) (holding that state sales tax law that taxed some magazine subscriptions but not newspapers violates First Amendment and is not content neutral). The Tennessee Court noted poignantly in *Southern Living* that "[i]t is not a legitimate function of the government to decide which form of information furthers better the public interest." *Southern Living*, 789 S.W.2d at 253. *But see supra* notes 116-30 and accompanying text (discussing public policy arguments for why states have legitimate interest in at least assisting in diversity of information dissemination).

195. *See Department of Revenue v. Magazine Publishers of Am.*, 565 So. 2d 1304, 1306 (Fla. 1990) (holding that state sales tax on secular magazines which contained exemption for newspapers violates magazines' First Amendment rights).

196. *Id.* The Florida Court read *Minneapolis Star* and *Ragland* broadly and found that "Florida's statutory differentiation between secular magazines and newspapers for purposes of sales taxation burdens rights protected by the First Amendment." *Id.* at 1306. The Florida Court noted the danger of abuse of differential treatment of the press in taxation even if there was no improper censorial motive shown. *Id.* at 1307. In interpreting *Arkansas Writers Project v. Ragland*, 481 U.S. 221 (1987), the Court stated that "*Ragland* stands for the proposition that the First Amendment prohibits a state from identifying a class or group of publications protected by the First Amendment and imposing a differential, discriminatory tax on some members of the class or group." *Id.* This interpretation of *Ragland* was narrowed in *Leathers* by clarifying that differential taxation was prohibited when a small group was singled out, the entire press was singled out, or viewpoint discrimination existed. *See supra* notes 54-59 and accompanying text (discussing *Leathers* holding and relation to *Ragland*).

197. *See Oklahoma Broadcasters Assoc. v. Oklahoma Tax Comm'n*, 789 P.2d 1312, 1316 (Okla. 1990) (holding that imposing sales tax on broadcast licensing agreements while exempting

The state court decisions handed down before *Leathers* seemed to assume that the Supreme Court was on course to declare all differential taxation of any branch of the press impermissible under the First Amendment.¹⁹⁸ Iowa's Supreme Court, however, decided that a state tax scheme in which newspapers were exempted and magazines were not did not violate the First Amendment.¹⁹⁹ The Iowa court held that the tax differential did not discriminate between a small group of similar media members, nor was it directed at the content of the publications.²⁰⁰ The Court ruled that the Iowa tax examined the "form and frequency" of the publication and not the content.²⁰¹ Although this analysis is slightly different from the *Leathers* emphasis on viewpoint discrimination, the result is similar—states permissibly may distinguish between different types of media.²⁰²

The Supreme Court, in light of *Leathers*, has vacated the Florida decision and denied certiorari to the Iowa and Tennessee decisions.²⁰³ The denial of certiorari to the Tennessee decision may appear inconsistent with the *Leathers* result, but, considering the reliance of the Tennessee Supreme Court on the Tennessee Constitution and the heavy content-based nature of the Tennessee statute, it is not inconsistent.²⁰⁴ Instead of looking to *Ragland*, which was critical of a state's ability to exempt some segments of the media, state courts now must look to the *Leathers* test.²⁰⁵ The *Leathers*

similar agreements with radio and newspapers violated First Amendment); *Dow Jones & Co., v. Oklahoma Tax Comm'n*, 787 P.2d 843, 846 (Okla. 1990) (holding that sales and use tax exemption for newspapers and periodicals sold for less than 75 cents burdened First Amendment rights).

198. See *supra* notes 190-97 and accompanying text (discussing state court decisions on taxation of press). All of these state decisions in Oklahoma, New York, Louisiana, Tennessee and Florida actually held differential taxes which exempted one media segment subject to a compelling state interest test. *Id.*

199. *Hearst Corp. v. Iowa Dep't. of Revenue & Finance*, 461 N.W.2d 295, 306 (Iowa 1990) (holding that First Amendment does not bar state sales tax from exempting one form of media and not another and that distinction was not content-based), *cert. denied*, 111 S. Ct. 1639 (1991).

200. *Id.* at 302-03.

201. *Id.* at 303.

202. *Id.* The Iowa tax statute exempted newspapers and defined newspapers as containing "news, articles of opinion (editorials), features, advertising, or other matter regarded as of current interest." *Id.* at 300.

203. See *Newsweek, Inc. v. Celauro*, 789 S.W.2d 247, 250 (Tenn. 1990) (holding sales tax which exempted newspapers but not magazines unconstitutional), *cert. denied*, 111 S. Ct. 1639 (1991); *Hearst*, 461 N.W.2d at 306 (holding tax which exempted newspapers but not other periodicals was constitutional); *Department of Revenue v. Magazine Publishers of Am.*, 565 So. 2d 1304, 1306 (Fla. 1990) (holding newspaper exemption from sales tax unconstitutional), *vacated*, 111 S. Ct. 1614 (1991).

204. See *Celauro*, 789 S.W.2d at 252 (noting Court's reliance on Tennessee Constitution); see also *Dyk & Kulwicki*, *supra* note 2, at 58 (noting Tennessee tax discriminated on basis of content). The Tennessee statute differed from the Iowa statute at issue in *Hearst* because the Tennessee statute used more actual content in the definition. *Id.*

205. See *Dyk & Kulwicki*, *supra* note 2, at 54 (noting importance to state courts of new *Leathers* test).

test should be easy and straightforward to apply.²⁰⁶ A state tax that taxes the media differentially is constitutional if the state can show a legitimate interest achieved through rational means and if there is no censorial motive demonstrated by the legislature.²⁰⁷ State courts can look to the protections outlined by *Leathers* to determine whether censorial motive is present.²⁰⁸ Perhaps the major confusion for state courts will be how to determine if a state statute taxes the press differentially based on content to the point of viewpoint discrimination.²⁰⁹

Justice O'Connor's opinion in *Leathers* made clear that content-based discrimination did not mean that any distinctions between different segments of the media were necessarily based on content.²¹⁰ By contrast the *Ragland* Court had implied that content-based distinctions involved almost all legislative distinctions.²¹¹ The *Leathers* Court instead focused on viewpoint-based and idea-based discrimination instead of distinctions of form, frequency, or even subject-matter.²¹² State courts will have to deal with this question and address the distinction between form and content.²¹³ In *Hearst*, the Iowa Supreme Court decided that a distinction between newspapers and magazines was not content-based.²¹⁴ The *Hearst* court reached this conclusion although the definition of a newspaper in the statute was written in terms of the types of articles the publication contained.²¹⁵

206. See *Hearst Corp. v. Iowa Dep't. of Revenue & Finance*, 461 N.W.2d 295, 306 (Iowa 1990) (performing application quite similar to that of *Leathers*), *cert. denied*, 111 S. Ct. 1639 (1991). The *Hearst* case as well as *Leathers* itself reflect the straightforward nature of the rational basis test. *Id.*

207. See *supra* notes 167-68 and accompanying text (describing goals of *Leathers* test).

208. See *supra* notes 137-66 and accompanying text (outlining *Leathers* protections which search for censorial motive).

209. See *Hearst*, 461 N.W.2d at 303 (attempting to determine if Iowa tax was content-based).

210. See *Leathers v. Medlock*, 111 S. Ct. 1438, 1443 (1991) (emphasizing search for viewpoint-based discrimination). *Leathers* clearly allowed states to make distinctions between members of the media, but it remains unclear what the permissible range is for how states can define their exemptions. Viewpoint-based distinctions, such as all Republican newspapers would be unconstitutional. *Id.* at 1443. However, distinctions such as that made by Iowa in the *Hearst* case between newspapers that provide general interest news and other periodicals appear to pass the *Leathers* test. *Hearst*, 461 N.W.2d at 303.

211. See *Arkansas Writers Project v. Ragland*, 481 U.S. 221, 229-30 (1987) (emphasizing negative aspects of content-based distinctions).

212. See *Leathers*, 111 S. Ct. at 1443 (emphasizing search for viewpoint based discrimination); *Hearst Corp. v. Iowa Dep't of Revenue & Finance*, 461 N.W.2d 295, 303 (Iowa 1990) (noting form and frequency distinctions do not really involve content), *cert. denied*, 111 S. Ct. 1639 (1991); see also Stephan, *supra* note 161, at 231-50 (observing that several different definitions exist for content under First Amendment).

213. See *Hearst*, 461 N.W.2d at 303 (dealing with form and frequency distinction in state tax). The *Hearst* court's use of form and frequency is similar to the second type of content definitions, subject-matter. See Stone, *supra* note 58, at 83-84 (reviewing two types of content-based distinctions, subject-matter and viewpoint).

214. See *Hearst*, 461 N.W.2d at 303 (noting form of publication is not considered content-based distinction).

215. See *id.* at 300 (defining newspaper in Iowa statute). This statutory definition was

The expected impact of *Leathers* on state courts is that *Leathers* will remind them that concerns about content-based distinctions should be focused on distinctions based on ideas and viewpoints, not mere form or subject-matter.²¹⁶ This change in the *Leathers* test should help state courts focus on true cases of censorship and should begin to allow state legislatures more deference to craft sensible and fair tax structures.²¹⁷ State courts still may be faced with state constitutional challenges, but the Supreme Court no longer requires that state courts use a strict scrutiny examination merely because a statute contains exemptions for one form of the media yet taxes another.²¹⁸

State courts, while grappling with differential taxation of the press problems, likely will find it necessary to utilize the heightened standard of rational basis review suggested earlier.²¹⁹ To give full effect to the three protections the Supreme Court laid out in *Leathers*, states will look carefully at state justifications for evidence of censorial motive.²²⁰ Although *Leathers* will and should be the main guide for the states, to insure maximum protection for the media, state courts will likely want to look more closely than mere low level rational basis.²²¹ For example, the *Hearst* court appropriately looked closely at Iowa's justifications and at the state definition of a newspaper, and the result was a perfect example of how the *Leathers* test will likely work in practice.²²²

B. State Legislatures

The impact of the *Leathers* decision on state legislatures likely will be dramatic.²²³ In the eyes of many members of the media, states will rush to

clearly not viewpoint based, but does involve content in the broader sense, just not the sense used by *Leathers*. *Id.* at 303.

See Reply Brief on Remand for Appellant at 1 (Revenue Department), Department of Revenue v. Magazine Publishers of America, Inc., 565 So. 2d 1304 (Fla. 1990) (arguing that some examination of content in tax exemption is allowable), *vacated*, 111 S. Ct. 1614 (1991). The Revenue Commissioner in Florida noted that *Hearst* revealed that "an examination of content is not entirely foreclosed as a consideration, so long as it is not the primary focus of the determination." *Id.* This analysis of *Hearst* makes clear that at least some content language in a statutory definition is acceptable, presumably, if the primary focus is on content, viewpoint discrimination is indicated. *Id.*

216. See *Leathers v. Medlock*, 111 S. Ct. 1438, 1443 (1991) (emphasizing search for viewpoint discrimination).

217. See *supra* notes 116-30 and accompanying text (focusing on policy support for *Leathers*).

218. See *Leathers*, 111 S. Ct. at 1445 (noting Arkansas tax does not have censorial motive and therefore is not subject to strict scrutiny).

219. See *supra* notes 170-76 and accompanying text (discussing application of heightened rational basis standard).

220. See *Hearst Corp. v. Iowa Dep't. of Revenue & Finance*, 461 N.W.2d 295, 306 (Iowa 1990) (scrutinizing carefully state justifications for tax differential), *cert. denied*, 111 S. Ct. 1639 (1991); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 447-50 (1985) (scrutinizing carefully justifications for local zoning ordinance).

221. See *Hearst*, 461 N.W.2d at 306 (reviewing state justifications in order that court can be sure of result).

222. See *id.* (looking closely at state justifications for state tax differential).

223. See Dyk & Kulwicki, *supra* note 2, at 59 (noting large impact *Leathers* will have on

impose taxes on previously exempt members of the media.²²⁴ That certainly will be true in financially strapped states.²²⁵ The long-term situation, however, is likely to be less onerous to the media.²²⁶ State tax codes should begin to reflect sensible policies of flexibility and fairness.²²⁷ The suggested revision of *Leathers* to look more closely at state justifications would require state legislatures to make their intentions clear in the statutes or legislative histories.²²⁸

The issue of content-based definitions particularly becomes problematic for state legislatures in deciding how to separate similar members of the media.²²⁹ Arkansas, in the *Leathers* case, originally had taxed cable television but exempted scrambled broadcasts.²³⁰ The Supreme Court allowed this differential because the two media members were similar in content, and, therefore, no content-based discrimination was present.²³¹ Several state legislatures recently have dealt with this problem in light of *Leathers* and come to different results.²³²

The Commonwealth of Pennsylvania recently considered repealing an exemption for the press and imposing a six percent periodical tax.²³³ The proposed bill defined the term "periodical" in terms similar to the Iowa statute at issue in *Hearst*.²³⁴ The proposed tax makes distinctions as to form and frequency.²³⁵ If this tax were being reviewed under *Leathers*, the

states). Because of its new approach to taxation of the press, *Leathers* could generate a "flurry of legislative activity." *Id.*

224. See Arthur B. Sackler, Remarks at the Meeting of the American Bar Association Forum on Communications Law (Sept. 25, 1991) (observing that state governments will be more aggressive in taxing media).

225. See *id.* (noting that California and Connecticut have begun to change tax structure in light of *Leathers*).

226. See *supra* notes 109-14 and accompanying text (discussing positive impact of *Leathers* on state taxing schemes).

227. See *supra* notes 116-30 and accompanying text (advancing public policy arguments in support of *Leathers*).

228. See *supra* notes 170-76 and accompanying text (suggesting improvements in *Leathers* test by using heightened rational basis test).

229. See *Hearst Corp. v. Iowa Dep't. of Revenue & Finance*, 461 N.W.2d 295, 300 (Iowa 1990) (discussing Iowa's attempt to define newspapers), *cert. denied*, 111 S. Ct. 1639 (1991).

230. See *supra* notes 33-36 and accompanying text (discussing Arkansas sales tax on cable television and exemption for scrambled satellite broadcasting).

231. See *supra* notes 33-36 and accompanying text.

232. See *infra* notes 233-39 and accompanying text (discussing situations in California and Pennsylvania).

233. Pennsylvania House Bill 840, Sess. 1991.

234. *Id.* House Bill 840 defined periodical as "regularly published at intervals not exceeding three months, which is circulated to the generally [sic] public and which contains either matters of general interest or reports of current events of is devoted to literature, sports, the sciences, art or some other special industry or area of interest." *Id.*

235. See *Hearst Corp. v. Iowa Dep't. of Revenue & Finance*, 461 N.W.2d 295, 303 (Iowa 1990) (noting that legislature used form and frequency to define tax differential and holding differential constitutional), *cert. denied*, 111 S. Ct. 1639 (1991).

reviewing Court would have to look to state justifications and test them against the means used to differentially tax periodicals.²³⁶

The State of California repealed an exemption for newspapers and periodicals but allowed an exception for newspapers distributed without charge.²³⁷ This type of differential is an example of a state legislature using its flexibility in tax matters sensibly.²³⁸ *Leathers'* looser definition of content-based discrimination allowed the state legislature to argue that this tax exemption is constitutional.²³⁹

The potential for abuse from state legislatures always exists, but *Leathers* gives legislatures the flexibility to rationally exempt and tax members of the media like other businesses.²⁴⁰ One negative impact on state legislatures will be dealing with increased lobbying from different media organizations.²⁴¹ Some members of the media, in an effort to gain exemptions, likely will work to gain clout in state houses in hopes of bettering their position.²⁴² This increased lobbying, however, falls into the potential for abuse category.²⁴³ If the lobbying causes states to tax differentially in a censorial or irrational way, causing actual abuse, the *Leathers* test is available to protect discriminated members of the media.²⁴⁴

IV. CONCLUSION

The Supreme Court in *Minneapolis Star* moved too hastily into the taxation of the press area. After ten years of confusion and increasing litigation on the state level, the Court has used *Leathers* to pull back from its previous unwise position. In *Minneapolis Star*, the Court based its ruling on shaky constitutional grounds and ignored policy considerations. *Leathers*, while not explicitly overruling the earlier cases, limited them to more sensible

236. See *supra* notes 167-76 and accompanying text (discussing application of *Leathers* test).

237. See California A.B. 2181, Sess. 1991; Regulation 1590 (defining newspaper and periodical for purposes of state tax scheme).

238. See *supra* notes 116-30 and accompanying text (stating policy justification for allowing states tax flexibility).

239. See Opinion of Legislative Counsel of California at 8-9, *Sales and Use Taxes: Elimination of Exemptions*, (June 9, 1991) (advising that differential taxes between free and paid newspapers is constitutional under *Leathers*).

240. See *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 601 (1983) (Rehnquist, J., dissenting) (observing that Supreme Court will be able to stop actual abuse when it occurs).

241. See Arthur B. Sackler, Remarks at the Meeting of the American Bar Association Forum on Communications Law (September 25, 1991) (noting that result of *Leathers* will be increased lobbying by media). As well as increased lobbying, Sackler observed that the increased pressure on the media to lobby state legislatures would lead to internecine struggles for power between different segments of the media. *Id.*

242. *Id.*

243. See *Minneapolis Star*, 460 U.S. at 601 (Rehnquist, J., dissenting) (observing that Supreme Court can handle potential for abuse cases when they turn to actual abuse).

244. See *Leathers v. Medlock*, 111 S. Ct. 1438, 1443-45 (1991) (noting that tax falling on small number of media is suspect).

results. *Leathers* is a decision based both on policy justifications and on solid constitutional foundations.

The improvement suggested here, using a heightened rational basis test, has the potential to make the *Leathers* approach even better. Perhaps states will abuse the flexibility that *Leathers* provides and the Supreme Court will be forced to revisit the taxation of the press area. For the present, however, the Court is wise to pull back from strict scrutiny and let the states and the press work together to achieve fair taxation and a free press. *Leathers* can be a victory for both the press and the states.

ROBERT M. HOWIE