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First Amendment Limits on the Use of Taxes to Subsidize Selectively the Media

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NOTES

FIRST AMENDMENT LIMITS ON THE USE OF TAXES TO SUBSIDIZE SELECTIVELY THE MEDIA

INTRODUCTION

Taxation and the First Amendment usually involve separate legal questions. Of course, every tax potentially impacts upon speech, insofar as each dollar the government takes from an individual taxpayer leaves less for that taxpayer to use towards speech activities, such as purchasing a newspaper, going to the theater, or writing to a local representative. When the press is the direct subject of the tax, First Amendment implications may not be readily apparent, particularly to tax collectors and judges.

However, starting with the 1983 decision of *Minneapolis Star v. Minnesota Commissioner of Revenue*,[1] the Supreme Court began emphasizing that state taxation schemes must treat the institutional press with care. *Minneapolis Star* prohibited taxes directed solely at the press or small groups within the press.[2] Subsequent state court decisions interpreted this holding to invalidate virtually any tax that established less than absolute equality among members of the press, including the broadcast media.[3] As a result, scores of state tax laws that privileged certain sectors of the press fell under judicial scrutiny at a time when states were scrambling to find new sources of revenue.[4]

The recent case of *Leathers v. Medlock*[5] settled many of these problems and significantly reduced the scope of the *Minneapolis Star* decision. After *Medlock*, only those differential taxes that pose a significant danger of censorial abuse warrant heightened judicial scrutiny.[6] *Medlock* raises two recurring issues in First Amendment analysis. First, because the tax at issue favored the traditional print

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1 460 U.S. 575 (1983).

2 *See infra* notes 35-46 and accompanying text.

3 *See infra* notes 60-67 and accompanying text.

4 Most states have tax structures that impact upon the media differentially in some way; for example, through a newspaper exception to a sales tax, through a tax on advertising sales, or through a manufacturing exemption which is granted to one medium (e.g., newspapers) but not others (e.g., broadcasting). *See* 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, 87-88 (1985).

5 111 S. Ct. 1438 (1991).

6 *Id.* at 1447; *see infra* notes 68-93 and accompanying text.

media at the expense of cable television,[7] an analysis of *Medlock* must consider the problems of intermedia discrimination and the First Amendment status of the broadcast media, as well as whether the Press Clause grants special protections to either broadcast or print media. Second, *Medlock* raises the problem of the government participanting in the marketplace of ideas, not as a censor, but rather as an advocate, thus using its power to subsidize certain speech or speakers to the exclusion of others.

This Note considers the remaining limits on the differential taxation of the media after *Medlock*. Part I surveys the history of taxation of the media prior to *Medlock*, including basic principles of taxation as they affect free speech in general. Part II examines *Medlock* and considers how it addresses some of the problems posed by taxation of the media. Part III describes some of the inadequacies of the *Medlock* test, particularly its failure to consider that a differential tax may still have a detrimental effect on access to the unique content of cable television, regardless of any possible legislative censorial motive. This Note concludes that the usual deference accorded tax statutes is not appropriate where differential taxation distorts the media market, and that the *Medlock* Court failed to appreciate fully the power of differential taxes to infringe upon the First Amendment rights of the media.

I
BACKGROUND

A. Constitutional Origins and the Press Clause

Judicial review of taxation has a mixed history. On the one hand, opposition to unfair taxation played a central role in the American Revolution.[8] Evidence indicates that the Framers were gravely concerned about differential taxation of the press.[9] The Press Clause was a reaction to the colonists' experiences with cen-

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7 Cable systems receive television or radio signals through antennae, process and feed the signals into a distribution network consisting of cables strung along utility poles or in underground pipes, and carry the signals to subscribers. They are thus primarily systems of distribution, but particularly significant ones because they provide a far greater number of channels and consequently greater diversity of programming than conventional commercial television. *See* DANIEL L. BRENNER ET AL., CABLE TELEVISION AND OTHER NONBROADCAST VIDEO: LAW AND POLICY § 1.03 (1989).

8 *See* PHILIP DAVIDSON, PROPAGANDA AND THE AMERICAN REVOLUTION, 1763-1783 226 (1941); MARC EGNAL, A MIGHTY EMPIRE: THE ORIGINS OF THE AMERICAN REVOLUTION 3 (1988); EDMUND S. MORGAN & HELEN M. MORGAN, THE STAMP ACT CRISIS: PROLOGUE TO REVOLUTION 292-96 (1953).

9 *See* 3 HERBERT J. STORING, THE COMPLETE ANTI-FEDERALIST 65, 81-82 (1981). Alexander Hamilton noted and attempted to refute this argument for press protection from taxation through the Bill of Rights. *See* THE FEDERALIST No. 84, at 477 n.80 (Alexander Hamilton) (Isaac Kramnick ed., 1987).

sorship at the hands of the British monarch.[10] In addition, a crucial early Supreme Court decision in the establishment of federal government powers, *McCulloch v. Maryland*, developed federal immunity to state taxation and declared that "the power to tax involves the power to destroy."[11]

On the other hand, the Supreme Court has long been reluctant to subject tax classifications to rigorous review, reflecting both government's vital need to secure revenues and the relatively disfavored status of property right claims usually involved in tax challenges.[12] Prior to *Grosjean v. American Press Co.*,[13] cases concerning taxation and freedom of the press were rare and treated summa-

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10 The Framers reacted to history and experience with the British government's use of taxes to control the press and to make access more difficult for the masses. Among the most effective means used by the British to restrict the press was the Stamp Tax, much hated by American publishers and revolutionaries alike. *See* EDWIN EMERY, THE PRESS AND AMERICA: AN INTERPRETIVE HISTORY OF THE MASS MEDIA 15 (1972); LEONARD W. LEVY, FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY: LEGACY OF SUPPRESSION 123-24 (1963); FREDERICK S. SIEBERT, FREEDOM OF THE PRESS IN ENGLAND, 1476-1776 322 (1965); David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455 (1983).

11 17 U.S. (4 Wheat.) 316, 431 (1819).

12 *See* Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 359 (1973) ("Where taxation is concerned and no specific federal right, apart from equal protection, is imperiled, the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation."); Allied Stores of Ohio v. Bowers, 358 U.S. 522, 526-27 (1959) ("The State may impose different specific taxes upon different trades and professions and may vary the rate of excise upon various products. It is not required to resort to close distinction or to maintain a precise, scientific uniformity with reference to composition, use or value."); *see also* Regan v. Taxation With Representation of Wash., 461 U.S. 540 (1983); Madden v. Kentucky, 309 U.S. 83, 87-88 (1940); Carmichael v. Southern Coal & Coke Co., 301 U.S. 495 (1937); State Bd. of Tax Comm'rs v. Jackson, 283 U.S. 527 (1931); Ohio Oil Co. v. Conway, 281 U.S. 146 (1930); Brown-Forman Co. v. Kentucky, 217 U.S. 563 (1910). *But see* Allegheny Pittsburgh Coal Co. v. Webster County Comm'n, 488 U.S. 336 (1989).

Disparate state classifications frequently reflect an aim to regulate or support certain industries or products. In fact, the Court has in the past recoguized, and deferred to, the regulatory purpose behind a system of taxation. *See* United States v. Sanchez, 340 U.S. 42, 44 (1950) ("[A] tax does not cease to be valid merely because it regulates, discourages, or even definitely deters the activities taxed."); Veazie Bank v. Fenno, 75 U.S. 533 (1869) (federal tax designed to drive state bank notes out of circulation); *cf.* Bailey v. Drexel Furniture Co., 259 U.S. 20 (1922) (federal tax on manufacturers who knowingly employ child labor held unconstitutional as a regulation beyond the federal government's commerce power). Such economic regulations are now subject to highly deferential equal protection review. *See* New Orleans v. Dukes, 427 U.S. 297 (1976); Railway Express Agency v. New York, 336 U.S. 106 (1949).

Taxes that discriminate against interstate commerce are a notable exception to this usual rule of federal court deference. *See* American Trucking Ass'ns v. Scheiner, 483 U.S. 266 (1987); Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981); Complete Auto Transit v. Brady, 430 U.S. 274 (1977); Walter Hellerstein, *State Taxation and the Supreme Court*, 1989 SUP. CT. REV. 223; Simon, *supra* note 4, at 84-86; Steven M. Cohen, Note, *A Tax on Advertising: First Amendment and Commerce Clause Implications*, 63 N.Y.U. L. REV. 810 (1988).

13 297 U.S. 233 (1936).

rily. In *Norfolk v. Norfolk Landmark Publishing Co.*,[14] the Virginia Supreme Court denied a challenge under the state constitution to a municipal tax directed solely at the press. *Preston v. Finley*[15] upheld a Texas occupation tax on newspapers with minimal discussion of the state constitution's press clause. These early cases preceded incorporation of the First Amendment to cover the states, and therefore relied only on interpretations of state constitutional guarantees.[16]

B. Evolution of First Amendment Limits on Taxation

1. *Grosjean v. American Press Co.*

The first case under the Federal Constitution dealing with the peculiar problem of taxing the press is *Grosjean v. American Press Co.*[17] *Grosjean* represents an example of a tax imposed by the legislature with an intent to penalize a group of newspapers because of their editorial content. In 1934, Louisiana imposed a license tax of two percent on gross receipts from the sale of advertising in newspapers with a weekly circulation in excess of 20,000.[18] Only thirteen newspapers fit this description, twelve of which had sharply criticized the powerful Senator Huey Long in a recent election.[19] Although it did not explicitly cite legislative censorial motive in striking down the tax, the Court did note that:

> [the tax here involved] is bad 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 to which the public is entitled in virtue of its constitutional guaranties.[20]

Many subsequent cases looked to this language, making *Grosjean*'s application dependent on a finding of legislative intent to censor newspaper content.[21]

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14 28 S.E. 959 (Va. Ct. App. 1898).

15 72 F. 850 (C.C.W.D. Tex. 1896).

16 The incorporation doctrine can be traced to dictum in Gitlow v. New York, 268 U.S. 652 (1925). Among the first cases to apply explicitly First Amendment standards to state conduct were Near v. Minnesota, 283 U.S. 697 (1931), and Grosjean v. American Press Co., 297 U.S. 233 (1936).

17 297 U.S. 233 (1936).

18 *Id.* at 240.

19 *Id.* at 238; *see also* Minneapolis Star v. Minnesota Comm'r of Revenue, 460 U.S. 575, 579-80 (1983).

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

21 The Supreme Court itself had been inconsistent as to whether malevolent legislative intent was decisive in *Grosjean*. *Compare* United States v. O'Brien, 391 U.S. 367, 384-85 (1968) (legislative intent irrelevant) *with* Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 383 (1973) (legislative intent to censor necessary). *Minneapolis Star* settled the question and declined to rely on *Grosjean* where a legislative intent to penalize newspapers for content is lacking. 460 U.S. 575, 580 (1983).

The *Grosjean* Court relied on two additional rationales in finding the tax infirm under the First Amendment: it had a tendency to restrict circulation and it was targeted only at the press.[22] The Court strongly suggested that the states may subject the press to taxes of general applicability: "It is not intended by anything we have said to suggest that the owners of newspapers are immune from any of the ordinary forms of taxation for support of the government."[23]

2. *Subsequent State Court Cases*

After *Grosjean*, some state court opinions also required that the challenger of a tax on the press prove it to be a deliberate device to censor or penalize the media.[24] Most courts, however, did not require a showing of malevolent motive and read *Grosjean* to limit taxes of the press to those of general applicability. For example, the Maryland Court of Appeals struck down a city ordinance taxing the sale of advertising in newspapers, radio, television, and billboards.[25] The court held that "the question of ulterior motive . . . was [not], alone, controlling in the *Grosjean* case."[26] A tax directed solely at the press, the court claimed, violates the First Amendment regardless of the purity of the legislature's intent.[27] Other courts used the same rationale to uphold the application of general tax schemes to the press.[28] Plaintiffs also relied frequently on *Grosjean* in cases involving media other than newspapers[29] or concerning regulations other than taxation.[30]

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22 *Grosjean*, 297 U.S. at 244-45.

23 *Id.* at 250.

24 *See, e.g.*, Giragi v. Moore, 64 P.2d 819, 823 (Ariz. 1937) (Lockwood, J., concurring); Westinghouse Broadcasting Co. v. Comm'r of Revenue, 416 N.E.2d 191 (Mass. 1981).

25 Baltimore v. A.S. Abell Co., 145 A.2d 111 (Md. 1958).

26 *Id.* at 119.

27 *Id.*

28 *See, e.g.*, Giragi v. Moore, 64 P.2d 819 (Ariz. 1937) (general sales tax as applied to newspapers); Tampa Times Co. v. Tampa, 29 So.2d 368 (Fla. 1947) (license tax directed at newspapers but considered part of general tax system levied on businesses); Steinbeck v. Gerosa, 151 N.E.2d 170 (N.Y. 1958) (state gross receipts tax as applied to income earned from the sale of an author's books). Over this period, the Supreme Court also upheld numerous general regulations as applied to the press. *See* Branzburg v. Hayes, 408 U.S. 665 (1972) (the enforcement of subpoenas); Mabee v. White Plains Publishing Co., 327 U.S. 178 (1946) (the Fair Labor Standards Act); Associated Press v. United States, 326 U.S. 1 (1945) (the antitrust laws); Associated Press v. NLRB, 301 U.S. 103 (1937) (the National Labor Relations Act).

29 *See, e.g.*, Weaver v. Jordan, 411 P.2d 289 (Cal. 1966) (holding total ban on pay television transmissions unconstitutional under First Amendment).

30 *See, e.g.*, Garcia v. Tully, 377 N.E.2d 10 (Ill. 1978) (denial of challenge to a state law giving government discretion to choose which newspapers could publish tax assessment lists).

3. *Taxation and Individual Speech*

In the period between *Grosjean* and *Minneapolis Star*, the Supreme Court decided several important cases dealing with taxation and individual speech. In *Speiser v. Randall*,[31] the Court found a California law requiring a loyalty oath in order to receive a property tax exemption unconstitutional under the First Amendment. The case developed the unconstitutional conditions doctrine: a state may not condition benefits on the sacrifice of constitutional rights, since such a condition has the same effect as if the state had directly punished the person for engaging in the speech.[32] The Court also relied on the discriminatory content of the state's requirement, as it was " 'aimed at the suppression of dangerous ideas.' "[33] The next year, in *Cammarano v. United States*,[34] the Court sustained an Internal Revenue Service regulation that denied a tax deduction for the lobbying expenses of businesses. The Court held that government does not have any obligation to subsidize a citizen's speech activities. The case was distinguished from *Speiser* because Cammarano was not denied an unrelated deduction due to a disfavored viewpoint.

C. The *Minneapolis Star/Taxation With Representation* Conflict

1. *Minneapolis Star*

In *Minneapolis Star v. Minnesota Comm'r of Revenue*[35] the Supreme Court rejected the notion that a tax scheme violated the First Amendment only if proven to have a censorial motive, stating that "[i]llicit legislative intent is not the *sine qua non* of a violation of the First Amendment."[36] The state of Minnesota exempted newspapers from its retail sales tax, but in 1971 the state legislature enacted a special "use tax" on the cost of paper and ink products consumed in the production of a newspaper.[37] Other businesses that used ink and paper were not subject to this tax but did pay a general sales tax on these items. Three years later, the state legislature amended the use tax to exempt a publication's first $100,000 of ink and paper.[38] As a result, small newspapers did not pay the tax. In 1974, for example, only eleven publications incurred use tax liability. The Min-

31 357 U.S. 513 (1958).

32 *Id.* at 518; *see infra* note 172 for more on the unconstitutional conditions doctrine.

33 *Id.* at 519 (quoting American Communications Ass'n v. Douds, 339 U.S. 382, 402 (1950)).

34 358 U.S. 498 (1959).

35 460 U.S. 575 (1983).

36 *Id.* at 592.

37 *Id.* at 577.

38 *Id.* at 578.

neapolis Star & Tribune Company accounted for roughly two-thirds of the revenue raised by the tax.[39]

Holding that the state could easily abuse the differential nature of the use tax, the Court struck down the tax and asserted that the tax presented newspapers with the constant threat of censorship.[40] The Court found the differential nature of the tax invidious in two respects. First, the state levied a tax on the press that was not applicable to the business community at large.[41] Second, the state taxed individual members of the same medium differently due to the $100,000 exemption, thus targeting a small group of newspapers.[42]

The Court concluded that such a disparate tax scheme presented a situation ripe for abuse, giving the legislature leverage to control and constrain the content of affected newspapers. In fact, the mere differential structure of the use tax rendered it unconstitutional.[43] Viewing the courts as institutions "poorly equipped to evaluate with precision the relative burdens of various methods of taxation,"[44] the Court refused to consider whether the tax in effect burdened the press more than other businesses. Consequently, under *Minneapolis Star*, differential tax treatment of the press is presumptively invalid, requiring a state to present a compelling objective that necessitates such treatment.[45] The need to raise revenue,

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39 *Id.*

40 *Id.* at 585.

41 *Id.* at 586.

42 *Id.* at 591. In dissent, Justice Rehnquist argued that the exemption did not create a differential burden because all newspapers benefited from the same $4000 credit due to the exemption. *Id.* at 603 (Rehnquist, J., dissenting). In effect, however, the tax gave the state strong leverage over the large newspapers subject to the tax, especially the Minneapolis Star & Tribune Company, which accounted for approximately two-thirds of the total revenue derived from the use tax.

43 Both the dissent and commentators criticized the Court's finding of a First Amendment violation without an actual intent or the effect of altering content. *See* Simon, *supra* note 4, at 75-76. Justice Rehnquist termed it "unprecedented and unwarranted." 460 U.S. at 598 (Rehnquist, J., dissenting).

Parallels, however, can be drawn to previous cases striking down vague statutes which vested standardless discretion in government officials in permitting speech in a public forum. In such cases, the Court strictly scrutinizes regulations that are content-neutral because of a fear of abuse and of a possible "chilling effect" on protected speech. *See, e.g.*, Coates v. Cincinnati, 402 U.S. 611 (1971); Shuttlesworth v. Birmingham, 394 U.S. 147 (1969); Niemotko v. Maryland, 340 U.S. 268 (1951); Lovell v. Griffin, 303 U.S. 444 (1938); *cf.* Cox v. New Hampshire, 312 U.S. 569 (1941) (Court upheld state licensing scheme for parades and marches but only after state court gave statute limiting construction to remove discretion of licensing authorities).

44 460 U.S. at 589. In dissent, Justice Rehnquist showed no such reluctance to analyze the relative tax burdens. In fact, he concluded that the use tax benefited the press by lowering its taxes relative to other businesses subject to the general sales tax. *Id.* at 598 (Rehnquist, J., dissenting). Also, compare *Minneapolis Star* with Washington v. United States, 460 U.S. 536 (1983), in which the Court willingly analyzed the effect of a state tax and sustained it from challenge under the Supremacy Clause.

45 460 U.S. at 585.

ordinarily sufficient to sustain any classification for tax purposes, does not justify special treatment of the press.[46]

2. *Regan v. Taxation With Representation of Washington*

Two months after *Minneapolis Star*, the Supreme Court upheld a scheme that employed differential taxation of individual speakers in a context even more ripe for discrimination on the basis of content. In *Regan v. Taxation With Representation of Washington*[47] [hereinafter *TWR*], the Court upheld I.R.C. section 501(c)(3), which denies a certain type of tax-exempt status to charitable organizations for whom lobbying constitutes a substantial part of their activities.[48] Lobbying organizations may still achieve tax-exempt status under section 501(c)(4), but, unlike those under section 501(c)(3), such organizations may not receive tax deductible charitable contributions.[49] Crucial to the Court's analysis was the assumption that TWR could reorganize in dual structure, with a section 501(c)(3) organization conducting nonlobbying activities and a section 501(c)(4) affiliate conducting lobbying activities.[50] Otherwise, TWR would have been denied a benefit based on the exercise of a constitutional right, presumably contrary to the rule in *Speiser*.[51] Tax deductible contributions could be directed to the section 501(c)(3) organization as long as the section 501(c)(3) organization did not subsidize the section 501(c)(4) affiliate.[52] The Internal Revenue Code also created a discriminatory tax structure because, under section 170(c)(3), taxpayers could deduct contributions to veterans' organizations regardless of how much those organizations lobbied.[53]

The Court first concluded that this differential tax treatment did not infringe upon the respondent's First Amendment liberties.

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46 *Id.* at 586.

47 461 U.S. 540 (1983).

48 461 U.S. at 543.

49 26 U.S.C. § 501(c)(3) (1988) contains a general description of charitable organizations, and includes a ban on lobbying and participation in political campaigning. By contrast, § 501(c)(4) only includes organizations "operated exclusively for the promotion of social welfare," and does not limit lobbying. Both types of organizations are tax-exempt, but any organization disqualified from § 501(c)(3) status by reason of lobbying activities cannot receive tax-deductible charitable contributions. § 170(c). The Court decided *TWR* under the assumption that a lobbying affiliate could readily qualify for § 501(c)(4) status. 461 U.S. at 544.

50 461 U.S. at 544.

51 *See supra* notes 31-33 and accompanying text. For confirmation that inability to form a dual structure would change the *TWR* result and lead to a violation of the unconstitutional conditions doctrine, see FCC v. League of Women Voters of Cal., 468 U.S. 364 (1984) (striking down a federal law banning editorializing by public broadcasting stations receiving federal funds).

52 461 U.S. at 544.

53 *Id.* at 546.

It considered an exemption under section 501(c)(3) and the accompanying access to deductible contributions as, in effect, a government subsidy for speech activities.[54] Congress has virtually complete discretion to choose which speech to subsidize, based on content or any other factors. Whether government support comes from a direct grant or a tax exemption is irrelevant.[55] The Court also considered an equal protection challenge to the statute, but because it had already decided that the statute did not infringe on speech rights, it applied only a rational basis standard of review.[56] Given the broad legislative discretion in creating tax classifications and the legitimate goal of rewarding veterans for their service, the differential tax structure easily satisfied this level of review.[57]

Minneapolis Star and *TWR* are not easily reconciled. The second prong of *Minneapolis Star*, barring differential taxation within a medium, is susceptible to a *TWR* analysis. That is, the tax exemption benefiting small newspapers operated as a government subsidy. Under the reasoning of *TWR*, the state did not infringe Minneapolis Star & Tribune Company's First Amendment rights merely because the company did not receive such a subsidy. In addition, while the *Minneapolis Star* Court feared that such a differential tax structure would present a significant risk of content-based abuse, the same Court in *TWR* made it clear that a government is free to grant or refuse subsidies on the basis of content.

Minneapolis Star might be reconciled with *TWR* in two ways. First, *Minneapolis Star* may represent a case where the First Amendment affords special protections to the press.[58] Second, the structure and applicability of the tax in *TWR* may be distinguished from that in *Minneapolis Star*.[59] In part, *Leathers v. Medlock* may be viewed as an attempt to reconcile these two cases based on the second rationale.

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54 *Id.* at 544-45.

55 *Id.* at 548-50. For more on subsidies and the First Amendment, see *infra* notes 172-92 and accompanying text.

56 *Id.* at 546-48.

57 *Id.* at 547-48, 550-51.

58 460 U.S. 575, 585 (1983); *see infra* notes 195-98 and accompanying text.

59 The tax at issue in *Minneapolis Star* was inherently more dangerous because it lacked general applicability and was directed at a small number of publications. By contrast, the I.R.C. provisions upheld in *TWR* applied to all nonveterans charitable organizations in the country. *See infra* notes 82-85 and accompanying text.

D. *Ragland* and Subsequent State Court Approaches to Differential Intermedia Taxation

The Court clarified the problematic second prong of *Minneapolis Star* in *Arkansas Writers' Project, Inc. v. Ragland*.[60] Arkansas imposed a tax on receipts from sales of tangible personal property but exempted newspapers and " 'religious, professional, trade and sports journals and/or publications printed and published within this State . . . when sold through regular subscriptions.' "[61] The appellant in *Ragland* published a general interest magazine that did not qualify for the magazine exemption. Not only did the tax discriminate within a medium, as in *Minneapolis Star*, but it did so on the basis of the magazine's contents.[62] The Court struck down the tax, finding that it failed to meet the strict scrutiny standard that *Minneapolis Star* required.

Because the *Ragland* Court decided the case based on the selective application of the tax to magazines, it declined to address whether "a distinction between different types of periodicals presents an additional basis for invalidating the sales tax."[63] Subsequent state court decisions, however, extended the *Minneapolis Star/Ragland* rationale to intermedia tax discrimination. Such cases defined the institutional press to include not only newspapers but also magazines and broadcasters. These courts struck down any differential taxation within the press based on this definition.

In *Oklahoma Broadcaster's Association v. Oklahoma Tax Commission*,[64] for example, the court invalidated a state sales tax on advertising revenue that applied to the broadcast media but exempted the print media. A New York appellate court found unconstitutional the opposite situation—a state tax on advertising revenue from magazines but not from broadcasters.[65] Finally, a Louisiana appellate court, addressing the question that *Ragland* avoided, struck down a tax that treated newspapers differently from magazines.[66] On the surface, the invalidity of such intermedia discrimination seems the logical extension of *Minneapolis Star* and *Ragland*. After all, television and magazines generally provide information services similar to newspapers. As the court in *Oklahoma Broadcaster's Ass'n* noted, "[t]he First

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60 481 U.S. 221 (1987).

61 *Id.* at 224.

62 *Id.* at 229-30. The Arkansas tax also targeted only a small segment of the press, because, at most, three magazines paid the tax. *Id.* at 229 n.4.

63 *Id.* at 233.

64 789 P.2d 1312 (Okla. 1990).

65 McGraw-Hill v. State Tax Comm'n, 541 N.Y.S.2d 252 (3d Dep't 1989), *aff'd*, 552 N.E.2d 163 (N.Y. 1990).

66 Louisiana Life, Ltd. v. McNamara, 504 So. 2d 900 (La. Ct. App. 1987).

Amendment guarantees freedom of the press—not just the *printed* press."[67]

II

LEATHERS V. MEDLOCK

The Supreme Court finally faced the problem of intermedia differentiation in *Leathers v. Medlock*.[68] As in *Ragland*, this case concerned Arkansas' Gross Receipts Act, which placed a 4% tax on receipts from the sale of all tangible personal property and certain services.[69] The statute expressly exempted subscription and over-the-counter newspaper sales as well as subscription magazine sales.[70] Originally, the Court held that the statute did not cover cable or satellite television services. In 1987, however, the Arkansas legislature amended the Act to impose a sales tax on cable television. The Act was applied to satellite television two years later.[71]

Immediately after the Act was amended, a number of cable companies and subscribers brought a class action suit in the Arkansas Chancery Court to challenge the constitutionality of extending the sales tax to cable. The complaint was based on the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. The Chancery Court upheld the Act based on cable's necessary use of a public right-of-way. The Arkansas Supreme Court rejected this decision because the cable companies already paid a franchise fee for access to the right-of-way.[72] The Arkansas court distinguished between differential *intramedia* taxation and differential *intermedia* taxation, and held only the former unconstitutional.[73] Defining cable and satellite television as part of the same media, the court held that the tax was only unconstitutional under the First Amendment for the period during which cable, but not satellite television, was subjected to the tax.[74] Both the cable companies and the Arkansas Commissioner of Revenue petitioned the Supreme Court for certiorari.[75]

The Court affirmed the Arkansas decision and reversed the trend toward invalidating all differential intermedia taxation.[76] The Court interpreted *Minneapolis Star* and *Ragland* as not questioning all

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67 789 P.2d at 1316.
68 111 S. Ct. 1438 (1991).
69 *Id.* at 1441.
70 *Id.*
71 *Id.*
72 *Id.* at 1442.
73 *Id.*
74 *Id.*
75 *Id.*
76 *Id.* at 1447.

differential taxation within the institutional media. Instead, the Court held that these cases only require examination of those differential tax structures that suggest a strong probability of government censorship.[77]

Three factors dictate when differential taxation warrants heightened judicial scrutiny. First, relying on the first prong of *Minneapolis Star*, the tax must be one of general applicability and may not target the press as an institution separate from other businesses.[78] Second, under *Ragland*, the state must not draw a content-based distinction.[79] Finally, the targeted segment of the media should be large enough so that intentional interference with its First Amendment activities is unlikely.[80]

The *Medlock* Court found little danger of censorship or other curtailment of First Amendment liberties for two reasons.[81] First, Arkansas subjected nearly 100 cable television companies to a generally applicable sales tax. Second, cable programming does not differ systematically from the content of newspapers or magazines.

Based on these distinctions, the Court largely reconciled *TWR* with *Minneapolis Star*. The tax in *TWR* subjected all nonveterans' lobbying organizations to a generally applicable tax scheme, while the Minnesota tax subjected a small number of large newspapers to a special tax directed at the press.[82] In fact, the *Medlock* Court specifically relied on *TWR* for the proposition that a tax scheme discriminating among speakers does not infringe upon First Amendment liberties unless it does so on the basis of content.[83] The Court concluded that "differential taxation of speakers, even members of the press, does not implicate the First Amendment unless the tax is directed at, or presents the danger of suppressing, particular ideas."[84] Thus, the Court concluded that the cable companies did not have a cognizable First Amendment claim, but remanded to the Arkansas Supreme Court for consideration of the equal protection issue.[85] Unlike the Arkansas courts, the majority did not term the problem as one of intermedia taxation, but as a tax "that excludes or exempts certain segments of the media but not others."[86] Presumably, the Court intends for its test to apply re-

77 *Id.* at 1443.
78 *Id.*
79 *Id.* at 1444.
80 *Id.* at 1443-44.
81 *Id.* at 1444-45.
82 *Id.*
83 *Id.* at 1445.
84 *Id.* at 1447.
85 *Id.*
86 *Id.* at 1441.

gardless of the intermedia context. Unfortunately, this approach ignores the significance of the state choosing to discriminate on the basis of medium and the important content effects of this discrimination.[87]

In dissent, Justice Marshall, joined by Justice Blackmun, agreed that *Ragland* had not answered the question of intermedia tax discrimination, but advocated an approach that would largely include the Arkansas tax under the *Minneapolis Star/Ragland* test. Marshall's approach focused on the potential for impeding the free flow of ideas and distorting "consumer preferences for particular information formats."[88] Thus, Marshall would concentrate on a tax statute potential effect on content, regardless of possible legislative motive. Because cable offers unique programming contributions, differential taxation affects consumer access to that programming and creates a potential for abuse under the *Minneapolis Star* framework.[89] Marshall also criticized the majority's "small number of speakers test" as vague in identifying what number will heighten the Court's scrutiny.[90] He also believed the majority was misapplying the test facts since cable operators do not function as a state-wide information market, but rather hold local monopolies.[91]

To summarize, the *Medlock* Court synthesized the facts of *Minneapolis Star* and *Ragland*, devising a three part test by which differential taxation of the media is judged. A court must apply strict scrutiny if any one of three elements is present: the tax lacks general applicability; the tax is based on content; or the tax is targeted at a small number of the media.[92] This test seeks to identify those situations that the Court considers to present an intolerable threat of state censorship.[93] Therefore, although the Court does not require proof of actual censorial intent, its analysis is only one step removed from such a requirement. The test emphasizes the possibility of using taxes to control content and presumes bad intent whenever one of the three factors is found. In this manner, the

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87 Justice Marshall noted this point in his dissenting opinion. *Id.* at 1452. For the Arkansas Supreme Court's emphasis on the difference between intermedia and intramedia tax discrimination in this case, see Medlock v. Pledger, 785 S.W.2d 202, 204 (Ark. 1990).

88 *Medlock*, 111 S. Ct. at 1450.

89 *Id.* at 1451.

90 *Id.*

91 *Id.* at 1451-52.

92 *Id.* at 1443-44. For a recent case drawing on the second strand of *Medlock*, see Simon & Schuster v. N.Y. State Crime Victims Bd., 112 S. Ct. 501 (1991) (striking down New York's "Son of Sam" law, which required the surrender of income derived from a wrongdoer's speech about a crime committed).

93 *Medlock*, 111 S. Ct. at 1447.

Court has all but resurrected the *Grosjean* intent requirement,[94] while failing to consider the possibility of a differential tax infringing on the freedom of the press even when a motive of state censorship is unlikely.

III
DISCUSSION

A. *Medlock* and Content Discrimination

1. *Censorship and Content Discrimination*

The *Medlock* test is well-adapted in preventing illicit legislative intent, the primary concern of the *Minneapolis Star* Court.[95] A generally applicable tax removes the state's potential leverage by assuring that any change in the taxation of the medium must similarly affect all other businesses subject to the tax.[96] Similarly, the larger and more diverse the segment of media affected by the tax, the less likely the legislature will be able to direct taxes at offending publications or broadcasters. Consequently, concern with possible content discrimination and a refusal to subject the Arkansas tax to strict scrutiny underlie the Court's decision in *Medlock*.

Indeed, a government regulation stated in terms of content normally requires the most exacting level of court scrutiny.[97] Facially neutral restraints on content expression usually require a less stringent level of review, which is satisfied by a showing of reasonable or significant government interests.[98] The *Minneapolis Star* line of cases is unique in subjecting content neutral statutes to strict scrutiny based on the mere potential for content censorship.

2. *Subject Matter Discrimination*

Within the area of content discrimination, a distinction has been drawn between discrimination of viewpoint and discrimination of subject matter.[99] Viewpoint discrimination involves a govern-

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94 *See supra* notes 17-23 and accompanying text.

95 460 U.S. 575, 585 (1983).

96 This point illustrates the salutary nature of the equal protection guarantee, as noted by Justice Jackson in Railway Express Agency v. New York, 336 U.S. 106, 112 (1949) (Jackson, J., concurring). In *Medlock*, it is actually the exempted newspapers and magazines that are singled out for "special" treatment and thus still susceptible to legislative pressure.

97 *See, e.g.*, Simon & Schuster v. N.Y. States Crime Victims Bd., 112 S. Ct. 501 (1991); Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221 (1987); Consolidated Edison Co. of N.Y. v. Public Serv. Comm'n, 447 U.S. 530 (1980); Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972).

98 *See Consolidated Edison Co. of N.Y.*, 447 U.S. at 536; Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 190 (1983).

99 Geoffrey R. Stone, *Restrictions of Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. CHI. L. REV. 81, 88 (1978); *see also Consolidated Edison Co. of*

ment regulation aimed at suppressing a particular position on a given topic. Through subject matter discrimination, government limits debate on an entire topic regardless of position. A subject matter restraint can often serve as a convenient proxy for viewpoint discrimination. For example, *Police Department of Chicago v. Mosley*[100] involved a statute barring all picketing near a school except labor picketing. While the legislature drew a subject matter distinction, it realized that only labor picketing would be by unions representing a particular point of view. In *Mosley*, the Court stated that "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[101] Similarly, the Court in *Ragland* found the state's differential tax particularly invidious because it made a subject matter distinction.[102]

Professor Stone criticizes this equation of subject matter with viewpoint in the context of content discrimination by pointing to the Court's inconsistent application.[103] Stone argues that the Court applies heightened scrutiny to content-based restrictions because such restrictions uniquely distort the "marketplace of ideas" and are likely the product of illegitimate legislative motive.[104] According to Stone, however, these factors basically only forcefully apply to viewpoint distinctions. In most cases, lower scrutiny will suffice to control subject matter discrimination.[105]

N.Y., 447 U.S. at 545-46 (Stevens, J., concurring) (noting that many legitimate time, manner, and place restrictions must be drafted in terms of subject matter, such as argument before a court or speech in a classroom); Laura V. Farthing, Note, Arkansas Writers' Project v. Ragland: *The Limits of Content Discrimination Analysis*, 78 GEO. L.J. 1949 (1990).

100 408 U.S. 92 (1972).

101 *Id.* at 95.

102 481 U.S. 221, 229 (1987).

103 Stone, *supra* note 99, at 88.

For examples of the Court's inconsistency, compare Greer v. Spock, 424 U.S. 828 (1976) (upholding military base's policy of permitting civilian speakers to address military personnel on a variety of subjects, but not on the subject of partisan politics), Lehman v. Shaker Heights, 418 U.S. 298, 302-04 (1974) (upholding city's policy of leasing the advertising spaces of its transit vehicles for the display of commercial but not political messages) and Broadrick v. Oklahoma, 413 U.S. 601 (1973) (upholding state statute prohibiting the involvement of its public employees in political campaigns) with Erznoznik v. Jacksonville, 422 U.S. 205 (1975) (striking down a city ordinance prohibiting drive-in theaters from displaying movies containing nudity) and Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972) (invalidating an ordinance that restricted picketing near a school, but exempted labor picketing). In part, the Court's confusion can be attributed to the convoluted nature of public forum analysis involved in many of these cases, as well as interest in preventing overt goverument involvement in speech regarding partisan politics. *See Lehman*, 418 U.S. at 305 (Douglas, J., concurring).

104 Stone, *supra* note 99, at 107.

105 *Id.* at 110.

A tax that treats various media differently also raises a structural problem that impacts on the Court's rigorous scrutiny of all overt content distinctions. The state legislature needs to define the relevant media subject to such a tax. For example, the Arkansas Supreme Court in *Medlock* chose to include cable and satellite television in the same medium, but to exclude commercial television.[106] Under *Ragland*, a state may not base its determination on the content of the publications.[107] Similarly, a distinction between newspapers and magazines based solely on physical properties, such as print type, runs the risk of being irrational for any legitimate state purpose.[108] The North Carolina Supreme Court evaded a similar problem of distinguishing between a newspaper and an advertising circular by basing the distinction upon the percentage of the publication devoted to advertising.[109]

The Court in *Medlock* does not clearly explain what type of content regulation generates concern. The Court notes that it will stringently review differential taxation "when it threatens to suppress the expression of particular ideas or viewpoints."[110] While the *Medlock* Court incorporates *Ragland*'s strict scrutiny for subject matter restrictions, a concern over government censorship of objectionable and unpopular views underlies the Court's decision.[111] In addition, although *Minneapolis Star* rejected an inquiry into legislative motive as the focal point of its analysis, its approach, in effect, is designed to target an invidious legislative motive but not necessarily a content distorting effect as well.

B. First Amendment Equal Protection

1. *Two-Tier Approach*

The emphasis on content discrimination influenced the level of scrutiny that the Court applied. The issue in *Medlock* was whether to subject the differential tax to strict scrutiny. *Minneapolis Star* defined this level of review as requiring an "interest of compelling importance that [the state] cannot achieve without differential taxation."[112] In *Medlock*, the Supreme Court rejected this First Amendment challenge to the differential tax, but remanded the equal protection claim for consideration by the state court. The decision leaves open the question of what remains for the state court

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106 *See supra* notes 73-74 and accompanying text.
107 481 U.S. 221, 229-30 (1987).
108 *See* Louisiana Life, Ltd. v. McNamara, 504 So. 2d 900, 906 (La. Ct. App. 1987); Farthing, *supra* note 99, at 1952.
109 *In re* Village Publishing Corp., 322 S.E.2d 155 (N.C. 1984).
110 111 S. Ct. 1438, 1443 (1991).
111 *Id.* at 1444.
112 460 U.S. 575, 585 (1983).

to review on remand. In fact, *Medlock* highlights the uneasy coexistence of equal protection and the First Amendment in differential tax cases. A plaintiff can readily cast any content based discrimination as an equal protection claim.[113] *Mosley* recognized the close relation between these two claims.[114] *Medlock* further underscores this relationship. Under an equal protection analysis, the first inquiry assesses whether strict scrutiny is appropriate. The Court uses such heightened scrutiny when the legislative classification burdens a suspect class or infringes upon a fundamental right.[115] Because freedom of expression (or the press) under the First Amendment constitutes a fundamental right, any classification abridging speech rights requires strict scrutiny.[116] This same inquiry is the focus of an independent First Amendment claim. Any infringement on First Amendment rights also leads to strict scrutiny.[117] Thus, as result of determining that the Arkansas tax did not infringe upon the cable companies' First Amendment rights, the *Medlock* Court decided not to apply strict scrutiny as part of an equal protection analysis.

Even if the statute does not burden a fundamental right, the classification at issue must still have a rational basis under the Fourteenth Amendment.[118] Presumably, review for such a basis is the purpose of the remand by the *Medlock* Court. In the context of its First Amendment decision, however, the Court answered this question. First, all legislative determinations receive a presumption of regnlarity.[119] In addition, the Court stressed the broad latitude given to state legislatures in making classifications and distinctions in tax statutes.[120] Consequently, it is incredibly rare for a state tax law to fall under equal protection alone.[121] By these standards, the Arkansas legislature may defend the tax by claiming that, while the

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113 *See* Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1975). *But see* Michael J. Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023, 1076 (1979).

114 408 U.S. 92, 95 (1972).

115 *See* Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 312 (1976) (per curium); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 16 (1973).

116 *See Police Dep't of Chicago*, 408 U.S. at 101.

117 The First Amendment "overriding interest test" ("necessary to achieve an overriding government interest") and equal protection strict scrutiny (necessary to a compelling governmental interest) appear linguistically identical. Both are mentioned and apparently applied in *Minneapolis Star*, 460 U.S. at 582, 585.

118 All legislation or other government regulations containing a classification not involving a suspect class or a fundamental right fall into this category. *See* Peter Weston, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 569 (1982).

119 United States v. Carolene Prod. Co., 304 U.S. 144, 152 (1938).

120 111 S. Ct. 1438, 1446 (1991); *see also* cases cited *supra* note 12.

121 The Court did find a state tax in violation of the Equal Protection Clause based on excessive variations in assessments of property values. *See* Allegheny Pittsburgh Coal Co. v. County Comm'n, 488 U.S. 336 (1989). *Allegheny* was the first equal protection violation by a state tax scheme under the rational basis test since Louis K. Liggett Co. v.

tax decided to promote speech activities in newspapers and magazines, the state could not afford to support similarly broadcast media. Such logic is rational and easily surpasses an equal protection challenge.

Consequently, in practice, an equal protection challenge is indistinguishable from a First Amendment challenge, as the entire case turns on the question of whether the statute infringes upon free speech.

2. *Adding the First Amendment—the Need for Intermediate Scrutiny*

The majority in *Medlock* correctly noted that a tax of general applicability levied against a large portion of the media reduces the potential for government censorship. This was the basis of the *Minneapolis Star* decision.[122] Professor Stone makes a similar point but in a somewhat different context. In making a distinction between viewpoint and subject matter restraints, he divides subject matter into two categories. First, there is speech involving a narrow issue or a narrow cluster of issues.[123] Stone views the regulation of such narrowly focused speech as inherently more suspect, as it is likely to disadvantage one side of the debate and serves more easily as a means of covert government censorship.[124] Similarly, where a differential tax targets only the press or burdens only a small segment of the press, the same potential for abuse exists.[125] On the other hand, subject matter restrictions directed against broad classes of speech raise far fewer problems of government abuse or distorting impact.[126] This characterization can apply to the tax at issue in *Medlock* in the same way.

Even in this second category, Stone does not advocate a completely deferential standard of scrutiny.[127] The Court's approach in *Medlock* suffers from the lack of more rigorous scrutiny. The absence of a possible government intent to control or restrict content does not exhaust the possible infringement of First Amendment values. Even content neutral burdens on speech must surpass more than a rational basis test.[128] In fact, the Arkansas tax may affect the

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Lee, 288 U.S. 517 (1933). *See* Robert J. Glennon, *Taxation and Equal Protection*, 58 GEO. WASH. L. REV. 261 (1990).

122 460 U.S. 575, 585 (1983).

123 Stone, *supra* note 99, at 110.

124 *Id.*

125 *See* Leathers v. Medlock, 111 S. Ct. 1438, 1444 (1991) (stating that a "tax on a small number of speakers runs the risk of affecting only a limited range of views.").

126 Stone, *supra* note 99, at 112.

127 *Id.* at 114.

128 Content neutral burdens are usually analyzed either as time, place, and manner regulations or as incidental burdens on speech under the *O'Brien* framework. *See infra* notes 139-49 and accompanying text.

content of and access to cable programming, thus limiting the permissible quantity of speech.

C. Intermediate Scrutiny

1. *Differential Taxation as an Infringement of Free Speech*

The First Amendment limits the government's ability to "abridge" freedom of expression, but this broad term is not easily defined. For example, the *Minneapolis Star* Court struck down a tax system that actually benefited the press in comparision to other businesses.[129] Even if the *Medlock* test is not met and the danger of censorship is minimal, a differential tax of the media still has the potential to curtail free speech. As the dissent in *Medlock* points out, cable offers a unique subject matter content to the "marketplace of ideas."[130] Cable presents original viewpoints, particularly through its greater access to national information and opinion as compared to the more local emphasis of many newspapers.[131] Local politicians dispensing tax breaks no doubt feel more comfortable with local newspapers, especially if their press coverage is usually favorable.[132]

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129 Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 596 (1983) (Rehnquist, J., dissenting).

130 Leathers v. Medlock, 111 S. Ct. 1438, 1451 (1991) (Marshall, J., dissenting). For the classic formulation of the marketplace of ideas concept, see Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he ultimate good desired is better reached by free trade in ideas . . . the best test of truth is the power of the thought to get itself accepted in the competition of the market. . . ."); *see also* THOMAS I. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 7-8 (1963); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 627-28 (1986).

131 *See* M. Ethan Katsh, *The First Amendment and Technological Change: The New Media Have a Message*, 57 GEO. WASH. L. REV. 1459, 1461 (1989). Much of the discussion about the value of cable television has focused on opportunities for greater access to the airwaves by citizens via cable technology's abundance of channels. *See infra* note 164. The most significant communicative impact of cable, however, comes not from greater access for speakers, but from the greater choices provided to viewers. Cable offrs greater viewer access to news (CNN), government proceedings (C-SPAN), cultural and entertainment programming (e.g., A&E network), and programming from "super-stations" in large national markets (e.g., WWOR from New York or WTBS from Atlanta). This information, effectively available only through a cable subscription, has independent First Amendment significance. *See* 1989 BROADCASTING/CABLE Y.B. E-5; John E. Nowak, *Using the Press Clause to Limit Government Speech*, 30 ARIZ. L. REV. 1, 39 (1988); Vernone Sparkes, *Cable Television in the United States: A Story of Continuing Growth and Change*, *in* CABLE TELEVISION AND THE FUTURE OF BROADCASTING 1, 38 (Ralph M. Negrine ed., 1985).

For criticism of the role of television in shaping (and distorting) public discourse in America, see Ronald K. L. Collins & David M. Skover, *The First Amendment in an Age of Paratroopers*, 68 TEX. L. REV. 1087 (1990). For an amusing and insightful criticism of the Collins and Shaver article, pointing out the communicative value of television, see Mark V. Tushnet, *Decoding Television (and Law Reviews)*, 68 TEX. L. REV. 1179 (1990).

132 *See* Richard J. Tofel, *Is Differential Taxation of Press Entities by States Constitutional?*, 73 J. TAX'N 42, 44 (1990).

Even if a differential tax does not affect the content of cable, it diminishes the permissible quantity and effective exercise of speech. The sales tax in *Medlock* distorts the market by pricing consumers out of cable subscriptions in favor of alternative media with different content such as newspapers or commercial television.[133] The majority failed to recognize this likely effect.[134]

The Supreme Court has recognized a constitutional right to receive information and ideas as a necessary corollary to the right to speak.[135] In *Board of Education v. Pico*, a plurality of the Court recognized a student's right of access to certain literature in a high school library.[136] This holding would be even more significant in a non-school setting such as a ban on books from a general public library. Although *Medlock* concerns the taxation rather than elimination of cable,[137] the analysis is similar. The school board in *Pico* did not forbid the students from using the banned books, but it did force them to take the more expensive and less convenient route of acquiring the books from sources other than the school library. Similarly, after *Medlock*, potential customers may still acquire cable television, but the tax imposes a differentially harsh burden on access to that medium.[138] In *Red Lion Broadcasting v. FCC*,[139] the Court

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133 *See* BRUCE M. OWEN, ECONOMICS AND FREEDOM OF EXPRESSION: MEDIA STRUCTURE AND THE FIRST AMENDMENT 31 (1975); *see also* Competition, Rate Deregulation, and the Commission's Policies Relating to the Provision of Cable Television Service, 5 F.C.C.R. 4962, 4995 (1990) (discussing competition between and interchangeability of cable television and rival media).

134 The Ninth Circuit Court of Appeals considered such a challenge in an intramedia context but denied the claim, holding that an economic regulation not affecting the content of a publication does not implicate the First Amendment merely because it may affect the number of readers of a newspaper. This decision failed to recoguize the First Amendment rights of a newspaper's readers (similar to cable television subscribers in *Medlock*). Committee for an Indep. P-I v. Hearst Corp., 704 F.2d 467, 483 (9th Cir.) (denying First Amendment challenge to the Newspaper Preservation Act, which created an exception to the antitrust laws for joint operating agreements between large newspapers despite possible detriment to smaller newspapers in the market), *cert. denied*, 464 U.S. 892 (1983).

135 *See, e.g.*, Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 763 (1976); Kleindienst v. Mandel, 408 U.S. 753, 762-765 (1972); Stanley v. Georgia, 394 U.S. 557, 564 (1969); Lamont v. Postmaster Gen., 381 U.S. 301, 305 (1965); Thomas v. Collins, 323 U.S. 516, 530 (1945).

136 457 U.S. 853, 868 (1982).

137 For a case striking down a total ban on pay television, see Weaver v. Jordan, 411 P.2d 289 (Cal. 1966), *cert. denied*, 385 U.S. 844 (1966).

138 Most economists agree that consumers bear the burden of retail sales taxes despite the fact that it is originally collected from merchants. Thus, while cable companies pay the tax, at least some of it will be passed on to the customers. The actual degree to which the customers bear the burden depends on the nature of supply and demand for the product. *See* Edgar K. Browning, *The Burden of Taxation*, 86 J. POL. ECON. 649, 658-59 (1978); Charles E. McClure, Jr., *Incidence Analysis and the Supreme Court: An Examination of Four Cases from the 1980 Term*, 1 SUP. CT. ECON. REV. 69, 72 (1980).

139 395 U.S. 367, 390 (1969).

recognized the customer right to receive information in the context of commercial television: "It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."[140] A differential tax significantly restricts the use of cable, regardless of any possible censorial motive by the legislature, thus burdening free expression and implicating First Amendment values.

2. *Judicial Scrutiny of the* Medlock *Infringement*

After distinguishing *Medlock* from *Minneapolis Star* and *Ragland*, the Supreme Court had three possible approaches by which it could subject the differential tax to heightened scrutiny. The analysis in the first approach is similar to the Court's analysis of time, manner, and place restrictions of other First Amendment rights.[141] First, both infringements are facially content neutral but present possible adverse content effects. Second, they present differential taxation burdens but do not prohibit the speech at issue, as time, manner, or place restrictions do, presuming that alternative communication formats are available.[142] Third, taxation classifications and the use of a public forum both raise the distinction between subsidization and burden.[143] Time, manner, and place restrictions must be tailored narrowly to serve a significant government interest.[144] In practice, this test has resembled a flexible reasonableness standard of balancing. It is, however, a more sensitive test to the First Amendment interests than a rational basis test.[145]

One primary difference between differential taxation and other content neutral restrictions on free expression is that the speech itself does not create a potential harm in the taxation case. Consequently, the government advances an interest independent of the

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140 *Id.*

141 *See* Ward v. Rock Against Racism, 491 U.S. 781 (1989); Frisby v. Schultz, 487 U.S. 474 (1988); Boos v. Barry, 485 U.S. 312 (1988); Heffron v. Int'l Soc'y for Krishna Consciousness, 452 U.S. 640, 654 (1981); Grayned v. City of Rockford, 408 U.S. 104, 116 (1972); Kovacs v. Cooper, 336 U.S. 77 (1949). For commentary on the Court's standard of scrutiny for regulations limiting the use of public forums, see C. Edwin Baker, *Unreasoned Reasonableness: Mandatory Parade Permits and Time, Place, and Manner Regulations*, 78 NW. U. L. REV. 937 (1983); Harry Kalven, Jr., *The Concept of the Public Forum:* Cox v. Louisiana, 1965 SUP. CT. REV. 1, 12; William E. Lee, *Lonely Pamphleteers, Little People, and the Supreme Court: The Doctrine of Time, Place, and Manner Regulations of Expression*, 54 GEO. WASH. L. REV. 757 (1986); Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46 (1987).

142 The Court's test requires that the regulation at issue "leave open ample alteruative channels of communication." Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45-46 (1983).

143 For more on subsidization analysis, see discussion *infra* part III.C.3.b.

144 *Heffron*, 452 U.S. at 654.

145 *See* Consolidated Edison Co. of N.Y. v. Public Serv. Comm'n, 447 U.S. 530, 536 (1980); *see also* Stone, *supra* note 98, at 190 (discussing the open-ending form of balancing used to test content neutral restrictions.).

speech, making it more difficult to weigh. In addition, while the emphasis on the availability of alternative outlets for expression does not clearly fit the differential tax question, it does show that First Amendment interests may be infringed upon regardless of the presence of possible improper legislative motives.

The second approach to the use of heightened scrutiny in the face of content neutral restrictions is illustrated in *United States v. O'Brien*.[146] *O'Brien* involved symbolic expression and the speech/conduct distinction as applied to the burning of a draft card in protest of the Vietnam war.[147] The *O'Brien* test has been widely applied to general government regulations that incidentally burden speech. The incidental restriction must serve a substantial government interest, be unrelated to free expression, and be no more restrictive than essential in furthering government interest.[148] Although the *O'Brien* test appears strict in form, the Court has often applied it in a highly deferential manner.[149] The lower courts, by contrast, have applied *O'Brien* more forcefully, usually in the context of a ban on a certain method of speech.[150] In any case, *O'Brien* does raise scrutiny above rational basis and appears particularly appropriate for taxation schemes that burden speech incidentally and without regard to content.

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146 391 U.S. 367 (1968).

147 Many Supreme Court opinions have distinguished between speech and conduct, and have resisted extending full First Amendment protections to expressive conduct or symbolic speech. *See* Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984); Street v. New York, 394 U.S. 576, 616 (1969) (Fortas, J., dissenting); United States v. O'Brien, 391 U.S. 367, 376 (1968); Cox v. Louisiana, 379 U.S. 536, 555 (1965); *see also* John H. Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1495 (1975) (arguing that the *O'Brien* Court declined to rely on the speech/conduct distinction). The *O'Brien* Court, however, recognized that regnlations aimed at conduct may still restrict speech incidentally. 391 U.S. at 377. Content neutral regulations that incidentally burden speech are not limited to the symbolic speech area, and also frequently arise concerning the appropriate First Amendment use of various forums and media for communication. The Supreme Court has recognized this fact and broadened the application of *O'Brien* beyond the context of symbolic speech. *See* Members of City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984); Susan H. Williams, *Content Discrimination and the First Amendment*, 139 U. PA. L. REV. 615, 648-49 (1991).

148 *O'Brien*, 391 U.S. at 377.

149 Indeed, in *O'Brien* itself the Court sustained the restriction with little actual scrutiny of the government's interest weighed against the value of the respondent's speech. *See also Vincent*, 466 U.S. at 789 (applying *O'Brien* test to uphold a city ordinance prohibiting the posting of signs on public property); Martin H. Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113, 127 (1981) ("[I]t is practically inconceivable that an asserted governmental purpose will not qualify.").

150 *See, e.g.*, Superior Ct. Trial Lawyers Ass'n v. FTC, 856 F.2d 226 (D.C. Cir. 1988) (partially protecting from antitrust laws concerted boycott with both political and commercial goals), *rev'd*, 493 U.S. 411 (1990); Century Communications Corp. v. FCC, 835 F.2d 292 (D.C. Cir. 1987) (invalidating the FCC's requirement that cable systems carry local broadcast signals).

The third possible approach by which heightened scrutiny may be applied to differential taxation of the press is through an equal protection analysis. Equality animates the principles of *Minneapolis Star* and *Ragland*—it is not taxation of the press alone that implicates the First Amendment, but the application of discriminatory taxes. Consequently, equal protection principles have inevitably influenced the analysis of such taxes.[151] As noted above, *Minneapolis Star* applied strict scrutiny to differential taxation of the press because the Court feared the likelihood of censorship. This mode of analysis parallels that used in general equal protection challenges, requiring a showing of illegitimate intent by the legislature as well as a disproportionate effect.[152] *Minneapolis Star* and *Medlock* take this conventional analysis one step further by presuming an intent to censor when a differential tax meets certain criteria.[153] When none of these conditions is met, however, the level of review presumably falls to rational basis. Equal protection analysis, by contrast, provides for the possibility of intermediate scrutiny. Such intermediate scrutiny requires that the government regulation at issue serve important government objectives and be substantially related to achievement of those objectives.[154] The Court has also recognized that heightened scrutiny is appropriate when a state classification significantly burdens a fundamental right.[155] The wisdom of revising the traditional structure of two-tier equal protection analysis has generated considerable debate.[156] At present, the *Craig* intermediate scrutiny

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151 *See* Arkansas Writers' Project v. Ragland, 481 U.S. 221, 227 (1987); Simon, *supra* note 4, at 82-83; *see also* discussion *supra* part III.B (dicussing the role of equal protection analysis in the *Medlock* decision).

152 *See* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 264-66 (1977); Washington v. Davis, 426 U.S. 229, 238-48 (1976).

153 The tax must lack general applicability, be based on content, or be applied to a small number within a medium. Leathers v. Medlock, 111 S. Ct. 1438, 1444-45 (1991).

154 Craig v. Boren, 429 U.S. 190, 197 (1976).

155 Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 312 (1976) (per curium); *see also* Plyler v. Doe, 457 U.S. 202 (1982) (striking down a law denying public education to children not "legally admitted" into the United States).

156 Rigid two-tier equal protection review, with its chasm between fatal strict scrutiny and the deferential rational basis test, is too blunt an instrument to address complicated issues of discrimination in areas such as gender. The Court reacted by tinkering with the old structure and adding an intermediate level of review. *See* Craig v. Bonon, 406 U.S. 164 (1972); Jeffrey H. Blattner, *The Supreme Court's "Intermediate" Equal Protection Decisions: Five Imperfect Models of Constitutional Equality*, 8 HASTINGS CONST. L.Q. 777 (1981). Critics of the Court's approach have either favored replacing the entire structure with a flexible balancing approach, *see Massachusetts Bd. of Retirement*, 427 U.S. at 318 (Marshall, J., dissenting); J. Harvie Wilkinson III, *The Supreme Court, the Equal Protection Clause, and the Three Faces of Constitutional Equality*, 61 VA. L. REV. 945 (1973), or have advocated putting more "bite" into rational basis review by requiring a closer fit between means and end, *see* Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

has not been applied to classifications other than gender[157] and illegitimacy.[158] It seems an unlikely precedent from which to argue for more stringent review of differential taxation.

The language of the *O'Brien* test is similar to intermediate scrutiny under *Craig*. Both require a showing of a considerable government interest and the use of the least restrictive means to reach the government's objective. Moreover, the Court has largely merged the *O'Brien* test with its test of time, manner, and place restrictions.[159] Consequently, all three of these tests combine to form a unified approach. This approach draws from equal protection the focus on the differential nature of the tax as the problem. It then uses First Amendment concepts to raise scrutiny above rational basis based on the speech-infringing effect of the tax, regardless of possible censorial intent.

Reliance on equal protection to invalidate laws such as the one at issue in *Medlock* raises another problem. The Court usually remedies such a violation by holding the differentiation unconstitutional, but permits the legislature to equalize the effects of the law by restricting all speech within the identified group, rather than lifting the tax on the disproportionately affected party. Justice Rehnquist noted this in *Minneapolis Star*, pointing out that the legislature could rectify the problem simply by subjecting all newspapers to a general tax.[160] The net effect of this remedy is to curtail speech. Such a rule, however, would have beneficial effects as well. It ends a distorting effect favoring some segments of the media and prevents sectors of the press from being divided and weakened politically.

3. *State Interests in Defense of the Tax*

In considering possible government interests, the state, in both *Minneapolis Star* and *Medlock*, asserted the need to raise revenue. Though this interest is substantial,[161] it fails to explain the need of the government to tax segments of the media differently. In fact, removing the exemption from newspapers, magazines, and commercial television better serves the goal of raising revenue. Instead, two other possible justifications for the tax should be analyzed: First, the special nature of a particular medium or member of the press and, second, the choice to subsidize certain types of speech.

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157 Craig v. Boren, 429 U.S. 190 (1976).

158 Weber v. Aetna Casualty & Sur. Co., 406 U.S. 164 (1972).

159 Ward v. Rock Against Racism, 491 U.S. 781, 798 (1989).

160 Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 602 (1983). For criticism of the use of equal protection analysis in First Amendment cases, see Roy A. Black, Case Comment, *Equal But Inadequate Protection: A Look at* Mosley *and* Grayned, 8 HARV. C.R.-C.L. L. REV. 469 (1973).

161 Arkansas Writers' Project v. Ragland, 481 U.S. 221, 231 (1987).

a. *Cable Television and the Broadcast Media*

The Court should have considered the unique nature of cable television and the extent to which constitutional restrictions regarding regulations of the print media apply to the broadcast media. The Court in *Medlock* made it clear that a cable television operation is engaged in "speech" under the First Amendment, as well as constituting part of the "press."[162] Some unique aspects of the broadcast media, however, justify differential treatment in certain circumstances. For example, television's greater power to intrude into the home and relative ease of access to children may justify a greater level of content restriction.[163] The limited access to broadcast media may support a requirement that equal time be provided for those opposing the views of the station or the views of those permitted to use the station.[164]

As a result of *Red Lion Broadcasting*, a state could justify a greater burden on cable television due to the unique nature of the medium; for example, an extra charge for use of a public right-of-way. The

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162 Leathers v. Medlock, 111 S. Ct. 1438, 1442 (1991) (citing Los Angeles v. Preferred Communications, Inc., 476 U.S. 488, 494 (1986)).

163 *See* FCC v. Pacifica Found., 438 U.S. 726 (1978).

164 *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) (upholding the FCC's fairness doctrine); *cf.* Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) (striking down a state statute which required a newspaper to provide a free "right of reply" to any candidate for public election criticized in the newspaper regarding his personal character or official record).

The regulations requiring access to cable, such as through local cable-access stations, have generated a considerable body of scholarly commentary. *See* Daniel Brenner, *Cable Television and the Freedom of Expression*, 1988 DUKE L.J. 329 (advocating flexible, ad hoc review of cable regulations, stressing the importance of access requirements given the large channel capability of cable); Robert A. Kreiss, *Deregulation of Cable Television and the Problem of Access Under the First Amendment*, 54 S. CAL. L. REV. 1001 (1981) (arguing that government must of necessity determine who may speak on cable—abundance of channels leads to affirmative duty to create access); Mark Mininberg, *Circumstances Within Our Control: Promoting Freedom of Expression Through Cable Television*, 11 HASTINGS CONST. L.Q. 551 (1984) (treating cable as a public fornm with reasonable access to the public); Christine Gasser, Note, *Cable Television: A New Challenge for the "Old" First Amendment*, 60 ST. JOHN'S L. REV. 114 (1985) (arguing that First Amendment rights of cable should be drawn with reference to print media, giving precedence to the cable operator's right to speak while still recoguizing that the unique nature of a medium may justify some regulations); Alison Melnick, Comment, *Access to Cable Television: A Critique of the Affirmative Duty Theory of the First Amendment*, 70 CAL. L. REV. 1393 (1982) (arguing that affirmative duty has not provided the intended diverse programming; instead, it has furnished regulators with a potential means of censorship and harassment).

In addition, note that newspapers, while not physically scarce in the same sense as broadcasting media, do have many characteristics of a natural monopoly, leading to a proliferation of one-newspaper towns. *See* POSNER, *supra* note 130, at 634-35; James N. Rosse, *Daily Newspapers, Monopolistic Competition, and Economies of Scale*, 57 AM. ECON. REV., *Papers and Proceeding*, No. 2, at 522 (May 1967). Congress passed the Newspaper Preservation Act to permit joint operating agreements between newspapers where one newspaper was failing and the papers retained independent editorial and reporting staffs. *See infra* notes 168-69 and accompanying text.

state may also reasonably choose not to tax small publications or broadcasters, a "fledgling publisher exception" alluded to in *Ragland*.[165] The *Ragland* Court considered the state's interests in not taxing small publications, such as an interest in keeping them afloat or avoiding the unjustified expense of levying taxes on their small revenues.[166] While the Court did not specifically endorse these interests as either compelling or important, it rejected them in *Ragland* only because the statute was not narrowly tailored to achieve this end.[167] Such interests could explain the *Hearst Corp.* case,[168] in which the Ninth Circuit upheld the Newspaper Preservation Act,[169] which provided an antitrust exemption for joint operating arrangements among newspapers when necessary to save a financially ailing publication. Hence, when a publication will fail without state subsidies, a special tax break to benefit that publication may better serve the ends of the First Amendment and pass heightened scrutiny.

A medium may also present unique administrative difficulties in the collection of a tax. For example, a state may resist placing a sales tax on newspapers because of the difficulty of collecting the tax from door-to-door delivery agents or vending machines.[170] The administrative ease of a government regulation or tax may well serve a sufficiently important interest when weighed against the incidental infringement of speech.[171]

b. *Government Subsidization of Speech*

Another possible defense for differential taxation is the government's interest in subsidizing some, but not all, speech.[172] This is

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165 *Ragland*, 481 U.S. at 232.

166 *Id.*

167 *Id.*

168 Committee for an Indep. P-I v. Hearst Corp., 704 F.2d 467 (9th Cir. 1983), *cert. denied*, 464 U.S. 892 (1983); *see supra* note 134 and accompanying text.

169 15 U.S.C. §§ 1801-1804 (1988).

170 *See* Dow Jones & Co. v. Oklahoma *ex rel.* Okla. Tax Comm'n, 787 P.2d 843, 847 (Okla. 1990).

171 *Compare* FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 430 (1990) (holding the administrative efficiency interest in an antitrust *per se* rule sufficient to outweigh any incidental effect on the expressive content of a concerted boycott) *with Dow Jones & Co.*, 787 P.2d at 847 (holding that efficient tax collection is not an interest distinct from that in raising revenue and does not justify differential intermedia taxation).

172 Government can take an active role in the First Amendment in one of two ways: either by speaking directly, as through education, or by subsidizing private actors to speak in its place. The Court has long rejected the power of government to use its subsidies to deter unrelated speech under the unconstitutional conditions doctrine. *See* Speiser v. Randall, 357 U.S. 513 (1958). However, government can selectively subsidize speech activities without challenge from those not subsidized. *See* Rust v. Sullivan, 111 S. Ct. 1759 (1991); Regan v. Taxation With Representation, 461 U.S. 540 (1983). There is a subtle distinction between the unconstitutional conditions doctrine and subsidiza-

the fundamental tension between *TWR* and *Minneapolis Star*.[173] The statute at issue in *Minneapolis Star* was struck down because it permitted possible abuse in the form of the censorship of independent views by the press. Yet, as Justice Rehnquist argued in dissent, the *Minneapolis Star* holding ignores the ability of a legislature to subsidize the press, or certain subgroups of it, in furtherance of First Amendment values.[174] Under *TWR*, a state has the discretion to subsidize any speech it chooses, using any criteria including content. Those whose speech the government decides not to support have no coguizable constitutional claim.[175] The essential principle behind subsidization cases is that "although government may not place obstacles in the path of the exercise of a constitutionally protected activity, it need not remove obstacles not of its own creation."[176]

The problem with the *Medlock* Court's reliance on *TWR* is that *TWR* cannot possibly mean that government is free to subsidize speech on any basis whatsoever. Prior precedents have in fact limited government's discretion to "remove obstacles" to speech selectively. First, *Minneapolis Star* rejected the differential use of subsidies for the press. The tax at issue in that case operated to subsidize both the press in general and to further benefit small newspapers. The Court, however, had no difficulty subjecting the tax to strict scrutiny and finding it in violation of the First Amendment. The Court has also limited government's power to subsidize selectively

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tion doctrine based on the relation of the benefit withheld to the right the person seeks to exercise. Subsidization permits the government to deny direct support for the exercise of a constitutional right, while the unconstitutional conditions doctrine prevents government from withholding unrelated benefits as a penalty for the exercise of a constitutional right. For example, in the abortion context, government may refuse to fund abortions, but it probably may not deny all welfare benefits to a woman who exercises her right to have an abortion. *See* Harris v. McRae, 448 U.S. 297, 317 n.19 (1980).

The problem of how to limit the possible distorting or coercive impact of selective government speech, while still recognizing the legitimate need for government to speak and to support speech, has generated considerable commentary. *See* Theodore C. Hirt, *Why the Government Is Not Required to Subsidize Abortion Counseling and Referral*, 101 HARV. L. REV. 1895 (1988); Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293 (1984); Steven Shiffrin, *Government Speech*, 27 UCLA L. REV. 565 (1980); Cass R. Sunstein, *Why the Unconstitutional Conditions Doctrine Is an Anachronism (With Particular Reference to Religion, Speech, and Abortion)*, 70 B.U. L. REV. 593 (1990); Mark G. Yudof, *When Governments Speak: Toward a Theory of Government Expression and the First Amendment*, 57 TEX. L. REV. 863 (1979); Gary A. Winters, Note, *Unconstitutional Conditions as "Nonsubsidies": When is Deference Inappropriate?*, 80 GEO. L.J. 131 (1991).

173 *See supra* notes 58-59 and accompanying text.

174 Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 602 (1983).

175 461 U.S. at 548-49.

176 Student Gov't Ass'n v. Board of Trustees of the Univ. of Mass., 868 F.2d 473, 479 (1st Cir. 1989) (citing Harris v. McRae, 448 U.S. 297, 316 (1980)).

in analogous free exercise cases.[177] For example, in *Bob Jones University v. United States*,[178] the Court denied a free exercise challenge to the IRS's denial of tax-exempt status to racially discriminatory schools. The Court denied this challenge only after applying an "overriding interest" test, finding the government's interest compelling and the means used to promote that interest to be the least restrictive possible.[179] Consequently, when government makes subsidization choices on the basis of viewpoint (or religious belief), the Court often limits government discretion and requires that selective subsidization meet the appropriate level of constitutional scrutiny.[180]

Second, the Court often limits the discretion of government to choose who may use its facilities for speech purposes. Every public forum case in which government denies access on the basis of content can be considered as a subsidization question.[181] However, the Court usually has no difficulty disposing of such cases under strict

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177 The Court has typically used the same standards and level of scrutiny in free exercise cases as in general free speech claims under the First Amendment. *See* Jimmy Swaggart Ministries v. Board of Equalization, 493 U.S. 378 (1990) (upholding the imposition of a generally applicable sales and use tax on the distribution of religious materials, relying on taxation of the press precedents *Minneapolis Star* and *Ragland*). *Compare Swaggart with* Murdock v. Pennsylvania, 319 U.S. 105 (1943), where the Court invalidated a flat license tax on door-to-door solicitation as applied to the distribution of religious literature. *See also* Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1 (arguing that the independent stature of the Free Exercise Clause demands that government take pains to avoid incidental interference with religious expression, including refraining from the application of general taxes and regulations).

178 461 U.S. 574, 602-05 (1983).

179 *Id.* at 604. *But see* Elliot M. Schachner, *Religion and the Public Treasury After* Taxation With Representation of Washington, Mueller, *and* Bob Jones, 1984 UTAH L. REV. 275 (arguing that the government interest in eliminating private discrimination not sufficiently compelling to justify a content restraint on Bob Jones University's religious speech).

180 *See Student Gov't Ass'n*, 868 F.2d at 482; Shiffrin, *supra* note 172; Yudof, *supra* note 172.

181 While a public fornm analytically represents a question of subsidization through government resources and facilities, courts usually treat public forum cases as an exception to subsidization analysis. *See Student Gov't Ass'n*, 868 F.2d at 480.

The Court has long implied a First Amendment right of access to traditional public forums such as streets and parks. *See* Hague v. CIO, 307 U.S. 496, 515-16 (1939)

> [S]treets and parks . . . have immorially been held in trust for use of the public . . . for purposes of [speech]. . . . The privilege . . . to use the streets and parks for communication of views on national questions may be regulated in the interest of all . . . it must not, in the guise of regulation, be abridged or denied

; Frisby v. Schultz, 487 U.S. 474 (1988); Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 777 (1988) (White, J., dissenting); Airport Comm'rs v. Jews for Jesus, Inc., 482 U.S. 569, 572-73 (1987); Perry Ed. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

On the other hand, the Court has more willingly denied access to nontraditional public forums, based either on a categorization or compatibility approach, and permit-

scrutiny. For example, in *Healy v. James*,[182] a state university denied official recognition to a student organization because of its radical views and possible disruptive activities.[183] Without recognition, the organization could not announce its activities in the school newspaper or on campus bulletin boards, nor could it use campus facilities for meetings.[184] The school argned that since the students in the organization could still meet and engage in First Amendment activities off campus, they only were denied the university's support and approval and not their First Amendment rights.[185] The Court rejected this argnment, finding it sufficient that the university had burdened the students' speech rights based on the content of their views.[186]

Additionally, the logic of *Minneapolis Star* dictates that a subsidy has at least as great a potential for censorial abuse as does the direct imposition of a burden on the press. Once a legislature subjects a medium to a general tax, the state loses any potential leverage with respect to that medium. Any change in the taxes on the medium must similarly affect all other businesses also subject to the tax. By granting a tax subsidy, however, the state can breed financial dependence on the medium if the state retains the discretion to remove the subsidy. The Arkansas legislature retained this discretion and

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ting restrictions if reasonable. *See Jews for Jesus, Inc.*, 482 U.S. at 569; Lehman v. Shaker Heights, 418 U.S. 298, 301-03 (1974).

For literature on public forum analysis, see Ronald A. Cass, *First Amendment Access to Government Facilities*, 65 VA. L. REV. 1287 (1979); Daniel A. Farber & John E. Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 VA. L. REV. 1219 (1984); Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713 (1987); Richard B. Saphire, *Reconsidering the Public Forum Doctrine*, 59 U. CIN. L. REV. 739 (1991); Barbara S. Gaal, Note, *A Unitary Approach to Claims of First Amendment Access to Publicly Owned Property*, 35 STAN. L. REV. 121 (1982).

A significant strand in those cases concerning non-traditional forums is the equation of government control over its facilities with that of a private property owner. *See* Adderley v. Florida, 385 U.S. 39, 47 (1966) ("The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated."). The Court does not explain why, other than tradition, streets and parks are held to a different standard. In any case, such a view of public forums adds support to a subsidy analysis. In fact, some members of the Court, notably Justice White, have recently applied subsidization analysis to public forums. *See Lakewood*, 486 U.S. at 780 (White, J., dissenting) ("[T]hose seeking to distribute materials protected by the First Amendment do not have a right to appropriate public property merely because it best facilitates their efforts. 'We again reject the "notion that First Amendment rights are somehow not fully realized unless they are subsidized by the State." ' ") (quoting Regan v. Taxation With Representation, 461 U.S. 540, 546 (1983) (quoting Cammarano v. United States, 358 U.S. 498, 515 (1959) (Douglas, J., concurring))).

182 408 U.S. 169 (1972).

183 *Id.* at 175-76.

184 *Id.* at 181.

185 *Id.* at 182-83.

186 *Id.* at 183.

removed the cable television companies' exemption in 1987.[187] Consequently, in *Medlock*, the continuing danger of censorial abuses exists not for the cable television operators who now pay a general tax, but rather for the exempted newspapers, magazines, and commercial television stations.

Most cases similar to *TWR* consider the subsidy issue as part of the infringement inquiry. If government chooses to subsidize only certain speech, those speakers excluded may not claim that their First Amendment rights are thereby burdened. The abortion subsidy cases are a good example of this approach.[188] In *Rust v. Sullivan*,[189] the Court upheld a federal regulation prohibiting family planning clinics from receiving federal funds if they offered abortion counseling or referral services. The Court did not attach siguificance to the content-discriminating intent of the law, which was desigued to suppress an idea the legislature considered dangerous. Nor did the Court consider the denial of a preguant woman's right to receive information as part of the First Amendment analysis.[190]

The Court, however, does not consistently follow this approach. It still has found potential infringement of speech or free exercise rights in cases like *Healy*, *Minneapolis Star*, and *Bob Jones University*. Where subsidization can be used to control the content of expression and suppress disfavored viewpoints, the Court has more readily ignored the subsidy question. However, some distinctions on the basis of content are inevitable when government subsidizes speech. The Court in *TWR* gave the example of a legislature directing public money to combat teenage alcohol abuse.[191] Certainly, government may impose content limits with such speech regarding both subject matter and viewpoint. Indeed, vigorous competition between programs for grants necessitates that government, with its limited funds, must make choices based on content. Similarly, the state, when subsidizing the arts, must make decisions based on artistic value, which invariably require judging content.[192] Consequently, merely identifying an issue as one concerning subsi-

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187 *See supra* notes 68-71 and accompanying text.

188 For the Court's approach in earlier abortion funding cases, see Harris v. McRae, 448 U.S. 297 (1980) (upholding the Hyde Amendment, which denied federal Medicaid funding for all abortions, even those necessary to save the mother's life); Maher v. Roe, 432 U.S. 464 (1977) (rejecting a constitutional challenge to a state regulation providing Medicaid payments for medical expenses necessary for childbirth but not for nontherapeutic abortions).

189 111 S. Ct. 1759 (1991).

190 *See* Janet Benshoof, *The Chastity Act: Government Manipulation of Abortion Information and the First Amendment*, 101 HARV. L. REV. 1916 (1988).

191 461 U.S. at 548-49.

192 Sunstein, *supra* note 172, at 611.

dization, as in *TWR* or *Medlock*, does not begin to address the complicated questions of legislative choice involved.

The Court could avoid this inconsistency by analyzing the subsidy question as a matter of government interest under the appropriate level of scrutiny. The Court should weigh the extent and significance of the burden on speech, the presence or absence of possible censorship or content effect, and the strength and legitimacy of the government's interest in selectively supporting the speech at issue. Where government subsidies provide possible leverage to control content, strict scrutiny under the model of *Minneapolis Star* should be used. Even in the absence of such a subsidy, as in *Medlock*, an incidental burden on speech should require intermediate scrutiny as in *O'Brien*.

4. *The Weighing Process and the Press Clause*

The method by which speech is subsidized is relevant to this inquiry. *TWR* and *Medlock* considered tax deductions and exemptions as equivalent to cash payments.[193] Indeed, both necessitate consideration of the problem of scarce government resources. Because the state cannot afford to support all speech activities, it must distinguish, on some basis, the speech it choses to subsidize.[194] The degree of infringement in a case like *Medlock* is not extreme because the tax only increases the cost of access, rather than foreclosing it completely. Confronted with this moderate, but real, infringement, the State in *Medlock* offered no persuasive reason for taxing cable television while not taxing newspapers, magazines, or commercial television. Nor did the subsidized media provide speech services systemically different or superior to cable television. Nor did the State show administrative difficulty in taxing newspapers, magazines, and commercial television. In addition, the State did not prove that the exempted media were experiencing financial difficulties which would account for the difference. Thus, the facts of *Medlock* did not justify the state's differential taxation, even if considered a matter of subsidization. In any case, the question is far closer than the Court recognized.

Finally, the vital role of the media, as provider of information and criticism under the First Amendment, should be recognized in

193 461 U.S. at 549 (citing Commissioner v. Sullivan, 356 U.S. 27, 28 (1958) (tax exemptions and deductions are "a matter of grace . . . [that] Congress can, of course, disallow . . . as it chooses.")). *Sullivan*, however, did not concern the effect of withholding a tax exemption on the exercise of a fundamental right.

194 Public forums probably represent a case where no severe resource expense is involved in providing access for speech to all, but even here speech must be restricted to reasonable times and manners, and no government could afford constant use of its public forums for demonstrations, marches and the like.

the weighing process. The press, as a whole, plays a unique role in informing the public, unmatched by any other First Amendment activity. First Amendment analysis, and much of this Note, treats freedom of speech and freedom of the press as synonymous, and in most cases the relevant interests involved do not diverge.[195] The constitutional text, however, assigns to the press an independent role as an institution. Its special status is invoked when government regulations distinctly harm its news-gathering capability.[196] Some commentators characterize the Press Clause as creating an independent check on government, almost a fourth branch in the constitutional framework.[197]

Furthermore, questions of media access are distinct from typical individual speech claims because, through the media, access is potentially afforded to all. This is the unique nature and special role of the press comprehended by the First Amendment and enhanced by the evolution of modern technology. Because of the widespread use of mass media for information, a differential tax has a far greater potential to distort access to speech. When a tax structure distinctly affects the media, the *Minneapolis Star* Court recoguized the significant danger to values protected by the Press Clause.[198] The same principles apply to the tax in *Medlock* because its differential nature also uniquely affects the press.

CONCLUSION

In *Medlock*, the Court successfully ended some of the uncertainty and fear of an expansive sweep following *Minneapolis Star* and

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195 *See* Anderson, *supra* note 10, at 458-59.

196 *See, e.g.*, Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) (right of access to courtrooms); Zurcher v. Stanford Daily, 436 U.S. 547 (1978) (right to keep police from searching newsrooms); Pell v. Procunier, 417 U.S. 817 (1974) (right of access to prisons); Branzburg v. Hayes, 408 U.S. 665 (1972) (right to maintain confidentiality of sources).

197 *See* Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521; Melville B. Nimmer, *Introduction—Is Freedom of the Press a Redundancy: What Does it Add to Freedom of Speech?*, 26 HASTINGS L.J. 639 (1975); Nowak, *supra* note 131; Potter Stewart, *"Or of the Press"*, 26 HASTINGS L.J. 631 (1975).

The debate about whether the Press Clause adds any special protections for, or burdens on, the press has also generated considerable commentary to the contrary. *See* First Nat'l Bank v. Bellotti, 435 U.S. 765, 796-802 (1978) (Burger, C.J., concurring); *see also* Anthony Lewis, *A Preferred Position for Journalism?*, 7 HOFSTRA L. REV. 595 (1979) (arguing that special press protection would exacerbate journalistic arrogance and create a press-centered jurisprndence that would overshadow equally deserving claims for individual freedoms); William V. Alstyne, *The Hazards to the Press of Claiming a "Preferred Position"*, 28 HASTINGS L.J. 761 (1977) (concerned that a press preferrence would also bring additional regulation of the press on the grounds that it acts in trust for the public). This view has generally prevailed in the Supreme Court, as evidenced by the fact that the press lost all the cases listed *supra* note 181.

198 460 U.S. at 585; *see supra* notes 40-46 and accompanying text.

Ragland. Unfortunately, the Court ended its analysis one step too soon. The power of government to use taxes to distort speech is not limited to censorship motives, for the First Amendment also subjects content neutral restrictions to close judicial scrutiny. Two constitutional problems plague a differential tax even after it survives the *Medlock* test: First, the continuing state leverage over the entities receiving subsidies under the differential tax, and second, the possible distortion of speech for those seeking access to cable television.

Medlock relied on the general principle that government has no First Amendment obligation to subsidize a person's speech, even if government chooses to do so selectively. This sharp line between subsidies and burdens fails to comport with the realities of the Court's past analysis or with the requirements of the First Amendment. Traditional distinctions, such as that between content neutral and content discriminatory regulations, are difficult to make when government takes an active role in the First Amendment process. Instead, a balancing approach that considers the government's discretion to subsidize as a legitimate interest to be weighed against its distorting effect on speech, will provide a more consistent speech protective analysis in this area.

This balance should also consider two additional facts. First, as an institution, the press plays a central role in criticizing the government and informing the public. While few suggest that the Press Clause creates immunity for the media from all taxes and regulations, the inherent First Amendment values require that such regulations be applied in the least discriminatory manner possible. Second, there is even less reason to accord state tax classifications their usual deference when the press is involved. In most cases, the dispensing or withholding of tax benefits concerns little more than the property of the tax payer and indirect economic management by the legislature. However, the institutional press represents a point at which the division between personal and property rights dissolves. The press constitutes profit-making entities in the business of free speech. The *Minneapolis Star* case took a step toward recognizing the special institutional role of the press in this unique situation. In *Medlock*, however, the Supreme Court beat a hasty and ill-advised retreat.

Benjamin Lombard