

# “Small Numbers” and Strict Scrutiny: Differential Taxation of the Press

By ALEC HUNTER BOYD\*

## Introduction

[A]ny effort to solve the broader problems of a monopoly press by forcing newspapers to cover all “newsworthy” events and print all viewpoints . . . is likely to undermine such independence as the press now shows without achieving any real diversity. Government measures to encourage a multiplicity of outlets, rather than compelling a few outlets to represent everybody, seems a far preferable course of action. Such a goal cannot be reached by mere enforcement of the antitrust laws. It will undoubtedly be necessary to go to the economic roots of the problem and either by government subsidies or other devices create an open market with a new form of economic base.<sup>1</sup>

Twenty years after Professor Emerson’s call for a revitalization of the system of freedom of expression, the vitality of the marketplace of ideas continues to erode.<sup>2</sup> Unfortunately, any legislature that seeks to implement Professor Emerson’s suggestion of a press subsidy plan, aimed at fostering the marketplace of ideas by combatting media monopoly, faces a potentially insurmountable barrier in the Press Clause of the First Amendment as currently interpreted by the Supreme Court.

In *Minneapolis Star & Tribune v. Minnesota Commissioner of Revenue*,<sup>3</sup> the Supreme Court articulated the first two prongs of a new First

---

\* Member, Third Year Class; B.S., University of Oregon, 1989. The author would like to thank Pete Messer, Carolyn Nestor, Greg Oakes, Kevin Boyer and Georgi Kelly for their assistance.

1. THOMAS EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 671 (1970).

2. See *infra* part IV (discussing the continuing trend in the United States toward media concentration and monopolization).

3. 460 U.S. 575 (1983). This case has generated a wealth of critical comment. See Jerry R. Parkinson, Note, *Minneapolis Star & Tribune v. Minnesota Commissioner of Revenue: Differential Taxation of the Press Violates the First Amendment*, 69 IOWA L. REV. 1103 (1984); Leila Sadat-Keeling, Note, *Supreme Court Finds First Amendment a Barrier to Taxation of the Press*, 58 TUL. L. REV. 1073 (1985); Mark J. Schwemler, Comment, *Non-general Schemes of Taxation Violate First Amendment Free Press Clause*, 89 DICK. L. REV. 261 (1984); 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 (1985).

Amendment doctrine, the three pronged singling out rule.<sup>4</sup> The first two prongs of the singling out rule hold taxation of the press presumptively unconstitutional if the press is singled out for taxation from: 1) other businesses; or, 2) other members of the press.<sup>5</sup> In articulating these two prongs, the Court saw its prior decisions, which held censorially motivated taxation of the press invalid, as an insufficient guarantee of press freedom.<sup>6</sup> Consequently, the Court decided it was necessary to analyze the First Amendment anew. Ultimately, the Court struck down a content neutral law that was economically beneficial to the press.<sup>7</sup> In so doing, the Court acted out of concern that singling out the press, even without censorial motivation, could threaten the press's editorial independence.<sup>8</sup>

After this case, commentators feared that the press would use the singling out rule in a flood of challenges to state tax structures.<sup>9</sup> These fears were reinforced in 1987 when the Court in *Arkansas Writers' Project, Inc. v. Ragland* added a third prong to the singling out rule proclaiming content based differential taxation of the press to be presumptively unconstitutional as well.<sup>10</sup> One commentator suggested, after examining lower court cases following *Minneapolis Star* and *Ragland*, that the lower courts were at the beginning of a wholesale invalidation of state laws differentially taxing the press.<sup>11</sup>

---

4. See Randall P. Bezanson, *Political Agnosticism, Editorial Freedom, and Government Neutrality Toward the Press: Observations on Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 72 IOWA L. REV. 1359, 1365 (1987) (discussing the *Minneapolis Star* Court's articulation of the first two prongs of the singling out rule).

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

6. *Id.* at 580 (viewing *Grosjean v. American Press Co.*, 297 U.S. 233 (1936) as being limited to situations where a censorial motivation is present on the part of the legislature and not merely the singling out of the press for special taxation). A contrary view of *Grosjean* was expressed in *Mabee v. White Plains Publishing Co.*, 327 U.S. 178, 184 (1946) in which the court saw the distinguishing facts of *Grosjean* as being that "the press was singled out for special taxation and the tax was graduated in accordance with the volume of circulation."

7. *Minneapolis Star*, 460 U.S. at 603 (Rehnquist, J., dissenting) ("*Minneapolis Star & Tribune* was benefitted to the amount of \$16,000 in the two years in question . . .").

8. *Id.* at 583-85. For a comprehensive analysis of the theoretical underpinnings of the Court's concern for editorial freedom, see Bezanson, *supra* note 4. Professor Bezanson suggests that while the Court expressed a clear desire to promote editorial freedom, the Court is not very clear in explaining *how* singling out the press will interfere with editorial freedom. In his article, Professor Bezanson attempts to explain how the singling out rule relates to editorial freedom.

9. See, e.g., Simon, *supra* note 3, at 89 ("Unfortunately, the *Minneapolis Star* Court does not seem to have considered the effects of its new rules. These rules may result in continual disruption of state tax systems as media corporations file challenges in the name of First Amendment equity. . . . A flood of cases should be expected.")

10. 481 U.S. 221 (1987).

11. Richard J. Tofel, *Is Differential Taxation of Press Entities by States Constitutional?*, 72 J. TAX'N 42 (July 1990). Tofel notes:

The lower courts struggled to interpret the Supreme Court's broad statements of First Amendment values when analyzing state tax schemes in the wake of *Minneapolis Star* and *Ragland*.<sup>12</sup> Because of the lack of clear rules, state and federal lower courts addressed differential taxation of the press in widely differing fashions.<sup>13</sup>

In 1991, recognizing the confusion which reigned in the lower courts, the Supreme Court revisited the singling out rule in *Leathers v. Medlock*.<sup>14</sup> Unfortunately, this most recent attempt to clarify the three prongs of the singling out rule has not resulted in a rule that will allow innovative legislatures room to attempt to foster diversity of expression while still safeguarding the integrity of the press.<sup>15</sup> This Note analyzes the Court's rulings on differential taxation of the press and suggests a review scheme that will effectively promote the values the Court has cited as underlying freedom of the press. In examining the policy implication of the Court's differential taxation decisions, this Note focuses on the differential taxation of newspapers because of the watchdog role the printed press has historically played in American politics.<sup>16</sup>

Part I of this Note addresses the original articulation of the Court's three pronged singling out rule in *Minneapolis Star* and *Ragland*. Part II examines the lower courts' contradictory applications of this rule following *Minneapolis Star* and *Ragland*. Part III addresses the Court's recent rearticulation of the rules governing differential taxation of the press in *Leathers v. Medlock*. Part IV presents a two-fold criticism of the singling out rule as clarified in *Medlock*. Part V will propose that the Court abandon the second prong of the singling out rule, and this Note will conclude that a press subsidy plan designed to foster First Amendment values could survive constitutional scrutiny under such a revised singling out rule.

## I. The Singling Out Rule

The Court articulated the first two prongs of the singling out rule in

---

If, as the courts of Louisiana, New York, Oklahoma and Tennessee have concluded, the second rule of *Minneapolis Star* is to read to mean what it says, the implications for state taxation of the press in this country could be considerable. . . . The differential taxation of magazines could by itself render 16 states' taxation of the press unconstitutional.

*Id.* at 43.

12. See *infra* part I.

13. See *infra* part II.

14. 111 S. Ct. 1438 (1991).

15. See *infra* part IV.

16. See *infra* notes 187-93 and accompanying text (discussing the watchdog role played by the printed press); *infra* notes 224-28 (discussing the use of government subsidies to increase the quantity of newspapers and the effect of such subsidies on the watchdog role of the printed press).

*Minneapolis Star & Tribune v. Minnesota Commissioner of Revenue.*<sup>17</sup> In *Minneapolis Star*, the Court confronted a tax scheme that resulted in differential taxation of the press from other businesses and between members of the press. The Court invalidated the tax scheme at issue, but declined to follow precedent.<sup>18</sup> Instead, the Court pronounced the first two prongs of the singling out rule: 1) the singling out of members of the press from other businesses for taxation is presumptively unconstitutional and, 2) the singling out of some press entities from other members of the press is presumptively unconstitutional.<sup>19</sup>

The first two prongs of the singling out rule were a response to the Minnesota tax scheme. The Minnesota legislature enacted a generally applicable tax on the sale of goods in 1967.<sup>20</sup> As a complement to its sales tax system, Minnesota also enacted a use tax<sup>21</sup> on any non-exempt personal property that was not subject to the sales tax.<sup>22</sup> The Supreme Court inferred that the intent of the use tax was to eliminate the incentive to avoid the sales tax by purchasing goods from other states.<sup>23</sup> From the enactment of this tax scheme until 1971, periodicals enjoyed an exemption from the sales and use taxes.

Between 1971 and 1974, the legislature modified the portions of the tax scheme affecting periodicals. These modifications resulted in two types of differential taxation of the press. First, by imposing a use tax on ink and paper used in the preparation of a publication, the press was singled out from other businesses as the only industry subject to a use tax on components of goods to be sold at retail.<sup>24</sup> Second, by a 1974 legislative amendment that enacted a use tax exemption for the "first \$100,000 worth of ink and paper consumed by a publication in any calendar year," certain larger press entities were singled out from the press as a whole for taxation because they were the only press entities that used more than \$100,000 worth of ink and paper.<sup>25</sup>

The net effect of these modifications was to single out the large

---

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

18. *Id.* at 580 (distinguishing *Grosjean v. American Press Co.*, 297 U.S. 233 (1936)). See *infra* notes 28-37 (discussing *Grosjean*).

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

20. Act of June 1, 1967, ch. 32, art. XIII, § 2, 1967 Minn. Laws 2143, 2179 (codified at MINN. STAT. § 297A.02 (1982)).

21. A use tax is defined as an "ad valorem tax on the use, consumption, or storage of tangible property, usually at the same rate as the sales tax, and levied for the purpose of preventing tax avoidance by the purchase of articles in a state or taxing jurisdiction which does not levy sales taxes." BLACK'S LAW DICTIONARY 1383 (5th ed. 1979).

22. MINN. STAT. § 297A.14 (1982)

23. *Minneapolis Star*, 460 U.S. at 577.

24. *Id.* at 578.

25. *Id.*

newspapers in the State for taxation under the use tax.<sup>26</sup> The Minneapolis Star Tribune bore close to two-thirds of the total receipts from the use tax because of the application of the exemption to other smaller members of the press.<sup>27</sup> As a result, the Minneapolis Star Tribune challenged the tax scheme as violating the constitutional guarantees of Freedom of the Press and Equal Protection.

Previously, in *Grosjean v. American Press Co.*,<sup>28</sup> the Court had invalidated a Louisiana newspaper license tax that singled out 13 of the 124 publishers in the state. The tax at issue in *Grosjean* had been promulgated by Huey Long as a way of punishing newspapers he saw as his political enemies.<sup>29</sup> In *Minneapolis Star*, the Court distinguished the Louisiana tax from the Minnesota tax at issue: "In the case currently before us, however, there is no legislative history and no indication, apart from the structure of the tax itself, of any impermissible or censorial motive on the part of the legislature."<sup>30</sup> Noting that *Grosjean* was not controlling because of the lack of a censorial motive, the Court declared, "we must analyze the problem anew under the general principles of the First Amendment."<sup>31</sup>

The Court refused to analyze the tax scheme under the Equal Protection Clause. This is significant because the tax scheme was arguably beneficial to the press, and consequently would have been upheld under equal protection analysis. Because the press was subject to the use tax instead of the sales tax, unlike other businesses, the press avoided some tax liability.<sup>32</sup> Consequently, the tax scheme arguably "benefitted, not burdened, the 'freedom of speech, [and] of the press.'" <sup>33</sup> The Court applies the rational basis test in equal protection cases in which it concludes no fundamental right is violated.<sup>34</sup> In these situations, the state need only demonstrate a legitimate governmental interest that is rationally re-

---

26. *Id.* at 578-79 (In 1974, only 14 of the 388 paid circulation newspapers incurred a tax liability. In 1975, only 16 of the 374 paid circulation newspapers incurred a tax liability.).

27. *Id.* at 579 ("In 1975, 13 publishers, producing 16 out of 374 paid circulation papers, paid a tax. That year, Star Tribune again bore roughly two-thirds of the total receipts from the use tax on ink and paper.").

28. 297 U.S. 233 (1936).

29. *Minneapolis Star*, 460 U.S. at 579-80 (Senator Long and the Governor of the State distributed a flyer to the State legislature describing the tax as a "tax on lying.").

30. *Id.* at 580.

31. *Id.*

32. Justice Rehnquist determined that the Star Tribune actually avoided \$2,440,345 in tax liability for 1974 and 1975 by being subject to a use tax instead of the sales tax. *Id.* at 598 (Rehnquist, J., dissenting).

33. *Id.* (Rehnquist, J., dissenting) (quoting U.S. CONST. amend. I).

34. See *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 312 (1976) ("equal protection analysis requires strict scrutiny of a legislative classification only when the classification impermissibly interferes with the exercise of a fundamental right . . ."). See also Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 50-52 (1987).

lated to the proposed legislation.<sup>35</sup> Courts have held that the imposition of a generally applicable tax on the press, for purposes of raising revenue, satisfies the rational relationship test.<sup>36</sup> Justice Rehnquist, dissenting in *Minneapolis Star*, would have analyzed the Minnesota tax under the Equal Protection Clause and upheld the Minnesota tax scheme as being rationally related to the State's interest in a fair tax scheme.<sup>37</sup>

Nonetheless, the Court did not rely upon traditional equal protection analysis in evaluating this tax scheme. Instead, the Court subjected the tax to strict scrutiny arising directly under the First Amendment.

#### A. The First Prong: Singling Out The Press From Other Businesses

The Court articulated the first prong of the singling out rule in response to the imposition of the use tax upon the press but not other businesses.<sup>38</sup> The Court held that differential taxation, "unless justified by some special characteristic of the press," will be upheld only if "the State asserts a counterbalancing interest of compelling importance that it cannot achieve without differential taxation."<sup>39</sup> The Court held the mere raising of revenue an insufficient interest to justify differential taxation of the press from other general businesses.<sup>40</sup>

In reaching this holding, the Court was forced to justify First Amendment protection for the press absent censorial motive on the part of the legislature.<sup>41</sup> The Court justified First Amendment protection for two related reasons: the intent of the Framers of the Constitution, and concern over the censorial capacity of differential taxation.<sup>42</sup> In essence, the Court argued that the Antifederalists were opposed to a congressional power to tax the press because the singling out of the press created an inherent threat to press independence:

When the state singles out the press . . . the political constraints that prevent a legislature from passing crippling taxes of general

---

35. JOHN E. NOWAK, ET AL., CONSTITUTIONAL LAW 524 (1978). See *Citizen Publishing Co. v. United States*, 342 U.S. 143, 155-56 (1952) (upholding application of antitrust laws to the press).

36. See, e.g., *Giragi v. Moore*, 64 P.2d 819 (Ariz. 1937) (tax on income stemming from newspaper subscriptions is constitutional, since the tax was generally applied and affected the business end of the media).

37. *Minneapolis Star*, 460 U.S. at 602 (Rehnquist, J., dissenting).

38. *Id.* at 582 ("By creating this special use tax . . . Minnesota has singled out the press for special treatment. We then must determine whether the First Amendment permits such special taxation.").

39. *Id.* at 585.

40. *Id.* at 586.

41. *Id.* at 580 ("In the case currently before us, however, there is no legislative history and no indication, apart from the structure of the tax itself, of any impermissible or censorial motive on the part of the legislature."). Cf. *Grosjean v. American Press Co.*, 297 U.S. 233 (1936) (finding a censorial motive on the part of the legislature).

42. *Minneapolis Star*, 460 U.S. at 583-85.

applicability are weakened, and the threat of burdensome taxes becomes acute. That threat can operate as effectively as a censor to check critical comment by the press.<sup>43</sup>

Justice Rehnquist forcefully dissented from the Court's analysis of this issue. Justice Rehnquist argued that because the Court has the ability to review subsequent changes in state tax laws that are intended to penalize newspapers, the threat of potentially more burdensome treatment in the future was not a compelling justification for strict scrutiny now.<sup>44</sup> Justice White in a separate dissent agreed with Justice Rehnquist's analysis.<sup>45</sup>

## B. The Second Prong: Singling Out A Few Members Of The Press

The *Minneapolis Star* Court articulated the second prong of the singling out rule in response to the imposition of the use tax on some press entities but not others.<sup>46</sup> The Court held that strict scrutiny review is warranted when a "small group of newspapers" is targeted.<sup>47</sup> The Court reasoned that a tax "that targets individual publications within the press, places a heavy burden on the State to justify its action."<sup>48</sup>

In analyzing the constitutionality of the tax exemption for smaller newspapers, the Court once again focused on the potential for state abuse of the taxing mechanism. The Court declared that "when the exemption selects such a narrowly defined group to bear the full burden of the tax, the tax begins to resemble more a penalty for a few of the largest newspapers than an attempt to favor struggling smaller enterprises."<sup>49</sup> Surprisingly, the Court made the pronouncement that "to tailor the tax so that it singles out a few members of the press presents such a potential for abuse that no interest suggested by Minnesota can justify the scheme."<sup>50</sup> Such a broad pronouncement seems to have been unnecessary because the only interest asserted by the State was that of implementing an equi-

---

43. *Id.* at 584.

44. *Id.* at 601 (Rehnquist, J., dissenting) ("The power to tax is not the power to destroy while this court sits.") (quoting Justice Holmes in *Panhandle Oil Co. v. Knox*, 277 U.S. 218, 223 (1928)). Justice Rehnquist noted that the Court was experienced in reviewing legislation to determine if it concealed some ulterior motive. *Id.*

45. *Id.* at 593-96 (White, J., concurring in part and dissenting in part) (Justice White joined the Court's opinion concerning the singling out of some members of the press for an exemption from the use tax).

46. *Id.* at 591 ("Minnesota's ink and paper tax violates the First Amendment not only because it singles out the press, but also because it targets a small group of newspapers.").

47. *Id.*

48. *Id.* at 593.

49. *Id.* at 592 (In 1975, only 16 of the 374 paid circulation papers were singled out for taxation.).

50. *Id.* at 593.

table tax system.<sup>51</sup>

Justice Rehnquist took issue with the Court's characterization of the exemption as a penalty. He perceived the exemption not as a penalty for some newspapers but as a subsidy for all newspapers. Justice Rehnquist argued that "the exemption is in effect a \$4000 credit which benefits all newspapers."<sup>52</sup> Consequently, Justice Rehnquist concluded that no fundamental right had been violated and that the State was acting "reasonably and rationally to fit its sales and use tax scheme to its own local needs and usages."<sup>53</sup>

*Minneapolis Star* did not clarify several important aspects of the second prong of the singling out rule. The Court left unclear whether any interest might be deemed compelling enough to justify singling out members of the press for taxation. It also left unclear how many members of the press must be singled out from the press at large to qualify as a "small number." Subsequently, the Court revisited the singling out rule but failed to clarify these questions.

### C. *Arkansas Writers' Project v. Ragland*: Articulating the Third Prong

In 1987, the Supreme Court expanded the application of the singling out rule in *Arkansas Writers' Project v. Ragland*.<sup>54</sup> A 1935 Arkansas statute enacted a sales tax on tangible personal property.<sup>55</sup> Items exempted from the tax included the gross receipts of religious, professional, trade and sports journals, newspapers, and all publications printed and published within the State.<sup>56</sup> The net effect of the scheme was to single out one to three magazines for taxation.<sup>57</sup> The statute was, therefore, a generally applicable tax law that singled out some members of the press for taxation based on their content. Arkansas Writer's Project challenged the Arkansas tax as violating the First Amendment.

Justice Marshall, writing for the majority, noted that "the Arkansas

---

51. *Id.* The State's claim, however, is considerably undermined by the fact the State did not grant exemptions to other non-press businesses subject to the use tax in order to effectuate the asserted interest in a fair tax scheme.

52. *Id.* at 603 (Rehnquist, J., dissenting).

53. *Id.* at 604.

54. 481 U.S. 221 (1987). For commentary on this case, see David L. Medford, Note, *Arkansas Writers' Project, Inc. v. Ragland: Taxation of the Press*, 13 OKLA. CITY U. L. REV. 401 (1988); Laura V. Farthing, Note, *Arkansas Writers' Project v. Ragland: The Limits of Content Discrimination Analysis*, 78 GEO. L.J. 1949 (1990); Jeanne M. Lanese, Note, *Arkansas Tax Exemption Structure Imposes an Unconstitutional Burden on the Press*, 65 U. DET. L. REV. 871 (1988).

55. ARK. CODE ANN. § 84-1903(a) (Michie 1980 and Supp. 1985).

56. *Id.* §§ 84-1904(f), -1904(j).

57. *Ragland*, 481 U.S. at 229 n.4 (The Appellant contended that the Arkansas Times was the only Arkansas publication that paid the tax. The Tax Commissioner contended that two other publications also paid the tax.).



sales tax scheme treats some magazines less favorably than others.”<sup>58</sup> Because the tax scheme singled out certain members of the press, the Court held it was subject to a strict scrutiny analysis under the second prong of the singling out rule articulated in *Minneapolis Star*.<sup>59</sup> The Court justified strict scrutiny based upon the risk of censorship posed by differential taxation noted in *Minneapolis Star*.<sup>60</sup> The Court, however, did not stop its analysis after finding that the tax scheme fell under the second prong of *Minneapolis Star*.

The facts in *Ragland* were distinguishable from *Minneapolis Star*. Unlike the Minnesota tax scheme, the Arkansas tax scheme was not content neutral: “a magazine’s tax status depends entirely upon its *content*.”<sup>61</sup> The Court noted that a content based differentiation is “a more disturbing use of selective taxation than *Minneapolis Star*” because the risk of censorship is acute.<sup>62</sup> The Court declared that “[r]egulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment.”<sup>63</sup>

The tax scheme was distinguishable from *Minneapolis Star* for a second reason: the tax scheme discriminated between different types of press entities — magazines and newspapers.<sup>64</sup> The Court, however, chose to focus on the content discrimination between magazines and did not address the separate issue of whether disparate treatment between newspapers and magazines should independently invalidate the statute.<sup>65</sup> The holding in *Ragland*, therefore, was limited to the singling out of members of the same *type* of press entity, as in *Minneapolis Star*.

The State of Arkansas asserted an important interest in support of its tax scheme: the encouragement of fledgling publishers.<sup>66</sup> The Court, however, did not decide if this interest could be sufficiently compelling. Instead, it assumed the interest was compelling but determined that the tax failed to narrowly effectuate this interest.<sup>67</sup>

---

58. *Id.* at 229.

59. *Id.* See also *supra* notes 47-53 and accompanying text (discussing the singling out of members of the press).

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

61. *Id.* (religious, professional, trade and sports journals were specifically exempted).

62. *Id.*

63. *Id.* (citing *Regan v. Time, Inc.*, 468 U.S. 641, 648-49 (1984)).

64. ARK. CODE ANN. § 84-1904(f) (Michie 1980 and Supp. 1985).

65. *Ragland*, 481 U.S. at 233.

66. *Id.* at 232. The State reasoned that by giving tax breaks to fledgling publishers it would make it easier for new publications to survive, thus enriching the media mix in the state. It is upon this interest that a state legislature would have to rely, if it sought to implement a press subsidy plan utilizing tax exemptions. See *infra* notes 225-28 (discussing press subsidization).

67. *Ragland*, 481 U.S. at 232 (the Court noted that the tax exemption was not targeted at “fledgling publishers” but included established publications which had the proper content).

In response to the application of the strict scrutiny standard, Justice Scalia, joined by Chief Justice Rehnquist, vigorously dissented. Justice Scalia, echoing Chief Justice Rehnquist's earlier dissent in *Minneapolis Star*, argued that the tax exemption should be categorized as a subsidy.<sup>68</sup> If the exemption is viewed as a subsidy, Justice Scalia argued, then it should be subject to the deferential standard of review adopted in *Regan v. Taxation with Representation of Washington*.<sup>69</sup>

In *Regan*, the Court was confronted with a law that gave a tax exemption to Veterans' organizations, which had lobbying as one of their activities, but did not grant a tax exemption to other lobbying organizations. The Court held that "a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny."<sup>70</sup> By analogy, Justice Scalia contended, the Arkansas statute also was a mere subsidy that did not infringe upon a fundamental right, and therefore was appropriately subject only to rational basis review.<sup>71</sup> The *Ragland* majority was unmoved by Justice Scalia's arguments, noting that the exemption resulted in a distortion of the marketplace of ideas by fostering only "communication on religion, sports, professional and trade matters."<sup>72</sup>

*Ragland* draws a bright line in holding that content based differential taxation is impermissible. The Court, however, intentionally avoided addressing whether the singling out rule would be offended by differential taxation of different types of press entities.<sup>73</sup> Further, *Ragland* did not clarify the questions left unresolved by *Minneapolis Star*. The Court held that one to three publishers were a "small number" under the second prong, but once again failed to articulate any criteria to support that holding. The Court also failed to address whether any state interest could be found sufficiently compelling to override the freedom of press issue at stake.

Significantly, in 1989 the Court had the opportunity to address what interests might be found compelling under the *Ragland* ruling in *Texas Monthly, Inc. v. Bullock*.<sup>74</sup> Texas exempted religious periodicals from its sales tax. The rationale behind this exemption was to prevent excessive government entanglement with religion, a potentially compelling First

---

68. *Id.* at 236-37 (Scalia, J., dissenting) (Justice Scalia noted "that tax exemptions, credits, and deductions are a 'form of subsidy that is administered through the tax system . . . .'" (quoting *Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 544 (1983))).

69. 461 U.S. 540 (1983).

70. *Id.* at 549.

71. *Ragland*, 481 U.S. at 236 (Scalia, J., dissenting).

72. *Id.* at 232.

73. *Id.* at 233.

74. 489 U.S. 1 (1989).

Amendment concern.<sup>75</sup> The plurality opinion held the statute to violate the Establishment Clause and avoided the free press issue altogether.<sup>76</sup> In a separate concurrence, however, Justices Blackmun and O'Connor indicated that a narrowly tailored statute that exempts both philosophical and religious material would survive strict scrutiny under the Press Clause.<sup>77</sup> Chief Justice Rehnquist and Justices Kennedy and Scalia, dissenting, appeared to share the view of Justices Blackmun and O'Connor, when they noted that "the Constitution sometimes requires accommodation of religious expression despite not only the Establishment Clause but also the Speech and Press Clauses."<sup>78</sup> It therefore appears that at least five of the Justices would find that a tax that exempts religious and philosophical periodicals constitutional. Justice Souter's and Justice Thomas' views are as yet unknown. Justice White, concurring, noted in a one paragraph opinion that the *Ragland* holding alone should have invalidated the tax.<sup>79</sup>

The Court's failure to revisit the *Ragland* ruling in *Texas Monthly* left the lower courts with only minimal guidance in the application of the singling out rule until the 1991 *Leathers v. Medlock* decision.

## II. Confusion in the Lower Court: Decisions following *Minneapolis Star* and *Ragland*

*Minneapolis Star* and *Ragland* provided lower courts with uncertain guidance when they faced content neutral differential taxation of the press. *Minneapolis Star* is dispositive on its very limited factual circumstance, singling out a small number of newspapers to effectuate the governmental interest of a "fair" tax structure,<sup>80</sup> and *Ragland* invalidated content based taxation that differentiated between magazines.<sup>81</sup> Accordingly, the lower courts made their own rules within the confines of the broad principles articulated in those cases. As one lower court noted:

---

75. *Id.* at 27-28 (Blackmun, J., concurring) ("If the Free Exercise Clause suggests that a State may not tax the sale of religious literature by a religious organization, this fact alone would give a State a compelling reason to exclude this category of sales from an otherwise general sales tax.").

76. *Id.* at 5.

77. *Id.* at 27-28 (Blackmun, J., concurring).

78. *Id.* at 45.

79. *Id.* at 25-26 (White, J., concurring). Only one lower court has subsequently addressed the issue. The Fourth Circuit adopted the position of Justice White, invalidating a tax that exempted religious periodicals under the principle stated in *Ragland*. *Finlator v. Powers*, 902 F.2d 1158 (4th Cir. 1990). Prior to the *Texas Monthly* decision, however, the Florida Supreme Court suggested that a sales tax exemption for religious publications could pass constitutional muster under *Minneapolis Star* and *Ragland*. *In re Advisory Opinion to the Governor*, 509 So. 2d 292, 308-09 (Fla. 1987).

80. *Minneapolis Star & Tribune v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 591-92 (1983).

81. *Arkansas Writers' Project v. Ragland*, 481 U.S. 221, 231, 234 (1987).

Extant jurisprudence gives no indication that the two pronouncements [*Minneapolis Star* and *Ragland*] invoked by the [t]axpayer[s] were intended to be rigidly confined within their specific scenarios. Rather, we find that the Court-announced constitutional standards are meant for broad and general application to the press.<sup>82</sup>

The Supreme Court's failure to guide the lower courts resulted in application of the singling out rule to a number of different factual situations<sup>83</sup> and in a variety of ways.<sup>84</sup>

#### A. Defining a "Small Number" of the Press

Under *Minneapolis Star* and *Ragland*, a lower court must invalidate a tax scheme if it finds that a small number of press entities have been singled out for differential taxation.<sup>85</sup> Unfortunately, *Minneapolis Star* offered no criteria for determining what is a small number, and *Ragland* did not address whether differential taxation of one type of press entity could qualify. Consequently, the lower courts had unlimited discretion in determining what constituted a small number of press entities.

The issue of what constitutes the singling out of a small number of press entities was squarely addressed by a Louisiana court in *Louisiana Life, Ltd. v. McNamara*.<sup>86</sup> At issue was a tax that exempted newspapers but not other periodic publications.<sup>87</sup> In determining if the tax singled out a small number of press entities, the court did not feel bound by the factual circumstances in *Minneapolis Star*, the singling out of a few large newspapers for taxation.<sup>88</sup> Instead, the court applied the *Minneapolis Star* holding to the singling out of one type<sup>89</sup> of press entity,<sup>90</sup> recogniz-

---

82. *Jones & Co. v. State ex rel. Tax Comm'n*, 787 P.2d 843, 846 (Okla. 1990).

83. *Hornstein v. Hartigan*, 676 F. Supp. 894 (C.D. Ill. 1988) (advertising); *J-R Distributors v. Eikenberry*, 725 F.2d 482 (9th Cir. 1984) (fines); *Century Federal v. City of Palo Alto*, 710 F. Supp. 1559 (N.D. Cal. 1988) (franchise fees); *Legi-Tech v. Keiper*, 766 F.2d 728 (2d Cir. 1985) (limits on access to information).

*But see* *Jensen v. Stengel*, 762 F.2d 815 (9th Cir. 1985) (excluding copyright fees from *Minneapolis Star* protection); *MNC of Hinesville v. United States Dep't of Defense*, 792 F.2d 1466 (1986) (excluding nonpublic speech); *Redwood Empire Publishing v. State Bd. of Equalization*, 207 Cal. App. 3d 1334 (1st Dist. 1989) (excluding commercial speech); *Doe v. City of Minneapolis*, 898 F.2d 612 (8th Cir. 1990) (excluding indirect economic activities).

84. *See infra* parts II.A, B (discussing lower court confusion in applying *Minneapolis Star*).

85. *Minneapolis Star*, 460 U.S. at 591; *Ragland*, 481 U.S. at 228-29.

86. 504 So. 2d 900 (La. Ct. App. 1st Cir. 1987).

87. *Id.* at 902 (the exemption is set forth in LA. REV. STAT. ANN. § 47:305D(1)(e)) (West 1990).

88. *Id.* at 903. *See Minneapolis Star*, 460 U.S. at 578-79 (discussing the singling out of newspapers that used more than \$100,000 of ink and paper from newspapers that used less than \$100,000 of ink and paper).

89. The courts have recognized that the free press guarantee extends from "newspapers, magazines, and books to, *inter alia*, motion pictures, news wire services, and interactive electronic data base services." *Tofel, supra* note 11, at 45.

90. *Louisiana Life*, 504 So.2d at 905.

ing as it did so that the “ ‘press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.’ ”<sup>91</sup> The court reasoned: “[The tax scheme] produces the same discriminatory result between newspaper publishers and magazine publishers . . . that the Minnesota statute created between small periodical publishers and large newspapers.”<sup>92</sup> Consequently, the court invalidated the Louisiana tax scheme.

The Oklahoma Supreme Court reached a similar result in *Jones & Co. v. State ex rel. Tax Commissioner*.<sup>93</sup> In *Jones*, the challenged statute differentially taxed members of the press according to the mode of delivery and cost.<sup>94</sup> The court held “[the exemption provision] is a narrowly ‘targeted’ levy exemption in the sense that its provisions aim at taxing a specific class of publications . . . [those] sold for more than seventy five cents or distributed by mail . . . .”<sup>95</sup> Without finding the tax to be a content based discrimination the court relied upon *Ragland*, which was aimed at a content based discrimination.<sup>96</sup> The court justified this approach by declaring: “Although not based on content, [the tax] targets only certain publications and hence violates the *spirit*, if not the letter, of both the First Amendment and the teachings of *Ragland*.”<sup>97</sup> Consequently, the court held invalid the taxation of those publications not subject to the exemption.

The Oklahoma Supreme Court revisited the tax scheme challenged in *Jones* in *Oklahoma Broadcasters Association v. Oklahoma Tax Commission*.<sup>98</sup> In *Oklahoma Broadcasters* members of the broadcast media challenged the portions of the state tax scheme that taxed broadcasters.<sup>99</sup> The court first determined that broadcasters were members of the press.<sup>100</sup> Because broadcasters were members of the press, regardless of the number of members affected, the court concluded that they were deserving of protection under the singling out rule articulated in *Minneapolis Star* and *Ragland*.<sup>101</sup> Consequently, the court held the taxation of broadcasters, but not other types of press entities, to be an invalid singling out of members of the press.

---

91. *Id.* at 903 (quoting *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938)).

92. *Id.* at 905.

93. 787 P.2d 843 (Okla. 1990).

94. OKLA. STAT. tit. 68 § 1357(c) (1981).

95. *Jones*, 787 P.2d at 846.

96. *Id.* See also *Arkansas Writers' Project v. Ragland*, 481 U.S. 221, 229-30 (1987) (“[T]he basis on which Arkansas differentiates between magazines is particularly repugnant to First Amendment principles: a magazine’s tax status depends entirely upon its *content*.”).

97. *Jones*, 787 P.2d. at 846.

98. 789 P.2d 1312 (Okla. 1990).

99. A similar issue was addressed in New York in *McGraw-Hill, Inc. v. State Tax Comm’n*, 541 N.Y.S.2d 252 (A.D. 3d Dept. 1989).

100. *Oklahoma Broadcasters*, 789 P.2d at 1316.

101. *Id.*

In each of these cases, the courts disregarded the quantity of press entities singled out.<sup>102</sup> In *Louisiana Life*, the court analogized the singling out of all magazines to the singling out of large newspapers in *Minneapolis Star*.<sup>103</sup> This comparison is not convincing because the Minnesota tax scheme only taxed sixteen newspapers<sup>104</sup> while the Louisiana scheme taxed a much greater number of magazines. Furthermore, the Oklahoma court in *Jones and Oklahoma Broadcasters*, relying upon the *Ragland* decision in which only three magazines were taxed,<sup>105</sup> was satisfied that any differential taxation of press entities was sufficient to constitute a singling out of the press. The courts in these cases divorced the holdings of *Minneapolis Star* and *Ragland* from their narrow facts.

At the opposite end of the spectrum, in *Hearst Corporation v. Iowa Department of Revenue and Finance*,<sup>106</sup> the Iowa Supreme Court upheld a tax scheme which granted exemptions to newspapers but not magazines.<sup>107</sup> The court held that the Iowa tax scheme did not single out "small groups of publications."<sup>108</sup> In reaching this conclusion, the court did not assess the quantity of publications affected by the tax. Instead, the court reasoned that the tax scheme itself was of such a form that the holdings in *Minneapolis Star* and *Ragland* did not apply. The court noted at the outset of its analysis that tax exemptions are a form of subsidy.<sup>109</sup> The court held that the reasoning of *Regan v. Taxation With Representation of Washington*<sup>110</sup> gave the legislature broad discretion to create classifications in tax statutes.<sup>111</sup> Specifically, the court noted that "the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes."<sup>112</sup>

Because the Iowa tax scheme did not discriminate between media entities of the same type, the court argued that the tax did not fall under

---

102. See also *Medlock v. Pledger*, 785 S.W.2d 202 (Ark. 1990) (differential treatment of cable TV from other press entities); *Department of Revenue v. Magazine Publishers*, 565 So. 2d 1304 (Fla. 1990) (differential treatment of magazines from newspapers); *Newsweek, Inc. v. Celauro*, 789 S.W.2d 247 (Tenn. 1990) (same); *McGraw-Hill, Inc. v. State Tax Comm'n*, 541 N.Y.S.2d 252 (A.D. 3d Dept. 1989) (differential treatment of print and broadcast media); *Satellink of Chicago v. City of Chicago*, 523 N.E.2d 13 (Ill. App. 1st Dist. 1988) (differential treatment of subscription TV from franchise TV).

103. See *supra* note 92 and accompanying text.

104. *Minneapolis Star & Tribune v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 579 (1983).

105. *Arkansas Writers' Project v. Ragland*, 481 U.S. 221, 229 n.4 (1987).

106. 461 N.W.2d 295 (Iowa 1990).

107. IOWA CODE §§ 422.43, 422.45(9) (1977).

108. *Hearst*, 461 N.W.2d at 302.

109. *Id.* at 304.

110. 461 U.S. 540 (1983). See *supra* notes 70-72 and accompanying text (discussing *Regan*).

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

112. *Id.* at 304 (quoting *Madden v. Kentucky*, 309 U.S. 83, 88 (1940)).

the holding in *Minneapolis Star*.<sup>113</sup> Further, because the Iowa tax scheme was content neutral, the court held it was factually distinguished from *Ragland*.<sup>114</sup> In essence, the court interpreted the broad pronouncements of *Minneapolis Star* and *Ragland* to apply only to differential taxation of the same type of press entities or to content based distinctions. By confining the application of the singling out rule, the *Hearst* court appeared to be attempting to strike a balance between Justice Scalia's dissent in *Ragland* and the majority opinions in *Minneapolis Star* and *Ragland*. By fashioning a narrow rule, however, the *Hearst* court ignored the concerns raised in *Minneapolis Star* and *Ragland* over the censorial capacity of certain taxes.

Judge Posner of the Seventh Circuit undertook a similar analytic process to that of the *Hearst* court in *Kucharek v. Hanaway*.<sup>115</sup> In *Kucharek*, the owner of a pornographic bookstore challenged a Wisconsin statute that banned some forms of obscenity.<sup>116</sup> The plaintiffs admitted that it is permissible under the First Amendment to ban obscenity.<sup>117</sup> Nonetheless, Judge Posner noted that an obscenity statute that banned only certain types of obscenity could run afoul of the First Amendment.<sup>118</sup> Citing *Ragland*, Judge Posner reasoned, "[t]he state is permitted to suppress obscenity but it is not permitted to distort the marketplace of erotic discourse by suppressing only that obscenity which conveys a disfavored message."<sup>119</sup> While Judge Posner recognized that *Ragland* addressed content based discrimination, he suggested that a facially content neutral statute might be brought under the purview of *Ragland*, due to the effect of the restriction. Specifically, Judge Posner noted, "a statute that exempts a particular material embodiment . . . such as videotapes . . . does not present a danger of distorting the market in ideas and expression unless particular messages are correlated with particular material embodiments . . . ." <sup>120</sup> If the court found such a correlation to exist, then it would be forced to evaluate the statute in light of the *Ragland* strict scrutiny standard.<sup>121</sup>

---

113. *Id.*

114. *Id.*

115. 902 F.2d 513 (7th Cir. 1990).

116. WIS. STAT. § 944.21 (1988).

117. *Kucharek*, 902 F.2d at 517. See *Miller v. California*, 413 U.S. 15 (1973) (holding that obscenity may be suppressed by the state).

118. *Kucharek*, 902 F.2d at 517-18. Judge Posner whimsically suggested that suppression only of "anti-Communist obscenity" might run afoul of the First Amendment, but failed to suggest a more realistic form of discrimination. *Id.* A more likely discrimination might be a statute that targeted only homosexual obscenity.

119. *Id.*

120. *Id.*

121. *Arkansas Writers' Project v. Ragland*, 481 U.S. 221, 231 (1987) ("The state must show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end.").

By focusing on correlations between the type of press entities singled out and content, Judge Posner expanded upon the analysis supporting *Minneapolis Star*. *Minneapolis Star* suggests that the singling out of a few members of the press is to be prohibited for fear of distorting the marketplace of ideas.<sup>122</sup> Judge Posner's analysis suggests that differential taxation of the press should be held suspect only if an actual risk of distorting the marketplace of ideas exists in the form of a correlation between the type of press singled out and certain ideas.

## B. Evaluating the Governmental Interests

The Supreme Court applies the strict scrutiny test in cases in which a fundamental right has been violated.<sup>123</sup> Under the strict scrutiny test the state must show the legislation at issue is pursuing a compelling governmental interest and that the legislation is the least restrictive means to achieve this interest.<sup>124</sup> Under *Minneapolis Star* and *Ragland* strict scrutiny is applied: "[W]e cannot countenance such treatment unless the State asserts a counterbalancing interest of compelling importance that it cannot achieve without differential taxation."<sup>125</sup> The practical effect of applying strict scrutiny is to invalidate almost all laws that are reviewed,<sup>126</sup> although sometimes the state is able to articulate a sufficiently compelling interest.<sup>127</sup> In *Minneapolis Star*, the Court's only guidance for the lower courts was the holding that the asserted state interest of raising revenue in an equitable fashion was not compelling.<sup>128</sup> Conse-

---

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

123. NOWAK, ET AL., *supra* note 35, at 524.

124. *Id.*

125. *Minneapolis Star*, 460 U.S. at 585; *see Ragland*, 481 U.S. at 229.

126. The Supreme Court has rejected a number of interests as not sufficiently compelling to justify infringement on the First Amendment. *See, e.g., Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979) (a state's interest in preserving the anonymity of its juvenile offenders); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978) (a state's interest in preserving the integrity of its judiciary); *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308 (1977) (a state's interest in preserving the anonymity of its juvenile offenders); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976) (a state's interest in protecting a criminal defendant's Sixth Amendment right to a fair trial); *Cox Broadcasting Co. v. Cohn*, 420 U.S. 469 (1975) (a state's interest in preserving the anonymity of victims of sexual assault and the right of privacy); *Craig v. Harney*, 331 U.S. 367 (1947) (a state's interest in protecting the integrity of the judiciary); *Near v. Minnesota*, 283 U.S. 697 (1931) (a state's interest in preserving integrity of public office).

127. The strict scrutiny test was met in *Austin v. Michigan Chamber of Commerce*, 110 S. Ct. 1391, 1401 (1990) (holding that the compelling reason of preventing corruption in the political arena justified the legislation at issue).

128. *Minneapolis Star*, 460 U.S. at 592. Justice Rehnquist would have found this interest sufficient under rational basis review. *Id.* at 602 (Rehnquist, J., dissenting). At least one lower court would not find this interest sufficient even under rational basis review. *Satellink of Chicago, Inc. v. City of Chicago*, 523 N.E.2d 13, 17 (Ill. App. 1st Dist. 1988) ("Neither raising revenue nor equalizing the financial burden on cable television can support the targeting of



quently, the lower courts evaluated the asserted government interests in widely varying fashions.

At one end of the spectrum, the *Louisiana Life* court's analysis of the asserted government interest erected a formidable barrier to a state seeking to survive strict scrutiny.<sup>129</sup> The court determined that the State did not assert a compelling interest by relying upon the pronouncement in *Minneapolis Star*, that to tailor a "tax so that it singles out a few members of the press presents such a potential for abuse that no interest . . . can justify the scheme."<sup>130</sup> The court held that "[h]owever much the legislature may have intended to advance the causes of a free press and an informed public, that governmental act of selecting one form of 'protected' speech over another for exempt status violates the instant taxpayer's First Amendment rights."<sup>131</sup>

Similarly, in *Department of Revenue v. Magazine Publishers*,<sup>132</sup> the court struck down a Florida tax scheme using strict scrutiny analysis. The State asserted "a significant public interest in promoting publishers who engage in the immediate dissemination of news; in publishing news while it is new."<sup>133</sup> The court held that the asserted interest was "clearly not a compelling governmental interest."<sup>134</sup> In fact, the court suggested that "[i]t is questionable whether this asserted interest would survive even a rational relationship test."<sup>135</sup>

Those courts that seek to apply strict scrutiny have formulated tests that insure a formidable protection of the press. Ironically, these courts' inability to conceive of any interest that would justify differential taxation of the press fails to allow room for legislation aimed at fostering the First Amendment values these courts are supposedly protecting.<sup>136</sup>

At the opposite end of the spectrum, in *Suburban Cable TV Co. v. Commonwealth of Pennsylvania*,<sup>137</sup> the court upheld a statute under strict scrutiny by relying upon the mere differences between the media sought to be taxed and those untaxed. The Pennsylvania tax code

---

subscription television. The amendment does not withstand an equal protection challenge regardless of the degree of scrutiny applied.").

129. *Louisiana Life, Ltd. v. McNamara*, 504 So. 2d 900, 905 (La. Ct. App. 1st Cir. 1987).

130. *Id.* (quoting *Minneapolis Star*, 460 U.S. at 592).

131. *Id.*

132. 565 So. 2d 1304 (Fla. 1990).

133. *Id.* at 1308.

134. *Id.*

135. *Id.* See also *Newsweek, Inc. v. Celauro*, 789 S.W.2d 247, 250 (Tenn. 1990); *Southern Living, Inc. v. Celauro*, 789 S.W.2d 251, 253 (Tenn. 1990). Cf. *Hearst v. Iowa Dep't of Revenue and Finance*, 461 N.W.2d 295, 307 (Iowa 1990) (finding the State's interest in encouraging the reading of newspapers and thereby enhancing the general knowledge and literacy of its citizenry to be sufficient under the rational basis test).

136. See *infra* part IV.A (discussing the purpose of the First Amendment, and how that purpose is frustrated by the second prong of the singling out rule).

137. 570 A.2d 601 (Pa. 1990).

granted a tax exemption to "manufacturers".<sup>138</sup> Cable TV providers challenged their exclusion from this exemption. The Court held:

Even under a strict scrutiny standard with respect to possible discriminations, a classification . . . distinguishing between dealing with tangible matter on the one hand, and activities involving the manipulation and transmission of information through the dealing with electrical and electronic elements — is a classification which is valid and rationally related to the purpose of the law.<sup>139</sup>

Similar analysis has been used by some courts to escape strict scrutiny review altogether. Such was the case in *Times Mirror Co. v. City of Los Angeles*,<sup>140</sup> in which the court upheld a tax scheme that discriminated between various types of First Amendment activities.<sup>141</sup> *Times Mirror* challenged the tax scheme at issue for discriminating between members of the press by using different methods of computing taxes for the motion picture industry from those used for newspapers and the broadcast media.<sup>142</sup> In analyzing the tax, the court determined that: "The inherent difference between these various forms of mass media is patent. These differences are reflected in the ways in which the ultimate product is conceived, produced, disseminated, and exhibited."<sup>143</sup> These differences led the court to review the tax under the rational basis test,<sup>144</sup> a standard the tax was able to survive.<sup>145</sup> The court specifically noted that the structure of the motion picture industry was "highly fragmented" and as a result the tax scheme had to be adapted accordingly.<sup>146</sup>

A contrary analysis was used by a New York court in *McGraw-Hill, Inc. v. State Tax Commission*.<sup>147</sup> In *McGraw-Hill*, the plaintiff challenged a statute that taxed the advertising of the broadcast media differently from print media.<sup>148</sup> The court applied strict scrutiny following the dictates of *Minneapolis Star* and *Ragland*. The state argued that differences between the print and visual media, including their susceptibility to

---

138. *Id.* at 602.

139. *Id.* at 608.

140. 192 Cal. App. 3d 170 (2d Dist. 1987).

141. Plaintiffs contended the tax would result in dramatically different tax burdens imposed on newspapers, radio, and television broadcasters as compared to the movie industry, lectures, shows, telephone company proceeds from the yellow pages, and billboards. *Id.* at 178.

142. *Id.* at 184-85.

143. *Id.* at 185.

144. *Id.* at 183. See also *Associated Film Distribution Corp. v. Thornburgh*, 800 F.2d 369, 375 (3rd Cir. 1986) ("[T]he regulation of trade practices singular to the distribution of motion pictures is not the type of differential taxation that requires application of the *Minneapolis Star* test, we need not reach the issue of whether the counterbalancing state interest is of 'compelling importance.'").

145. *Times Mirror*, 192 Cal. App. 3d at 185.

146. *Id.*

147. 541 N.Y.S.2d 252 (A.D. 3d Dept. 1989).

148. *Id.* at 255.

taxation, justified the scheme. The court responded: "While that may be true, such an argument fails to show any compelling state interest in taxing the two types of media differently. Thus the regulation must fail."<sup>149</sup>

The *Times Mirror* court makes a strong argument that the fragmented nature of the movie industry requires accommodation in the tax system.<sup>150</sup> However, the court's statement that the various mass media are different,<sup>151</sup> is an unpersuasive argument for application of rational basis review absent any other protection for the press in the review scheme. The extension of this reasoning would allow unrestrained differential taxation due to the various media's differing characteristics, risking government censorship if content were to correlate with media type.<sup>152</sup> Likewise, the *Suburban Cable TV* court's analysis is merely that of the *Times Mirror* court disguised by strict scrutiny language, and falls prey to the same criticism.

The lower courts' analyses provide a number of helpful insights into the workings of the singling out rule. Most importantly, the courts' varying approaches suggest the undesirability of rules that do not give guidance to the lower courts. The considerable variation in approaches taken by the lower courts to differential taxation in the wake of *Minneapolis Star* and *Ragland* prompted the Supreme Court to attempt to provide further guidance.

### III. Clarifying the Singling Out Rule: *Leathers v. Medlock*

In 1991, the Supreme Court revisited the singling out rule in *Leathers v. Medlock*.<sup>153</sup>

The Court reviewed the case in order to clarify "whether the First Amendment prevents a State from imposing its sales tax on only selected segments of the media."<sup>154</sup> In analyzing this question, the Court discussed all three prongs of the singling out rule.

In 1987, Arkansas amended its gross receipts tax to impose the sales tax on cable television.<sup>155</sup> Other members of the press were not subject to the tax.<sup>156</sup> The cable companies contended that exemption of newspapers, magazines, and satellite broadcast services from the tax violated their First Amendment rights.

---

149. *Id.* This same conclusion was reached by the court in *Oklahoma Broadcasters v. Oklahoma Tax Comm'n*, 789 P.2d 1312 (Okla. 1990).

150. *Times Mirror*, 192 Cal. App. 3d at 185. See *supra* notes 140-46 and accompanying text.

151. *Times Mirror*, 192 Cal. App. 3d at 185.

152. See *Kucharek v. Hanaway*, 902 F.2d 513, 517 (1990), discussed *supra* notes 115-21 and accompanying text.

153. 111 S. Ct 1438 (1991).

154. *Id.* at 1442.

155. 1987 Ark. Acts 188.

156. *Medlock*, 111 S. Ct. at 1441.

Justice O'Connor writing for the Court, began analysis of the Arkansas tax scheme by reexamining *Minneapolis Star* and *Ragland*. The Court characterized these cases as standing for the proposition that "differential taxation of First Amendment speakers is constitutionally suspect when it threatens to suppress the expression of particular ideas or viewpoints."<sup>157</sup> The Court justified this constitutional presumption by noting the press's "unique role as a check on government abuse . . . ."<sup>158</sup>

The Court cited the three different prongs of the singling out rule that would trigger strict scrutiny: First, the singling out of the press from other businesses for taxation; second, the singling out of a "small group of speakers"; third, the singling out of a speaker based on the content of speech.<sup>159</sup> The Court upheld the Arkansas tax scheme in *Medlock* because none of these forms of differential taxation were present.

#### A. The First Prong: Singling Out The Press From Other Businesses

*Medlock* did not alter the original formulation of the first prong of the singling out rule from *Minneapolis Star*. The Court noted that "absent a compelling justification, the government may not exercise its taxing power to single out the press."<sup>160</sup> This rule was justified because, "the press plays a unique role as a check on government abuse, and a tax limited to the press raises concerns about censorship of critical information and opinion."<sup>161</sup> This rule did not apply to the tax in *Medlock*, however, because "the tax does not single out the press and does not therefore threaten to hinder the press as a watchdog of government activity."<sup>162</sup>

#### B. The Second Prong: Singling Out a Small Number of the Press

The focus of the Court's opinion was on clarifying the second prong of the rule. The Court emphasized the quantity of speakers differentially taxed in analyzing the application of the tax to only selected members of the press. In *Ragland* only three magazines, at most, paid the State's sales tax.<sup>163</sup> In contrast, the Court noted that 100 cable systems were

---

157. *Id.* at 1443.

158. *Id.*

159. *Id.* at 1444.

160. *Id.* at 1443.

161. *Id.*

162. *Id.* at 1444. It is also possible that the Court failed to alter this aspect of the singling out rule because the lower courts have generally had no trouble in reaching consistent conclusions with respect to singling out the press from other businesses. *See, e.g.,* *United Artists Communications, Inc. v. City of Montclair*, 209 Cal. App. 3d 248 (4th Dist. 1989); *County of Stanislaus v. Assessment Appeals Bd.*, 213 Cal. App. 3d 1445 (5th Dist. 1989).

163. *Arkansas Writer's Project v. Ragland*, 481 U.S. 221, 229 n.4 (1987) (The appellant maintained that only the Arkansas Times paid the sales tax. The Tax Commissioner con-

subject to the sales tax in *Medlock*.<sup>164</sup> The Court held those 100 speakers to be a number too large for the tax to be considered a “ ‘penalty for a few.’ ”<sup>165</sup>

In reaching this conclusion, the Court noted that “the danger from a tax scheme that targets a small number of speakers is the danger of censorship; a tax on a small number of speakers runs the risk of affecting only a limited number of views.”<sup>166</sup> The Court feared that such a tax would “distort the market for ideas.”<sup>167</sup> That risk was not perceived to be present, because the tax affected a “large number of cable operators offering a wide variety of programming . . . .”<sup>168</sup>

Justice Marshall, dissenting, criticized the Court’s reformulation of the second prong. Justice Marshall noted:

From the majority’s approach we can infer that three is a sufficiently “small” number of affected actors to trigger First Amendment problems and that one hundred is too “large” to do so. But the majority fails to pinpoint the magic number *between* three and one hundred actors above which discriminatory taxation can be accomplished with impunity. Would the result in this case be different if Arkansas had only 50 cable-service providers? Or 25?<sup>169</sup>

Echoing Judge Posner’s analysis in *Kucharek v. Hanaway*,<sup>170</sup> Justice Marshall warned that the majority’s formulation risks the suppression of sufficiently large mediums that correlate with certain ideas.<sup>171</sup> The Court, however, addressed Justice Marshall’s argument in its analysis under the third prong of the rule.

### C. The Third Prong: Content Based Discrimination

The third prong of the singling out rule, as articulated in *Ragland*, holds content based discrimination between press entities to be presumptively unconstitutional.<sup>172</sup> In *Medlock*, the Court determined that the Arkansas tax was not explicitly content based.<sup>173</sup> This contrasted with the statute in *Ragland*, which explicitly cited content as a criteria for

---

tended that two other periodicals also paid the tax. The Court reasoned “[w]hether there are three Arkansas magazines paying the tax or only one, the burden of the tax clearly falls on a limited group of publishers.”)

164. *Medlock*, 111 S. Ct. at 1444.

165. *Id.* (quoting *Minneapolis Star & Tribune v. Minnesota Comm’r of Revenue*, 460 U.S. 575, 592 (1983)).

166. *Id.* at 1444.

167. *Id.*

168. *Id.* at 1445. *Contra id.* at 1451 (Marshall, J., dissenting).

169. *Id.* at 1451 (Marshall, J., dissenting).

170. 902 F.2d 513 (7th Cir. 1990). *See supra* notes 115-21 and accompanying text.

171. *Medlock*, 111 S. Ct. at 1452 (Marshall, J., dissenting).

172. *See supra* part I.C and accompanying text (discussing the articulation of the third prong of the singling out rule in *Arkansas Writers Project v. Ragland*, 481 U.S. 221 (1987)).

173. *Medlock*, 111 S. Ct. at 1445.

assessing taxes.<sup>174</sup> Unlike *Ragland*, however, the Court went beyond the mere wording of the statute in determining whether the tax was content based. As advocated by Judge Posner in *Kucharek v. Hanaway*,<sup>175</sup> the Court examined the cable TV medium to determine if it correlated with certain ideas. The Court concluded that the record established that the cable television medium did not differ in its content from that communicated by other mediums.<sup>176</sup>

Justice Marshall objected to this conclusion. He argued that "the record for this case furnishes ample support for the conclusion that the State's cable operators make unique contributions to the information market."<sup>177</sup> Nonetheless, even though the Court disagreed about the actual content of cable TV, the Court's conduct in examining the medium for message correlations indicates that review of message correlation is part of the scrutiny scheme.

#### IV. Critique of the Singling Out Rule

Throughout its decisions the Court has stressed the importance of the press to our democratic scheme of governing. The singling out rule is the Court's attempt to safeguard that role. The Court, however, has had difficulty fashioning a rule that gives sufficient guidance to the lower courts. This lack of guidance results from a theoretical inconsistency on the part of the Court in addressing the press's role, and from an inability of the Court to fashion a review scheme that maximizes the values underlying freedom of the press.

##### A. Flaws in the Theoretical Underpinnings of the Rule

Throughout its opinions on taxation and subsidization of the press, the Court has cited the "watchdog" function of the press as the interest which it seeks to protect.<sup>178</sup> The concern with the press's watchdog function is well-founded. The drafters of the Constitution created a special protection for "the press"<sup>179</sup> in the First Amendment. The First Amendment reads: "Congress shall make no law . . . abridging the free-

---

174. *Ragland*, 481 U.S. 221.

175. See *supra* notes 115-22 and accompanying text (discussing Judge Posner's message correlation test).

176. *Medlock*, 111 S. Ct. at 1445.

177. *Id.* at 1451 (Marshall, J., dissenting). One such contribution was Spanish language TV.

178. See, e.g., *id.* at 1443 ("The press plays a unique role as a check on government abuse . . .").

179. Technological developments have forced the Court to recognize that "the press" is more than just the printed press. "The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion." *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938).

dom of speech, or of the press . . . ."<sup>180</sup>

Unlike other constitutional provisions, the Free Press Clause does not protect a specific liberty or right, but an institution.<sup>181</sup> Consequently, the importance of protecting the press is not self-evident, but derives from "the critical role played by the press in American society."<sup>182</sup> This role was spelled out in the original version of the First Amendment, introduced by James Madison at the constitutional convention, as one of the "bulwarks of liberty."<sup>183</sup>

Freedom of speech has long been held to derive justification from the notion that the combat of ideas produces truth. Prior to the drafting of the Constitution, John Milton argued this point in opposition to the English censorship laws:

[T]hough all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously by licensing and prohibiting to misdoubt her strength. Let her and Falsehood grapple; whoever knew Truth put to the worse in a free and open encounter?<sup>184</sup>

Justice Holmes articulated this concept as the market of ideas theory of free speech, in which "the best test of truth is the power of the thought to get itself accepted in the competition of the market."<sup>185</sup> It is this theory upon which the Court relies in justifying the singling out rule.<sup>186</sup>

The press's role in the market of ideas is unique. The press provides the base of information upon which ordinary citizens rely.<sup>187</sup> As Justice Learned Hand noted:

[The newspaper] industry serves one of the most vital of all general interests: the dissemination of news from as many different sources, and with as many different facets and colors as is possible.

---

180. U.S. CONST. amend. I.

181. Justice Potter Stewart, "Or Of The Press", 26 HASTINGS L.J. 631, 633 (1975).

182. *Houchins v. KQED, Inc.*, 438 U.S. 1, 17 (1977) (Stewart, J., concurring). See also Theodore I. Glasser, *Competition and Diversity Among Radio Formats: Legal and Structural Issues*, 17 J. BROADCASTING 127, 137 (1984) ("[F]reedom of the press is an important constitutional guarantee not because a free press is inherently valuable but because a free press can best serve the public communication needs of a democratic society.").

183. 1 ANNALS OF CONG. 451 (Gales & Seaton eds. 1789) (The original version of the First Amendment as introduced by James Madison read: "The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable."). See Floyd Abrams, *The Press is Different: Reflections on Justice Stewart and the Autonomous Press*, 7 HOFSTRA L. REV. 563, 576-79 (1979).

184. JOHN MILTON, AREOPAGETICA: A SPEECH FOR THE LIBERTY OF UNLICENSED PRINTING TO THE PARLIAMENT OF ENGLAND (1644).

185. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

186. *Leathers v. Medlock*, 111 S. Ct. 1438, 1444 (1991) ("[A] tax on a small number of speakers runs the risk of affecting only a limited range of views. The risk is similar to that from content-based regulation: it will distort the market for ideas.").

187. BEN H. BAGDIKIAN, *THE MEDIA MONOPOLY* 237 (3d ed. 1990).

That interest is closely akin to, if indeed it is not the same as, the interest protected by the First Amendment; it presupposes that right conclusions are more likely to be gathered out of a multitude of tongues than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.<sup>188</sup>

Under this theory, government suppression of the press should be avoided because it will distort the marketplace of ideas.<sup>189</sup>

Distortion of the marketplace of ideas is especially troubling because of the press's role as a "watchdog" on government.<sup>190</sup> Alexis De Tocqueville recognized that the press is "constantly open to detect the secret springs of political designs and to summon the leaders of all parties in turn to the bar of public opinion."<sup>191</sup> While this theory is closely related to that of the marketplace of ideas, it focuses not on seeking the truth, but the narrower goal of improving self-government.<sup>192</sup> Due to its resources, only the press as an institution is capable of serving as a watchdog on government.<sup>193</sup>

Admittedly, the marketplace of ideas theory and the watchdog theory are not the only grounds upon which the First Amendment Speech and Press Clauses may be justified.<sup>194</sup> Professor Tribe has noted that justifications of freedom of speech based only upon the instrumental functions of insuring self-government or maintaining an open marketplace of ideas might cheapen the value of free speech.<sup>195</sup> He has noted that freedom of speech can be "an end in itself and as a constitutive part of personal and group autonomy."<sup>196</sup> However, Professor Tribe recognizes that "freedom of speech is also central to the workings of a tolerably responsive and responsible democracy."<sup>197</sup> And it is upon this

188. *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943), *aff'd*, 326 U.S. 1 (1944), *reh'g denied*, 326 U.S. 802 (1945).

189. *See Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).

190. *See* Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521; William T. Coleman, Jr., *A Free Press: The Need to Ensure an Unfettered Check on Democratic Government Between Elections*, 59 TUL. L. REV. 243, 244 (1984).

191. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 187 (Alfred A. Knopf ed. 1945).

192. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 786 (2d ed. 1988).

193. *See Abrams*, *supra* note 183, at 592. The Supreme Court has recognized that the press is the governmental watchdog. *See, e.g., Leathers v. Medlock*, 111 S. Ct. 1438, 1443 (1991) ("The press plays a unique role as a check on government abuse . . .").

194. *See* NOWAK, ET AL., *supra* note 35, at 718 (citing the function of enhancing individual self-fulfillment).

195. *See* TRIBE, *supra* note 192, at 786-88. *See also* Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593 (1982).

196. TRIBE, *supra* note 192, at 788.

197. *Id.*



ground that the Court's opinions rest.<sup>198</sup>

If the purpose of a free press is to further an open marketplace of ideas and to be a watchdog on government by providing a diverse array of information, however, then the press today is becoming increasingly ineffective at fulfilling its purpose. As Professor Ben Bagdikian has noted, it is ironic that in the 1980s as many Communist societies were forced to move away from centralized control of information, the United States was moving in the opposite direction.<sup>199</sup> The press as a whole is becoming increasingly monopolized and concentrated.<sup>200</sup>

The newspaper industry provides startling evidence of the trend towards monopolization: more and more cities are being serviced by only a single paper.<sup>201</sup> In 1909 daily newspapers competed in 609 American cities, but by 1986 only 28 cities had daily newspaper competition.<sup>202</sup> "No city has as many daily papers as New York, with only three."<sup>203</sup> By comparison, "London has fourteen dailies, Paris fourteen, Rome eighteen, Tokyo seventeen, and Moscow nine."<sup>204</sup> It is no exaggeration to declare daily newspaper competition in the United States nearly extinct, considering the Supreme Court did precisely that, in 1953, when daily newspaper competition was actually more robust.<sup>205</sup>

The declining competition in the newspaper industry is especially troubling given the historic role of newspapers in America.<sup>206</sup> No other media provides the diversity and in-depth coverage of a newspaper.<sup>207</sup> As Professor Busterna notes: "[W]hile other media may occasionally offer some diversity in the market for news and opinion or for advertising, they don't appear to be good substitutes for the loss of competing daily newspapers."<sup>208</sup>

Unfortunately, newspaper monopolization results in a decrease in

---

198. See, e.g., *Minneapolis Star & Tribune v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 585 (1983) ("the basic assumption of our political system is that the press will often serve as an important restraint on government").

199. BAGDIKIAN, *supra* note 187, at 3.

200. *Id.* at 21 ("In 1981, forty-six corporations controlled most of the business in daily newspapers, magazines, television, books, and motion pictures. Today . . . the number of giants that get most of the business has shrunk from forty-six to twenty-three.").

201. John Busterna, *Trends in Daily Newspaper Ownership*, 65 JOURNALISM Q. 831 (1988)

202. Eric J. Gertler, Comment, *Michigan Citizens for an Independent Press v. Attorney General: Subscribing to Newspaper Joint Operating Agreements or the Decline of Newspapers?*, 39 AM. U. L. REV. 123, 129 n.27 (1989).

203. BAGDIKIAN, *supra* note 187, at 118.

204. *Id.*

205. See *Times-Picayune Co. v. United States*, 345 U.S. 594, 603 (1953).

206. See *United States v. Associated Press*, 52 F. Supp. 362 (S.D.N.Y. 1943); see also *supra* notes 181-83 and accompanying text.

207. Keith Roberts, *Antitrust Problems in the Newspaper Industry*, 82 HARV. L. REV. 319, 320-23 (1968).

208. Busterna, *supra* note 201, at 835.

the news product that reaches readers.<sup>209</sup> "What a local newspaper does not print about local affairs does not see general print at all."<sup>210</sup> On the other hand when daily newspaper competition exists: "[I]f a reporter overlooks a story, his rival may get it. If he writes inaccurately, the opposition sets the public right."<sup>211</sup> As a result, when there is newspaper competition "[t]he result should be more diversity of ideas . . . more problems noted and more diverse ideas on how to deal with these problems which, in turn, should be reflected in the audiences of these media."<sup>212</sup> Today, however, this healthy competitive diverse newspaper environment exists in only twenty-eight American cities.<sup>213</sup>

Monopolization of these local markets is aggravated by the fact that often a city's single paper is owned by a corporate newspaper chain.<sup>214</sup> When a corporate chain buys an independent paper, coverage of local news suffers.<sup>215</sup> Indeed, some of the largest chains order all of their papers to endorse the same national political candidates, regardless of the local feeling about those candidates.<sup>216</sup> Monopoly and concentrated control call into question the very vitality of the marketplace of ideas.<sup>217</sup> As Professor Bagdikian has noted, monopolization undermines the press's role of checking government and providing information for informed decision making.<sup>218</sup>

---

209. Stephen Lacy, *Impact of Repealing the Newspaper Preservation Act*, 11 *NEWSPAPER RES. J.* 2, 8-9 (1990) (hereinafter *Impact of Repealing*); see also Dominic L. Lasora, *Effects of Newspaper Competition on Public Opinion Diversity*, 68 *JOURNALISM Q.* 38 (1991); Shu-Ling Chen Everett & Stephen E. Everett, *How Readers and Advertisers Benefit from Local Newspaper Competition*, 66 *JOURNALISM Q.* 76 (1989); Stephen Lacy, *The Effect of Intracity Competition on Daily Newspaper Content*, 64 *JOURNALISM Q.* 281 (1987).

210. MARC FRANKLIN, *THE FIRST AMENDMENT AND THE FOURTH ESTATE* 466 (1985).

211. George L. Bird, *Newspaper Monopoly and Political Independence*, 17 *JOURNALISM Q.* 207 (1940).

212. Lasorsa, *supra* note 209, at 41.

213. Gertler, *supra* note 202, at 129 n.27.

214. BAGDIKIAN, *supra* note 187, at 4 ("At the end of World War II, for example, 80 percent of the daily newspapers in the United States were independently owned, but by 1989 the proposition was reversed, with 80 percent owned by corporate chains.").

215. See Roya Akhavan-Majid, et al., *Chain Ownership and Editorial Independence: A Case Study of Gannett Newspapers*, 68 *JOURNALISM Q.* 59, 66 (1991) ("These results suggest that a homogenizing effect on editorial position and policy results from chain ownership."). See also C.N. Olien, et al., *Relation Between Corporate Ownership and Editor Attitudes About Business*, 65 *JOURNALISM Q.* 29 (1988); Ralph P. Thrift, Jr., *How Chain Ownership Affects Editorial Vigor of Newspapers*, 54 *JOURNALISM Q.* 329 (Summer 1967).

216. BAGDIKIAN, *supra* note 187, at 84. See also Daniel B. Wackman, et al., *Chain Newspaper Autonomy as Reflected in Presidential Campaign Endorsements*, 52 *JOURNALISM Q.* 411 (Autumn 1975); Cecilie Gaziano, *Chain Newspaper Homogeneity and Presidential Endorsements, 1972-1988*, 66 *JOURNALISM Q.* 836 (1989).

217. David Shelledy, Note, *Access to the Press: A Teleological Analysis of a Constitutional Double Standard*, 50 *GEO. WASH. L. REV.* 430 n.2 (1982) ("The marketplace of ideas lies in disequilibrium today, it is effectively closed to new competitors.").

218. BAGDIKIAN, *supra* note 187, at 237.

Recognizing the importance of preserving newspaper competition, Congress enacted the Newspaper Preservation Act in 1970.<sup>219</sup> The Act grants failing newspapers a limited antitrust exception to allow the newspaper to enter into a "joint operating agreement"<sup>220</sup> with a healthier competitor.<sup>221</sup> Unfortunately, newspapers subject to such agreements "generally fail to provide greater depth of coverage or editorial diversity than monopolistic newspapers."<sup>222</sup> Joint operating agreements also fail to achieve the more limited goal of keeping failing newspapers in business.<sup>223</sup>

These data suggest that the Court's focus solely on *government* interference with press freedom is misplaced. Media monopoly harms the marketplace of ideas and threatens the press's watchdog role. Court action that would strike down government efforts to combat monopoly is at odds with the Court's stated rationale for protecting the press. Indeed, it is possible that differential taxation might combat monopoly and foster the very functions of the press that the Court seeks to protect by prohibiting such taxation.

Commentators have suggested that the government might best reinvigorate the marketplace of ideas through subsidizing of fledgling or failing publishers.<sup>224</sup> For example, Sweden has instituted a comprehensive press subsidy program that includes differential taxation.<sup>225</sup> The Swedish subsidy plan has had the effect of increasing daily newspaper competition.<sup>226</sup> The increase in competition has not been accomplished through

---

219. 15 U.S.C. §§ 1801-1804 (1982).

220. A "joint operating agreement" is an agreement whereby two businesses merge to share profits and losses, yet remain distinct and independent businesses in the eyes of the public. *Id.* § 1802.

221. *Id.* §§ 1801-1804.

222. Robbie Steel, Note, *Joint Operating Agreements in the Newspaper Industry: A Threat to First Amendment Freedoms*, 138 U. PA. L. REV. 275, 276 (1989).

223. *Impact of Repealing*, *supra* note 209, at 2 (five newspapers subject to joint operating agreements have gone under).

224. See EMERSON, *supra* note 1; Milton Hollstein, *Are Newspaper Subsidies Unthinkable?*, 17 COLUM. JOURNALISM REV. 15 (May/June 1978); Donald McDonald, *The Media's Conflict of Interest*, THE CENTER MAGAZINE 15 (Nov.-Dec. 1976); Don Lively, *Affirmative Action and a Free Press: Policies and Problems in Promoting the First Amendment*, 11 PAC. L.J. 65 (1979); Robert G. Picard, *State Intervention in U.S. Press Economics*, 30 GAZETTE 3, 10 (1982); Simon, *supra* note 3, at 59; David C. Coulson, *Antitrust Law and the Media: Making The Newspapers Safe for Democracy*, 57 JOURNALISM Q. 79, 84 (1980).

225. See Michael Metcalf, *Public Debate: How the Scandinavians Do It*, 70 SCANDINAVIAN REV. 72 (1982); Robert G. Picard, *Government Subsidies and Newspaper Marketing in Two Swedish Cities, 1965-1978*, 28 GAZETTE 17 (1981); K. GUSTAFSSON & S. HADENIUS, SWEDISH PRESS POLICY (1976). For a comparison of the Swedish conception of freedom of the press with that of the United States, see Dennis Campbell, *Free Press in Sweden and America: Who's the Fairest of Them All*, 8 SW. U. L. REV. 61 (1976).

226. See John Gothberg, *Newspaper Subsidies in Sweden Pose No Dangers, its Editors Feel*, 60 JOURNALISM Q. 629 (1983) (arguing that since the Swedish subsidy program began in 1970 the number of newspapers has increased, and daily competition has been preserved).

the sacrifice of editorial independence.<sup>227</sup> Instead, the content of Swedish papers is more diverse than here in the United States.<sup>228</sup> Unfortunately, any legislature that seeks to emulate Sweden by implementing a subsidy plan using the tax structure would find an intractable barrier in the singling out rule. The Court's current articulation of the rule thus hamstringing legislatures that might wish to experiment with tax programs aimed at fostering diversity of expression.

## B. Flaws in the Court's Formulation of the Rule

The Court accepted *Medlock* for review with an eye towards eliminating some of the confusion which reigned in the lower courts. The Court did not succeed in this task.

The lower courts following *Minneapolis Star* and *Ragland* came to widely disparate conclusions over what constituted a "small number" of press entities. At one end of the spectrum were courts that held discrimination against an entire type of press to qualify.<sup>229</sup> At the other end of the spectrum were courts that stringently confined *Minneapolis Star* and *Ragland* to their specific factual situations.<sup>230</sup> The Court's reformulation of the rule in *Medlock* does not seem to resolve this confusion.

The Court's avowed purpose in reviewing *Medlock* was to resolve the question "whether the First Amendment prevents a State from imposing its sales tax on only selected segments of the media."<sup>231</sup> The Court, however, did not articulate any rules specific to intramedia discrimination. Instead, the Court examined the discrimination between cable TV and newspapers under the "small number" standard articulated in *Minneapolis Star*.<sup>232</sup>

In *Minneapolis Star* 16 out of 374 newspapers paid a tax.<sup>233</sup> In *Medlock* 100 cable TV stations (all of this type of media) out of approximately 600 media members in Arkansas paid a tax.<sup>234</sup> By upholding the scheme in *Medlock* and striking down the scheme in *Minneapolis Star*, the Court concluded that a tax exemption ratio of 6:1 is acceptable, but a ratio of approximately 23:1 is not. This begs the question of what is inherently different between these ratios to justify this conclusion.

---

227. *Id.* at 634 (Swedish editors polled were unanimous in concluding that subsidies have not influenced the papers' editorial positions.).

228. *See* Metcalf, *supra* note 225, at 73 ("[T]he public debate of both the burning political issues of the day and the more esoteric questions of art and culture [are] much richer in the Scandinavian dailies than in their American counterparts.").

229. *See supra* notes 86-101 and accompanying text.

230. *See supra* notes 106-14 and accompanying text.

231. *Leathers v. Medlock*, 111 S. Ct 1438, 1442 (1991).

232. *Id.* at 1444.

233. *Minneapolis Star & Tribune v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 579 (1983).

234. *Medlock*, 111 S. Ct. at 1451.

Admittedly, the Court suggests that a "small number" of publishers should be protected from differential taxation because of fear that the mere threat of future crippling taxes might stifle the press from being a watchdog.<sup>235</sup> Nonetheless, the Court makes no argument to support a finding that 100 cable TV stations will be less likely to succumb to this threat than 16 newspapers. Indeed, the mere fact that an element of the press is being singled out at all, regardless of the quantity, suggests that it lacked the political power to protect itself from taxation. This contradiction might suggest that if a threat of future crippling taxes results from the singling out of press entities, then the Court is not offering sufficient protection to entire mediums when singled out.

The Court's reasoning, however, suggests that a threat of future crippling taxes does not exist when a "small number" of the press is singled out for taxation. The Court noted in *Minneapolis Star*, "we need not fear that a government will destroy a selected group of taxpayers by burdensome taxation if it must impose the same burden on the rest of its constituency."<sup>236</sup> Therefore, as long as the "small number" of press entities are being taxed as a result of the lack of exemption from a tax generally applicable to other businesses, no threat of future crippling taxes will exist. Consequently, the Court is overprotecting the "small number" of press entities by holding them immune from paying a generally applicable tax.

The Court does address those who fear that the singling out of one medium might be censorially motivated. As part of its third prong analysis, the Court will assess correlations between a particular medium and message, and strike down laws that single out a medium which correlates with a certain message.<sup>237</sup> Nonetheless, the Court fails to present an adequate theory as to why it is valid to single out for taxation an entire medium, as long as there is no correlation to message, but not valid to single out for taxation large members of that medium when no message correlation exists.<sup>238</sup> This contradiction suggests that the Court's rule provides too much protection to members of a particular press type singled out for taxation.

By not grounding the determination of whether a "small number" of the press have been singled out in a consistent theory, the Court leaves the lower courts with no guidance other than raw numbers. These numbers give the lower courts no meaningful guidance when faced with new situations. Given the lower courts previous confusion in attempting to apply the singling out rule, further confusion can be expected as the

---

235. *Id.* at 1443.

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

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

238. In *Minneapolis Star* the Court did not find any message correlation or censorial effect on the newspapers singled out. The Court merely cited a threat of future censorship. *Minneapolis Star*, 460 U.S. at 585.

lower courts seek to arbitrarily determine what constitutes a “small number” of the press.

## V. Proposal: Modifying the Singling Out Rule

The intent of the singling out rule is to safeguard the watchdog function of the press.<sup>239</sup> Unfortunately, today the watchdog function is threatened not only by the government, but also by unrestrained media monopolization.<sup>240</sup> The singling out rule, however, does not allow legislatures sufficient flexibility to attempt to combat such monopolization. Consequently, a reformulation of the rule is necessary. This Note proposes that the first and third prongs of the rule remained unchanged from the articulation in *Medlock*. The second prong, imposing strict scrutiny analysis when a “small number” of the press is singled out for taxation, should be eliminated and such taxation should be subject only to rational basis review.

Abandonment of the entire rule would not be justified. The legislature is prevented from passing crippling taxes of general applicability by the political constraints in our system.<sup>241</sup> Taxes aimed solely at the press are not subject to these same political constraints, thus the risk of future censorship is magnified. “That threat can operate as effectively as a censor to check critical comment by the press.”<sup>242</sup> This is the evil the first prong of the rule was designed to combat. Consequently, such taxes should not be upheld “unless the State asserts a counterbalancing interest of compelling importance that it cannot achieve without differential taxation.”<sup>243</sup>

The current second prong of the singling out rule establishes that if a “small number” of the press are singled out from the press as a whole for taxation, strict scrutiny should be applied.<sup>244</sup> The theoretical underpinnings of this prong are not sound.<sup>245</sup> The stated rationale is protection of the watchdog function of the press. The first prong of the rule, however, protects the press from crippling taxes that are not of general applicability. Consequently, the threat of future crippling taxes on those members taxed is not increased by the exemption of other members of the press. This protection is therefore unnecessary.

The third prong of the singling out rule serves the important function of preventing content based discrimination between members of the

---

239. See *Medlock*, 111 S. Ct. at 1444.

240. See *supra* part IV.A.

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

242. *Id.*

243. *Id.*

244. See *Leathers v. Medlock*, 111 S. Ct. 1438, 1443-44 (1991).

245. See *supra* part IV.B (arguing that governmental censorship is not the only threat to freedom of the press).

press. Content based discrimination is particularly repugnant to the First Amendment.<sup>246</sup> Content based discrimination can result from both content based and facially neutral statutes. If a statute is facially neutral, analysis of media/message correlation is necessary to ascertain if content discrimination results. If such a correlation is found, then strict scrutiny is warranted.

This modification of the singling out rule would significantly strengthen the rule's ability to safeguard the watchdog function of the press. For example, a legislature might pass a tax scheme aimed at preserving newspaper competition by granting tax exemptions to papers with less than 30 percent of their particular market. The effect of this exemption might be to single out a "small number" of large papers for taxation. Under the current formulation of the singling out rule, such an exemption would be subject to strict scrutiny for that reason alone, and struck down.

Analysis under the modified version of the rule proposed in this Note would proceed differently. The Court would first have to determine if the tax at issue was one of general applicability. Here that requirement would be met, and the tax would survive the first prong. Under the new second prong the legislature would only need to assert a rational basis for singling out a "small number" of large newspapers, a requirement that is traditionally easy to meet. Under the third prong the Court would assess whether the tax is content based. Here, the tax scheme at issue is facially neutral. The Court, however, would need to assess the tax to ascertain whether a message/medium correlation exists. In this case such a correlation would probably not exist. The large newspapers would probably reflect a variety of perspectives, perspectives that would be very similar to some of the papers exempted. Likewise, the papers exempted would span a wide variety of viewpoints and topics. Because the medium taxed or exempted is not characterized by a particular message, strict scrutiny would not be required. The statute would be upheld.

### Conclusion

This Note recognizes the desirability of allowing legislatures freedom to develop approaches to combat media monopoly. Press subsidy through differential taxation is one such method. Unfortunately, the Court by protecting the press too zealously, denies the legislatures such freedom. A reformulation of the singling out rule, with the elimination of the "small numbers" strict scrutiny test, would best protect the press's watchdog function from government and from the press itself.

---

246. *Arkansas Writers' Project v. Ragland*, 481 U.S. 221, 227 (1983).

