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SUPREME COURT
OF THE STATE OF NEVADA

K-KEL, INC., d/b/a Spearmint Rhino Gentlemen's Club, et al.,

Appellants,

vs.

NEVADA DEPARTMENT OF TAXATION, et al.,

Respondents.

Supreme Court Docket: 69886

District Court Case: A-11-648894-J
Consolidated with A-14-697515-J

Appellants' Appendix

APPELLANTS' APPENDIX
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481 U.S. 221, 107 S.Ct. 1722, 95 L.Ed.2d 209, 55 USLW 4522, 13 Media L. Rep. 2313
(Cite as: 481 U.S. 221, 107 S.Ct. 1722)

Arkansas Writers' Project, Inc. v. Ragland
U.S.Ark.,1987.

Supreme Court of the United States
ARKANSAS WRITERS' PROJECT, INC.,
Appellant
v.
Charles D. RAGLAND, Commissioner of Revenue of Arkansas.
No. 85-1370.

Argued Jan. 20, 1987.
Decided April 22, 1987.

Publisher of general interest magazine brought state suit challenging Arkansas' sales tax scheme. The Chancery Court granted publisher summary judgment, and the Arkansas Supreme Court reversed, 287 Ark. 155, 697 S.W.2d 94. On petition for rehearing, 287 Ark. 155, 698 S.W.2d 802, publisher's claims of discriminatory treatment were rejected. Probable jurisdiction was noted. The Supreme Court, Justice Marshall, held that: (1) publisher had standing, and (2) sales tax scheme violated First Amendment's freedom of press guarantee by taxing general interest magazines but exempting newspapers and religious, professional, trade and sports journals.

Reversed and remanded.

Justice Stevens filed an opinion concurring in part and concurring in the judgment.

Justice Scalia filed a dissenting opinion in which Chief Justice Rehnquist joined.

West Headnotes

[1] Constitutional Law 92 ⇐878

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(A) Persons Entitled to Raise Constitutional Questions; Standing
92VI(A)9 Freedom of Speech, Expression, and Press
92k878 k. Taxation. Most Cited Cases
(Formerly 92k42.1(7))

Publisher of general interest magazine had standing to challenge constitutionality of Arkansas sales tax scheme, which exempted proceeds derived from sales of newspapers and religious, professional, trade and sports journals; notwithstanding that it was concededly not publisher of newspaper or listed journal; publisher alleged sufficient personal stake in litigation's outcome, since state Supreme Court's holding stood as total bar to its relief and its constitutional attack held only promise of escape from burden imposed upon it by challenged statute. Ark.Stats. § 84-1904(f).

[2] Constitutional Law 92 ⇐2081

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(U) Press in General
92k2081 k. Taxation. Most Cited Cases
(Formerly 92k90.1(8))

Taxation 371 ⇐3626

371 Taxation
371IX Sales, Use, Service, and Gross Receipts Taxes
371IX(B) Regulations
371k3625 Validity of Acts and Ordinances
371k3626 k. In General. Most Cited Cases
(Formerly 371k1212.1, 371k1212)

Arkansas sales tax scheme, which taxed general interest magazines but exempted newspapers and religious, professional, trade and sports journals, violated First Amendment's freedom of the press guarantee; even though there was no evidence of an improper censorial motive, tax burdened rights protected by First Amendment by discriminating against small group of magazines, and state failed to

satisfy its heavy burden of showing that such discriminatory tax scheme was necessary to serve compelling state interest. Ark.Stats. § 84-1904(f); U.S.C.A. Const.Amend. 1.

[3] Constitutional Law 92 ⊂2081

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(U) Press in General
92k2081 k. Taxation. Most Cited Cases
(Formerly 92k90.1(8))
Discriminatory tax on press burdens rights protected by First Amendment. U.S.C.A. Const.Amend. 1.

**1723 *Syllabus* [FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

*221 Arkansas imposes a tax on receipts from sales of tangible personal property, but exempts numerous items, including newspapers and "religious, professional, trade, and sports journals and/or publications printed and published within this State" (magazine exemption). Appellant publishes in Arkansas a general interest magazine that includes articles on a variety of subjects, including religion and sports. In 1984, relying on *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 103 S.Ct. 1365, 75 L.Ed.2d 295, appellant sought a refund of sales tax it had paid since 1982, asserting that the magazine exemption must be construed to include its magazine, and that subjecting its magazine to the sales tax, while sales of newspapers and other magazines were exempt, violated the First and Fourteenth Amendments. After appellee denied the refund claim, appellant sought review in State Chancery Court, stating an additional claim under 42 U.S.C. §§ 1983 and 1988 for injunctive relief and attorney's fees. That court granted appellant summary judgment, construing the magazine exemption to include appellant because its magazine was published and printed in Arkansas. The Arkansas Supreme Court reversed, holding that the magazine exemption applies only to religious, professional, trade, or sports periodicals. The court rejected the claim that the exemption granted to other publications discriminated against appellant, ruling that success on this claim would avail appellant nothing since it would still be subject to tax even if the exemption fell. The court also refused to find that appellant's First and Fourteenth Amendment rights had been violated, ruling that the sales tax was a permissible "ordinary form of taxation" to which publishers are not immune. Accordingly, the court did not consider appellant's attorney's fees claim. *Held:*

1. Appellant has standing to challenge the Arkansas sales tax scheme. Appellee's argument that appellant has not asserted an injury that this Court can redress since appellant concededly publishes neither a newspaper nor a religious, professional, trade, or sports journal is unpersuasive, since it would effectively insulate underinclusive statutes from constitutional **1724 challenge. Appellant has alleged a sufficient personal stake in this litigation's outcome, in that the State Supreme Court's holding stands as a total bar to appellant's relief, and its constitutional attack *222 holds the only promise of escape from the burden imposed upon it by the challenged statute. Pp. 1726-1727.

2. The Arkansas sales tax scheme that taxes general interest magazines, but exempts newspapers and religious, professional, trade, and sports journals, violates the First Amendment's freedom of the press guarantee. Pp. 1727-1730.

(a) Even though there is no evidence of an improper censorial motive, the Arkansas tax burdens rights protected by the First Amendment by discriminating against a small group of magazines, including appellant's, which are the only magazines that pay the tax. Such selective taxation is one of the types of discrimination identified in *Minneapolis Star*. Indeed, its use here is even more disturbing than in that case because the Arkansas statute requires official scrutiny of publications' content as the basis for imposing a tax. This is incompatible with the First Amendment, whose requirements are not

avoided merely because the statute does not burden the expression of particular views expressed by specific magazines, and exempts other members of the media that might publish discussions of the various subjects contained in appellant's magazine. Pp. 1726-1728.

(b) Appellee has not satisfied its heavy burden of showing that its discriminatory tax scheme is necessary to serve a compelling state interest and is narrowly drawn to achieve that end. The State's general interest in raising revenue does not justify selective imposition of the sales tax on some magazines and not others, based solely on their content, since revenues could be raised simply by taxing businesses generally. Furthermore, appellee's assertion that the magazine exemption serves the state interest of encouraging "fledgling" publishers is not persuasive, since the exemption is not narrowly tailored to achieve that end. To the contrary, the exemption is both overinclusive and underinclusive in that it exempts the enumerated types of magazines regardless of whether they are "fledgling" or are lucrative and well established, while making general interest magazines and struggling specialty magazines on other subjects ineligible for favorable tax treatment. Moreover, although the asserted state need to "foster communication" might support a blanket exemption of the press from the sales tax, it cannot justify selective taxation of certain publishers. Pp. 1728-1729.

3. Since the state courts have not yet indicated whether they will exercise jurisdiction over appellant's claims under §§ 1983 and 1988, this Court remands to give them an opportunity to do so. P. ---.

287 Ark. 155, 697 S.W.2d 94 and 698 S.W.2d 802, reversed and remanded.

*223 MARSHALL, J., delivered the opinion of the Court, in which BRENNAN, WHITE, BLACKMUN, POWELL, and O'CONNOR, JJ., joined, and in Parts I, II, III in B, IV, and V of which STEVENS, J., joined. STEVENS, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. ---. SCALIA, J., filed a dissenting opinion, in which REHNQUIST, C.J., joined, *post*, p. ---.

Anne Owings Wilson argued the cause and filed briefs for appellant.

John Steven Clark argued the cause for appellee. With him on the brief were *R. B. Friedlander* and *Joseph V. Svoboda.**

* Briefs of *amici curia* urging reversal were filed for the American Civil Liberties Union Foundation et al. by *Jack Novik* and *Philip E. Kaplan;* for the City & Regional Magazine Association by *Donald M. Middlebrooks;* for the Magazine Publishers Co. et al. by *Edward Soto, Gerald B. Cope, Jr., W. Terry Maguire,* and *Parker Thomson;* for Time Inc., by *E. Barrett Prettyman, Jr., David J. Saylor,* and *John G. Roberts, Jr.;* and for the Times Mirror Co. et al. by *Rex S. Heinke, William A. Niese,* and *Jeffrey S. Klein.*

Briefs of *amici curiae* urging affirmance were filed for the Territory of American Samoa et al. by the Attorneys General for their respective jurisdictions as follows: *Thomas J. Miller* of Iowa, *Leulumoega S. Lutu* of American Samoa, *Joseph Liberman* of Connecticut, *Jim Smith* of Florida, *Corinne K. A. Watanabe* of Hawaii, *Jim Jones* of Idaho, *William J. Guste, Jr.,* of Louisiana, *Hubert H. Humphrey III* of Minnesota, *Michael Turpen* of Oklahoma, *LeRoy S. Zimmerman* of Pennsylvania, *T. Travis Medlock* of South Carolina, *Mark V. Meierhenry* of South Dakota, *Jim Mattox* of Texas, *David L. Wilkinson* of Utah, and *Jeffrey L. Amestoy* of Vermont; and for the State of Maryland by *Stephen H. Sachs,* Attorney General, *Ralph S. Tyler III,* Assistant Attorney General, and *Carmen M. Shepard,* Special Assistant Attorney General.

Justice MARSHALL delivered the opinion of the Court.

The question presented in this case is whether a state sales tax scheme that taxes general interest magazines, but exempts newspapers and religious, professional, trade, and sports journals, violates the First Amendment's guarantee of freedom of the press.

*224 **1725 I

Since 1935, Arkansas has imposed a tax on receipts from sales of tangible personal property. 1935 Ark.Gen. Acts 233, § 4, pp. 593, 594, now codified at Ark.Stat.Ann. § 84-1903(a) (1980 and Supp.1985). The rate of tax is currently four percent of gross receipts. § 84-1903 (three percent); Ark.Stat.Ann. § 84-1903.1 (Supp.1985) (additional one percent). Numerous items are exempt from the state sales tax, however. These include "[g]ross receipts or gross proceeds derived from the sale of newspapers," § 84-1904(f) (newspaper exemption),[FN1] and "religious, professional, trade and sports journals and/or publications printed and published within this State ... when sold through regular subscriptions." § 84-1904(j) (magazine exemption).[FN2]

FN1. The newspaper exemption was added in 1941. 1941 Ark.Gen.Acts 386, § 4, p. 1060. Gross Receipts Tax Regulations of 1981, adopted by the Arkansas Commissioner of Revenue define a newspaper as "a publication in sheet form containing reports of current events and articles of general interest to the public, published regularly in short intervals such as daily, weekly, or bi-weekly, and intended for general circulation." GR-48(A)(1), reproduced at Record 50.

FN2. The magazine exemption was added in 1949. 1949 Ark.Gen.Acts 152, § 2, p. 491. The regulations define a publication as "any pamphlet, magazine, journal, or periodical, other than a newspaper, designed for the information or entertainment of the general public or any segment thereof." GR-48(A)(5), reproduced at Record 50. The term " regular subscription" is defined as "the purchase by advance payment of a specified number of issues of a publication over a certain period of time, and delivered to the subscriber by mail or otherwise." GR-48(A)(6), reproduced at Record 50.

Appellant Arkansas Writers' Project, Inc. publishes Arkansas Times, a general interest monthly magazine with a circulation of approximately 28,000. The magazine includes articles on a variety of subjects, including religion and sports. It is printed and published in Arkansas, and is sold through mail subscriptions, coin-operated stands, and over-the-counter sales. In 1980, following an audit, appellee Commissioner of Revenue assessed tax on sales of Arkansas *225 Times. Appellant initially contested the assessment, but eventually reached a settlement with the State and agreed to pay the tax beginning in October 1982. However, appellant reserved the right to renew its challenge if there were a change in the tax law or a court ruling drawing into question the validity of Arkansas' exemption structure. Record 46-47.

Subsequently, in *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 103 S.Ct. 1365, 75 L.Ed.2d 295 (1983), this Court held unconstitutional a Minnesota tax on paper and ink used in the production of newspapers. In January 1984, relying on this authority, appellant sought a refund of sales tax paid since October 1982, asserting that the magazine exemption must be construed to include Arkansas Times. It maintained that subjecting Arkansas Times to the sales tax, while sales of newspapers and other magazines were exempt, violated the First and Fourteenth Amendments. The Commissioner denied appellant's claim for refund. App. to Juris. Statement 12-14.

Having exhausted available administrative remedies, appellant filed a complaint in the Chancery Court for Pulaski County, Arkansas, seeking review of the Commissioner's decision. The complaint also stated a claim under 42 U.S.C. § § 1983 and 1988 for injunctive relief and attorney's fees. The parties stipulated that Arkansas Times is not a "newspaper" or a "religious, professional, trade or sports journal" and that, during the relevant time period, appellant had paid $15,838.22 in sales tax. The Chancery Court granted appellant summary judgment, construing § 84-1904(j) to create two categories of tax-exempt magazines sold through subscriptions, one for religious, professional, trade, and sports journals, and one for publications published and printed within the State of Arkansas. No. 84-1268 (Pulaski Cty. Chancery

Ct., **1726 Mar. 29, 1985). Because Arkansas Times came within the second category, the court held that the magazine was exempt from sales tax and appellant was entitled to a refund. The court determined that resolution of the *226 dispute on statutory grounds made it unnecessary to address the constitutional issues raised in appellant's § 1983 claim.

The Arkansas Supreme Court reversed the decision of the Chancery Court. 287 Ark. 155, 697 S.W.2d 94 (1985). It construed § 84-1904(j) as creating a single exemption and held that, in order to qualify for this exemption, a magazine had to be a " religious, professional, trade, or sports periodical." *Id.*, at 157, 697 S.W.2d, at 95. Concluding that " neither party has questioned the constitutionality of the exemption," the State Supreme Court failed to address appellant's First and Fourteenth Amendment claims. *Ibid.*

On petition for rehearing, the court issued a supplementary opinion in which it acknowledged that appellant had pursued its constitutional claims and that they "should have been discussed" in the court's original opinion. *Id.*, at 157, 157A, 157B, 698 S.W.2d 802, 803 (1985). It rejected appellant's claims of discriminatory treatment, reasoning that exemptions granted to other publications need not be considered, because:
"[I]t would avail [appellant] nothing if it wins its argument.... It is immaterial that an exemption in favor of some other taxpayer may be invalid, as discriminatory. If so, it is the exemption that would fall, not the tax against the [Arkansas] *Times.* " *Id.*, at 157A, 698 S.W.2d, at 803.

As to appellant's First Amendment objections, the court noted that this Court has held that "the owners of newspapers are not immune from any of the ' ordinary forms of taxation' for support of the government." *Ibid.*, quoting *Grosjean v. American Press Co.*, 297 U.S. 233, 250, 56 S.Ct. 444, 449, 80 L.Ed. 660 (1936). In contrast to *Minneapolis Star*, *supra*, and *Grosjean*, *supra*, the Arkansas Supreme Court concluded that the Arkansas sales tax was a permissible "ordinary form of taxation." Because the court did not find that appellant's First and Fourteenth Amendment rights had been violated, it did not consider the claim for attorney's fees under § 1988.

*227 We noted probable jurisdiction, 476 U.S. 1113, 106 S.Ct. 1966, 90 L.Ed.2d 651 (1986), and we now reverse.

II

[1] As a threshold matter, the Commissioner argues that appellant does not have standing to challenge the Arkansas sales tax scheme. Extending the reasoning of the court below, he contends that, since appellant has conceded that Arkansas Times is neither a newspaper nor a religious, professional, trade, or sports journal, it has not asserted an injury that can be redressed by a favorable decision of this Court and therefore does not meet the requirements for standing set forth in *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472, 102 S.Ct. 752, 758, 70 L.Ed.2d 700 (1982).

We do not accept the Commissioner's notion of standing, for it would effectively insulate underinclusive statutes from constitutional challenge, a proposition we soundly rejected in *Orr v. Orr*, 440 U.S. 268, 272, 99 S.Ct. 1102, 1108, 59 L.Ed.2d 306 (1979). The Commissioner's position is inconsistent with numerous decisions of this Court in which we have considered claims that others similarly situated were exempt from the operation of a state law adversely affecting the claimant. See, *e.g.*, *Armco Inc. v. Hardesty*, 467 U.S. 638, 104 S.Ct. 2620, 81 L.Ed.2d 540 (1984); *Carey v. Brown*, 447 U.S. 455, 100 S.Ct. 2286, 65 L.Ed.2d 263 (1980); *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972). Contrary to the Commissioner's assertion, appellant has alleged sufficient a personal stake in the outcome **1727 of this litigation. "The holding of the [Arkansas] cour [t] stand[s] as a total bar to appellant's relief; [its] constitutional attack holds the only promise of escape from the burden that derives from the challenged statut[e]." *Orr v. Orr, supra*, 440 U.S., at 273, 99 S.Ct., at 1108.

III

A

[2][3] Our cases clearly establish that a discriminatory tax on the press burdens rights protected by the First Amendment.[FN3] *228 See *Minneapolis Star,* 460 U.S., at 591-592, 103 S.Ct., at 1375; *Grosjean v. American Press Co., supra,* 297 U.S., at 244-245, 56 S.Ct., at 446-447. In *Minneapolis Star,* the discrimination took two distinct forms. First, in contrast to generally applicable economic regulations to which the press can legitimately be subject, the Minnesota use tax treated the press differently from other enterprises. 460 U.S., at 581, 103 S.Ct., at 1369 (the tax " singl[es] out publications for treatment that is ... unique in Minnesota tax law"). Second, the tax targeted a small group of newspapers. This was due to the fact that the first $100,000 of paper and ink were exempt from the tax; thus "only a handful of publishers pay any tax at all, and even fewer pay any significant amount of tax." *Id.,* at 591, 103 S.Ct., at 1375.

FN3. Appellant's First Amendment claims are obviously intertwined with interests arising under the Equal Protection Clause. See *Police Dept. of Chicago v. Mosley,* 408 U.S. 92, 94-95, 92 S.Ct. 2286, 2289, 33 L.Ed.2d 212 (1972). However, since Arkansas' sales tax system directly implicates freedom of the press, we analyze it primarily in First Amendment terms. See *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue,* 460 U.S. 575, 585, n. 7, 103 S.Ct. 1365, 1372 n. 7, 75 L.Ed.2d 295 (1983).

Both types of discrimination can be established even where, as here, there is no evidence of an improper censorial motive. See *id.,* at 579-580, 592, 103 S.Ct., at 1368-1369, 1375 ("Illicit legislative intent is not the *sine qua non* of a violation of the First Amendment"). This is because selective taxation of the press-either singling out the press as a whole or targeting individual members of the press-poses a particular danger of abuse by the State.

"A power to tax differentially, as opposed to a power to tax generally, gives a government a powerful weapon against the taxpayer selected. When the State imposes a generally applicable tax, there is little cause for concern. We need not fear that a government will destroy a selected group of taxpayers by burdensome taxation if it must impose the same burden on the rest of its constituency." *Id.,* at 585, 103 S.Ct., at 1371.

Addressing only the first type of discrimination, the Commissioner defends the Arkansas sales tax as a generally applicable*229 economic regulation. He acknowledges the numerous statutory exemptions to the sales tax, including those exempting newspapers and religious, trade, professional, and sports magazines. Nonetheless, apparently because the tax is nominally imposed on receipts from sales of *all* tangible personal property, see § 84-1903, he insists that the tax should be upheld.

On the facts of this case, the fundamental question is not whether the tax singles out the press as a whole, but whether it targets a small group within the press. While we indicated in *Minneapolis Star* that a genuinely nondiscriminatory tax on the receipts of newspapers would be constitutionally permissible, 460 U.S., at 586, and n. 9, 103 S.Ct., at 1372, and n. 9, the Arkansas sales tax cannot be characterized as nondiscriminatory, because it is not evenly applied to all magazines. To the contrary, the magazine exemption means that only a few Arkansas magazines pay any sales tax; [FN4] in that respect, it operates in much **1728 the same way as did the $100,000 exemption to the Minnesota use tax. Because the Arkansas sales tax scheme treats some magazines less favorably than others, it suffers from the second type of discrimination identified in *Minneapolis Star.*

FN4. Appellant maintains that Arkansas Times is the *only* Arkansas publication that pays sales tax. App. 13 (Affidavit of Alan Leveritt). The Commissioner contends that there are two periodicals, in addition

> to Arkansas Times, that pay tax. Tr. of Oral Arg. 22. Whether there are three Arkansas magazines paying tax or only one, the burden of the tax clearly falls on a limited group of publishers.

Indeed, this case involves a more disturbing use of selective taxation than *Minneapolis Star*, because the basis on which Arkansas differentiates between magazines is particularly repugnant to First Amendment principles: a magazine's tax status depends entirely on its *content*. "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *230 *Police Dept. of Chicago v. Mosley*, 408 U.S., at 95, 92 S.Ct., at 2289. See also *Carey v. Brown*, 447 U.S., at 462-463, 100 S.Ct., at 2291. "Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment." *Regan v. Time, Inc.*, 468 U.S. 641, 648-649, 104 S.Ct. 3262, 3266-3267, 82 L.Ed.2d 487 (1984).

If articles in Arkansas Times were uniformly devoted to religion or sports, the magazine would be exempt from the sales tax under § 84-1904(i). However, because the articles deal with a variety of subjects (sometimes including religion and sports), the Commissioner has determined that the magazine's sales may be taxed. In order to determine whether a magazine is subject to sales tax, Arkansas' "enforcement authorities must necessarily examine the content of the message that is conveyed...." *FCC v. League of Women Voters of California*, 468 U.S. 364, 383, 104 S.Ct. 3106, 3119, 82 L.Ed.2d 278 (1984). Such official scrutiny of the content of publications as the basis for imposing a tax is entirely incompatible with the First Amendment's guarantee of freedom of the press. See *Regan v. Time, Inc., supra*, at 648, 104 S.Ct., at 3266.

Arkansas' system of selective taxation does not evade the strictures of the First Amendment merely because it does not burden the expression of particular *views* by specific magazines. We rejected a similar distinction between content and viewpoint restrictions in *Consolidated Edison Co. v. Public Service Comm'n of New York*, 447 U.S. 530, 100 S.Ct. 2326, 65 L.Ed.2d 319 (1980). As we stated in that case, "[t]he First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic." *Id.*, at 537, 100 S.Ct., at 2333. See *FCC v. League of Women Voters of California, supra*, 468 U.S., at 383-384, 104 S.Ct., at 3119; *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 518-519, 101 S.Ct. 2882, 2898, 69 L.Ed.2d 800 (1981) (plurality opinion); *Carey v. Brown, supra*, 447 U.S., at 462, n. 6, 100 S.Ct., at 2291, n. 6.

Nor are the requirements of the First Amendment avoided by the fact that Arkansas grants an exemption to other members of the media that might publish discussions of the various*231 subjects contained in Arkansas Times. For example, exempting *newspapers* from the tax, see § 84-1904(f), does not change the fact that the State discriminates in determining the tax status of *magazines* published in Arkansas. "It hardly answers one person's objection to a restriction on his speech that another person, outside his control, may speak for him." *Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 553, 103 S.Ct. 1997, 2005, 76 L.Ed.2d 129 (1983) (BLACKMUN, J., concurring). See also *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 757, n. 15, 96 S.Ct. 1817, 1823, n. 15, 48 L.Ed.2d 346 (1976) ("We are aware of no general principle that freedom of speech may be abridged when the speaker's listeners could come by his message by some other means").

**1729 B

Arkansas faces a heavy burden in attempting to defend its content-based approach to taxation of magazines. In order to justify such differential taxation, the State must show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end. See *Minneapolis Star*, 460 U.S., at 591-592, 103 S.Ct., at 1375.

The Commissioner has advanced several state interests. First, he asserts the State's general interest in raising revenue. While we have recognized that this interest is an important one, see *id.*, at 586, it does not explain selective imposition of the sales tax on some magazines and not others, based solely on their content. In *Minneapolis Star*, this interest was invoked in support of differential treatment of the press in relation to other businesses. *Ibid.* In that context, we noted that an interest in raising revenue,

"[s]tanding alone, ... cannot justify the special treatment of the press, for an alternative means of achieving the same interest without raising concerns under the First Amendment is clearly available: the State could raise the revenue by taxing businesses generally, avoiding*232 the censorial threat implicit in a tax that singles out the press," *Ibid.* (footnote omitted).

The same is true of a tax that differentiates between members of the press.

The Commissioner also suggests that the exemption of religious, professional, trade, and sports journals was intended to encourage "fledgling" publishers, who have only limited audiences and therefore do not have access to the same volume of advertising revenues as general interest magazines such as *Arkansas Times*. Brief for Appellee 16. Even assuming that an interest in encouraging fledgling publications might be a compelling one, we do not find the exemption in § 84-1904(j) of religious, professional, trade, and sports journals narrowly tailored to achieve that end. To the contrary, the exemption is both overinclusive and underinclusive. The types of magazines enumerated in § 84-1904(j) are exempt, regardless of whether they are "fledgling"; even the most lucrative and well-established religious, professional, trade, and sports journals do not pay sales tax. By contrast, struggling general interest magazines and struggling specialty magazines on subjects other than those specified in § 84-1904(j) are ineligible for favorable tax treatment.

Finally, the Commissioner asserted for the first time at oral argument a need to "foster communication" in the State. Tr. of Oral Arg. 28, 32. While this state interest might support a blanket exemption of the press from the sales tax, it cannot justify selective taxation of certain publishers. The Arkansas tax scheme only fosters communication on religion, sports, and professional and trade matters. It therefore does not serve its alleged purpose in any significant way.

C

Appellant argues that the Arkansas tax scheme violates the First Amendment because it exempts all newspapers from the tax, but only some magazines. Appellant contends that, under applicable state regulations, see nn. 1 and 2, *233 *supra*, the critical distinction between newspapers and magazines is not format, but rather content: newspapers are distinguished from magazines because they contain reports of current events and articles of general interest. Just as content-based distinctions between magazines are impermissible under prior decisions of this Court, appellant claims that content-based distinctions between different members of the media are also impermissible, absent a compelling justification.[FN5]

FN5. This challenge was made in the courts below, but it was not addressed by either the Chancery Court or the Arkansas Supreme Court. Since the Chancery Court construed the magazine exemption to cover sales of *Arkansas Times*, it was not necessary to reach the issue. The Arkansas Supreme Court ruled that the sales tax was a generally applicable regulation and did not examine the impact of the magazine exemption or the newspaper exemption. 287 Ark. 155, 157A, 157B, 698 S.W.2d 802, 803 (1985).

Because we hold today that the State's selective application of its sales tax to magazines is unconstitutional and therefore invalid, our ruling eliminates the differential treatment of newspapers and magazines. Accordingly, we need not decide whether a distinction between different types of periodicals**1730 presents an additional basis for

invalidating the sales tax, as applied to the press.

IV

In the Chancery Court, appellant asserted its First and Fourteenth Amendment claims under 42 U.S.C. § 1983, as well as a corresponding entitlement to attorney's fees under § 1988. Because this Court has found a constitutional violation, appellant urges us to consider its cause of action under § 1983 and order an award of attorney's fees. However, the state courts have not yet indicated whether they will exercise jurisdiction over this claim [FN6] and we therefore remand to give them an opportunity to do so.

FN6. The Chancery Court construed the magazine exemption to apply to sales of Arkansas Times and therefore did not reach the federal cause of action. The Arkansas Supreme Court reversed the Chancery Court's construction of the statute and held that there was no First Amendment violation. It found that it was not necessary to consider appellant's claim for attorney's fees under § 1988.

*234 The parties recognize that federal and state courts have concurrent jurisdiction over actions brought under § 1983, see, *e.g.*, *Martinez v. California*, 444 U.S. 277, 283, n. 7, 100 S.Ct. 553, 558 n. 7, 62 L.Ed.2d 481 (1980), although the Tax Injunction Act, 28 U.S.C. § 1341, ordinarily precludes federal courts from entertaining challenges to the assessment of state taxes. The parties disagree, however, on whether the state court *must* exercise jurisdiction in such cases.[FN7] We leave it to the courts on remand to consider the necessity of entertaining this claim.

FN7. Whether state courts must assume jurisdiction over these cases is not entirely clear. See Note, Section 1983 in State Court: A Remedy for Unconstitutional State Taxation, 95 Yale L.J. 414, 420-421 (1985). See also *Spencer v. South Carolina Tax Comm'n*, 281 S.C. 492, 316 S.E.2d 386, aff'd by an equally divided Court, 471 U.S. 82, 105 S.Ct. 1859, 85 L.Ed.2d 62 (1984). Of course, an affirmance by an equally divided Court is not entitled to precedential weight. See *Nell v. Biggers*, 409 U.S. 188, 192, 93 S.Ct. 375, 378, 34 L.Ed.2d 401 (1972).

V

We stated in *Minneapolis Star* that "[a] tax that singles out the press, or that targets individual publications within the press, places a heavy burden on the State to justify its action." 460 U.S., at 592-593, 103 S.Ct., at 1376. In this case, Arkansas has failed to meet this heavy burden. It has advanced no compelling justification for selective, content-based taxation of certain magazines, and the tax is therefore invalid under the First Amendment. Accordingly, we reverse the judgment of the Arkansas Supreme Court and remand for proceedings not inconsistent with this opinion.

It is so ordered.

Justice STEVENS, concurring in part and concurring in the judgment.

To the extent that the Court's opinion relies on the proposition " 'that government has no power to restrict expression *235 because of its message, its ideas, its subject matter, or its content,' " see *ante*, at 1727 (quoting *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95, 92 S.Ct. 2286, 2289, 33 L.Ed.2d 212 (1972)), I am unable to join it.[FN*] I do, however, agree that the State has the burden of justifying its content-based discrimination and has plainly failed to do so. Accordingly, I join Parts I, II, III-B, IV, and V of the Court's opinion and concur in its judgment.

FN* See my separate opinions in *Consolidated Edison Co. v. Public Service Comm'n of New York*, 447 U.S. 530, 544, 100 S.Ct. 2326, 2337, 65 L.Ed.2d 319 (1980); *Widmar v. Vincent*, 454 U.S. 263, 277, 102 S.Ct. 269, 278, 70 L.Ed.2d 440 (1981); and *Regan v. Time, Inc.*, 468 U.S. 641, 692, 104 S.Ct. 3262, 3289, 82

L.Ed.2d 487 (1984); see also *FCC v. League of Women Voters of California,* 468 U.S. 364, 408, 104 S.Ct. 3106, 3132, 82 L.Ed.2d 278 (1984).

Justice SCALIA, with whom THE CHIEF JUSTICE joins, dissenting.

All government displays an enduring tendency to silence, or to facilitate silencing, those voices that it disapproves. In the case of the Judicial Branch of Government, the principal restraint upon that **1731 tendency, as upon other judicial error, is the requirement that judges write opinions providing logical reasons for treating one situation differently from another. I dissent from today's decision because it provides no rational basis for distinguishing the subsidy scheme here under challenge from many others that are common and unquestionably lawful. It thereby introduces into First Amendment law an element of arbitrariness that ultimately erodes rather than fosters the important freedoms at issue.

The Court's opinion does not dispute, and I think it evident, that the tax exemption in this case has a rational basis sufficient to sustain the tax scheme against ordinary equal protection attack, see, *e.g., Massachusetts Board of Rettrement v. Murgia,* 427 U.S. 307, 312, 96 S.Ct. 2562, 2566, 49 L.Ed.2d 520 (1976) (*per curiam*). Though assuredly not " narrowly tailored," it is reasonably related to the legitimate goals of encouraging small publishers with limited audiences and advertising revenues (a category which in the State's judgment includes most publishers of religious, professional, trade, and sports magazines) and of *236 avoiding the collection of taxes where administrative cost exceeds tax proceeds. See Brief for Appellee 15-16. The exemption is found invalid, however, because it does not pass the "strict scrutiny" test applicable to discriminatory restriction or prohibition of speech, namely, that it be "necessary to serve a compelling state interest and ... narrowly drawn to achieve that end." *Ante,* at 1728; cf. *Police Department of Chicago v. Mosley,* 408 U.S. 92, 101, 92 S.Ct. 2286, 2293, 33 L.Ed.2d 212 (1972) (discriminatory ban on picketing); *Carey v. Brown,* 447 U.S. 455, 461-462, 100 S.Ct. 2286, 2290-2291, 65 L.Ed.2d 263 (1980) (same).

Here, as in the Court's earlier decision in *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue,* 460 U.S. 575, 103 S.Ct. 1365, 75 L.Ed.2d 295 (1983), application of the "strict scrutiny" test rests upon the premise that for First Amendment purposes denial of exemption from taxation is equivalent to regulation. That premise is demonstrably erroneous and cannot be consistently applied. Our opinions have long recognized-in First Amendment contexts as elsewhere-the reality that tax exemptions, credits, and deductions are "a form of subsidy that is administered through the tax system," and the general rule that "a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny." *Regan v. Taxation With Representation of Washington,* 461 U.S. 540, 544, 549, 103 S.Ct. 1997, 2000, 2002, 76 L.Ed.2d 129 (1983) (upholding denial of tax exemption for organization engaged in lobbying even though veterans' organizations received exemption regardless of lobbying activities). See also *Cammarano v. United States,* 358 U.S. 498, 513, 79 S.Ct. 524, 533, 3 L.Ed.2d 462 (1959) (deduction for lobbying activities); *Buckley v. Valeo,* 424 U.S. 1, 93-95, 96 S.Ct. 612, 670-671, 46 L.Ed.2d 659 (1976) (declining to apply strict scrutiny to campaign finance law that excludes certain candidates); *Harris v. McRae,* 448 U.S. 297, 324-326, 100 S.Ct. 2671, 2692-2693, 65 L.Ed.2d 784 (1980) (declining to apply strict scrutiny to legislative decision not to subsidize abortions even though other medical procedures were subsidized); *Maher v. Roe,* 432 U.S. 464, 97 S.Ct. 2376, 53 L.Ed.2d 484 (1977) (same).

*237 The reason that denial of participation in a tax exemption or other subsidy scheme does not necessarily "infringe" a fundamental right is that-unlike direct restriction or prohibition-such a denial does not, as a general rule, have any significant coercive effect. It may, of course, be manipulated so as to do so, in which case the courts will be available to provide relief. But that is not remotely the case here. It is implausible that the 4% sales tax, generally applicable to all sales in the State with the few enumerated exceptions, was meant to inhibit, or had the effect of inhibiting, this

appellant's publication.

**1732 Perhaps a more stringent, prophylactic rule is appropriate, and can consistently be applied, when the subsidy pertains to the expression of a particular viewpoint on a matter of political concern-a tax exemption, for example, that is expressly available only to publications that take a particular point of view on a controversial issue of foreign policy. Political speech has been accorded special protection elsewhere. See, e.g., *FCC v. League of Women Voters of California*, 468 U.S. 364, 375-376, 104 S.Ct. 3106, 3114-3115, 82 L.Ed.2d 278 (1984) (invalidating ban on editorializing by recipients of grants from the Corporation for Public Broadcasting, in part on ground that political speech "is entitled to the most exacting degree of First Amendment protection"); *Connick v. Myers*, 461 U.S. 138, 143-146, 103 S.Ct. 1684, 1688-1689, 75 L.Ed.2d 708 (1983) (discussing history of First Amendment protection for political speech by public employees); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 89 S.Ct. 1794, 23 L.Ed.2d 371 (1969) (upholding FCC's "fairness doctrine," which imposes special obligations upon broadcasters with regard to "controversial issues of public importance"). There is no need, however, and it is realistically quite impossible, to extend to all speech the same degree of protection against exclusion from a subsidy that one might think appropriate for opposing shades of political expression.

By seeking to do so, the majority casts doubt upon a wide variety of tax preferences and subsidies that draw distinctions based upon subject matter. The United States Postal *238 Service, for example, grants a special bulk rate to written material disseminated by certain nonprofit organizations-religious, educational, scientific, philanthropic, agricultural, labor, veterans', and fraternal organizations. See Domestic Mail Manual § 623 (1985). Must this preference be justified by a "compelling governmental need" because a nonprofit organization devoted to some other purpose-dissemination of information about boxing, for example-does not receive the special rate? The Kennedy Center, which is subsidized by the Federal Government in the amount of up to $23 million per year, see 20 U.S.C. § 76n(a), is authorized by statute to "present classical and contemporary music, opera, drama, dance, and poetry." § 76j. Is this subsidy subject to strict scrutiny because other kinds of expressive activity, such as learned lectures and political speeches, are excluded? Are government research grant programs or the funding activities of the Corporation for Public Broadcasting, see 47 U.S.C. § 396(g)(2), subject to strict scrutiny because they provide money for the study or exposition of some subjects but not others?

Because there is no principled basis to distinguish the subsidization of speech in these areas-which we would surely uphold-from the subsidization that we strike down here, our decision today places the granting or denial of protection within our own idiosyncratic discretion. In my view, that threatens First Amendment rights infinitely more than the tax exemption at issue. I dissent.

U.S.Ark.,1987.
Arkansas Writers' Project, Inc. v. Ragland
481 U.S. 221, 107 S.Ct. 1722, 95 L.Ed.2d 209, 55 USLW 4522, 13 Media L. Rep. 2313

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297 U.S. 233, 56 S.Ct. 444, 80 L.Ed. 660, 1 Media L. Rep. 2685
(Cite as: 297 U.S. 233, 56 S.Ct. 444)

GROSJEAN v. AMERICAN PRESS CO.
U.S. 1936.

Supreme Court of the United States.
GROSJEAN, Sup'r of Public Accounts of Louisiana
v.
AMERICAN PRESS CO., Inc., et al.
No. 303.

Argued Jan. 13, 14, 1936.
Decided Feb. 10, 1936.

Suit by American Press Company, Incorporated, and others against Alice Lee Grosjean, Supervisor of Public Accounts for the State of Louisiana. From a decree for plaintiffs (10 F.Supp. 161), the defendant appeals.

Affirmed.

West Headnotes

[1] Federal Courts 170B ⇨335

170B Federal Courts
170BV Amount or Value in Controversy Affecting Jurisdiction
170Bk335 k. Requisite Amount or Value. Most Cited Cases
(Formerly 106k327)
Where bill by nine newspaper publishers sought to restrain collection of state license tax on ground that statute authorizing it violated Fourteenth Amendment, and record supported allegation that in respect of each of six of plaintiffs, jurisdictional amount was involved, District Court had jurisdiction (Acts La. No. 23 of 1934, s 1; Jud.Code, s 24(1), 28 U.S.C.A. s 41(1); Const. Amend. 14, s 1).

[2] Federal Civil Procedure 170A ⇨1742(4)

170A Federal Civil Procedure
170AXI Dismissal
170AXI(B) Involuntary Dismissal
170AXI(B)2 Grounds in General
170Ak1742 Want of Jurisdiction
170Ak1742(4) k. Amount in Controversy. Most Cited Cases
(Formerly 170Ak1742.3, 106k3511/2, 106k351)
Where bill, supported by record, showed that as to each of six of the nine plaintiffs, jurisdictional amount was involved, motion to dismiss bill in its entirety held property denied. Jud.Code, § 24(1), 28 U.S.C.A. § 1331 et seq.

[3] Appeal and Error 30 ⇨866(1)

30 Appeal and Error
30XVI Review
30XVI(A) Scope, Standards, and Extent, in General
30k862 Extent of Review Dependent on Nature of Decision Appealed from
30k866 On Appeal from Decision on Motion for Dismissal or Nonsuit or Direction of Verdict
30k866(1) k. Appeal from Ruling on Motion for Dismissal or Nonsuit. Most Cited Cases
(Formerly 106k356(13))
Where motion to dismiss, for insufficiency of amount involved, was directed to bill, filed by nine plaintiffs, in its entirety, whether bill should have been dismissed as to three of plaintiffs held not presented for review. Jud.Code, § 24(1), 28 U.S.C.A. §§ 1331, 1332, 1341, 1342, 1345, 1354, 1359.

[4] Federal Courts 170B ⇨7

170B Federal Courts
170BI Jurisdiction and Powers in General
170BI(A) In General
170Bk7 k. Equity Jurisdiction. Most Cited Cases
(Formerly 106k262(2))
Where general laws of state afforded no remedy for recovery of taxes paid under protest, and it was

speculative whether aggrieved taxpayer could obtain relief under statute imposing license tax on newspaper publishers and providing for $500 find or imprisonment, or both, for violation thereof, newspaper publishers attacking statute as violation of Fourteenth Amendment held without plain, adequate, and complete remedy at law and entitled to apply for equitable relief (Acts La. No. 23 of 1934, ss 1, 5; Const. Amend. 14, s 1).

[5] Constitutional Law 92 ⟹3851

92 Constitutional Law
92XXVII Due Process
92XXVII(A) In General
92k3848 Relationship to Other Constitutional Provisions; Incorporation
92k3851 k. First Amendment. Most Cited Cases
(Formerly 92k274.1(1), 92k90(1), 92k274)
States are precluded from abridging freedom of speech or of the press, not by the First Amendment, but by the due process clause of the Fourteenth Amendment. U.S.C.A.Const. Amends. 1, 14, § 1.

[6] Constitutional Law 92 ⟹4037

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)1 In General
92k4037 k. Personal and Bodily Rights in General. Most Cited Cases
(Formerly 92k255(1), 92k255)
"Liberty," as used in Fourteenth Amendment, embraces not only the right of a person to be free from physical restraint, but the right to be free in the enjoyment of all his faculties as well. U.S.C.A.Const. Amend. 14, § 1.

[7] Constitutional Law 92 ⟹2913

92 Constitutional Law
92XXIV Privileges or Immunities; Emoluments
92XXIV(B) Privileges and Immunities of Citizens of the United States (Fourteenth Amendment)
92XXIV(B)1 In General
92k2911 Entities Protected By, or Subject To, Constitutional Provision
92k2913 k. Corporations or Other Business Entities. Most Cited Cases
(Formerly 92k206(7))

Constitutional Law 92 ⟹3012

92 Constitutional Law
92XXVI Equal Protection
92XXVI(A) In General
92XXVI(A)3 Persons or Entities Protected
92k3012 k. Corporations and Other Business Entities. Most Cited Cases
(Formerly 92k210(2), 92k210, 92k252)
Corporation is not a "citizen" within privileges and immunities clause of the Fourteenth Amendment (Const. Amend. 14).

[8] Constitutional Law 92 ⟹1290

92 Constitutional Law
92XIII Freedom of Religion and Conscience
92XIII(A) In General
92k1290 k. In General. Most Cited Cases
(Formerly 92k84.1, 92k84(1), 92k82)

Constitutional Law 92 ⟹3851

92 Constitutional Law
92XXVII Due Process
92XXVII(A) In General
92k3848 Relationship to Other Constitutional Provisions; Incorporation
92k3851 k. First Amendment. Most Cited Cases
(Formerly 92k274(3.1), 92k274(3), 92k251)
Abridgement clause of the First Amendment expresses one of those fundamental principles of liberty and justice, and, as such, is embodied in the concept "due process of law," and is, therefore, protected against hostile state invasion by due process clause of the Fourteenth Amendment. U.S.C.A.Const. Amends. 1, 14, § 1.

[9] Constitutional Law 92 ⟹613

92 Constitutional Law
92V Construction and Operation of

Constitutional Provisions
92V(A) General Rules of Construction
92k613 k. Relation to Common Law. Most Cited Cases
(Formerly 92k17)
Range of a constitutional provision phrased in terms of the common law may sometimes be fixed by recourse to the common law, but the doctrine justifying such recourse must yield to more compelling reasons and is subject to the qualification that the common-law rule invoked shall not have been rejected by our ancestors as unsuited to their civil or political conditions.

[10] Common Law 85 ⇐11

85 Common Law
85k10 Adoption and Repeal
85k11 k. In General. Most Cited Cases
(Formerly 85k1)
Restricted rules of the English law in respect of the freedom of the press, in force when the Constitution was adopted, were never accepted by the American colonists.

[11] Constitutional Law 92 ⇐1575

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)3 Particular Issues and Applications in General
92k1575 k. Books. Most Cited Cases
(Formerly 92k90.1(4), 92k90)

Constitutional Law 92 ⇐4034

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)1 In General
92k4034 k. Speech, Press, Assembly, and Petition. Most Cited Cases
(Formerly 92k274.1(1), 92k274)
First and Fourteenth Amendments were intended to preclude Congress and the states from adopting any form of restraint upon printed publications, or their circulation, including those restraints which had theretofore been effected by means of censorship, license, and taxation, and from taking any government action which might prevent such free and general discussion of public matters as seems essential to prepare the people for an intelligent exercise of their rights as citizens. U.S.C.A.Const. Amends. 1, 14, § 1.

[12] Constitutional Law 92 ⇐4291

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)12 Trade or Business
92k4266 Particular Subjects and Regulations
92k4291 k. News Gathering and Dissemination; Newspapers. Most Cited Cases
(Formerly 92k287.2(1), 92k287)

Licenses 238 ⇐7(1)

238 Licenses
238I For Occupations and Privileges
238k7 Constitutionality and Validity of Acts and Ordinances
238k7(1) k. In General. Most Cited Cases
State statute imposing license tax for privilege of engaging in business of selling advertising upon all publishers of newspapers or magazines having weekly circulation of more than 20,000 copies held unconstitutional under due process of law clause of Fourteenth Amendment because it abridges the freedom of the press. Acts La. No. 23 of 1934, § 1; U.S.C.A.Const. Amend. 14, § 1.

Constitutional Law 92 ⇐1494

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)1 In General
92k1494 k. Applicability to Governmental or Private Action; State Action. Most Cited Cases
(Formerly 92k90(1))

Freedom of speech and of the press, which are protected from congressional infringement by First Amendment, are among fundamental personal rights and liberties protected by Fourteenth Amendment from invasion by state action. U.S.C.A.Const. Amends. 1, 14.

Constitutional Law 92 ⚿3927

92 Constitutional Law
92XXVII Due Process
92XXVII(C) Persons and Entities Protected
92k3927 k. Business Organizations; Corporations. Most Cited Cases
(Formerly 92k252)
Corporation is a "person" within due process clause of Fourteenth Amendment. U.S.C.A.Const. Amend. 14.

Licenses 238 ⚿7(1)

238 Licenses
238I For Occupations and Privileges
238k7 Constitutionality and Validity of Acts and Ordinances
238k7(1) k. In General. Most Cited Cases
State statute imposing license tax for privilege of engaging in business of selling advertising upon all publishers of newspapers or magazines having weekly circulation of more than 20,000 copies held unconstitutional. Acts La. No. 23 of 1934, § 1.

*233 Appeal from the District Court of the United States for the Eastern District of Louisiana.

*234 Messrs. Charles J. Rivet, of New Orleans, La., and Gaston L. Porterie, Atty. Gen., for appellant.
*237 Messrs. Esmond Phelps, of New Orleans, La., and Elisha Hanson, of Washington, D.C., for appellees.
*240 Mr. Justice SUTHERLAND delivered the opinion of the Court.
This suit was brought by appellees, nine publishers of newspapers in the state of Louisiana, to enjoin the enforcement against them of the provisions of section 1 of the act of the Legislature of Louisiana known as Act No. 23, passed and approved July 12, 1934, as follows: 'That every person, firm, association or corporation, domestic or foreign, engaged in the business of selling, or making any charge for, advertising or for advertisements, whether printed or published, or to be printed or published, in any newspaper, magazine, periodical or publication whatever having a circulation of more than 20,000 copies per week, or displayed and exhibited, or to be displayed and exhibited, by means of moving pictures, in the State of Louisiana, shall, in addition to all other taxes and licenses levied and assessed in this State, pay a license tax for the privilege of engaging in such business in this State of two per cent. (2%) of the gross receipts of such business.'

The nine publishers who brought the suit publish thirteen newspapers; and these thirteen publications are the *241 only ones within the state of Louisiana having each a circulation of more than 20,000 copies per week, although the lower court finds there are four other daily newspapers each having a circulation of 'slightly less than 20,000 copies part week' which are in competition with those published by appellees both as to circulation and as to advertising. In addition, there are 120 weekly newspapers published in the state, also in competition, to a greater or less degree, with the newspapers of appellees. The revenue derived from appellees' newspapers comes almost entirely from regular subscribers or purchasers thereof and from payments received for the insertion of advertisements therein.

The act requires every one subject to the tax to file a sworn report every three months showing the amount and the gross receipts from the business described in section 1. The resulting tax must be paid when the report is filed. Failure to file the report or pay the tax as thus provided constitutes a misdemeanor and subjects the offender to a fine not exceeding $500, or imprisonment not exceeding six months, or both, for each violation. Any corporation violating the acts subjects itself to the payment of $500 to be recovered by suit. All of the appellees are corporations. The lower court entered a decree for appellees and granted a permanent injunction. (D.C.) 10 F.Supp. 161.

[1][2][3] First. Appellant assails the federal

jurisdiction of the court below on the ground that the matter in controversy does not exceed the sum or value of $3,000, as required by paragraph 1 of section 24 of the Judicial Code (28 U.S.C.A. s 41(1) . The case arises under the Federal Constitution; and the bill alleges, and the record shows, that the requisite amount is involved in respect of each of six of the nine appellees. This is enough to sustain the jurisdiction of the District Court. The motion was to dismiss the bill-that is to say, the bill in its entirety-and in that form it was properly denied. No motion to dismiss was made or considered *242 by the lower court as to the three appellees in respect of whom the jurisdictional amount was insufficient, and that question, therefore, is not before us. The Rio Grande, 19 Wall. 178, 189, 22 L.Ed. 60; Gibson v. Shufeldt, 122 U.S. 27, 32, 7 S.Ct. 1066, 30 L.Ed. 1083.

[4] Second. The objection also is made that the bill does not make a case for equitable relief. But the objection is clearly **446 without merit. As pointed out in Ohio Oil Co. v. Conway, 279 U.S. 813, 815, 49 S.Ct. 256, 73 L.Ed. 972, the laws of Louisiana afford no remedy whereby restitution of taxes and property exacted may be enforced, even where payment has been made under both protest and compulsion. It is true that the present act contains a provision (section 5) to the effect that where it is established to the satisfaction of the Supervisor of Public Accounts of the state that any payment has been made under the act which was ' not due and collectible,' the supervisor is authorized to refund the amount out of any funds on hand collected by virtue of the act and not remitted to the state treasurer according to law. It seems clear that this refers only to a payment not due and collectible within the terms of the act, and does not authorize a refund on the ground that the act is invalid. Moreover, the act allows the supervisor to make remittances immediately to the state treasurer of taxes paid under the act, and requires him to do so not later than the 30th day after the last day of the preceding quarter; in which even the right to a refund, if not sooner exercised, would be lost. Whether an aggrieved taxpayer may obtain relief under section 5 is, at best, a matter of speculation. In no view can it properly be said that there exists a plain, adequate, and complete remedy at law. Davis v. Wakelee, 156 U.S. 680, 688, 15 S.Ct. 555, 39 L.Ed. 578; Union Pac. R. Co. v. Board of Com'rs of Weld County, 247 U.S. 282, 285, 38 S.Ct. 510, 62 L.Ed. 1110.

Third. The validity of the act is assailed as violating the Federal Constitution in two particulars: (1) That it abridges the freedom of the press in contravention of the due process clause contained in section 1 of the Fourteenth *243 Amendment; (2) that it denies appellees the equal protection of the laws in contravention of the same amendment.

[5] 1. The first point presents a question of the utmost gravity and importance; for, if well made, it goes to the heart of the natural right of the members of an organized society, united for their common good, to impart and acquire information about their common interests. The First Amendment to the Federal Constitution provides that 'Congress shall make no law * * * abridging the freedom of speech, or of the press.' While this provision is not a restraint upon the powers of the states, the states are precluded from abridging the freedom of speech or of the press by force of the due process clause of the Fourteenth Amendment.

In the case of Hurtado v. California, 110 U.S. 516, 4 S.Ct. 111, 28 L.Ed. 232, this court held that the term 'due process of law' does not require presentment or indictment by a grand jury as a prerequisite to prosecution by a state for a criminal offense. And the important point of that conclusion here is that it was deduced from the fact that the Fifth Amendment, which contains the due process of law clause in its national aspect, also required an indictment as a prerequisite to a prosecution for crime under federal law; and it was thought that since no part of the amendment could be regarded as superfluous, the term 'due process of law' did not, ex vi termini, include presentment or indictment by a grand jury in any case; and that the due process of law clause of the Fourteenth Amendment should be interpreted as having been used in the same sense, and as having no greater extent. But in Powell v. State of Alabama, 287 U.S. 45, 65, 68, 53 S.Ct. 55, 77 L.Ed. 158, 84 A.L.R. 527, we held that in the light of subsequent decisions the sweeping language of the Hurtado

Case could not be accepted without qualification. We concluded that certain fundamental rights, safeguarded by the first eight amendments against federal action, were also safeguarded*244 against state action by the due process of law clause of the Fourteenth Amendment, and among them the fundamental right of the accused to the aid of counsel in a criminal prosecution.

[6] That freedom of speech and of the press are rights of the same fundamental character, safeguarded by the due process of law clause of the Fourteenth Amendment against abridgement by state legislation, has likewise been settled by a series of decisions of this court beginning with Gitlow v. People of State of New York, 268 U.S. 652, 666, 45 S.Ct. 625, 69 L.Ed. 1138, and ending with Near v. State of Minnesota, 283 U.S. 697, 707, 51 S.Ct. 625, 75 L.Ed. 1357. The word 'liberty' contained in that amendment embraces not only the right of a person to be free from physical restraint, but the right to be free in the enjoyment of all his faculties as well. Allgeyer**447 v. State of Louisiana, 165 U.S. 578, 589, 17 S.Ct. 427, 41 L.Ed. 832.

[7] Appellant contends that the Fourteenth Amendment does not apply to corporations; but this is only partly true. A corporation, we have held, is not a 'citizen' within the meaning of the privileges and immunities clause. Paul v. Virginia, 8 Wall. 168, 19 L.Ed. 357. But a corporation is a 'person' within the meaning of the equal protection and due process of law clauses, which are the clauses involved here. Covington & L. Turnpike Road Co. v. Sandford, 164 U.S. 578, 592, 17 S.Ct. 198, 41 L.Ed. 560; Smyth v. Ames, 169 U.S. 466, 522, 18 S.Ct. 418, 42 L.Ed. 819.

The tax imposed is designated a 'license tax for the privilege of engaging in such business,' that is to say, the business of selling, or making any charge for, advertising. As applied to appellees, it is a tax of 2 per cent. on the gross receipts derived from advertisements carried in their newspapers when, and only when, the newspapers of each enjoy a circulation of more than 20,000 copies per week. It thus operates as a restraint in a double sense. First, its effect is to curtail the amount of revenue realized from advertising; and, second, its direct *245 tendency is to restrict circulation. This is plain enough when we consider that, if it were increased to a high degree, as it could be if valid (Magnano Co. v. Hamilton, 292 U.S. 40, 45, 54 S.Ct. 599, 78 L.Ed. 1109, and cases cited), it well might result in destroying both advertising and circulation.

[8] A determination of the question whether the tax is valid in respect of the point now under review requires an examination of the history and circumstances which antedated and attended the adoption of the abridgement clause of the First Amendment, since that clause expresses one of those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions' (Hebert v. State of Louisiana, 272 U.S. 312, 316, 47 S.Ct. 103, 104, 71 L.Ed. 270, 48 A.L.R. 1102), and, as such, is embodied in the concept 'due process of law' (Twining v. State of New Jersey, 211 U.S. 78, 99, 29 S.Ct. 14, 53 L.Ed. 97), and, therefore, protected against hostile state invasion by the due process clause of the Fourteenth Amendment. Cf. Powell v. State of Alabama, supra, 287 U.S. 45, at pages 67, 68, 53 S.Ct. 55, 77 L.Ed. 158, 84 A.L.R. 527. The history is a long one; but for present purposes it may be greatly abbreviated.

For more than a century prior to the adoption of the amendment-and, indeed, for many years thereafter-history discloses a persistent effort on the part of the British government to prevent or abridge the free expression of any opinion which seemed to criticize or exhibit in an unfavorable light, however truly, the gaencies and operations of the government. The struggle between the proponents of measures to that end and those who asserted the right of free expression was continuous and unceasing. As early as 1644, John Milton, in an ' Appeal for the Liberty of Unlicensed Printing,' assailed an act of Parliament which had just been passed providing for censorship of the press previous to publication. He vigorously defended the right of every man to make public his honest views 'without previous censure'; and declared the impossibility of finding any man base enough to accept*246 the office of censor and at the same time good enough to be allowed to perform its

duties. Collett, History of the Taxes on Knowledge, vol. I, pp. 4-6. The act expired by its own terms in 1695. It was never renewed; and the liberty of the press thus became, as pointed out by Wickwar (The Struggle for the Freedom of the Press, p. 15), merely 'a right or liberty to publish without a license what formerly could be published only with one.' But mere exemption from previous censorship was soon recognized as too narrow a view of the liberty of the press.

In 1712, in response to a message from Queen Anne (Hansard's Parliamentary History of England, vol. 6, p. 1063), Parliament imposed a tax upon all newspapers and upon advertisements. Collett, vol. I, pp. 8-10. That the main purpose of these taxes was to suppress the publication of comments and criticisms objectionable to the Crown does not admit of doubt. Stewart, Lennox and the Taxes on Knowledge, 15 Scottish Historical Review, 322-327. There followed more than a century of resistance to, and evasion of, the taxes, and of agitation for their repeal. In the article last referred to (p. 326), which was written in 1918, it was pointed out that these taxes constituted one of the factors that aroused the American colonists to protest against **448 taxation for the purposes of the home government; and that the revolution really began when, in 1765, that government sent stamps for newspaper duties to the American colonies.

These duties were quite commonly characterized as 'taxes on knowledge,' a phrase used for the purpose of describing the effect of the exactions and at the same time condemning them. That the taxes had, and were intended to have, the effect of curtailing the circulation of newspapers, and particularly the cheaper ones whose readers were generally found among the masses of the people, went almost without question, even on the part of *247 those who defended the act. May (Constitutional History of England, 7th Ed., vol. 2, p. 245), after discussing the control by 'previous censure,' says: '* * * a new restraint was devised in the form of a stamp duty on newspapers and advertisements,-avowedly for the purpose of repressing libels. This policy, being found effectual in limiting the circulation of cheap papers, was improved upon in the two following reigns, and continued in high esteem until our own time.' Collett (vol. I, p. 14), says: 'Any man who carried on printing or publishing for a livelihood was actually at the mercy of the Commissioners of Stamps, when they chose to exert their powers.'

Citations of similar import might be multiplied many times; but the foregoing is enough to demonstrate beyond peradventure that in the adoption of the English newspaper stamp tax and the tax on advertisements, revenue was of subordinate concern; and that the dominant and controlling aim was to prevent, or curtail the opportunity for, the acquisition of knowledge by the people in respect of their governmental affairs. It is idle to suppose that so many of the best men of England would for a century of time have waged, as they did, stubborn and often precarious warfare against these taxes if a mere matter of taxation had been involved. The aim of the struggle was not to relieve taxpayers from a burden, but to establish and preserve the right of the English people to full information in respect of the doings or misdoings of their government. Upon the correctness of this conclusion the very characterization of the exactions as 'taxes on knowledge' sheds a flood of corroborative light. In the ultimate, an informed and enlightened public opinion was the thing at stake; for, as Erskine, in his great speech in defense of Paine, has said, 'The liberty of opinion keeps governments themselves in due subjection to their *248 duties.' Erskine's Speeches, High's Ed., vol. I, p. 525. See May's Constitutional History of England (7th Ed.) vol. 2, pp. 238-245.

In 1785, only four years before Congress had proposed the First Amendment, the Massachusetts Legislature, following the English example, imposed a stamp tax on all newspapers and magazines. The following year an advertisement tax was imposed. Both taxes met with such violent opposition that the former was repealed in 1786, and the latter in 1788. Duniway, Freedom of the Press in Massachusetts, pp. 136, 137.

[9] The framers of the First Amendment were familiar with the English struggle, which then had continued for nearly eighty years and was destined to go on for another sixty-five years, at the end of

which time it culminated in a lasting abandonment of the obnoxious taxes. The framers were likewise familiar with the then recent Massachusetts episode; and while that occurrence did much to bring about the adoption of the amendment (see Pennsylvania and the Federal Constitution, 1888, p. 181), the predominant influence must have come from the English experience. It is impossible to concede that by the words 'freedom of the press' the framers of the amendment intended to adopt merely the narrow view then reflected by the law of England that such freedom consisted only in immunity from previous censorship; for this abuse had then permanently disappeared from English practice. It is equally impossible to believe that it was not intended to bring within the reach of these words such modes of restraint as were embodied in the two forms of taxation already described. Such belief must be rejected in the face of the then well-known purpose of the exactions and the general adverse sentiment of the colonies in respect of them. Undoubtedly, the range of a constitutional provision phrased in terms of the common law sometimes may be fixed by recourse to the applicable rules of that *249 law. But the doctrine which justifies such recourse, like other canons of construction, must yield to more compelling reasons whenever they exist. Cf. Continental Illinois Nat. Bank & Trust Co. v. Chicago, Rock Island & P. Ry. **449 Co., 294 U.S. 648, 668, 669, 55 S.Ct. 595, 79 L.Ed. 1110. And, obviously, it is subject to the qualification that the commonlaw rule invoked shall be one not rejected by our ancestors as unsuited to their civil or political conditions. Den ex dem. Murray v. Hoboken Land & Improvement Co., 18 How. 272, 276, 277, 15 L.Ed. 372; Waring et al. v. Clarke, 5 How. 441, 454-457, 12 L.Ed. 226; Powell v. State of Alabama, supra, 287 U.S. 45, at pages 60-65, 53 S.Ct. 55, 77 L.Ed. 158, 84 A.L.R. 527.

[10][11] In the light of all that has now been said, it is evident that the restricted rules of the English law in respect of the freedom of the press in force when the Constitution was adopted were never accepted by the American colonists, and that by the First Amendment it was meant to preclude the national government, and by the Fourteenth Amendment to preclude the states, from adopting any form of previous restraint upon printed publications, or their circulation, including that which had theretofore been effected by these two wellknown and odious methods.

This court had occasion in Near v. State of Minnesota, supra, 283 U.S. 697, at pages 713 et seq., 51 S.Ct. 625, 75 L.Ed. 1357, to discuss at some length the subject in its general aspect. The conclusion there stated is that the object of the constitutional provisions was to prevent previous restraints on publication; and the court was careful not to limit the protection of the right to any particular way of abridging it. Liberty of the press within the meaning of the constitutional provision, it was broadly said (283 U.S. 697, 716, 51 S.Ct. 625, 631, 75 L.Ed. 1357), meant 'principally although not exclusively, immunity from previous restraints or (from) censorship.'

Judge Cooley has laid down the test to be applied: ' The evils to be prevented were not the censorship of the press merely, but any action of the government by *250 means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens.' 2 Cooley's Constitutional Limitations (8th Ed.) p. 886.

It is not intended by anything we have said to suggest that the owners of newspapers are immune from any of the ordinary forms of taxation for support of the government. But this is not an ordinary form of tax, but one single in kind, with a long history of hostile misuse against the freedom of the press.

[12] The predominant purpose of the grant of immunity here invoked was to preserve an untrammeled press as a vital source of public information. The newspapers, magazines, and other journals of the country, it is safe to say, have shed and continue to shed, more light on the public and business affairs of the nation than any other instrumentality of publicity; and since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern. The tax here involved is bad not because

it takes money from the pockets of the appellees. If that were all, a wholly different question would be presented. It is bad because, in the light of its history and of its present setting, it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the constitutional guaranties. A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves.

In view of the persistent search for new subjects of taxation, it is not without significance that, with the single exception of the Louisiana statute, so far as we can discover, no state during the one hundred fifty years of our *251 national existence has undertaken to impose a tax like that now in question.

The form in which the tax is imposed is in itself suspicious. It is not measured or limited by the volume of advertisements. It is measured alone by the extent of the circulation of the publication in which the advertisements are carried, with the plain purpose of penalizing the publishers and curtailing the circulation of a selected group of newspapers.

2. Having reached the conclusion that the act imposing the tax in question is unconstitutional under the due process of law clause because it abridges the freedom of the press, we deem it unnecessary to consider the further ground assigned, that it also constitutes a denial of the equal protection of the laws.

Decree affirmed.

U.S. 1936.
Grosjean v. American Press Co.
297 U.S. 233, 56 S.Ct. 444, 80 L.Ed. 660, 1 Media L. Rep. 2685

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Jimmy Swaggart Ministries v. Board of Equalization of California
U.S.Cal.,1990.

Supreme Court of the United States
JIMMY SWAGGART MINISTRIES, Appellant
v.
BOARD OF EQUALIZATION OF CALIFORNIA.
No. 88-1374.

Argued Oct. 31, 1989.
Decided Jan. 17, 1990.

Religious organization brought action seeking refund of sales and use taxes paid under protest. The Superior Court, San Diego County, Jack R. Levitt, J., refused refund, and religious organization appealed. The Court of Appeal, 204 Cal.App.3d 1269, 250 Cal.Rptr. 891, affirmed, and religious organization appealed. The Supreme Court, Justice O'Connor, held that: (1) collection and payment of generally applicable sales and use tax did not impose constitutionally significant burden on organization's religious practices or beliefs, and thus free exercise clause did not require California to grant organization an exemption from tax; (2) imposition of sales and use tax on religious organization did not result in excessive entanglement between government and religion, and thus did not violate establishment clause; and (3) Supreme Court would not reach merits of organization's contention that California's imposition of use tax liability violated commerce and due process clauses, where California courts below had ruled that claim was procedurally barred because it was not raised before Board of Equalization.

Affirmed.

West Headnotes

[1] Constitutional Law 92 ⇐1386(1)

92 Constitutional Law
92XIII Freedom of Religion and Conscience
92XIII(B) Particular Issues and Applications
92k1384 Taxation
92k1386 Religious Organizations or Educational Institutions
92k1386(1) k. In General. Most Cited Cases
(Formerly 92k84.5(8))

Constitutional Law 92 ⇐1391

92 Constitutional Law
92XIII Freedom of Religion and Conscience
92XIII(B) Particular Issues and Applications
92k1390 Licenses
92k1391 k. In General. Most Cited Cases
(Formerly 92k84.5(8))

Rule that free exercise clause prevents imposition of tax on religious organization applies only where flat license tax operates as prior restraint on free exercise of religious beliefs. U.S.C.A. Const.Amend. 1.

[2] Constitutional Law 92 ⇐1386(2)

92 Constitutional Law
92XIII Freedom of Religion and Conscience
92XIII(B) Particular Issues and Applications
92k1384 Taxation
92k1386 Religious Organizations or Educational Institutions
92k1386(2) k. Exemptions. Most Cited Cases
(Formerly 92k84.5(8))

Taxation 371 ⇐3664

371 Taxation
371IX Sales, Use, Service, and Gross Receipts Taxes
371IX(D) Persons Subject to or Liable for Tax
371k3664 k. Clubs, Co-Operatives, and

Nonprofit Organizations. Most Cited Cases
(Formerly 371k1265)
Collection of sales and use taxes on distribution of religious materials by religious organization and religious organization's payment of the taxes did not impose constitutionally significant burden on organization's religious practices or belief, and thus free exercise clause did not require California to grant organization an exemption from taxes; sales and use tax was not flat tax, represented only small fraction of any retail sale, and applied neutrally to all retail sales of tangible personal property made in California. West's Ann.Cal.Rev. & T.Code §§ 6051, 6201; U.S.C.A. Const.Amends. 1, 14.

[3] Constitutional Law 92 ⇐1386(1)

92 Constitutional Law
92XIII Freedom of Religion and Conscience
92XIII(B) Particular Issues and Applications
92k1384 Taxation
92k1386 Religious Organizations or Educational Institutions
92k1386(1) k. In General. Most Cited Cases
(Formerly 92k84.5(8))

Taxation 371 ⇐3664

371 Taxation
371IX Sales, Use, Service, and Gross Receipts Taxes
371IX(D) Persons Subject to or Liable for Tax
371k3664 k. Clubs, Co-Operatives, and Nonprofit Organizations. Most Cited Cases
(Formerly 371k1265)
Requirement under California tax laws that seller must register to facilitate reporting and payment of sales and use taxes, and the sales and use taxes themselves, did not act as prior restraints to religious organization's exercise of evangelistic activity; fee was not charged for registration, tax was due regardless of preregistration, and tax was not imposed as precondition of disseminating the message. West's Ann.Cal.Rev. & T.Code §§ 6066-6074; U.S.C.A. Const.Amends. 1, 14.

[4] Constitutional Law 92 ⇐1386(1)

92 Constitutional Law
92XIII Freedom of Religion and Conscience
92XIII(B) Particular Issues and Applications
92k1384 Taxation
92k1386 Religious Organizations or Educational Institutions
92k1386(1) k. In General. Most Cited Cases
(Formerly 92k84.5(8))

Taxation 371 ⇐2100

371 Taxation
371III Property Taxes
371III(B) Laws and Regulation
371III(B)3 Constitutional Requirements and Restrictions
371k2100 k. In General. Most Cited Cases
(Formerly 371k37)
To extent that imposition of generally applicable tax merely decreases amount of money religious organization has to spend on its religious activities, any such burden is not constitutionally significant. U.S.C.A. Const.Amend. 1.

[5] Constitutional Law 92 ⇐1386(1)

92 Constitutional Law
92XIII Freedom of Religion and Conscience
92XIII(B) Particular Issues and Applications
92k1384 Taxation
92k1386 Religious Organizations or Educational Institutions
92k1386(1) k. In General. Most Cited Cases
(Formerly 92k84.5(8))

Taxation 371 ⇐3664

371 Taxation
371IX Sales, Use, Service, and Gross Receipts Taxes
371IX(D) Persons Subject to or Liable for Tax
371k3664 k. Clubs, Co-Operatives, and Nonprofit Organizations. Most Cited Cases
(Formerly 371k1265)
California's imposition of sales and use tax liability

on religious organization for distribution of religious materials did not result in excessive entanglement between government and religion, and thus did not violate establishment clause, even if tax imposed administrative and record keeping burdens on organization. West's Ann.Cal.Rev. & T.Code §§ 6051, 6201; U.S.C.A. Const.Amends. 1, 14.

[6] Administrative Law and Procedure 15A 669.1

15A Administrative Law and Procedure
15AV Judicial Review of Administrative Decisions
15AV(A) In General
15Ak669 Preservation of Questions Before Administrative Agency
15Ak669.1 k. In General. Most Cited Cases
(Formerly 15Ak669)

Taxation 371 2696

371 Taxation
371III Property Taxes
371III(H) Levy and Assessment
371III(H)10 Judicial Review or Intervention
371k2691 Review of Board by Courts
371k2696 k. Presentation and Reservation Before Board or Officer of Grounds of Review. Most Cited Cases
(Formerly 371k493.5)
Supreme Court would not reach merits of religious organization's claim that California's imposition of use tax liability on organization violated commerce and due process clauses on basis that organization had insufficient "nexus" to California, where California courts had ruled the claim was procedurally barred because organization failed to raise such claims before California Board of Equalization, and California law provided that administrative claim for tax refund shall state specific grounds upon which claim is founded. U.S.C.A. Const. Art. 1, § 8, cl. 3; Amends. 5, 14; West's Ann.Cal.Rev. & T.Code §§ 6904(a), 6932, 6933.

[7] Taxation 371 3700

371 Taxation
371IX Sales, Use, Service, and Gross Receipts Taxes
371IX(H) Payment
371k3699 Refunding Taxes Paid
371k3700 k. In General. Most Cited Cases
(Formerly 371k1333.1, 371k1333)
Taxpayer failed to substantiate any claim that California courts in general apply in an irregular, arbitrary, or inconsistent manner the public policy exception to rule that courts will not decide issue that was not raised in administrative claim for refund before Board of Equalization, and thus United States Supreme Court would not determine whether California courts improperly declined to apply public policy exception and consider taxpayer's commerce clause and due process clause challenges to use taxes which were not raised before Board. U.S.C.A. Const. Art. 1, § 8, cl. 3; Amends. 5, 14; West's Ann.Cal.Rev. & T.Code §§ 6904(a), 6932, 6933.

*378 *Syllabus* FN*

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

California law requires retailers to pay a 6% sales tax on in-state sales of tangible personal property and to collect from state residents a 6% use tax on such property purchased outside the State. During the tax period in question, appellant religious organization, which is incorporated in Louisiana, sold a variety of religious materials at "evangelistic crusades" within California and made mail-order sales of other such materials to California residents. Appellee State Board of Equalization (Board) audited appellant and advised it that it should register as a seller as required by state law and report and pay sales and use taxes on the aforementioned sales. Appellant paid the taxes and the Board ruled against it on its petitions for redetermination and refund, rejecting its contention that the tax on religious materials violated the First Amendment. The state trial court entered judgment

for the Board in appellant's refund suit, the State Court of Appeal affirmed, and the State Supreme Court denied discretionary review.

Held:

1. California's imposition of sales and use tax liability on appellant's sales of religious**690 materials does not contravene the Religion Clauses of the First Amendment. Pp. 693-699.

(a) The collection and payment of the tax imposes no constitutionally significant burden on appellant's religious practices or beliefs under the Free Exercise Clause, which accordingly does not *require* the State to grant appellant a tax exemption. Appellant misreads *Murdock v. Pennsylvania,* 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292, and *Follett v. McCormick,* 321 U.S. 573, 64 S.Ct. 717, 88 L.Ed. 938, which, although holding flat license taxes on commercial sales unconstitutional with regard to the evangelical distribution of religious materials, nevertheless specifically stated that religious activity may constitutionally be subjected to a generally applicable income or property tax akin to the California tax at issue. Those cases apply only where a flat license tax operates as a prior restraint on the free exercise of religious belief. As such, they do not invalidate California's generally applicable sales and use tax, which is not a flat tax, represents only a small fraction of any sale, and applies neutrally to all relevant sales regardless of the nature of the seller or purchaser, so that there is no danger that appellant's*379 religious activity is being singled out for special and burdensome treatment. Moreover, the concern in *Murdock* and *Follett* that flat license taxes operate as a precondition to the exercise of evangelistic activity is not present here, because the statutory registration requirement and the tax itself do not act as prior restraints-no fee is charged for registering, the tax is due regardless of preregistration, and the tax is not imposed as a precondition of disseminating the message. Furthermore, since appellant argues that the exercise of its beliefs is unconstitutionally burdened by the reduction in its income resulting from the presumably lower demand for its wares (caused by the marginally higher price generated by the tax) and from the costs associated with administering the tax, its free exercise claim is in significant tension with *Hernandez v. Commissioner,* 490 U.S. 680, 699, 109 S.Ct. 2136, 2148-2149, 104 L.Ed.2d 766, which made clear that, to the extent that imposition of a generally applicable tax merely decreases the amount of money appellant has to spend on its religious activities, any such burden is not constitutionally significant because it is no different from that imposed by other generally applicable laws and regulations to which religious organizations must adhere. While a more onerous tax rate than California's, even if generally applicable, might effectively choke off an adherent's religious practices, that situation is not before, or considered by, this Court. Pp. 693-697.

(b) Application of the California tax to appellant's sale of religious materials does not violate the Establishment Clause by fostering an excessive governmental entanglement with religion. The evidence of administrative entanglement is thin, since the Court of Appeal expressly found that, in light of appellant's sophisticated accounting staff and computerized accounting methods, the record did not support its assertion that the collection and payment of the tax impose severe accounting burdens on it. Moreover, although collection and payment will require some contact between appellant and the State, generally applicable administrative and recordkeeping burdens may be imposed on religious organizations without running afoul of the Clause. See, *e.g., Hernandez, supra,* at 696-697, 109 S.Ct., at 2147. The fact that appellant must bear the cost of collecting and remitting the tax-even if the financial burden may vary from religion to religion-does not enmesh the government in religious affairs, since the statutory scheme requires neither the involvement of state employees in, nor on-site continuing inspection of, appellant's day-to-day operations. Most significantly, the imposition of the tax without an exemption for appellant does not require the State to inquire into the religious content of the items sold or the religious motivation for selling or purchasing them, since they are subject to the tax regardless of content or motive. Pp. 697-699.

**691 *380 2. The merits of appellant's Commerce

Clause and Due Process Clause claim are not properly before, and will not be reached by, this Court, since both the trial court and the Court of Appeal ruled that the claim was procedurally barred because it was not presented to the Board as required by state law. See, *e.g., Michigan v. Long,* 463 U.S. 1032, 1041-1042, 103 S.Ct. 3469, 3476-3477, 77 L.Ed.2d 1201. Appellant has failed to substantiate any claim that the California courts in general apply the procedural bar rule and a pertinent exception in an irregular, arbitrary, or inconsistent manner. Pp. 699-701.

204 Cal.App.3d 1269, 250 Cal.Rptr. 891, affirmed.

O'CONNOR, J., delivered the opinion for a unanimous Court.

Michael W. McConnell argued the cause for appellant. With him on the brief were *Charles R. Ajalat, Edward McGlynn Gaffney, Jr.,* and *Jessee H. Choper.*

Richard E. Nielsen, Deputy Attorney General of California, argued the cause for appellee. With him on the brief were *John K. Van de Kamp,* Attorney General, and *Neal J. Gobar,* Deputy Attorney General.*

* Briefs of *amici curiae* urging reversal were filed for the Association of Public Justice by *Bradley P. Jacob;* for the Evangelical Council for Financial Accountability et al. by *Samuel E. Ericsson, Michael J. Woodruff,* and *Forest D. Montgomery;* for the International Society for Krishna Consciousness of California, Inc., by *David M. Liberman, Robert C. Moest,* and *Barry A. Fisher;* for the National Council of Churches of Christ in the U.S.A. by *Douglas Laycock;* and for the National Taxpayers Union by *Gale A. Norton.*

Steven R. Shapiro filed a brief for the American Civil Liberties Union as *amicus curiae* urging affirmance.

Briefs of *amici curiae* were filed for the National Conference of State Legislatures et al. by *Benna Ruth Solomon* and *Charles Rothfeld;* and for the Watchtower Bible and Tract Society of New York, Inc., by *James M. McCabe* and *Donald T. Ridley.*

Justice O'CONNOR delivered the opinion of the Court.

This case presents the question whether the Religion Clauses of the First Amendment prohibit a State from imposing a generally applicable sales and use tax on the distribution of religious materials by a religious organization.

*381 I

California's Sales and Use Tax Law requires retailers to pay a sales tax "[f]or the privilege of selling tangible personal property at retail." Cal.Rev. & Tax.Code Ann. § 6051 (West 1987). A "sale" includes any transfer of title or possession of tangible personal property for consideration. Cal.Rev. & Tax.Code Ann. § 6006(a) (West Supp.1989).

The use tax, as a complement to the sales tax, reaches out-of-state purchases by residents of the State. It is "imposed on the storage, use, or other consumption in this state of tangible personal property purchased from any retailer," § 6201, at the same rate as the sales tax (6 percent). Although the use tax is imposed on the purchaser, § 6202, it is generally collected by the retailer at the time the sale is made. §§ 6202-6206. Neither the State Constitution nor the State Sales and Use Tax Law exempts religious organizations from the sales and use tax, apart from a limited exemption for the serving of meals by religious organizations, § 6363.5.

During the tax period in question (1974 to 1981), appellant Jimmy Swaggart Ministries was a religious organization incorporated as a Louisiana nonprofit corporation and recognized as such by the Internal Revenue Service pursuant to § 501(c)(3) of the Internal Revenue Code of 1954, as amended, 26 U.S.C. § 501(c)(3) (1982 ed.), and by the California State Controller pursuant to the Inheritance Tax and Gift Tax Laws of the State of California. Appellant's constitution and bylaws provide that it " is called for the purpose of establishing and maintaining an evangelistic outreach for the worship of Almighty God." App. 107. This outreach is to be performed "by all available means, both at home and in foreign lands," and "shall specifically include evangelistic crusades;

missionary endeavors; radio broadcasting (as owner, broadcaster, and placement agency); television broadcasting (both as owner and broadcaster); and audio production and reproduction of music; audio production and reproduction*382 of preaching; audio production and reproduction of teaching; writing, printing and publishing; and, any and all other individual or mass media methods that presently exist or may be devised in the future to proclaim the good news of Jesus Christ." *Id.*, at 107-108.

From 1974 to 1981, appellant conducted numerous " evangelistic crusades" in auditoriums and arenas across the country in cooperation with local churches. *Id.*, at 61. During this period, appellant held 23 crusades in California-each lasting 1 to 3 days, with one crusade lasting 6 days-for a total of 52 days. *Id.*, at 19-20. At the crusades, appellant conducted religious services that included preaching and singing. Some of these services were recorded for later sale or broadcast.**692 Appellant also sold religious books, tapes, records, and other religious and nonreligious merchandise at the crusades.

Appellant also published a monthly magazine, "The Evangelist," which was sold nationwide by subscription. The magazine contained articles of a religious nature as well as advertisements for appellant's religious books, tapes, and records. The magazine included an order form listing the various items for sale in the particular issue and their unit price, with spaces for purchasers to fill in the quantity desired and the total price. Appellant also offered its items for sale through radio, television, and cable television broadcasts, including broadcasts through local California stations.

In 1980, appellee Board of Equalization of the State of California (Board) informed appellant that religious materials were not exempt from the sales tax and requested appellant to register as a seller to facilitate reporting and payment of the tax. See Cal.Rev. & Tax.Code Ann. §§ 6066-6074 (West 1987 and Supp.1989) (tax registration requirements). Appellant responded that it was exempt from such taxes under the First Amendment.

In 1981, the Board audited appellant and advised appellant that it should register as a seller and report and pay sales tax on all sales made at its *383 California crusades. The Board also opined that appellant had a sufficient nexus with the State of California to require appellant to collect and report use tax on its mail-order sales to California purchasers.

Based on the Board's review of appellant's records, the parties stipulated "that [appellant] sold for use in California tangible personal property for the period April 1, 1974, through December 31, 1981, measured by payment to [appellant] of $1,702,942.00 for mail order sales from Baton Rouge, Louisiana and $240,560.00 for crusade merchandise sales in California." App. 58. These figures represented the sales and use in California of merchandise with specific religious content-Bibles, Bible study manuals, printed sermons and collections of sermons, audiocassette tapes of sermons, religious books and pamphlets, and religious music in the form of songbooks, tapes, and records. See App. to Juris. Statement B-1 to B-3. Based on the sales figures for appellant's religious materials, the Board notified appellant that it owed sales and use taxes of $118,294.54, plus interest of $36,021.11, and a penalty of $11,829.45, for a total amount due of $166,145.10. App. 8. Appellant did not contest the Board's assessment of tax liability for the sale and use of certain nonreligious merchandise, including such items as " T-shirts with JSM logo, mugs, bowls, plates, replicas of crown of thorns, ark of the covenant, Roman coin, candlesticks, Bible stand, pen and pencil sets, prints of religious scenes, bud vase, and communion cups." *Id.*, at 59-60.

Appellant filed a petition for redetermination with the Board, reiterating its view that the tax on religious materials violated the First Amendment. Following a hearing and an appeal to the Board, the Board deleted the penalty but otherwise redetermined the matter without adjustment in the amount of $118,294.54 in taxes owing, plus $65,043.55 in interest. Pursuant to state procedural law, appellant paid the amount and filed a petition for redetermination and refund with the Board. See Cal.Rev. & Tax.Code Ann. § 6902 *384 West

1987). The Board denied appellant's petition, and appellant brought suit in state court, seeking a refund of the tax paid.

The trial court entered judgment for the Board, ruling that appellant was not entitled to a refund of any tax. The California Court of Appeal affirmed, 204 Cal.App.3d 1269, 250 Cal.Rptr. 891 (1988), and the California Supreme Court denied discretionary review. We noted probable jurisdiction pursuant to 28 U.S.C. § 1257(2) (1982 ed.) (amended in 1988), 490 U.S. 1018, 109 S.Ct. 1741, 104 L.Ed.2d 178 (1989), and now affirm.

**693 II

Appellant's central contention is that the State's imposition of sales and use tax liability on its sale of religious materials contravenes the First Amendment's command, made applicable to the States by the Fourteenth Amendment, to "make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Appellant challenges the Sales and Use Tax Law under both the Free Exercise and Establishment Clauses.

A

The Free Exercise Clause, we have noted, " withdraws from legislative power, state and federal, the exertion of any restraint on the free exercise of religion. Its purpose is to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority." *Abington School Dist. v. Schempp,* 374 U.S. 203, 222-223, 83 S.Ct. 1560, 1571-1572, 10 L.Ed.2d 844 (1963). Indeed, "[a] regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion." *Wisconsin v. Yoder,* 406 U.S. 205, 220, 92 S.Ct. 1526, 1535, 32 L.Ed.2d 15 (1972). Our cases have established that "[t]he free exercise inquiry asks whether government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the *385 burden." *Hernandez v. Commissioner,* 490 U.S. 680, 699, 109 S.Ct. 2136, 2148, 104 L.Ed.2d 766 (1989) (citations omitted).

Appellant relies almost exclusively on our decisions in *Murdock v. Pennsylvania,* 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292 (1943), and *Follett v. McCormick,* 321 U.S. 573, 576, 64 S.Ct. 717, 719, 88 L.Ed. 938 (1944), for the proposition that a State may not impose a sales or use tax on the evangelical distribution of religious material by a religious organization. Appellant contends that the State's imposition of use and sales tax liability on it burdens its evangelical distribution of religious materials in a manner identical to the manner in which the evangelists in *Murdock* and *Follett* were burdened.

We reject appellant's expansive reading of *Murdock* and *Follett* as contrary to the decisions themselves. In *Murdock,* we considered the constitutionality of a city ordinance requiring all persons canvassing or soliciting within the city to procure a license by paying a flat fee. Reversing the convictions of Jehovah's Witnesses convicted under the ordinance of soliciting and distributing religious literature without a license, we explained:

"The hand distribution of religious tracts is an age-old form of missionary evangelism ... [and] has been a potent force in various religious movements down through the years. This form of evangelism is utilized today on a large scale by various religious sects whose colporteurs carry the Gospel to thousands upon thousands of homes and seek through personal visitations to win adherents to their faith. It is more than preaching; it is more than distribution of religious literature. It is a combination of both. Its purpose is as evangelical as the revival meeting. This form of religious activity occupies the same high estate under the First Amendment as do worship in the churches and preaching in the pulpits." 319 U.S., at 108-109, 63 S.Ct., at 872-873 (footnotes omitted).

Accordingly, we held that "spreading one's religious beliefs or preaching the Gospel through distribution of religious literature*386 and through personal visitations is an age-old type of evangelism with as high a claim to constitutional protection as the more orthodox types." *Id.,* at 110, 63 S.Ct., at 873; see

also *Jones v. Opelika*, 319 U.S. 103, 63 S.Ct. 890, 87 L.Ed. 1290 (1943); *Martin v. Struthers*, 319 U.S. 141, 63 S.Ct. 862, 87 L.Ed. 1313 (1943).

We extended *Murdock* the following Term by invalidating, as applied to "one who earns **694 his livelihood as an evangelist or preacher in his home town," an ordinance (similar to that involved in *Murdock*) that required all booksellers to pay a flat fee to procure a license to sell books. *Follett v. McCormick*, 321 U.S., at 576, 64 S.Ct., at 719. Reaffirming our observation in *Murdock* that " 'the power to tax the exercise of a privilege is the power to control or suppress its enjoyment,' " 321 U.S., at 577, 64 S.Ct., at 719 (quoting *Murdock, supra*, 319 U.S., at 112, 63 S.Ct., at 874), we reasoned that " [t]he protection of the First Amendment is not restricted to orthodox religious practices any more than it is to the expression of orthodox economic views. He who makes a profession of evangelism is not in a less preferred position than the casual worker." 321 U.S., at 577, 64 S.Ct., at 719.

Our decisions in these cases, however, resulted from the particular nature of the challenged taxes-flat license taxes that operated as a prior restraint on the exercise of religious liberty. In *Murdock*, for instance, we emphasized that the tax at issue was "a license tax-a flat tax imposed on the exercise of a privilege granted by the Bill of Rights," 319 U.S., at 113, 63 S.Ct., at 875, and cautioned that "[w]e do not mean to say that religious groups and the press are free from all financial burdens of government.... We have here something quite different, for example, from a tax on the income of one who engages in religious activities or a tax on property used or employed in connection with those activities." *Id.*, at 112, 63 S.Ct., at 874 (citing *Grosjean v. American Press Co.*, 297 U.S. 233, 250, 56 S.Ct. 444, 449, 80 L.Ed. 660 (1936)); see also 319 U.S., at 115, 63 S.Ct., at 876 ("This tax is not a charge for the enjoyment of a privilege or benefit bestowed by the state"). In *Follett*, we reiterated that a preacher is not "free from all financial burdens of government, including taxes on income *387 or property" and, "like other citizens, may be subject to *general* taxation," 321 U.S., at 578, 64 S.Ct., at 719 (emphasis added).

Significantly, we noted in both cases that a primary vice of the ordinances at issue was that they operated as prior restraints of constitutionally protected conduct:

"In all of these cases [in which license taxes have been invalidated] the issuance of the permit or license is dependent on the payment of a license tax. And the license tax is fixed in amount and unrelated to the scope of the activities of petitioners or to their realized revenues. It is not a nominal fee imposed as a regulatory measure to defray the expenses of policing the activities in question. It is in no way apportioned. It is a flat license tax levied and collected as a condition to the pursuit of activities whose enjoyment is guaranteed by the First Amendment. Accordingly, *it restrains in advance those constitutional liberties of press and religion and inevitably tends to suppress their exercise.* That is almost uniformly recognized as the inherent vice and evil of this flat license tax." *Murdock, supra*, 319 U.S., at 113-114, 63 S.Ct., at 875-876 (emphasis added).

See also *Follett, supra*, 321 U.S., at 577, 64 S.Ct., at 719 ("The exaction of a tax as a condition to the exercise of the great liberties guaranteed by the First Amendment is as obnoxious as the imposition of a censorship or a previous restraint") (citations omitted). Thus, although *Murdock* and *Follett* establish that appellant's form of religious exercise has "as high a claim to constitutional protection as the more orthodox types," *Murdock, supra*, 319 U.S., at 110, 63 S.Ct., at 873, those cases are of no further help to appellant. Our concern in *Murdock* and *Follett*-that a flat license tax would act as a *precondition* to the free exercise of religious beliefs-is simply not present where a tax applies to all sales and uses of tangible personal property in the State.

Our reading of *Murdock* and *Follett* is confirmed by our decision in **695*Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575, 103 S.Ct. 1365, 75 L.Ed.2d 295 (1983), where we considered*388 a newspaper's First Amendment challenge to a state use tax on ink and paper products used in the production of periodic publications. In the course of striking down the tax, we rejected the newspaper's suggestion,

premised on *Murdock* and *Follett*, that a generally applicable sales tax could not be applied to publications. Construing those cases as involving " a flat tax, unrelated to the receipts or income of the speaker or to the expenses of administering a valid regulatory scheme, as a *condition* of the right to speak," 460 U.S., at 587, n. 9, 103 S.Ct., at 137, n. 9 (emphasis in original), we noted:

"By imposing the tax as a condition of engaging in protected activity, the defendants in those cases imposed a form of prior restraint on speech, rendering the tax highly susceptible to constitutional challenge. In that regard, the cases cited by Star Tribune do not resemble a generally applicable sales tax. Indeed, our cases have consistently recognized that nondiscriminatory taxes on the receipts or income of newspapers would be permissible." *Ibid.* (citations omitted).

Accord, *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 229, 107 S.Ct. 1722, 1727, 95 L.Ed.2d 209 (1987) ("[A] genuinely nondiscriminatory tax on the receipts of newspapers would be constitutionally permissible").

We also note that just last Term a plurality of the Court rejected the precise argument appellant now makes. In *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 109 S.Ct. 890, 103 L.Ed.2d 1 (1989), Justice BRENNAN, writing for three Justices, held that a state sales tax exemption for religious publications violated the Establishment Clause. *Id.*, at 14-21, 109 S.Ct., at 899-903 (plurality opinion). In so concluding, the plurality further held that the Free Exercise Clause did not prevent the State from withdrawing its exemption, noting that "[t]o the extent that our opinions in *Murdock* and *Follett* might be read ... to suggest that the States and the Federal Government may never tax the sale of religious or other publications, we reject those dicta. " *Id.*, at 24, 109 S.Ct., at 904. Justice WHITE, concurring in the judgment, concluded*389 that the exemption violated the Free Press Clause because the content of a publication determined its tax-exempt status. *Id.*, at 24-25, 109 S.Ct., at 905. Justice BLACKMUN, joined by Justice O'CONNOR, concurred in the plurality's holding that the tax exemption at issue in that case contravened the Establishment Clause, but reserved the question whether "the Free Exercise Clause requires a tax exemption for the sale of religious literature by a religious organization; in other words, defining the ultimate scope of *Follett* and *Murdock* may be left for another day." *Id.*, at 28, 109 S.Ct., at 907. In this case, of course, California has not chosen to create a tax exemption for religious materials, and we therefore have no need to revisit the Establishment Clause question presented in *Texas Monthly*.

[1][2] We do, however, decide the free exercise question left open by Justice BLACKMUN's concurrence in *Texas Monthly* by limiting *Murdock* and *Follett* to apply only where a flat license tax operates as a prior restraint on the free exercise of religious beliefs. As such, *Murdock* and *Follett* plainly do not support appellant's free exercise claim. California's generally applicable sales and use tax is not a flat tax, represents only a small fraction of any retail sale, and applies neutrally to all retail sales of tangible personal property made in California. California imposes its sales and use tax even if the seller or the purchaser is charitable, religious, nonprofit, or state or local governmental in nature. See *Union League Club v. Johnson*, 18 Cal.2d 275, 278, 115 P.2d 425, 426 (1941); *People v. Imperial County*, 76 Cal.App.2d 572, 576-577, 173 P.2d 352, 354 (1946); *Bank of America National Trust & Savings Assn. v. State Board of Equalization*, 209 Cal.App.2d 780, 796-797, 26 Cal.Rptr. 348, 357-358 (1962). Thus, the sales and use tax is not a tax on the right to disseminate religious information, ideas, or **696 beliefs *per se;* rather, it is a tax on the privilege of making retail sales of tangible personal property and on the storage, use, or other consumption of tangible personal property in California. For example, *390 California treats the sale of a Bible by a religious organization just as it would treat the sale of a Bible by a bookstore; as long as both are in-state retail sales of tangible personal property, they are both subject to the tax regardless of the motivation for the sale or the purchase. There is no danger that appellant's religious activity is being singled out for special and burdensome treatment.

[3] Moreover, our concern in *Murdock* and *Follett* that flat license taxes operate as a precondition to

the exercise of evangelistic activity is not present in this case, because the registration requirement, see Cal.Rev. & Tax.Code Ann. §§ 6066-6074 (West 1987 and Supp.1989), and the tax itself do not act as prior restraints-no fee is charged for registering, the tax is due regardless of preregistration, and the tax is not imposed as a precondition of disseminating the message. Thus, unlike the license tax in *Murdock*, which was "in no way apportioned" to the "realized revenues" of the itinerant preachers forced to pay the tax, 319 U.S., at 113-114, 63 S.Ct., at 875-876; see also *Texas Monthly, supra*, 489 U.S., at 22, 109 S.Ct., at 903, the tax at issue in this case is akin to a generally applicable income or property tax, which *Murdock* and *Follett* specifically state may constitutionally be imposed on religious activity.

[4] In addition to appellant's misplaced reliance on *Murdock* and *Follett*, appellant's free exercise claim is also in significant tension with the Court's decision last Term in *Hernandez v. Commissioner*, 490 U.S. 680, 109 S.Ct. 2136, 104 L.Ed.2d 766 (1989), holding that the Government's disallowance of a tax deduction for religious "auditing" and " training" services did not violate the Free Exercise Clause. *Id.*, at 694-700, 109 S.Ct., at 2146-2149. The Court reasoned that

"[a]ny burden imposed on auditing or training ... derives solely from the fact that, as a result of the deduction denial, adherents have less money to gain access to such sessions. This burden is no different from that imposed by any public tax or fee; indeed, the burden imposed by the denial of the ' contribution or gift' deduction *391 would seem to pale by comparison to the overall federal income tax burden on an adherent." *Id.*, at 699, 109 S.Ct., at 2149.

There is no evidence in this case that collection and payment of the tax violates appellant's sincere religious beliefs. California's nondiscriminatory Sales and Use Tax Law requires only that appellant collect the tax from its California purchasers and remit the tax money to the State. The only burden on appellant is the claimed reduction in income resulting from the presumably lower demand for appellant's wares (caused by the marginally higher price) and from the costs associated with administering the tax. As the Court made clear in *Hernandez*, however, to the extent that imposition of a generally applicable tax merely decreases the amount of money appellant has to spend on its religious activities, any such burden is not constitutionally significant. See *ibid.*; *Texas Monthly, supra*, 489 U.S., at 19-20, 109 S.Ct., at 902 (plurality opinion); see also *Bob Jones University v. United States*, 461 U.S. 574, 603-604, 103 S.Ct. 2017, 1381-1382, 76 L.Ed.2d 157 (1983).

Appellant contends that the availability of a deduction (at issue in *Hernandez*) and the imposition of a tax (at issue here) are distinguishable, but in both cases adherents base their claim for an exemption on the argument that an "incrementally larger tax burden interferes with their religious activities." 490 U.S., at 700, 109 S.Ct., at 2149. It is precisely this argument-rather than one applicable only to deductions-that the Court rejected in *Hernandez*. At bottom, though we do not doubt the economic cost to appellant of complying**697 with a generally applicable sales and use tax, such a tax is no different from other generally applicable laws and regulations-such as health and safety regulations-to which appellant must adhere.

Finally, because appellant's religious beliefs do not forbid payment of the sales and use tax, appellant's reliance on *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963), and its progeny is misplaced, because in no sense has the State " ' condition[ed] receipt of an important benefit upon conduct proscribed by a *392 religious faith, or ... denie[d] such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs.' " *Hobbie v. Unemployment Appeals Comm'n of Florida*, 480 U.S. 136, 141, 107 S.Ct. 1046, 1049, 94 L.Ed.2d 190 (1987) (quoting *Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U.S. 707, 717-718, 101 S.Ct. 1425, 1431-1432, 67 L.Ed.2d 624 (1981)). Appellant has never alleged that the mere act of paying the tax, by itself, violates its sincere religious beliefs.

We therefore conclude that the collection and

payment of the generally applicable tax in this case imposes no constitutionally significant burden on appellant's religious practices or beliefs. The Free Exercise Clause accordingly does not *require* the State to grant appellant an exemption from its generally applicable sales and use tax. Although it is of course possible to imagine that a more onerous tax rate, even if generally applicable, might effectively choke off an adherent's religious practices, cf. *Murdock, supra,* 319 U.S., at 115, 63 S.Ct., at 876 (the burden of a flat tax could render itinerant evangelism "crushed and closed out by the sheer weight of the toll or tribute which is exacted town by town"), we face no such situation in this case. Accordingly, we intimate no views as to whether such a generally applicable tax might violate the Free Exercise Clause.

B

[5] Appellant also contends that application of the sales-and-use tax to its sale of religious materials violates the Establishment Clause because it fosters " 'an excessive government entanglement with religion,' " *Lemon v. Kurtzman,* 403 U.S. 602, 613, 91 S.Ct. 2105, 2111, 29 L.Ed.2d 745 (1971) (quoting *Walz v. Tax Comm'n of New York City,* 397 U.S. 664, 674, 90 S.Ct. 1409, 1414, 25 L.Ed.2d 697 (1970)). Appellant alleges, for example, that the present controversy has featured on-site inspections of appellant's evangelistic crusades, lengthy on-site audits, examinations of appellant's books and records, threats of criminal prosecution, and layers of administrative and judicial proceedings.

*393 The Establishment Clause prohibits " sponsorship, financial support, and active involvement of the sovereign in religious activity." *Walz, supra,* at 668, 90 S.Ct., at 1411. The " excessive entanglement" prong of the tripartite purpose-effect-entanglement *Lemon* test, see *Lemon,* 403 U.S., at 612-613, 91 S.Ct., at 2111-2112, requires examination of "the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority" *id.,* at 615, 91 S.Ct., at 2112; see also *Walz,* 397 U.S., at 695, 90 S.Ct., at 1425 (separate opinion of Harlan, J.) (warning of " programs, whose very nature is apt to entangle the state in details of administration"). Indeed, in *Walz* we held that a tax exemption for "religious organizations for religious properties used solely for religious worship," as part of a general exemption for nonprofit institutions, *id.,* at 666-667, 90 S.Ct., at 1410-1411, did not violate the Establishment Clause. In upholding the tax exemption, we specifically noted that taxation of religious properties would cause at least as much administrative entanglement between government and religious authorities as did the exemption:

**698 "Either course, taxation of churches or exemption, occasions some degree of involvement with religion. Elimination of exemption would tend to expand the involvement of government by giving rise to tax valuation of church property, tax liens, tax foreclosures, and the direct confrontations and conflicts that follow in the train of these legal processes.

"Granting tax exemptions to churches necessarily operates to afford an indirect economic benefit and also gives rise to some, but yet a lesser, involvement than taxing them. In analyzing either alternative the questions are whether the involvement is excessive, and whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement." *Id.,* at 674-675, 90 S.Ct., at 1414-1415.

*394 The issue presented, therefore, is whether the imposition of sales and use tax liability in this case on appellant results in "excessive" involvement between appellant and the State and "continuing surveillance leading to an impermissible degree of entanglement."

At the outset, it is undeniable that a generally applicable tax has a secular purpose and neither advances nor inhibits religion, for the very essence of such a tax is that it is neutral and nondiscriminatory on questions of religious belief. Thus, whatever the precise contours of the Establishment Clause, see *County of Allegheny v. American Civil Liberties Union of Pittsburgh,* 492 U.S. 573, 589-594, 109 S.Ct. 3086, 3099-3101, 106

L.Ed.2d 472 (1989) (tracing evolution of Establishment Clause doctrine); cf. *Bowen v. Kendrick*, 487 U.S. 589, 615-618, 108 S.Ct. 2562, ---, 101 L.Ed.2d 520 (1988) (applying but noting criticism of the entanglement prong of the *Lemon* test), its undisputed core values are not even remotely called into question by the generally applicable tax in this case.

Even applying the "excessive entanglement" prong of the *Lemon* test, however, we hold that California's imposition of sales and use tax liability on appellant threatens no excessive entanglement between church and state. First, we note that the evidence of administrative entanglement in this case is thin. Appellant alleges that collection and payment of the sales and use tax impose severe accounting burdens on it. The Court of Appeal, however, expressly found that the record did not support appellant's factual assertions, noting that appellant "had a sophisticated accounting staff and had recently computerized its accounting and that [appellant] in its own books and for purposes of obtaining a federal income tax exemption segregated 'retail sales' and 'donations.' . " 204 Cal.App.3d, at 1289, 250 Cal.Rptr., at 905.

Second, even assuming that the tax imposes substantial administrative burdens on appellant, such administrative and recordkeeping burdens do not rise to a constitutionally significant level. Collection and payment of the tax will of course require some contact between appellant and the State, *395 but we have held that generally applicable administrative and recordkeeping regulations may be imposed on religious organization without running afoul of the Establishment Clause. See *Hernandez*, 490 U.S., at 696-697, 109 S.Ct., at 2147-2148 ("[R]outine regulatory interaction [such as application of neutral tax laws] which involves no inquiries into religious doctrine, ... no delegation of state power to a religious body, ... and no 'detailed monitoring and close administrative contact' between secular and religious bodies, ... does not of itself violate the nonentanglement command"); *Tony and Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290, 305-306, 105 S.Ct.1953, 1963-1964, 85 L.Ed.2d 278 (1985) ("The Establishment Clause does not exempt religious organizations from such secular governmental activity as fire inspections and building and zoning regulations, *Lemon*, *supra*, 403 U.S., at 614, 91 S.Ct., at 2112, and the recordkeeping requirements of the Fair Labor Standards Act, while perhaps more burdensome in terms of paperwork, are not significantly more intrusive into religious affairs"). To be sure, we noted in *Tony and Susan Alamo Foundation***699* that the recordkeeping requirements at issue in that case "appl[ied] only to commercial activities undertaken with a 'business purpose,' and would therefore have no impact on petitioners' own evangelical activities," 471 U.S., at 305, 105 S.Ct., at 1963, but that recognition did not bear on whether the generally applicable regulation was nevertheless "the kind of government surveillance the Court has previously held to pose an intolerable risk of government entanglement with religion," *ibid.*

The fact that appellant must bear the cost of collecting and remitting a generally applicable sales and use tax-even if the financial burden of such costs may vary from religion to religion-does not enmesh government in religious affairs. Contrary to appellant's contentions, the statutory scheme requires neither the involvement of state employees in, nor on-site continuing inspection of, appellant's day-to-day operations. There is no "official and continuing surveillance," *Walz, supra*, 397 U.S., at 675, 90 S.Ct., at 1414, by government auditors. The sorts of *396 government entanglement that we have found to violate the Establishment Clause have been far more invasive than the level of contact created by the administration of neutral tax laws. Cf. *Aguilar v. Felton*, 473 U.S. 402, 414, 105 S.Ct. 3232, 3238, 87 L.Ed.2d 290 (1985); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 126-127, 103 S.Ct. 505, 511-512, 74 L.Ed.2d 297 (1982).

Most significantly, the imposition of the sales and use tax without an exemption for appellant does not require the State to inquire into the religious content of the items sold or the religious motivation for selling or purchasing the items, because the materials are subject to the tax regardless of content or motive. From the State's point of view, the

critical question is not whether the materials are religious, but whether there is a sale or a use, a question which involves only a secular determination. Thus, this case stands on firmer ground than *Hernandez,* because appellant offers the items at a stated price, thereby relieving the State of the need to place a monetary value on appellant's religious items. Compare *Hernandez,* 490 U.S., at 697-698, 109 S.Ct., at 2148 (where no comparable good or service is sold in the marketplace, Internal Revenue Service looks to cost of providing the good or service), with *id.,* at 706, 109 S.Ct., at 2152 (O'CONNOR, J., dissenting) ("It becomes impossible ... to compute the 'contribution ' portion of a payment to charity where what is received in return is not merely an intangible, but an intangible (or, for that matter a tangible) that is not bought and sold except in donative contexts"). Although appellant asserts that donations often accompany payments made for the religious items and that items are sometimes given away without payment (or only nominal payment), it is plain that, in the first case, appellant's use of "order forms" and "price lists" renders illusory any difficulty in separating the two portions and that, in the second case, the question is only whether any particular transfer constitutes a "sale." Ironically, appellant's theory, under which government may not tax " religious core" activities but may tax "nonreligious" activities, would require government to do precisely what appellant asserts the Religion *397 Clauses prohibit: "determine which expenditures are religious and which are secular." *Lemon,* 403 U.S., at 621-622, 91 S.Ct., at 2115-2116.

Accordingly, because we find no excessive entanglement between government and religion in this case, we hold that the imposition of sales and use tax liability on appellant does not violate the Establishment Clause.

III

[6] Appellant also contends that the State's imposition of use tax liability on it violates the Commerce and Due Process Clauses because, as an out-of-state distributor, it had an insufficient "nexus" to the **700 State. See *National Geographic Society v. California Bd. of Equalization,* 430 U.S. 551, 554, 97 S.Ct. 1386, 1389, 51 L.Ed.2d 631 (1977); *National Bellas Hess, Inc. v. Department of Revenue of Ill.,* 386 U.S. 753, 756-760, 87 S.Ct. 1389, 1391-1393, 18 L.Ed.2d 505 (1967). We decline to reach the merits of this claim, however, because the courts below ruled that the claim was procedurally barred.

California law provides that an administrative claim for a tax refund "shall state the specific grounds upon which the claim is founded," Cal.Rev. & Tax.Code Ann. § 6904(a) (West Supp.1989), and that refund suits will be entertained only if "a claim for refund or credit has been duly filed" with the Board, § 6932. Suit may thereafter be brought only "on the grounds set forth in the claim." § 6933. Thus, under state law, "[t]he claim for refund delineates and restricts the issues to be considered in a taxpayer's refund action. The trial court and [appellate] court are without jurisdiction to consider grounds not set forth in the claim." *Atari, Inc. v. State Board of Equalization,* 170 Cal.App.3d 665, 672, 216 Cal.Rptr. 267, 271 (1985) (citations omitted). This rule serves a legitimate state interest in requiring parties to exhaust administrative remedies before proceeding to court, for "[s]uch a rule prevents having an overworked court consider issues and remedies available through administrative channels." *Id.,* at 673, 216 Cal.Rptr., at 272.

*398 The record in this case makes clear that appellant, in its refund claim before the Board, failed even to cite the Commerce Clause or the Due Process Clause, much less articulate legal arguments contesting the nexus issue. See App. 34 (incorporating petition for redetermination, which in turn raised only First Amendment arguments, see *id.,* at 11-16). The Board's hearing officer specifically noted, in forwarding his decision to the Board, that appellant's "[c]ounsel does not argue nexus," *id.,* at 22, and indeed the parties stipulated before the trial court that appellant's request for a refund was based on its First Amendment claim, *id.,* at 59. Accordingly, both the trial court and the Court of Appeal declined to rule on the nexus issue on the ground that appellant had failed to raise it in its refund claim before the Board. 204 Cal.App.3d,

at 1290-1292, 250 Cal.Rptr., at 905-906; App. 213. This unambiguous application of state procedural law makes it unnecessary for us to review the asserted claim. See *Michigan v. Long,* 463 U.S. 1032, 1041-1042, 103 S.Ct. 3469, 3476-3477, 77 L.Ed.2d 1201 (1983); *Michigan v. Tyler,* 436 U.S. 499, 512, n. 7, 98 S.Ct. 1942, 1951, n. 7, 56 L.Ed.2d 486 (1978).

[7] Appellant nevertheless urges that the state procedural ground relied upon by the courts below is inadequate because the procedural rule is not " ' strictly or regularly followed.' " *Hathorn v. Lovorn,* 457 U.S. 255, 263, 102 S.Ct. 2421, 2426, 72 L.Ed.2d 824 (1982) (quoting *Barr v. City of Columbia,* 378 U.S. 146, 149, 84 S.Ct. 1734, 1736, 12 L.Ed.2d 766 (1964)). Appellant asserts that state courts in California retain the authority to hear claims "involving important questions of public policy" notwithstanding the parties' failure to raise those claims before an administrative agency. See *Lindeleaf v. Agricultural Labor Relations Bd.,* 41 Cal.3d 861, 870-871, 226 Cal.Rptr. 119, 124-125, 718 P.2d 106, 112 (1986); *Hale v. Morgan,* 22 Cal.3d 388, 394, 149 Cal.Rptr. 375, 379, 584 P.2d 512, 516 (1978). Appellant observes, for example, that although the Court of Appeal in this case found appellant's nexus claim to be procedurally barred, it ignored the procedural bar and ruled on the merits of appellant's Ninth and Tenth Amendment arguments, see 204 Cal.App.3d, at 1292-1293, 250 Cal.Rptr., at 907-908, even though those arguments *399 were likewise not raised in appellant's refund claim, see *id.,* at 1292, n. 19, 250 Cal.Rptr., at 907, n. 19.

The Court of Appeal, however, specifically rejected appellant's claim that the nexus issue raised " important questions of public policy," noting that the issue instead "raise[d] **701 factual questions, the determination of which is not a matter of ' public policy' but a matter of evidence." *Id.,* at 1292, 250 Cal.Rptr., at 907. Even if the Court of Appeal erred as a matter of state law in declining to rule on appellant's nexus claim, appellant has failed to substantiate any claim that the California courts in general apply this exception in an irregular, arbitrary, or inconsistent manner. Accordingly, we conclude that appellant's Commerce Clause and Due Process Clause argument is not properly before us. We thus express no opinion on the merits of the claim.

The judgment of the California Court of Appeal is affirmed.

It is so ordered.

U.S.Cal.,1990.
Jimmy Swaggart Ministries v. Board of Equalization of California
493 U.S. 378, 110 S.Ct. 688, 107 L.Ed.2d 796, 58 USLW 4135

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Westlaw.

111 S.Ct. 1438

499 U.S. 439, 111 S.Ct. 1438, 69 Rad. Reg. 2d (P & F) 60, 113 L.Ed.2d 494, 59 USLW 4281, 18 Media L. Rep. 1953
(Cite as: 499 U.S. 439, 111 S.Ct. 1438)

Leathers v. Medlock
U.S.Ark.,1991.

Supreme Court of the United States
Timothy J. LEATHERS, Commissioner of Revenues of Arkansas, Petitioner,
v.
Daniel L. MEDLOCK et al.
Daniel L. MEDLOCK, et al., Petitioners,
v.
Timothy J. LEATHERS, Commissioner of Revenues of Arkansas, et al.
Nos. 90-29, 90-38.

Argued Jan. 9, 1991.
Decided April 16, 1991.

Cable television subscriber and trade organization of cable operators brought action challenging imposition of sales tax on cable television services. The Chancery Court, Pulaski County, Lee A. Munson, Chancellor, upheld sales tax. Appeal was taken. The Arkansas Supreme Court, 301 Ark. 483, 785 S.W.2d 202, reversed and remanded. Subscriber, operators and Arkansas Commissioner of Revenues petitioned for certiorari. The Supreme Court, Justice O'Connor, held that Arkansas' extension of its generally applicable sales tax to cable television services alone, or to cable and satellite services, while exempting print media, does not violate First Amendment.

Affirmed in part, and reversed in part and remanded.

Justice Marshall filed a dissenting opinion in which Justice Blackmun joined.

Opinion on remand, 305 Ark. 610, 808 S.W.2d 785.

West Headnotes

[1] Constitutional Law 92 ⇐2140

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(W) Telecommunications and Computers
92k2139 Cable and Satellite Television Systems; Community Antenna Systems
92k2140 k. In General. Most Cited Cases
(Formerly 92k90.1(9))

Cable television operator is engaged in "speech" under First Amendment, and is, in much of its operation, part of the "press" since it provides to its subscribers news, information, and entertainment. U.S.C.A. Const.Amend. 1.

[2] Constitutional Law 92 ⇐2140

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(W) Telecommunications and Computers
92k2139 Cable and Satellite Television Systems; Community Antenna Systems
92k2140 k. In General. Most Cited Cases
(Formerly 92k90.1(9))

Fact that cable television is taxed differently from other media does not by itself raise First Amendment concerns. U.S.C.A. Const.Amend. 1.

[3] Constitutional Law 92 ⇐2140

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(W) Telecommunications and Computers
92k2139 Cable and Satellite Television Systems; Community Antenna Systems
92k2140 k. In General. Most Cited Cases
(Formerly 92k90.1(9))

Taxation 371 ⇐3626

371 Taxation
371IX Sales, Use, Service, and Gross Receipts Taxes
371IX(B) Regulations
371k3625 Validity of Acts and Ordinances
371k3626 k. In General. Most Cited Cases
(Formerly 371k1212.1, 371kI212)
Arkansas' extension of its generally applicable sales tax to cable television services alone, or to cable and satellite services, while exempting print media, does not violate First Amendment; tax generally applied to receipts from sale of all tangible personal property and broad range of services unless within group of specific exemptions, there was no indication that Arkansas had targeted cable television in purposeful attempt to interfere with its First Amendment activities, and sales tax was not content based. U.S.C.A. Const.Amend. 1.

[4] Constitutional Law 92 ⇐1572

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)3 Particular Issues and Applications in General
92k1572 k. Taxation. Most Cited Cases
(Formerly 92k90.1(1))
Differential taxation of First Amendment speakers is constitutionally suspect when it threatens to suppress expression of particular ideas or viewpoints. U.S.C.A. Const.Amend. 1.

[5] Constitutional Law 92 ⇐2081

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(U) Press in General
92k2081 k. Taxation. Most Cited Cases
(Formerly 92k90.1(8))
Absent compelling justification, government may not exercise its taxing power to single out the press. U.S.C.A. Const.Amend. 1.

[6] Constitutional Law 92 ⇐1572

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)3 Particular Issues and Applications in General
92k1572 k. Taxation. Most Cited Cases
(Formerly 92k90.1(1))
Tax is suspect under First Amendment if it targets a small group of speakers. U.S.C.A. Const.Amend. 1.

[7] Constitutional Law 92 ⇐1572

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)3 Particular Issues and Applications in General
92k1572 k. Taxation. Most Cited Cases
(Formerly 92k90.1(1))
Tax will trigger heightened scrutiny under First Amendment if it discriminates on basis of content of taxpayer speech. U.S.C.A. Const.Amend. 1.

Syllabus [FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

Arkansas' Gross Receipts Act imposes a tax on receipts from the sale of all tangible personal property and specified services, but expressly exempts, *inter alia*, certain receipts from newspaper and magazine sales. In 1987, Act 188 amended the Gross Receipts Act to impose the tax on cable television. Petitioners in No. 90-38, a cable television subscriber, a cable operator, and a cable trade organization (cable petitioners), brought this class action in the State Chancery Court, contending that their expressive rights under the First Amendment and their rights under the Equal Protection Clause of the Fourteenth Amendment

were violated by the extension of the tax to cable services, the exemption from the tax of newspapers and magazines, and the exclusion from the list of services subject to the tax of scrambled satellite broadcast television services to home dish-antennae owners. In 1989, shortly after the Chancery Court upheld the constitutionality of Act 188, Arkansas adopted Act 769, which extended the tax to, among other things, all television services to paying customers. On appeal, the State Supreme Court held that the tax was not invalid after the passage of Act 769 because the Constitution does not prohibit the differential taxation of different media. However, believing that the First Amendment does prohibit discriminatory taxation among members of the same medium, and that cable and scrambled satellite television services were "substantially the same," the Supreme Court held that the tax was unconstitutional for the period during which it applied to cable but not satellite broadcast services.

Held:

1. Arkansas' extension of its generally applicable sales tax to cable television services**1440 alone, or to cable and satellite services, while exempting the print media, does not violate the First Amendment. Pp. 1442-1447.

(a) Although cable television, which provides news, information, and entertainment to its subscribers, is engaged in "speech" and is part of the "press" in much of its operation, the fact that it is taxed differently from other media does not by itself raise First Amendment concerns. *440 The Arkansas tax presents none of the First Amendment difficulties that have led this Court to strike down differential taxation of speakers. See, *e.g., Grosjean v. American Press Co.*, 297 U.S. 233, 56 S.Ct. 444, 80 L.Ed. 660; *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 103 S.Ct. 1365, 75 L.Ed.2d 295; *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 107 S.Ct. 1722, 95 L.Ed.2d 209. It is a tax of general applicability covering all tangible personal property and a broad range of services and, thus, does not single out the press and thereby threaten to hinder it as a watchdog of government activity. Furthermore, there is no indication that Arkansas has targeted cable television in a purposeful attempt to interfere with its First Amendment activities, nor is the tax structured so as to raise suspicion that it was intended to do so. Arkansas has not selected a small group of speakers to bear fully the burden of the tax, since, even if the State Supreme Court's finding that cable and satellite television are the same medium is accepted, Act 188 extended the tax uniformly to the approximately 100 cable systems then operating in the State. Finally, the tax is not content based, since there is nothing in the statute's language that refers to the content of mass media communications, and since the record contains no evidence that the variety of programming cable television offers subscribers differs systematically in its message from that communicated by satellite broadcast programming, newspapers, or magazines. Pp. 1442-1445.

(b) Thus, cable petitioners can prevail only if the Arkansas tax scheme presents "an additional basis" for concluding that the State has violated their First Amendment rights. See *Arkansas Writers', supra,* at 233, 107 S.Ct., at 1729. This Court's decisions do not support their argument that such a basis exists here because the tax discriminates among media and discriminated for a time within a medium. Taken together, cases such as *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 103 S.Ct. 1997, 76 L.Ed.2d 129, *Mabee v. White Plains Publishing Co.*, 327 U.S. 178, 66 S.Ct. 511, 90 L.Ed. 607, and *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 66 S.Ct. 494, 90 L.Ed. 614, establish that differential taxation of speakers, even members of the press, does not implicate the First Amendment unless the tax is directed at, or presents the danger of suppressing, particular ideas. Nothing about Arkansas' choice to exclude or exempt certain media from its tax has ever suggested an interest in censoring the expressive activities of cable television. Nor does anything in the record indicate that this broad-based, content-neutral tax is likely to stifle the free exchange of ideas. Pp. 1445-1447.

2. The question whether Arkansas' temporary tax distinction between cable and satellite services violated the Equal Protection Clause must be addressed by the State Supreme Court on remand. P. 1447.

301 Ark. 483, 785 S.W.2d 202 (1990), affirmed in part, reversed in part, and remanded.

*441 O'CONNOR, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and WHITE, STEVENS, SCALIA, KENNEDY, and SOUTER, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which BLACKMUN, J., joined, *post*, p. 1447.

William E. Keadle argued the cause for petitioner in No.90-29 and respondents in No. 90-38. With him on the briefs was *Larry D. Vaught.*

Eugene G. Sayre argued the cause and filed briefs for petitioners in No. 90-38 and respondents in No. 90-29.†

†Briefs of *amici curiae* urging reversal were filed for Dow Jones & Co., Inc., by *Richard J. Tofel* and *Robert D. Sack;* for the Indiana Cable Telvision Association Inc. by *D. Craig Martin;* and for the National Cable Television Association, Inc., by *H. Bartow Farr III, Richard G. Taranto, Brenda L. Fox,* and *Michael S. Schooler.*

Briefs of *amici curiae* urging affirmance were filed for the City of Los Angeles, California, et al., by *Larrine S. Holbrooke, William R. Malone, Edward J. Perez,* and *Barry A. Lindahl;* and for the City of New York et al. by *Robert Alan Garrett.*

Briefs of *amici curiae* were filed for Cablevision Industries Corp. et al. by *Brent N. Rushforth;* for the California Cable Television Association by *Frank W. Lloyd III, Diane B. Burstein,* and *Alan J. Gardner;* for Century Communications Corp, et al. by *John P. Cole, Jr.,* and *Wesley R. Heppler;* for the Competitive Cable Associaiton et al. by *Harold R. Farrow, Sol Schildhause,* and *Robert M. Bramson;* for Greater Media Cablevision, inc., by *Robert H. Louis* and *Salvatore M. DeBunda;* and for the National Association of Broadcasters et al. by *Jack N. Goodman* and *James J. Popham.*

Justice O'CONNOR delivered the opinion of the Court.

These consolidated cases require us to consider the constitutionality of a state sales tax that excludes or exempts certain segments of the media but not others.

I

Arkansas' Gross Receipts Act imposes a 4% tax on receipts from the sale of all tangible personal property and specified services. Ark.Code Ann. §§ 26-52-301, 26-52-302 (1987 and Supp.1989). The Act exempts from the tax certain sales of goods and services. § 26-52-401 (Supp.1989). Counties *442 within Arkansas impose a 1% tax on all goods and services subject to taxation under the Gross Receipts Act, §§ 26-74-307, 26-74-222 (1987 and Supp.1989), and cities may impose a further 1/2 or 1% tax on these items, § 26-75-307 (1987).

The Gross Receipts Act expressly exempts receipts from subscription and over-the-counter newspaper sales and subscription magazine sales. See §§ 26-52-401(4), (14) (Supp.1989); Revenue Policy Statement 1988-1 (Mar. 10, 1988), reprinted in CCH Ark.Tax Rep. ¶ 69-415. Before 1987, the Act did not list among those services subject to the sales tax either cable television [FN1] or scrambled satellite broadcast television services to home dish-antennae owners.[FN2] See § 26-52-301 (1987). In 1987, Arkansas adopted Act 188, which amended the Gross Receipts Act to impose the sales tax on cable television. 1987 Ark.Gen.Acts, No. 188, § 1.

FN1. Cable systems receive television, radio, or other signals through antennae located at their so-called "headends." Information gathered in this way, as well as any other material that the system operator wishes to transmit, is then conducted through cables strung over utility poles and through underground conduits to subscribers. See generally D. Brenner, M. Price, & M. Meyerson, Cable Television and Other Nonbroadcast Video:

Law and Policy § 1.03 (1989).

FN2. Satellite television broadcast services transmit over-the-air "scrambled" signals directly to the satellite dishes of subscribers, who must pay for the right to view the signals. See generally A. Easton & S. Easton, The Complete Sourcebook of Home Satellite TV 57-66 (1988).

Daniel L. Medlock, a cable television subscriber, Community Communications Co., a cable television operator, and the Arkansas Cable Television Association, Inc., a trade organization composed of approximately 80 cable operators with systems throughout the State (cable petitioners), brought this class action in the Arkansas Chancery Court to challenge the extension of the sales tax to cable television services. Cable petitioners contended that their expressive activities are protected by the First Amendment and are comparable to those of newspapers, magazines, and scrambled satellite broadcast television. They argued that Arkansas' sales taxation*443 of cable services, and exemption or exclusion from the tax of newspapers, magazines, and satellite broadcast services, violated their constitutional rights under the First Amendment and under the Equal Protection Clause of the Fourteenth Amendment.

The Chancery Court granted cable petitioners' motion for a preliminary injunction, requiring Arkansas to place in escrow the challenged sales taxes and to keep records identifying collections of the taxes. Both sides introduced extensive testimony and documentary evidence at the hearing on this motion and at the subsequent trial. Following the trial, the Chancery Court concluded that cable television's necessary use of public rights-of-way distinguishes it for constitutional purposes from other media. It therefore upheld the constitutionality of Act 188, dissolved its preliminary injunction, and ordered all funds collected in escrow released.

In 1989, shortly after the Chancery Court issued its decision, Arkansas adopted Act 769, which extended the sales tax to "all other distribution of television, video or radio services with or without the use of wires provided to subscribers or paying customers **1442 or users." 1989 Ark.Gen.Acts, No. 769, § 1. On appeal to the Arkansas Supreme Court, cable petitioners again challenged the State's sales tax on the ground that, notwithstanding Act 769, it continued unconstitutionally to discriminate against cable television. The Supreme Court rejected the claim that the tax was invalid after the passage of Act 769, holding that the Constitution does not prohibit the differential taxation of different media. *Medlock v. Pledger*, 301 Ark. 483, 487, 785 S.W.2d 202, 204 (1990). The court believed, however, that the First Amendment prohibits discriminatory taxation among members of the same medium. On the record before it, the court found that cable television services and satellite broadcast services to home dish-antennae owners were "substantially the same." *Ibid.* The State Supreme Court rejected the Chancery Court's conclusion that cable television's use of public *444 rights-of-way justified its differential sales tax treatment, explaining that cable operators already paid franchise fees for that right. *Id.*, at 485, 785 S.W.2d, at 203. It therefore held that Arkansas' sales tax was unconstitutional under the First Amendment for the period during which cable television, but not satellite broadcast services, were subject to the tax. *Id.*, at 487; 785 S.W.2d, at 204.

Both cable petitioners and the Arkansas Commissioner of Revenues petitioned this Court for certiorari. We consolidated these petitions and granted certiorari, *Pledger v. Medlock*, 498 U.S. 809, 111 S.Ct. 41, 42, 112 L.Ed.2d 18 (1990), in order to resolve the question, left open in *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 233, 107 S.Ct. 1722, 1729, 95 L.Ed.2d 209 (1987), whether the First Amendment prevents a State from imposing its sales tax on only selected segments of the media.

II

[1][2][3] Cable television provides to its subscribers news, information, and entertainment. It is engaged in "speech" under the First Amendment,

and is, in much of its operation, part of the "press." See *Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494, 106 S.Ct. 2034, 2037, 90 L.Ed.2d 480 (1986). That it is taxed differently from other media does not by itself, however, raise First Amendment concerns. Our cases have held that a tax that discriminates among speakers is constitutionally suspect only in certain circumstances.

In *Grosjean v. American Press Co.*, 297 U.S. 233, 56 S.Ct. 444, 80 L.Ed. 660 (1936), the Court considered a First Amendment challenge to a Louisiana law that singled out publications with weekly circulations above 20,000 for a 2% tax on gross receipts from advertising. The tax fell exclusively on 13 newspapers. Four other daily newspapers and 120 weekly newspapers with weekly circulations of less than 20,000 were not taxed. The Court discussed at length the pre-First Amendment English and American tradition of taxes imposed exclusively on the press. This invidious form of censorship was intended to curtail the circulation of newspapers and thereby prevent the *445 people from acquiring knowledge of government activities. *Id.*, at 246-251, 56 S.Ct., at 447-451. The Court held that the tax at issue in *Grosjean* was of this type and was therefore unconstitutional. *Id.*, at 250, 56 S.Ct., at 449.

In *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 103 S.Ct. 1365, 75 L.Ed.2d 295 (1983), we noted that it was unclear whether the result in *Grosjean* depended on our perception in that case that the State had imposed the tax with the intent to penalize a selected group of newspapers or whether the structure of the tax was sufficient to invalidate it. See 460 U.S., at 580, 103 S.Ct., at 1369 (citing cases and commentary). *Minneapolis Star* resolved any doubts about whether direct evidence of improper censorial motive is required in order to invalidate a differential tax on First Amendment grounds: " Illicit legislative intent is not the *sine qua non* of a **1443 violation of the First Amendment." *Id.*, at 592, 103 S.Ct., at 1376.

At issue in *Minneapolis Star* was a Minnesota special use tax on the cost of paper and ink consumed in the production of publications. The tax exempted the first $100,000 worth of paper and ink consumed annually. Eleven publishers, producing only 14 of the State's 388 paid circulation newspapers, incurred liability under the tax in its first year of operation. The Minneapolis Star & Tribune Co. (Star Tribune) was responsible for roughly two-thirds of the total revenue raised by the tax. The following year, 13 publishers, producing only 16 of the State's 374 paid circulation papers, paid the tax. Again, the Star Tribune bore roughly two-thirds of the tax's burden. We found no evidence of impermissible legislative motive in the case apart from the structure of the tax itself.

We nevertheless held the Minnesota tax unconstitutional for two reasons. First, the tax singled out the press for special treatment. We noted that the general applicability of any burdensome tax law helps to ensure that it will be met with widespread opposition. When such a law applies only to a single constituency, however, it is insulated from this politicalconstraint. *446 See *id.*, at 585, 103 S.Ct., at 1371. Given "the basic assumption of our political system that the press will often serve as an important restraint on government," we feared that the threat of exclusive taxation of the press could operate "as effectively as a censor to check critical comment." *Ibid.* " Differential taxation of the press, then, places such a burden on the interests protected by the First Amendment," that it is presumptively unconstitutional. *Ibid.*

Beyond singling out the press, the Minnesota tax targeted a small group of newspapers-those so large that they remained subject to the tax despite its exemption for the first $100,000 of ink and paper consumed annually. The tax thus resembled a penalty for certain newspapers. Once again, the scheme appeared to have such potential for abuse that we concluded that it violated the First Amendment: "[W]hen 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." *Id.*, at 592, 103 S.Ct., at 1375.

Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 107 S.Ct. 1722, 95 L.Ed.2d 209 (1987), reaffirmed the rule that selective taxation of the press through the narrow targeting of individual members offends the First Amendment. In that case, Arkansas Writers' Project sought a refund of state taxes it had paid on sales of the Arkansas Times, a general interest magazine, under Arkansas' Gross Receipts Act of 1941. Exempt from the sales tax were receipts from sales of religious, professional, trade and sports magazines. See *id.*, at 224-226, 107 S.Ct., at 1725-1726. We held that Arkansas' magazine exemption, which meant that only "a few Arkansas magazines pay any sales tax," operated in much the same way as did the $100,000 exemption in *Minneapolis Star* and therefore suffered from the same type of discrimination identified in that case. *Id.*, at 229, 107 S.Ct., at 1727. Moreover, the basis on which the tax differentiated among magazines depended entirely on their content. *Ibid.*

[4][5][6][7] *447 These cases demonstrate that differential taxation of First Amendment speakers is constitutionally suspect when it threatens to suppress the expression of particular ideas or viewpoints. Absent a compelling justification, the government may not exercise its taxing power to single out the press. See *Grosjean*, 297 U.S., at 244-249, 56 S.Ct., at 446-449; *Minneapolis Star*, 460 U.S., at 585, 103 S.Ct., at 1371. 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. A tax is also suspect if it targets a small group of speakers. See **1444*Id.*, at 575, 103 S.Ct., at 1365; *Arkansas Writers'*, 481 U.S., at 229, 107 S.Ct., at 1727. Again, the fear is censorship of particular ideas or viewpoints. Finally, for reasons that are obvious, a tax will trigger heightened scrutiny under the First Amendment if it discriminates on the basis of the content of taxpayer speech. See *Id.*, at 229-231, 107 S.Ct., at 1727-1729.

The Arkansas tax at issue here presents none of these types of discrimination. The Arkansas sales tax is a tax of general applicability. It applies to receipts from the sale of all tangible personal property and a broad range of services, unless within a group of specific exemptions. Among the services on which the tax is imposed are natural gas, electricity, water, ice, and steam utility services; telephone, telecommunications, and telegraph service; the furnishing of rooms by hotels, apartment hotels, lodging houses, and tourist camps; alteration, addition, cleaning, refinishing, replacement, and repair services; printing of all kinds; tickets for admission to places of amusement or athletic, entertainment, or recreational events; and fees for the privilege of having access to, or use of, amusement, entertainment, athletic, or recreational facilities. See Ark.Code Ann. § 26-52-301 (Supp.1989). The tax does not single out the press and does not therefore threaten to hinder the press as a watchdog of government activity. Cf. *Minneapolis Star, supra*, 460 U.S., at 585, 103 S.Ct., at 1371. We have said repeatedly that a State may impose on the press a generally applicable tax. See *448*Jimmy Swaggart Ministries v. Board of Equalization of Cal.*, 493 U.S. 378, 387-388, 110 S.Ct. 688, 694-695, 107 L.Ed.2d 796 (1990); *Arkansas Writers', supra*, 481 U.S., at 229, 107 S.Ct., at 1727; *Minneapolis Star, supra*, 460 U.S., at 586, and n. 9, 103 S.Ct., at 1372-1373, and n. 9.

Furthermore, there is no indication in these cases that Arkansas has targeted cable television in a purposeful attempt to interfere with its First Amendment activities. Nor is the tax one that is structured so as to raise suspicion that it was intended to do so. Unlike the taxes involved in *Grosjean* and *Minneapolis Star*, the Arkansas tax has not selected a narrow group to bear fully the burden of the tax.

The tax is also structurally dissimilar to the tax involved in *Arkansas Writers'*. In that case, only "a few" Arkansas magazines paid the State's sales tax. See *Arkansas Writers'*, 481 U.S., at 229, and n. 4, 107 S.Ct., at 1727, and n. 4. Arkansas Writers' Project maintained before the Court that the

Arkansas Times was the only Arkansas publication that paid sales tax. The Commissioner contended that two additional periodicals also paid the tax. We responded that, "[w]hether there are three Arkansas magazines paying tax or only one, the burden of the tax clearly falls on a limited group of publishers." *Id.*, at 229, n. 4, 107 S.Ct., at 1727, n. 4. In contrast, Act 188 extended Arkansas' sales tax uniformly to the approximately 100 cable systems then operating in the State. See App. to Pet. for Cert. in No. 90-38, p. 12a. While none of the seven scrambled satellite broadcast services then available in Arkansas, Tr. 12 (Aug. 19, 1987), was taxed until Act 769 became effective, Arkansas' extension of its sales tax to cable television hardly resembles a "penalty for a few." See *Minneapolis Star, supra,* 460 U.S., at 592, 103 S.Ct., at 1375; *Arkansas Writers', supra,* 481 U.S., at 229, and n. 4, 107 S.Ct., at 1727, and n. 4.

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 range of views. The risk is similar to that from content-based regulation: It will distort the market for ideas. "The constitutional right of free expression is ... intended to remove governmental restraints from the arena of public discussion, *449 putting the decision as to what views shall be voiced largely into the hands of each of us ... in the belief that no other approach would comport with the premise of individual dignity and choice **1445 upon which our political system rests." *Cohen v. California,* 403 U.S. 15, 24, 91 S.Ct. 1780, 1787-1788, 29 L.Ed.2d 284 (1971). There is no comparable danger from a tax on the services provided by a large number of cable operators offering a wide variety of programming throughout the State. That the Arkansas Supreme Court found cable and satellite television to be the same medium does not change this conclusion. Even if we accept this finding, the fact remains that the tax affected approximately 100 suppliers of cable television services. This is not a tax structure that resembles a penalty for particular speakers or particular ideas.

Finally, Arkansas' sales tax is not content based. There is nothing in the language of the statute that refers to the content of mass media communications. Moreover, the record establishes that cable television offers subscribers a variety of programming that presents a mixture of news, information, and entertainment. It contains no evidence, nor is it contended, that this material differs systematically in its message from that communicated by satellite broadcast programming, newspapers, or magazines.

Because the Arkansas sales tax presents none of the First Amendment difficulties that have led us to strike down differential taxation in the past, cable petitioners can prevail only if the Arkansas tax scheme presents "an additional basis" for concluding that the State has violated petitioners' First Amendment rights. See *Arkansas Writers', supra,* 481 U.S., at 233, 107 S.Ct., at 1729. Petitioners argue that such a basis exists here: Arkansas' tax discriminates among media and, if the Arkansas Supreme Court's conclusion regarding cable and satellite television is accepted, discriminated for a time within a medium. Petitioners argue that such intermedia and intramedia discrimination, even in the absence of any evidence of intent to suppress speech or of any effect on the expression of particular*450 ideas, violates the First Amendment. Our cases do not support such a rule.

Regan v. Taxation with Representation of Wash., 461 U.S. 540, 103 S.Ct. 1997, 76 L.Ed.2d 129 (1983), stands for the proposition that a tax scheme that discriminates among speakers does not implicate the First Amendment unless it discriminates on the basis of ideas. In that case, we considered provisions of the Internal Revenue Code that discriminated between contributions to lobbying organizations. One section of the Code conferred tax-exempt status on certain nonprofit organizations that did not engage in lobbying activities. Contributions to those organizations were deductible. Another section of the Code conferred tax-exempt status on certain other nonprofit organizations that did lobby, but contributions to them were not deductible. Taxpayers contributing to veterans' organizations

were, however, permitted to deduct their contributions regardless of those organizations' lobbying activities.

The tax distinction between these lobbying organizations did not trigger heightened scrutiny under the First Amendment. *Id.*, at 546-551, 103 S.Ct., at 2001-2004. We explained that a legislature is not required to subsidize First Amendment rights through a tax exemption or tax deduction.[FN3] *Id.*, at 546, 103 S.Ct., at 2001. For this proposition, we relied on *Cammarano v. United States*, 358 U.S. 498, 79 S.Ct. 524, 3 L.Ed.2d 462 (1959). In *Cammarano*, the Court considered an Internal Revenue regulation that denied a tax deduction for money spent by businesses on publicity programs directed at pending state **1446 legislation. The Court held that the regulation did not violate the First Amendment because it did not discriminate on the basis of who was spending the money on *451 publicity or what the person or business was advocating. The regulation was therefore "plainly not ' "aimed at the suppression of dangerous ideas." ' " *Id.*, at 513, 79 S.Ct., at 533, quoting *Speiser v. Randall*, 357 U.S. 513, 519, 78 S.Ct. 1332, 1338, 2 L.Ed.2d 1460 (1958).

FN3. Certain *amici* in support of cable petitioners argue that *Regan* is distinguishable from these cases because the petitioners in *Regan* were complaining that their contributions to lobbying organizations should be tax *deductible*, while cable petitioners complain that sales of their services should be tax *exempt*. This is a distinction without a difference. As we explained in *Regan*, "[b]oth tax exemptions and tax deductibility are a form of subsidy that is administered through the tax system." 461 U.S., at 544, 103 S.Ct., at 2000.

Regan, while similar to *Cammarano*, presented the additional fact that Congress had chosen to exempt from taxes contributions to veterans' organizations, while not exempting other contributions. This did not change the analysis. Inherent in the power to tax is the power to discriminate in taxation. " Legislatures have especially broad latitude in creating classifications and distinctions in tax statutes." *Regan*, *supra*, 461 U.S., at 547, 103 S.Ct., at 2002. See also *Madden v. Kentucky*, 309 U.S. 83, 87-88, 60 S.Ct. 406, 407-408, 84 L.Ed. 590 (1940); *New York Rapid Transit Corp. v. City of New York*, 303 U.S. 573, 578, 58 S.Ct. 721, 724, 82 L.Ed. 1024 (1938); *Magoun v. Illinois Trust & Savings Bank*, 170 U.S. 283, 294, 18 S.Ct. 594, 598, 42 L.Ed. 1037 (1898).

Cammarano established that the government need not exempt speech from a generally applicable tax. *Regan* established that a tax scheme does not become suspect simply because it exempts only some speech. *Regan* reiterated in the First Amendment context the strong presumption in favor of duly enacted taxation schemes. In so doing, the Court quoted the rule announced more than 40 years earlier in *Madden*, an equal protection case:
" 'The broad discretion as to classification possessed by a legislature in the field of taxation has long been recognized.... [T]he passage of time has only served to underscore the wisdom of that recognition of the large area of discretion which is needed by a legislature in formulating sound tax policies. Traditionally classification has been a device for fitting tax programs to local needs and usages in order to achieve an equitable distribution of the tax burden. It has, because of this, been pointed out that in taxation, even more than in other fields, legislatures possess the greatest freedom in classification. Since the members of a legislature necessarily enjoy a familiarity with local conditions which this Court cannot*452 have, 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.' " *Madden*, *supra*, 309 U.S., at 87-88, 60 S.Ct., at 408 (footnotes omitted), quoted in *Regan*, 461 U.S., at 547-548, 103 S.Ct., at 2002.

On the record in *Regan*, there appeared no such " hostile and oppressive discrimination." We explained that "[t]he case would be different if

Congress were to discriminate invidiously in its subsidies in such a way as to aim at the suppression of dangerous ideas." *Id.*, at 548, 103 S.Ct., at 2002 (internal quotation marks omitted). But that was not the case. The exemption for contributions to veterans' organizations applied without reference to the content of the speech involved; it was not intended to suppress any ideas; and there was no demonstration that it had that effect. *Ibid.* Under these circumstances, the selection of the veterans' organizations for a tax preference was "obviously a matter of policy and discretion." *Id.*, at 549, 103 S.Ct., at 2002 (internal quotation marks omitted).

That a differential burden on speakers is insufficient by itself to raise First Amendment concerns is evident as well from *Mabee v. White Plains Publishing Co.*, 327 U.S. 178, 66 S.Ct. 511, 90 L.Ed. 607 (1946), and *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 66 S.Ct. 494, 90 L.Ed. 614 (1946). Those cases do not involve taxation, but they do involve government action that places differential burdens on members of the press. The Fair Labor Standards Act of 1938, 52 Stat. 1060, as amended, 29 U.S.C. § 201 *et* **1447 *seq.*, applies generally to newspapers as to other businesses, but it exempts from its requirements certain small papers. § 213(a)(8). Publishers of larger daily newspapers argued that the differential burden thereby placed on them violates the First Amendment. The Court upheld the exemption because there was no indication that the government had singled out the press for special treatment, *Walling, supra,* at 194, 66 S.Ct., at 498, or that the exemption was a " 'deliberate and *453 calculated device' " to penalize a certain group of newspapers, *Mabee, supra,* 327 U.S., at 184, 66 S.Ct., at 514, quoting *Grosjean*, 297 U.S., at 250, 56 S.Ct., at 449.

Taken together, *Regan, Mabee,* and *Oklahoma Press* establish that differential taxation of speakers, even members of the press, does not implicate the First Amendment unless the tax is directed at, or presents the danger of suppressing, particular ideas. That was the case in *Grosjean, Minneapolis Star,* and *Arkansas Writers',* but it is not the case here. The Arkansas Legislature has chosen simply to exclude or exempt certain media from a generally applicable tax. Nothing about that choice has ever suggested an interest in censoring the expressive activities of cable television. Nor does anything in this record indicate that Arkansas' broad-based, content-neutral sales tax is likely to stifle the free exchange of ideas. We conclude that the State's extension of its generally applicable sales tax to cable television services alone, or to cable and satellite services, while exempting the print media, does not violate the First Amendment.

Before the Arkansas Chancery Court, cable petitioners contended that the State's tax distinction between cable and other media violated the Equal Protection Clause of the Fourteenth Amendment as well as the First Amendment. App. to Pet. for Cert. in No. 90-38, p. 21a. The Chancery Court rejected both claims, and cable petitioners challenged these holdings before the Arkansas Supreme Court. That court did not reach the equal protection question as to the State's temporary tax distinction between cable and satellite services because it disallowed that distinction on First Amendment grounds. We leave it to the Arkansas Supreme Court to address this question on remand.

For the foregoing reasons, the judgment of the Arkansas Supreme Court is affirmed in part and reversed in part, and the cases are remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

*454 Justice MARSHALL, with whom Justice BLACKMUN joins, dissenting.
This Court has long recognized that the freedom of the press prohibits government from using the tax power to discriminate against individual members of the media or against the media as a whole. See *Grosjean v. American Press Co.*, 297 U.S. 233, 56 S.Ct. 444, 80 L.Ed. 660 (1936); *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 103 S.Ct. 1365, 75 L.Ed.2d 295 (1983); *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 107 S.Ct. 1722, 95 L.Ed.2d 209 (1987). The Framers of the First Amendment, we have explained, specifically intended to prevent

government from using disparate tax burdens to impair the untrammeled dissemination of information. We granted certiorari in this case to consider whether the obligation not to discriminate against individual members of the press prohibits the State from taxing one information medium-cable television-more heavily than others. The majority's answer to this question-that the State is free to discriminate between otherwise like-situated media so long as the more heavily taxed medium is not too "small" in number-is no answer at all, for it fails to explain which media actors are entitled to equal tax treatment. Indeed, the majority so adamantly proclaims the irrelevance of this problem that its analysis calls into question whether any general obligation to treat media actors even-handedly survives today's decision. Because I believe the majority has unwisely cut **1448 back on the principles that inform our selective-taxation precedents, and because I believe that the First Amendment prohibits the State from singling out a particular information medium for heavier tax burdens than are borne by like-situated media, I dissent.

I

A

Our decisions on selective taxation establish a nondiscrimination principle for like-situated members of the press. Under this principle, " differential treatment, unless justified *455 by some special characteristic of the press, ... is presumptively unconstitutional," and must be struck down "unless the State asserts a counterbalancing interest of compelling importance that it cannot achieve without differential taxation." *Minneapolis Star, supra,* 460 U.S., at 585, 103 S.Ct., at 1372.

The nondiscrimination principle is an instance of government's general First Amendment obligation not to interfere with the press as an institution. As the Court explained in *Grosjean,* the purpose of the Free Press Clause "was to preserve an untrammeled press as a vital source of public information." 297 U.S., at 250, 56 S.Ct., at 449. Reviewing both the historical abuses associated with England's infamous " 'taxes on knowledge' " and the debates surrounding ratification of the Constitution, see *id.,* at 246-250, 56 S.Ct., at 447-449; *Minneapolis Star,* 460 U.S., at 583-586, and nn. 6-7, 103 S.Ct., at 1370-1372, and nn. 6-7, our decisions have recognized that the Framers viewed selective taxation as a distinctively potent "means of abridging the freedom of the press," *id.,* at 586, n. 7, 103 S.Ct., at 1372, n. 7.

We previously have applied the nondiscrimination principle in two contexts. First, we have held that this principle prohibits the State from imposing on the media tax burdens not borne by like-situated nonmedia enterprises. Thus, in *Minneapolis Star,* we struck down a use tax that applied to the ink and paper used in newspaper production but not to any other item used as a component of a good to be sold at retail. See *id.,* at 578, 581-582, 103 S.Ct., at 1368, 1369-1370. Second, we have held that the non-discrimination principle prohibits the State from taxing *individual* members of the press unequally. Thus, as an alternative ground in *Minneapolis Star,* we concluded that the State's use tax violated the First Amendment because it exempted the first $100,000 worth of ink and paper consumed and thus effectively singled out large publishers for a disproportionate tax burden. See *id.,* at 591-592, 103 S.Ct., at 1375-1376. Similarly, in *Arkansas Writers' Project,* we concluded that selective exemptions for certain periodicals rendered unconstitutional the application of a general sales tax to the remaining *456 periodicals "because [the tax] [was] not evenly applied to *all* magazines." See 481 U.S., at 229, 107 S.Ct., at 1727 (emphasis added); see also *Grosjean v. American Press Co., supra* (tax applied only to newspapers that meet circulation threshold unconstitutionally discriminates against more widely circulated newspapers).

Before today, however, we had not addressed whether the nondiscrimination principle prohibits the State from singling out a particular information medium for tax burdens not borne by other media. *Grosjean* and *Minneapolis Star* both invalidated tax

schemes that discriminated between different members of a single medium, namely, newspapers. Similarly, *Arkansas Writers' Project* invalidated a general sales tax because it "treat [ed] some magazines less favorably than others," 481 U.S., at 229, 107 S.Ct., at 1728, leaving open the question whether less favorable tax treatment of magazines than of newspapers furnished an additional ground for invalidating the scheme, see *id.*, at 233, 107 S.Ct., at 1729-30. This case squarely presents the question whether the State may discriminate between distinct information media, for under Arkansas' general sales tax scheme, cable operators pay a sales tax on **1449 their subscription fees that is not paid by newspaper or magazine companies on their subscription fees or by television or radio broadcasters on their advertising revenues.[FN1] In my view, the principles *457 that animate our selective-taxation cases clearly condemn this form of discrimination.

FN1. Subject to various exemptions, Arkansas law imposes a 4% tax on the receipts from sales of all tangible personal property and of specified services. Ark.Code Ann. §§ 26-52-301, 26-52-302, 26-52-401 (1987 and Supp.1989). Cable television service is expressly included in the tax. See § 26-52-301(3)(D)(i) (Supp.1989). Proceeds from the sale of newspapers, § 26-52-401(4) (Supp.1989), and from the sale of magazines by subscription, § 26-52-401(14) (Supp.1989) ; Revenue Policy Statement 1988-1 (Mar. 10, 1988), reprinted in CCH Ark. Tax Rep. ¶ 69-415, are expressly exempted, as are the proceeds from the sale of advertising in newspapers and other publications, § 26-52-401(13) (Supp.1989). Proceeds from the sale of advertising for broadcast radio and television services are not included in the tax.
Insofar as the Arkansas Supreme Court found that cable and scrambled satellite television are a *single* medium, 301 Ark. 483, 487, 785 S.W.2d 202, 204-205 (1990) , this case also involves a straightforward application of *Arkansas Writers' Project* and *Minneapolis Star* in resolving the cable operators' constitutional challenge to the taxes that they paid prior to 1989, the year in which Arkansas amended its sales tax to include the subscription fees collected by scrambled-satellite television. I would affirm on that basis the Arkansas Supreme Court's conclusion that the pre-1989 version of the Arkansas sales tax violated the First Amendment by imposing on cable a tax burden not borne by its scrambled-satellite television.

B

Although cable television transmits information by distinctive means, the *information service* provided by cable does not differ significantly from the information services provided by Arkansas' newspapers, magazines, television broadcasters, and radio stations. This Court has recognized that cable operators exercise the same core press function of "communication of ideas as do the traditional enterprises of newspaper and book publishers, public speakers, and pamphleteers," *Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494, 106 S.Ct. 2034, 2038, 90 L.Ed.2d 480 (1986), and that "[c]able operators now share with broadcasters a significant amount of editorial discretion regarding what their programming will include," *FCC v. Midwest Video Corp.*, 440 U.S. 689, 707, 99 S.Ct. 1435, 1445, 59 L.Ed.2d 692 (1979). See also *ante*, at 1442 (acknowledging that cable television is "part of the 'press' "). In addition, the cable-service providers in this case put on extensive and unrebutted proof at trial designed to show that consumers regard the news, sports, and entertainment features provided by cable as largely interchangeable with the services provided by other members of the *458 print and electronic media. See App. 81-85, 100-101, 108, 115, 133-137, 165-170. See generally *Competition, Rate Deregulation and the Commission's Policies Relating to Provision of Cable Television Service*, 5 FCC Record 4962, 4967 (1990) (discussing competition between cable and other forms of television).

Because cable competes with members of the print and electronic media in the larger information market, the power to discriminate between these media triggers the central concern underlying the nondiscrimination principle: the risk of covert censorship. The nondiscrimination principle protects the press from censorship prophylactically, condemning any selective-taxation scheme that presents the "*potential* for abuse" by the State, *Minneapolis Star,* 460 U.S., at 592, 103 S.Ct., at 1375-76 (emphasis added), independent of any actual "evidence of an improper censorial motive," *Arkansas Writers' Project, supra,* 481 U.S., at 228, 107 S.Ct., at 1727; see *Minneapolis Star, supra,* 460 U.S., at 592, 103 S.Ct., at 1376 ("Illicit legislative intent is not the *sine qua non* of a violation of the First Amendment"). The power to discriminate among like-situated media presents such a risk. By imposing tax burdens that disadvantage one information medium relative to another, the State can favor those **1450 media that it likes and punish those that it dislikes.

Inflicting a competitive disadvantage on a disfavored medium violates the First Amendment " command that the government ... shall not impede the free flow of ideas." *Associated Press v. United States,* 326 U.S. 1, 20, 65 S.Ct. 1416, 1424-25, 89 L.Ed. 2013 (1945). We have previously recognized that differential taxation *within* an information medium distorts the marketplace of ideas by imposing on some speakers costs not borne by their competitors. See *Grosjean,* 297 U.S., at 241, 244-245, 56 S.Ct., at 445, 446-47 (noting competitive disadvantage arising from differential tax based on newspaper circulation). Differential taxation *across* different media likewise "limit[s] the circulation of information to which the public is entitled," *id.,* at 250, 56 S.Ct., at 449, where, as here, the *459 relevant media compete in the same information market. By taxing cable television more heavily relative to its social cost than newspapers, magazines, broadcast television and radio, Arkansas distorts consumer preferences for particular information formats, and thereby impairs " the widest possible dissemination of information from diverse and antagonistic sources." *Associated Press v. United States, supra,* 326 U.S., at 20, 65 S.Ct., at 1424-1425.

Because the power selectively to tax cable operators triggers the concerns that underlie the nondiscrimination principle, the State bears the burden of demonstrating that "differential treatment" of cable television is justified by some "special characteristic" of that particular information medium or by some other "counterbalancing interest of compelling importance that [the State] cannot achieve without differential taxation." *Minneapolis Star, supra,* 460 U.S., at 585, 103 S.Ct., at 1372 (footnote omitted). The State has failed to make such a showing in this case. As the Arkansas Supreme Court found, the amount collected from the cable operators pursuant to the state sales tax does not correspond to any social cost peculiar to cable-television service, see 301 Ark. 483, 485, 785 S.W.2d 202, 203 (1990); indeed, cable operators in Arkansas must pay a franchise fee expressly designed to defray the cost associated with cable's unique exploitation of public rights of way. See *ibid.* The only justification that the State asserts for taxing cable operators more heavily than newspapers, magazines, television broadcasters and radio stations is its interest in raising revenue. See Brief for Respondents in No. 90-38, p. 9. This interest is not sufficiently compelling to overcome the presumption of unconstitutionality under the nondiscrimination principle. See *Arkansas Writers' Project,* 481 U.S., at 231-232, 107 S.Ct., at 1728-1729; *Minneapolis Star, supra,* 460 U.S., at 586, 103 S.Ct., at 1372-73. FN2

FN2. I need not consider what, if any, state interests might justify selective taxation of cable television, since the State has advanced no interest other than revenue enhancement. I also do not dispute that the unique characteristics of cable may justify special regulatory treatment of that medium. See *Los Angeles v. Preferred Communications, Inc.,* 476 U.S. 488, 496, 106 S.Ct. 2034, 2038-39, 90 L.Ed.2d 480 (1986) (BLACKMUN, J., concurring); cf. *Red Lion Broadcasting Co. v. FCC,* 395

U.S. 367, 386-401, 89 S.Ct. 1794, 1804-1812, 23 L.Ed.2d 371 (1969). I conclude only that the State is not free to burden cable with a selective tax absent a clear nexus between the tax and a "special characteristic" of cable television service or a "counterbalancing interest of compelling importance." *Minneapolis Star*, 460 U.S., at 585, 103 S.Ct., at 1372.

*460 II

The majority is undisturbed by Arkansas' discriminatory tax regime. According to the majority, the power to single out cable for heavier tax burdens presents no realistic threat of governmental abuse. The majority also dismisses the notion that the State has any general obligation to treat members of the press evenhandedly. Neither of these conclusions is supportable.

A

The majority dismisses the risk of governmental abuse under the Arkansas tax scheme **1451 on the ground that the number of media actors exposed to the tax is "large." *Ante*, at 1445. According to the majority, where a tax is generally applicable to nonmedia enterprises, the selective application of that tax to different segments of the media offends the First Amendment only if the tax is limited to "a small number of speakers," *ante*, at 1444, for it is only under those circumstances that selective taxation "resembles a penalty for particular speakers or particular ideas," *ante*, at 1445. The selective sales tax at issue in *Arkansas Writers' Project*, the majority points out, applied to no more than three magazines. See *ante*, at 1444. The tax at issue here, "[i]n contrast," applies "uniformly to the approximately *100* cable systems" in operation in Arkansas. *Ibid.* (emphasis added). In my view, this analysis is overly simplistic and is unresponsive to the concerns that inform our selective-taxation precedents.

To start, the majority's approach provides no meaningful guidance on the intermedia scope of the nondiscrimination principle. From the majority's discussion, we can infer that three is a sufficiently "small" number of affected actors to *461 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? The suggestion that the First Amendment prohibits selective taxation that "resembles a penalty" is no more helpful. A test that turns on whether a selective tax "penalizes" a particular medium presupposes some baseline establishing that medium's entitlement to equality of treatment with other media. The majority never develops any theory of the State's obligation to treat like-situated media equally, except to say that the State must avoid discriminating against too "small" a number of media actors.

In addition, the majority's focus on absolute numbers fails to reflect the concerns that inform the nondiscrimination principle. The theory underlying the majority's "small versus large" test is that "a tax on the services provided by a large number of cable operators offering a wide variety of programming throughout the State," *ante*, at 1445, poses no "risk of affecting only a limited range of views," *ante*, at 1444. This assumption is unfounded. The record in this case furnishes ample support for the conclusion that the State's cable operators make unique contributions to the information market. See, *e.g.*, App. 82 (testimony of cable operator that he offers "certain religious programming" that "people demand ... because they otherwise could not have access to it"); *id.*, at 138 (cable offers Spanish-language information network); *id.*, at 150 (cable broadcast of local city council meetings). The majority offers no reason to believe that programs like these are duplicated by other media. Thus, to the extent that selective taxation makes it harder for Arkansas' 100 cable operators to compete with Arkansas' 500 newspapers, magazines, and broadcast television and radio stations, see 1 Gale Directory of Publications and Broadcast Media 67-68 *462

123d ed. 1991), Arkansas' discriminatory tax *does* " risk ... affecting only a limited range of views," and may well "distort the market for ideas" in a manner akin to direct "content-based regulation." *Ante,* at 1444.[FN3]

FN3. Even if it did happen to apply neutrally across the range of viewpoints expressed in the Arkansas information market, Arkansas' discriminatory tax would still raise First Amendment problems. "It hardly answers one person's objection to a restriction on his speech that another person, outside his control, may speak for him." *Regan v. Taxation with Representation of Washington,* 461 U.S. 540, 553, 103 S.Ct. 1997, 2005, 76 L.Ed.2d 129 (1983) (BLACKMUN, J., concurring).

The majority also mistakenly assesses the impact of Arkansas' discriminatory tax as if the State's 100 cable operators comprised 100 **1452 additional actors in a *statewide* information market. In fact, most communities are serviced by only a single cable operator. See generally 1 Gale Directory, *supra,* at 69-91. Thus, in any given locale, Arkansas' discriminatory tax may disadvantage a *single* actor, a "small" number even under the majority's calculus.

Even more important, the majority's focus on absolute numbers ignores the potential for abuse inherent in the State's power to discriminate based on *medium identity.* So long as the disproportionately taxed medium is sufficiently " large," nothing in the majority's test prevents the State from singling out a particular medium for higher taxes, either because the State does not like the character of the services that the medium provides or because the State simply wishes to confer an advantage upon the medium's competitors.

Indeed, the facts of this case highlight the potential for governmental abuse inherent in the power to discriminate among like-situated media based on their identities. Before this litigation began, most receipts generated by the media-including newspaper sales, certain magazine subscription fees, print and electronic media advertising revenues, and cable television and scrambled-satellite television subscription fees-were either expressly exempted from, or not expressly included in, the Arkansas sales tax. See Ark.Code *463 Ann. §§ 84-1903, 84-1904(f), (j), (1947 and Supp.1985); see also *Arkansas Writers' Project,* 481 U.S., at 224-225, 107 S.Ct., at 1725-1726. Effective July 1, 1987, however, the legislature expanded the tax base to include cable television subscription fees. See App. to Pet. for Cert. in No. 90-38, p. 16a. Cable operators then filed this suit, protesting the discriminatory treatment in general and the absence of any tax on scrambled-satellite television-cable's closest rival-in particular. While the case was pending on appeal to the Arkansas Supreme Court, the Arkansas legislature again amended the sales tax, this time extending the tax to the subscription fees paid for scrambled-satellite television. 301 Ark., at 484, 785 S.W.2d, at 203. Of course, for all we know, the legislature's initial decision selectively to tax cable may have been prompted by a similar plea from traditional broadcast media to curtail competition from the emerging cable industry. If the legislature did indeed respond to such importunings, the tax would implicate government censorship as surely as if the government itself disapproved of the new competitors.

As I have noted, however, our precedents do not require "evidence of an improper censorial motive," *Arkansas Writers' Project, supra,* 481 U.S. at 228, 107 S.Ct. at 1727, before we may find that a discriminatory tax violates the Free Press Clause; it is enough that the application of a tax offers the " *potential* for abuse," *Minneapolis Star,* 460 U.S., at 592, 103 S.Ct., at 1375 (emphasis added). That potential is surely present when the legislature may, at will, include or exclude various media sectors from a general tax.

B

The majority, however, does not flinch at the

prospect of intermedia discrimination. Purporting to draw on *Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 103 S.Ct. 1997, 76 L.Ed.2d 129 (1983)-a decision dealing with the tax-deductibility of lobbying expenditures-the majority embraces "the proposition that a tax scheme that discriminates among speakers does not implicate the First Amendment unless it discriminates *on *464 the basis of ideas.*" *Ante,* at 1445 (emphasis added). "[T]he power to discriminate in taxation," the majority insists, is " [i]nherent in the power to tax." *Ante,* at 1446.

Read for all they are worth, these propositions would essentially annihilate the nondiscrimination principle, at least as it applies to tax differentials between individual members of the press. If *Minneapolis Star, Arkansas Writers' Project,* and *Grosjean* stand for anything, it is that the "power to tax" does *not* **1453 include "the power to discriminate" when the press is involved. Nor is it the case under these decisions that a tax regime that singles out individual members of the press implicates the First Amendment *only* when it is " directed at, or presents the danger of suppressing, *particular* ideas." *Ante,* at 1447 (emphasis added). Even when structured in a manner that is content-neutral, a scheme that imposes differential burdens on like-situated members of the press violates the First Amendment because it poses *the risk* that the State might abuse this power. See *Minneapolis Star, supra,* at 592, 103 S.Ct., at 1375-76.

At a minimum, the majority incorrectly conflates our cases on selective taxation of the press and our cases on the selective taxation (or subsidization) of speech generally. *Regan* holds that the government does not invariably violate the Free Speech Clause when it selectively subsidizes one group of speakers according to content-neutral criteria. This power, when exercised with appropriate restraint, inheres in government's legitimate authority to tap the energy of expressive activity to promote the public welfare. See *Buckley v. Valeo,* 424 U.S. 1, 90-97, 96 S.Ct. 612, 668-672, 46 L.Ed.2d 659 (1976).

But our cases on the selective taxation of the *press* strike a different posture. Although the Free Press Clause does not guarantee the press a preferred position over other speakers, the Free Press Clause does "protec[t] [members of press] from invidious discrimination." L. Tribe, American Constitutional Law § 12-20, p. 963 (2d ed. 1988). Selective taxation is precisely that. In light of the Framers' specific intent*465 "to preserve an untrammeled press as a vital source of public information," *Grosjean,* 297 U.S., at 250, 56 S.Ct., at 449; see *Minneapolis Star, supra,* 460 U.S., at 585, n. 7, 103 S.Ct., at 1372, n. 7, our precedents recognize that the Free Press Clause imposes a special obligation on government to avoid disrupting the integrity of the information market. As Justice Stewart explained:

"[T]he Free Press guarantee is, in essence, a *structural* provision of the Constitution. Most of the other provisions in the Bill of Rights protect specific liberties or specific rights of individuals: freedom of speech, freedom of worship, the right to counsel, the privilege against compulsory self-incrimination, to name a few. In contrast, the Free Press Clause extends protection to an institution." Stewart, "Or of the Press," 26 Hastings L.J. 631, 633 (1975) (emphasis in original).

Because they distort the competitive forces that animate this institution, tax differentials that fail to correspond to the social cost associated with different information media, and that are justified by nothing more than the State's desire for revenue, violate government's obligation of evenhandedness. Clearly, this is true of disproportionate taxation of cable television. Under the First Amendment, government simply has no business interfering with the process by which citizens' preferences for information formats evolve.[FN4]

FN4. The majority's reliance on *Mabee v. White Plains Publishing Co.,* 327 U.S. 178, 66 S.Ct. 511, 90 L.Ed. 607 (1946), and *Oklahoma Press Publishing Co. v. Walling,* 327 U.S. 186, 66 S.Ct. 494, 90 L.Ed. 614 (1946), is also misplaced. At

issue in those cases was a provision that exempted small newspapers with primarily local distribution from the Fair Labor Standards Act of 1938 (FLSA). In upholding the provision, the Court noted that the exemption promoted a legitimate interest in placing the exempted papers "on a parity with other small town enterprises" that also were not subject to regulation under the FLSA. *Mabee, supra,* 327 U.S., at 184, 66 S.Ct., at 514; see also *Oklahoma Press, supra,* 327 U.S., at 194, 66 S.Ct., at 498. In *Minneapolis Star,* we distinguished these cases on the ground that, unlike the FLSA exemption, Minnesota's discrimination between large and small newspapers did not derive from, or correspond to, any *general* state policy to benefit small businesses. See 460 U.S., at 592, and n. 16, 103 S.Ct., at 1375, and n. 16. Similarly, Arkansas' discrimination against cable operators derives not from any general, legitimate state policy unrelated to speech but rather from the simple decision of state officials to treat one information medium differently from all others. Thus, like the schemes in *Arkansas Writers' Project* and *Minneapolis Star,* but unlike the scheme at issue in *Mabee* and *Oklahoma Press,* the Arkansas tax scheme must be supported by a compelling interest to survive First Amendment scrutiny. Cf. *United States v. O'Brien,* 391 U.S. 367, 377, 88 S.Ct. 1673, 1679, 20 L.Ed.2d 672 (1968).

**1454 *466 Today's decision unwisely discards these teachings. I dissent.

U.S.Ark.,1991.
Leathers v. Medlock
499 U.S. 439, 111 S.Ct. 1438, 69 Rad. Reg. 2d (P & F) 60, 113 L.Ed.2d 494, 59 USLW 4281, 18 Media L. Rep. 1953

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103 S.Ct. 1365

460 U.S. 575, 103 S.Ct. 1365, 75 L.Ed.2d 295, 9 Media L. Rep. 1369
(Cite as: 460 U.S. 575, 103 S.Ct. 1365)

Minneapolis Star and Tribune Co. v. Minnesota Com'r of Revenue
U.S.,1983.

Supreme Court of the United States
MINNEAPOLIS STAR AND TRIBUNE COMPANY, Appellant
v.
MINNESOTA COMMISSIONER OF REVENUE.
No. 81-1839.

Argued Jan. 12, 1983.
Decided March 29, 1983.

Newspaper brought an action seeking a refund of use taxes imposed on the cost of paper and ink products consumed in the production of its publication. The District Court, Hennepin County, Minnesota, entered summary judgment in favor of the newspaper, and the State Commissioner of Revenue appealed. The Minnesota Supreme Court, 314 N.W.2d 201, reversed. The United States Supreme Court, Justice O'Connor, held that imposition of use tax on cost of paper and ink products consumed in production of publications violated the First Amendment by imposing significant burden on freedom of the press.

Reversed.

Justice Blackmun joined the opinion except footnote 12.

Justice White concurred in part and dissented in part and filed opinion.

Justice Rehnquist dissented and filed opinion.

West Headnotes

[1] Taxation 371 ⚿3626

371 Taxation
371IX Sales, Use, Service, and Gross Receipts Taxes
371IX(B) Regulations
371k3625 Validity of Acts and Ordinances
371k3626 k. In General. Most Cited Cases
(Formerly 371k1212.1, 371k1212)
Use tax on cost of paper and ink products consumed in production of publications was not unconstitutional under *Grosjean* decision where there was no legislative history and no indication, apart from structure of tax itself, of any impermissible or censorial motive on part of legislature. M.S.A. §§ 297A.14, 297A.24, 297A.25, subd. 1(i).

[2] Constitutional Law 92 ⚿2072

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(U) Press in General
92k2072 k. Enforcement of Generally Applicable Laws. Most Cited Cases
(Formerly 92k90.1(8))
States and the federal government can subject newspapers to generally applicable economic regulations without creating constitutional problems. U.S.C.A. Const.Amend. 1.

[3] Taxation 371 ⚿3603

371 Taxation
371IX Sales, Use, Service, and Gross Receipts Taxes
371IX(A) In General
371k3601 Nature of Taxes
371k3603 k. Use Tax. Most Cited Cases
(Formerly 371k1202)
"Use tax" ordinarily serves to complement sales tax by eliminating incentive to make major purchases in states with lower sales taxes; it requires resident who shops out-of-state to pay use tax equal to sales tax savings.

[4] Constitutional Law 92 ⇐1170

92 Constitutional Law
92X First Amendment in General
92X(B) Particular Issues and Applications
92k1170 k. In General. Most Cited Cases
(Formerly 92k82(6.1), 92k82(6))
Tax that burdens rights protected by First Amendment cannot stand unless burden is necessary to achieve overriding governmental interest. U.S.C.A. Const.Amend. 1.

[5] Constitutional Law 92 ⇐2070

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(U) Press in General
92k2070 k. In General. Most Cited Cases
(Formerly 92k90(1))
Differential treatment of press, unless justified by some special characteristic of the press, suggests that goal of regulation is not unrelated to suppression of expression, and such goal is presumptively unconstitutional. U.S.C.A. Const.Amend. 1.

[6] Constitutional Law 92 ⇐2081

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(U) Press in General
92k2081 k. Taxation. Most Cited Cases
(Formerly 92k90.1(8), 92k90.1(1))
Differential taxation of press places such burden on interest protected by First Amendment that such treatment cannot be countenanced unless state asserts counterbalancing interest of compelling importance that it cannot achieve without differential taxation. U.S.C.A. Const.Amend. 1.

[7] Constitutional Law 92 ⇐2070

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(U) Press in General
92k2070 k. In General. Most Cited Cases
(Formerly 92k90(1))
Regulation of press can survive only if governmental interest outweighs burden and cannot be achieved by means that do not infringe First Amendment rights as significantly. U.S.C.A. Const.Amend. 1.

[8] Constitutional Law 92 ⇐2081

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(U) Press in General
92k2081 k. Taxation. Most Cited Cases
(Formerly 92k90.1(8), 92k90.1(1))
Raising of revenue, standing alone, cannot justify special treatment of press, for alternative means of achieving same interest without raising concerns under First Amendment is clearly available: state could raise revenue by taxing businesses generally, avoiding censorial threat implicit in tax that singles out the press. U.S.C.A. Const.Amend. 1.

[9] Constitutional Law 92 ⇐2081

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(U) Press in General
92k2081 k. Taxation. Most Cited Cases
(Formerly 92k90.1(8))

Taxation 371 ⇐3626

371 Taxation
371IX Sales, Use, Service, and Gross Receipts Taxes
371IX(B) Regulations
371k3625 Validity of Acts and Ordinances
371k3626 k. In General. Most Cited Cases
(Formerly 371k1212.1, 371k1212)
Use tax on cost of paper and ink products consumed in production of publications could not be justified as merely substitute for generally applicable sales tax, thereby avoiding First Amendment threat implicit in the use tax, where there was no explanation for choosing to use substitute for sales tax rather than sales tax itself and where permitting

state to single out press for different method of taxation even if effect of burden was no different from that on other taxpayers posed too great a threat to First Amendment concerns. U.S.C.A. Const.Amend. 1; M.S.A. §§ 297A.14, 297A.24, 297A.25, subd. 1(i).

[10] Constitutional Law 92 ⇐2081

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(U) Press in General
92k2081 k. Taxation. Most Cited Cases
(Formerly 92k90.1(8))

Taxation 371 ⇐3626

371 Taxation
371IX Sales, Use, Service, and Gross Receipts Taxes
371IX(B) Regulations
371k3625 Validity of Acts and Ordinances
371k3626 k. In General. Most Cited Cases
(Formerly 371k1212.1, 371k1212)
Use tax on cost of paper and ink products consumed in production of publications was unconstitutional not only because it singled out the press but also because, due to effect of exemption for first $100,000 in ink and paper purchases, it targeted small group of newspapers. U.S.C.A. Const.Amend. 1; M.S.A. §§ 297A.14, 297A.24, 297A.25, subd. 1(i).

[11] Constitutional Law 92 ⇐1150

92 Constitutional Law
92X First Amendment in General
92X(A) In General
92k1150 k. In General. Most Cited Cases
(Formerly 92k82(3))
Illicit legislative intent is not sine qua non of violation of First Amendment. U.S.C.A. Const.Amend. 1.

[12] Constitutional Law 92 ⇐2081

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(U) Press in General
92k2081 k. Taxation. Most Cited Cases
(Formerly 92k90.1(8))

Taxation 371 ⇐3626

371 Taxation
371IX Sales, Use, Service, and Gross Receipts Taxes
371IX(B) Regulations
371k3625 Validity of Acts and Ordinances
371k3626 k. In General. Most Cited Cases
(Formerly 371k1212.1, 371k1212)
Imposition of use tax on cost of paper and ink products consumed in production of publications violated the First Amendment by imposing significant burden on freedom of the press. U.S.C.A. Const.Amend. 1; M.S.A. §§ 297A.14, 297A.24, 297A.25, subd. 1(i).

**1366 *Syllabus* [FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

*575 While exempting periodic publications from its general sales and use tax, Minnesota imposes a "use tax" on the cost of paper and ink products consumed in the production of such a publication, but exempts the first $100,000 worth of paper and ink consumed in any calendar year. Appellant newspaper publisher brought an action seeking a refund of the ink and paper use taxes it had paid during certain years, contending that the tax violates, *inter alia*, the guarantee of the freedom of press in the First Amendment. The Minnesota Supreme Court upheld the tax.

Held: The tax in question violates the First Amendment. Pp. 1368-1376.

(a) 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 Minnesota Legislature in enacting the tax. *Grosjean v. American Press Co.*, 297 U.S. 233, 56 S.Ct. 444, 80 L.Ed. 660 distinguished. Pp. 1368-1369.

(b) But by creating the special use tax, which is without parallel in the State's tax scheme, Minnesota has singled out the press for special treatment. When a State so singles out the press, the political constraints that prevent a legislature from imposing crippling taxes of general applicability are weakened, and the threat of burdensome**1367 taxes becomes acute. That threat can operate as effectively as a censor to check critical comment by the press, thus undercutting the basic assumption of our political system that the press will often serve as an important restraint on government. Moreover, differential treatment, unless justified by some special characteristic of the press, suggests that the goal of the regulation is not unrelated to suppression of expression, and such goal is presumptively unconstitutional. Differential treatment of the press, then, places such a burden on the interests protected by the First Amendment that such treatment cannot be countenanced unless the State asserts a counterbalancing interest of compelling importance that it cannot achieve without differential taxation. Pp. 1369-1372.

(c) Minnesota has offered no adequate justification for the special treatment of newspapers. Its interest in raising revenue, standing alone, cannot justify such treatment, for the alternative means of taxing businesses generally is clearly available. And the State has offered no explanation of why it chose to use a substitute for the sales tax rather *576 than the sales tax itself. A rule that would automatically allow the State to single out the press for a different method of taxation as long as the effective burden is no different from that on other taxpayers or, as Minnesota asserts here, is lighter than that on other businesses, is to be avoided. The possibility of error inherent in such a rule poses too great a threat to concerns at the heart of the First Amendment. Pp. 1369-1375.

(d) 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. The effect of the $100,000 exemption is that only a handful of publishers in the State pay any tax at all, and even fewer pay any significant amount of tax. To recognize a power in the State not only to single out the press but also to tailor the tax so that it singles out a few members of the press presents such a potential for abuse that no interest suggested by Minnesota can justify the scheme. Pp. 1375-1376.

314 N.W.2d 201 (Minn.1981), reversed.

Lawrence C. Brown argued the cause for appellant. With him on the briefs were *John D. French, John P. Borger,* and *Norton L. Armour.*

Paul R. Kempainen, Special Assistant Attorney General of Minnesota, argued the cause for appellee. With him on the brief was *Warren Spannaus,* Attorney General.*

* Briefs of *amici curiae* urging reversal were filed by *Peter W. Schroth* and *Charles S. Sims* for the American Civil Liberties Union et al.; and by *Philip A. Lacovara, W. Terry Maguire,* and *Pamela J. Riley* for Knight-Ridder Newspapers, Inc., et al.

Justice O'CONNOR delivered the opinion of the Court.[FN*]

FN* Justice BLACKMUN joins this opinion except footnote 12.

This case presents the question of a State's power to impose a special tax on the press and, by enacting exemptions, to limit its effect to only a few newspapers.

*577 I

Since 1967, Minnesota has imposed a sales tax on most sales of goods for a price in excess of a nominal sum.[FN1] Act of June 1, 1967, ch. 32, art. XIII, § 2, 1967 Minn.Laws Sp.Sess. 2143, 2179, codified at Minn.Stat. § 297A.02 (1982). In general, the tax applies only to retail sales. *Ibid.* An exemption for industrial and agricultural users shields from the tax sales of components to be used in the production of goods that will themselves be sold at retail. § 297A.25(1)(h). As part of this

general system of taxation and in support of the sales tax, see Minn.Code of Agency Rules, Tax S & U 300 (1979), Minnesota also enacted a tax on the "privilege of using, storing or consuming in Minnesota tangible personal property." This use tax applies to any nonexempt tangible personal property unless the sales tax was paid on the sales price. Minn.Stat. § 297A.14 (1982). Like the classic use tax, this use tax protects the State's sales tax by eliminating the residents'**1368 incentive to travel to States with lower sales taxes to buy goods rather than buying them in Minnesota. §§ 297A.14, 297A.24.

FN1. Currently, the tax applies to sales of items for more than 9¢ . Minn.Stat. § 297A.03(3) (1982). When first enacted, the threshold amount was 16¢. Act of June 1, 1967, ch. 32, art. XIII, § 3(2), 1967 Minn.Laws Sp.Sess. 2143, 2180.

The appellant, Minneapolis Star and Tribune Company "Star Tribune", is the publisher of a morning newspaper and an evening newspaper in Minneapolis. From 1967 until 1971, it enjoyed an exemption from the sales and use tax provided by Minnesota for periodic publications. 1967 Minn.Laws Sp.Sess. 2187, codified at Minn.Stat. § 297A.25(1)(i). In 1971, however, while leaving the exemption from the sales tax in place, the legislature amended the scheme to impose a "use tax" on the cost of paper and ink products consumed in the production of a publication. Act of October 31, 1971, ch. 31, art. I, § 5, 1971 Minn.Laws Sp.Sess. 2561, 2565, codified *578 with modifications at Minn.Stat. §§ 297A.14, 297A.25(1)(i) (1982). Ink and paper used in publications became the only items subject to the use tax that were components of goods to be sold at retail. In 1974, the legislature again amended the statute, this time to exempt the first $100,000 worth of ink and paper consumed by a publication in any calendar year, in effect giving each publication an annual tax credit of $4,000. Act of May 24, 1973, ch. 650, art. XIII, § 1, 1973 Minn.Laws 1606, 1637, codified at Minn.Stat. § 297A.14 (1982). [FN2] Publications remained exempt from the sales tax, § 2, 1973 Minn.Laws 1639.

FN2. After the 1974 amendment, the use tax provision read in full:
"For the privilege of using, storing or consuming in Minnesota tangible personal property, tickets or admissions to places of amusement and athletic events, electricity, gas, and local exchange telephone service purchased for use, storage or consumption in this state, there is hereby imposed on every person in this state a use tax at the rate of four percent of the sales price of sales at retail of any of the aforementioned items made to such person after October 31, 1971, unless the tax imposed by section 297A.02 [the sales tax] was paid on said sales price.
"Motor vehicles subject to tax under this section shall be taxed at the fair market value at the time of transport into Minnesota if such motor vehicles were acquired more than three months prior to its [*sic*.] transport into this state.
"Notwithstanding any other provisions of section 297A.01 to 297A.44 to the contrary, the cost of paper and ink products exceeding $100,000 in any calendar year, used or consumed in producing a publication as defined in section 297A.25, subdivision 1, clause (i) is subject to the tax imposed by this section." 1973 Minn.Laws 1637, codified at Minn.Stat. § 297A.14 (1982).
The final paragraph was the only addition of the 1974 amendment. The provision has since been amended to increase the rate of the tax, Act of June 6, 1981, ch. 1, art. IV, § 5, 1981 Minn.Laws Sp.Sess. 2396, but has not been changed in any way relevant to this litigation.

After the enactment of the $100,000 exemption, 11 publishers, producing 14 of the 388 paid circulation newspapers in the State, incurred a tax liability in 1974. Star Tribune was one of the 11, and, of the $893,355 collected, it paid $608,634, or roughly two-thirds of the total revenue raised by the tax, *579 See 314 N.W.2d 201, 203 and n. 4 (1981). 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. *Id.,* at 204 and n. 5.

Star Tribune instituted this action to seek a refund of the use taxes it paid from January 1, 1974 to May 31, 1975. It challenged the imposition of the use tax on ink and paper used in publications as a violation of the guarantees of freedom of the press and equal protection in the First and Fourteenth Amendments. The Minnesota Supreme Court upheld the tax against the federal constitutional challenge. 314 N.W.2d 201 (1981). We noted probable jurisdiction, 457 U.S. 1130, 102 S.Ct. 2955, 73 L.Ed.2d 1347 (1982), and we now reverse.

II

[1] Star Tribune argues that we must strike this tax on the authority of *Grosjean v. American Press Co., Inc.,* 297 U.S. 233, 56 S.Ct. 444, 80 L.Ed. 660 (1936). Although there are similarities between the two cases, we agree with the State that *Grosjean* is not controlling.

**1369 In *Grosjean,* the State of Louisiana imposed a license tax of 2% of the gross receipts from the sale of advertising on all newspapers with a weekly circulation above 20,000. Out of at least 124 publishers in the State, only 13 were subject to the tax. After noting that the tax was "single in kind " and that keying the tax to circulation curtailed the flow of information, *id.,* at 250-251, 56 S.Ct., at 449, this Court held the tax invalid as an abridgment of the freedom of the press. Both the brief and the argument of the publishers in this Court emphasized the events leading up to the tax and the contemporary political climate in Louisiana. See Arg. for Appellees, 297 U.S., at 238, 56 S.Ct., at 445; Brief for Appellees, O.T. 1936, No. 303, pp. 8-9, 30. All but one of the large papers subject to the tax had "ganged up" on Senator Huey Long, and a circular distributed by Long and the governor to each member of the state legislature*580 described "lying newspapers" as conducting "a vicious campaign" and the tax as "a tax on lying, 2c [*sic*] a lie." *Id.,* at 9. Although the Court's opinion did not describe this history, it stated, "[The tax] is bad because, in the light of its history and of its present setting, it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information," 297 U.S., at 250, 56 S.Ct., at 449, an explanation that suggests that the motivation of the legislature may have been significant.

Our subsequent cases have not been consistent in their reading of *Grosjean* on this point. Compare *United States v. O'Brien,* 391 U.S. 367, 384-385, 88 S.Ct. 1673, 1683, 20 L.Ed.2d 672 (1968) (stating that legislative purpose was irrelevant in *Grosjean*) with *Houchins v. KQED, Inc.,* 438 U.S. 1, 9-10, 98 S.Ct. 2588, 2594, 57 L.Ed.2d 553 (1978) (plurality opinion) (suggesting that purpose was relevant in *Grosjean*); *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations,* 413 U.S. 376, 383, 93 S.Ct. 2553, 2557, 37 L.Ed.2d 669 (1973) (same). Commentators have generally viewed *Grosjean* as dependent on the improper censorial goals of the legislature. See T. Emerson, The System of Freedom of Expression 419 (1970); L. Tribe, American Constitutional Law 592 n. 8, 724 n. 10 (1978). We think that the result in *Grosjean* may have been attributable in part to the perception on the part of the Court that the state imposed the tax with an intent to penalize a selected group of newspapers. In the case currently before us, however, there is no legislative history [FN3] and no indication, apart from the structure of the tax itself, of any impermissible or censorial motive on the part of the legislature. We cannot resolve the case by simple citation to *Grosjean.* Instead, we must analyze the problem anew under the general principles of the First Amendment.

FN3. Although the Minnesota legislature records some proceedings and preserves the recordings, it has specifically provided that those recordings are not to be considered as evidence of legislative intent. See Minnesota Legislative Manual, Rule 1.18, Rules of the Minn. House of Representatives; Rule 65, Permanent Rules of the Senate (1981-1982). There is no evidence of legislative intent on the record in this

litigation.

*581 III

[2] Clearly, the First Amendment does not prohibit all regulation of the press. It is beyond dispute that the States and the Federal Government can subject newspapers to generally applicable economic regulations without creating constitutional problems. See, *e.g., Citizens Publishing Co. v. United States,* 394 U.S. 131, 139, 89 S.Ct. 927, 931, 22 L.Ed.2d 148 (1969) (antitrust laws); *Lorain Journal Co. v. United States,* 342 U.S. 143, 155-156, 72 S.Ct. 181, 187, 96 L.Ed. 162 (1951) (same); *Breard v. Alexandria,* 341 U.S. 622, 71 S.Ct. 921, 95 L.Ed. 1233 (1951) (prohibition of door-to-door solicitation); *Oklahoma Press Publishing Co. v. Walling,* 327 U.S. 186, 192-193, 66 S.Ct. 494, 497-98, 90 L.Ed. 614 (1946) (Fair Labor Standards Act); *Mabee v. White Plains Publishing Co.,* 327 U.S. 178, 66 S.Ct. 511, 90 L.Ed. 607 (1946) (same); *Associated Press v. United States,* 326 U.S. 1, 6-7, 19-20, 65 S.Ct. 1416, 1418, **1370 1424, 89 L.Ed. 2013 (1945) (antitrust laws); *Associated Press v. NLRB,* 301 U.S. 103, 132-133, 57 S.Ct. 650, 656, 81 L.Ed. 953 (1937) (NLRA); see also *Branzburg v. Hayes,* 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972) (enforcement of subpoenas). Minnesota, however, has not chosen to apply its general sales and use tax to newspapers. Instead, it has created a special tax that applies only to certain publications protected by the First Amendment. Although the State argues now that the tax on paper and ink is part of the general scheme of taxation, the use tax provision, quoted in note 2, *supra,* is facially discriminatory, singling out publications for treatment that is, to our knowledge, unique in Minnesota tax law.

[3] Minnesota's treatment of publications differs from that of other enterprises in at least two important respects: [FN4] it imposes a use tax that does not serve the function of protecting the sales tax, and it taxes an intermediate transaction rather than the ultimate retail sale. A use tax ordinarily serves to complement the sales tax by eliminating the incentive to make major purchases in States with lower sales taxes; it requires*582 the resident who shops out-of-state to pay a use tax equal to the sales tax savings. *E.g., National Geographic Society v. California Board of Equalization,* 430 U.S. 551, 555, 97 S.Ct. 1386, 1389, 51 L.Ed.2d 631 (1977); P. Hartman, Federal Limitations on State and Local Taxation §§ 10:1, 10:5 (1981); Warren & Schlesinger, Sales and Use Taxes: Interstate Commerce Pays Its Way, 38 Colum.L.Rev. 49, 63 (1938). Minnesota designed its overall use tax scheme to serve this function. As the regulations state, "The 'use tax' is a compensatory or complementary tax." Minn.Code of Agency Rules, Tax S & U 300 (1979); see Minn.Stat. § 297A.24 (1982). Thus, in general, items exempt from the sales tax are not subject to the use tax, for, in the event of a sales tax exemption, there is no "complementary function" for a use tax to serve. See *DeLuxe Check Printers, Inc. v. Commissioner of Tax,* 295 Minn. 76, 203 N.W.2d 341, 343 (1972). But the use tax on ink and paper serves no such complementary function; it applies to all uses, whether or not the taxpayer purchased the ink and paper in-state, and it applies to items exempt from the sales tax.

FN4. A third difference is worth noting, though it may have little economic effect. The use tax is not visible to consumers, while the sales tax must, by law, be stated separately as an addition to the price. See Minn.Stat. § 297A.03(1) (1982).

Further, the ordinary rule in Minnesota, as discussed above, is to tax only the ultimate, or retail, sale rather than the use of components like ink and paper. "The statutory scheme is to devise a unitary tax which exempts intermediate transactions and imposes it only on sales when the finished product is purchased by the ultimate user." *Standard Packaging Corp. v. Commissioner of Revenue,* 288 N.W.2d 234 (Minn.1979). Publishers, however, are taxed on their purchase of components, even though they will eventually sell their publications at retail.

[4] By creating this special use tax, which, to our knowledge, is without parallel in the State's tax scheme, Minnesota has singled out the press for

special treatment. We then must determine whether the First Amendment permits such special taxation. A tax that burdens rights protected by the First Amendment cannot stand unless the burden is necessary to achieve an overriding governmental interest. See, *583 *e.g., United States v. Lee*, 455 U.S. 252, 102 S.Ct. 1051, 71 L.Ed.2d 127 (1982). Any tax that the press must pay, of course, imposes some "burden." But, as we have observed, see p. 1369, *supra*, this Court has long upheld economic regulation of the press. The cases approving such economic regulation, however, emphasized the general applicability of the challenged regulation to all businesses, *e.g., Oklahoma Press Publishing Co. v. Walling, supra*, 327 U.S., at 194, 66 S.Ct., at 498; *Mabee v. White Plains Publishing Co., supra*, 327 U.S., at 184, 66 S.Ct., at 514; *Associated **1371 Press v. NLRB, supra*, 301 U.S., at 132-133, 57 S.Ct., at 655-56,[FN5] suggesting that a regulation that singled out the press might place a heavier burden of justification on the State, and we now conclude that the special problems created by differential treatment do indeed impose such a burden.

FN5. The Court recognized in *Oklahoma Press* that the FLSA excluded seamen and farm workers. See 327 U.S., at 193, 66 S.Ct., at 497. It rejected, however, the publisher's argument that the exclusion of these workers precluded application of the law to the employees of newspapers. The State here argues that *Oklahoma Press* establishes that the press cannot successfully challenge regulations on the basis of the exemption of other enterprises. We disagree. The exempt enterprises in *Oklahoma Press* were isolated exceptions and not the rule. Here, everything is exempt from the use tax on ink and paper, except the press.

There is substantial evidence that differential taxation of the press would have troubled the Framers of the First Amendment.[FN6] The role of the press in mobilizing sentiment*584 in favor of independence was critical to the Revolution. When the Constitution was proposed without an explicit guarantee of freedom of the press, the Antifederalists objected. Proponents of the Constitution, relying on the principle of enumerated powers, responded that such a guarantee was unnecessary because the Constitution granted Congress no power to control the press. The remarks of Richard Henry Lee are typical of the rejoinders of the Antifederalists:

FN6. It is true that our opinions rarely speculate on precisely how the Framers would have analyzed a given regulation of expression. In general, though, we have only limited evidence of exactly how the Framers intended the First Amendment to apply. There are no recorded debates in the Senate or in the States, and the discussion in the House of Representatives was couched in general terms, perhaps in response to Madison's suggestion that the representatives not stray from simple acknowledged principles. See Constitution of the United States: Analysis & Interpretation, 92d Cong., 2d Sess., S.Doc. 92-82 at 936 and n. 5 (1973); see also Z. Chafee, Freedom of Speech in the United States 16 (1941). Consequently, we ordinarily simply apply those general principles, requiring the government to justify any burdens on First Amendment rights by showing that they are necessary to achieve a legitimate overriding governmental interest, see note 7, *infra*. But when we do have evidence that a particular law would have offended the Framers, we have not hesitated to invalidate it on that ground alone. Prior restraints, for instance, clearly strike to the core of the Framers' concerns, leading this Court to treat them as particularly suspect. *Near v. Minnesota*, 283 U.S. 697, 713, 716-718, 51 S.Ct. 625, 630, 631-32, 75 L.Ed. 1357 (1931); cf. *Grosjean v. American Press Co., Inc.*, 297 U.S. 233, 56 S.Ct. 444, 80 L.Ed. 660 (1936) (relying on the role of the "taxes on knowledge" in inspiring the First Amendment to strike down a contemporary tax on knowledge).

"I confess I do not see in what cases the congress can, with any pretence of right, make a law to suppress the freedom of the press; though I am not clear, that congress is restrained from laying any duties whatever on printing, and from laying duties particularly heavy on certain pieces printed." R. Lee, Observation Leading to a Fair Examination of the System of Government, Letter IV, reprinted in 1 B. Schwartz, The Bill of Rights: A Documentary History 466, 474 (1971).
See also A Review of the Constitution Proposed by the Late Convention by a Federal Republican, reprinted in 3 H. Storing, The Complete Anti-Federalist 65, 81-82 (1981); M. Smith, Address to the People of New York on the Necessity of Amendments to the Constitution, reprinted in 1 B. Schwartz, *supra*, 566, 575-576; cf. The Federalist No. 84, p. 440 and n. 1 (A. Hamilton) (M. Beloff ed. 1948) (recognizing and attempting to refute the argument). The concerns voiced by the Antifederalists led to the adoption of the Bill of Rights. See 1 B. Schwartz, *supra*, at 527.

*585 The fears of the Antifederalists were well-founded. A power to tax differentially, as opposed to a power to tax generally, gives a government a powerful weapon against the taxpayer selected. When the State imposes a generally applicable tax, there is little cause for concern. We need not fear that a government will destroy a selected group of taxpayers by burdensome taxation if it must impose the same burden on the rest of its constituency. See **1372*Railway Express Agency v. New York*, 336 U.S. 106, 112-113, 69 S.Ct. 463, 467, 93 L.Ed. 533 (1949) (Jackson, J., concurring). When the State singles out the press, though, the political constraints that prevent a legislature from passing crippling taxes of general applicability are weakened, and the threat of burdensome taxes becomes acute. That threat can operate as effectively as a censor to check critical comment by the press, undercutting the basic assumption of our political system that the press will often serve as an important restraint on government. See generally, Stewart, "Or of the Press," 26 Hastings L.J. 631, 634 (1975). "[A]n untrammeled press [is] a vital source of public information," *Grosjean*, 297 U.S., at 250, 56 S.Ct., at 449, and an informed public is the essence of working democracy.

[5][6][7] Further, differential treatment, unless justified by some special characteristic of the press, suggests that the goal of the regulation is not unrelated to suppression of expression, and such a goal is presumptively unconstitutional. See, *e.g.*, *Police Department of the City of Chicago v. Mosley*, 408 U.S. 92, 95-96, 92 S.Ct. 2286, 2289-90, 33 L.Ed.2d 212 (1972); cf. *Brown v. Hartlage*, 456 U.S. 45, 102 S.Ct. 1523, 71 L.Ed.2d 732 (1982) (First Amendment has its "fullest and most urgent" application in the case of regulation of the content of political speech). Differential taxation of the press, then, places such a burden on the interests protected by the First Amendment that we cannot countenance such treatment unless the State asserts a counterbalancing interest of compelling importance that it cannot achieve without differential taxation.[FN7]

FN7. Justice REHNQUIST'S dissent analyzes this case solely as a problem of equal protection, applying the familiar tiers of scrutiny. *Post*, at 1380. We, however, view the problem as one arising directly under the First Amendment, for, as our discussion shows, the Framers perceived singling out the press for taxation as a means of abridging the freedom of the press, see note 6, *supra*. The appropriate method of analysis thus is to balance the burden implicit in singling out the press against the interest asserted by the State. Under a long line of precedent, the regulation can survive only if the governmental interest outweighs the burden and cannot be achieved by means that do not infringe First Amendment rights as significantly. See, *e.g.*, *United States v. Lee*, 455 U.S. 252, 257-258, 102 S.Ct. 1051, 1055, 71 L.Ed.2d 127 (1982); *United States v. O'Brien*, 391 U.S. 367, 376-377, 88 S.Ct. 1673, 1678-79, 20 L.Ed.2d 672; *NAACP v. Alabama*, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958).

*586 IV

[8] The main interest asserted by Minnesota in this case is the raising of revenue. Of course that interest is critical to any government. Standing alone, however, it cannot justify the special treatment of the press, for an alternative means of achieving the same interest without raising concerns under the First Amendment is clearly available: the State could raise the revenue by taxing businesses generally,[FN8] avoiding the censorial threat implicit in a tax that singles out the press.

FN8. Cf. *United States v. Lee*, 455 U.S. 252, 102 S.Ct. 1051, 71 L.Ed.2d 127 (1982) (generally applicable tax may be applied to those with religious objections).

[9] Addressing the concern with differential treatment, Minnesota invites us to look beyond the form of the tax to its substance. The tax is, according to the State, merely a substitute for the sales tax, which, as a generally applicable tax, would be constitutional as applied to the press.[FN9] **1373 There are *587 two fatal flaws in this reasoning. First, the State has offered no explanation of why it chose to use a substitute for the sales tax rather than the sales tax itself. The court below speculated that the State might have been concerned that collection of a tax on such small transactions would be impractical. 314 N.W.2d, at 207. That suggestion is unpersuasive, for sales of other low-priced goods are not exempt, see note 1, *supra*.[FN10] If the real goal of this tax is to duplicate*588 the sales tax, it is difficult to see why the State did not achieve that goal by the obvious and effective expedient of applying the sales tax.

FN9. Star Tribune insists that the premise of the State's argument-that a generally applicable sales tax would be constitutional-is incorrect, citing *Follett v. McCormick*, 321 U.S. 573, 64 S.Ct. 717, 88 L.Ed. 938 (1944), *Murdock v. Pennsylvania*, 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292 (1943), and *Jones v. Opelika*, 319 U.S. 103, 63 S.Ct. 890, 87 L.Ed. 1290 (1943). We think that *Breard v. Alexandria*, 341 U.S. 622, 71 S.Ct. 921, 95 L.Ed. 1233 (1951), is more relevant and rebuts Star Tribune's argument. There, we upheld an ordinance prohibiting door-to-door solicitation, even though it applied to prevent the door-to-door sale of subscriptions to magazines, an activity covered by the First Amendment. Although *Martin v. Struthers*, 319 U.S. 141, 63 S.Ct. 862, 87 L.Ed. 1313 (1943), had struck down a similar ordinance as applied to the distribution of free religious literature, the *Breard* Court explained that case as emphasizing that the information distributed was religious in nature and that the distribution was noncommercial. 341 U.S., at 642-643, 71 S.Ct., at 932-33. As the dissent in *Breard* recognized, the majority opinion substantially undercut both *Martin* and the cases now relied upon by Star Tribune, in which the Court had invalidated ordinances imposing a flat license tax on the sale of religious literature. See *id.*, at 649-650, 71 S.Ct., at 936 (Black, J., dissenting) ("Since this decision cannot be reconciled with the *Jones, Murdock* and *Martin v. Struthers* cases, it seems to me that good judicial practice calls for their forthright overruling.") Whatever the value of those cases as authority after *Breard*, we think them distinguishable from a generally applicable sales tax. In each of those cases, the local government imposed a flat tax, unrelated to the receipts or income of the speaker or to the expenses of administering a valid regulatory scheme, as a *condition* of the right to speak. By imposing the tax as a condition of engaging in protected activity, the defendants in those cases imposed a form of prior restraint on speech, rendering the tax highly susceptible to constitutional challenge. *Follett, supra*, 321 U.S., at 576-578, 64 S.Ct., at 718-19; *Murdock, supra*, 319 U.S., at 112, 113-114, 63 S.Ct., at 874, 875; *Jones v. Opelika*, 316 U.S. 584, 609, 611, 62 S.Ct. 1231, 1244, 1245,

86 L.Ed. 1691 (1942) (Stone, C.J., dissenting), adopted as opinion of Court, 319 U.S. 103, 63 S.Ct. 890, 87 L.Ed. 1290 (1943); see *Grosjean v. American Press Co., Inc., supra,* 297 U.S., at 249, 56 S.Ct., at 448; see generally *Near v. Minnesota, supra,* 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357. In that regard, the cases cited by Star Tribune do not resemble a generally applicable sales tax. Indeed, our cases have consistently recognized that nondiscriminatory taxes on the receipts or income of newspapers would be permissible, *Branzburg v. Hayes,* 408 U.S. 665, 683, 92 S.Ct. 2646, 2657, 33 L.Ed.2d 626 (dictum); *Grosjean v. American Press Co., Inc., supra,* 297 U.S., at 250, 56 S.Ct., at 449 (1936) (dictum); cf. *Follett, supra,* 321 U.S., at 578, 64 S.Ct., at 719 (preacher subject to taxes on income or property) (dictum); *Murdock, supra,* 319 U.S., at 112, 63 S.Ct., at 874 (same) (dictum).

FN10. Justice REHNQUIST'S dissent explains that collecting sales taxes on newspapers entails special problems because of the unusual marketing practices for newspapers-sales from vending machines and at newstands, for instance. *Post,* at 1382. The dissent does not, however, explain why the State cannot resolve these problems by using the same methods used for items like chewing gum and candy, marketed in these same unusual ways and subject to the sales tax, see Minn.Stat. § 297A.01(3)(c)(vi), (viii) (defining the sale of food from vending machines as a sale); see also § 297A.04 (dealing with vending machine operators).
Further, Justice REHNQUIST fears that the imposition of a sales tax will mean that vending machine prices will be 26¢ instead of 25¢; or prices will be 30¢, with publishers retaining an extra 4¢ per paper; or the price will be 25¢, with publishers absorbing the tax. *Post,* at 1381. It is difficult to see how the use tax rectifies this problem, for it increases publishers' costs. If the increase is a penny, the use taxes forces publishers to choose to pass the exact increment along to consumers by raising the price of the finished product to 26¢; or to increase the price by a nickel and retain an extra 4¢ per paper; or to leave the price at 25¢ and absorb the tax.

Further, even assuming that the legislature did have valid reasons for substituting another tax for the sales tax, we are not persuaded that this tax does serve as a substitute. The State asserts that this scheme actually *favors* the press over other businesses, because the same rate of tax is applied, but, for the press, the rate applies to the cost of components rather than to the sales price. We would be hesitant to fashion a rule that automatically allowed the State to single out the press for a different method of taxation as long as the effective burden was no different from that on other taxpayers or the burden on the press was lighter than that on other businesses. One reason for this reluctance is that the very selection of the press for special treatment threatens the press not only with the current *differential* treatment, but with the possibility of subsequent ~~differentially more~~ *burdensome* treatment. Thus, even without actually imposing an extra burden on the press, the government might be able to achieve censorial effects, for "[t]he threat of sanctions may deter [the] exercise of [First Amendment]**1374 rights almost as potently as the actual application of sanctions." *NAACP v. Button,* 371 U.S. 415, 433, 83 S.Ct. 328, 338, 9 L.Ed.2d 405 (1963).[FN11]

FN11. Justice REHNQUIST'S dissent deprecates this concern, asserting that there is no threat, because this Court will invalidate any differentially more burdensome tax. *Post,* at 1380-1381. That assertion would provide more security if we could be certain that courts will always prove able to identify differentially more burdensome taxes, a question we explore further, *infra.*

*589 A second reason to avoid the proposed rule is that courts as institutions are poorly equipped to

evaluate with precision the relative burdens of various methods of taxation.[FN12] The *590 complexities of factual economic proof always present a certain potential for error, and courts have little familiarity with the process of evaluating the relative economic burden of taxes. In sum, the possibility of error inherent in the proposed rule poses too great a threat to concerns at the heart of the First Amendment, and we cannot tolerate that possibility.[FN13] Minnesota, therefore, has offered no adequate justification for the special treatment of newspapers.[FN14]

FN12. We have not always avoided evaluating the relative burdens of different methods of taxation in certain cases involving state taxation of the Federal Government and those with whom it does business. See *Washington v. United States,* 460 U.S. 536, 103 S.Ct. 1344, 74 L.Ed.2d —- (1983); *United States v. County of Fresno,* 429 U.S. 452, 97 S.Ct. 699, 50 L.Ed.2d 683 (1977). Since *M'Culloch v. Maryland,* 4 Wheat. 316, 4 L.Ed. 579 (1819), the Supremacy Clause has prohibited not only state taxation that discriminates against the Federal Government but also any direct taxation of the Federal Government. See generally *United States v. New Mexico,* 455 U.S. 720, 730-734, 102 S.Ct. 1373, 1380-82, 71 L.Ed.2d 580 (1982). In spite of the rule against direct taxation of the Federal Government, States remain free to impose the *economic* incidence of a tax on the Federal Government, as long as that tax is not discriminatory. *E.g., id.,* at 734-735 and n. 11, 102 S.Ct., at 1382-83 and n. 11; *United States v. County of Fresno,* 429 U.S. 452, 460, 97 S.Ct. 699, 703, 50 L.Ed.2d 683 (1977). In that situation, then, the valid state interest in requiring federal enterprises to bear their share of the tax burden will often justify the use of differential methods of taxation. As we explained in *Washington v. United States,* " [Washington] has merely accommodated for the fact that it may not impose a tax directly on the United States...." 460 U.S., at —-, 103 S.Ct., at 1350. The special rule prohibiting direct taxation of the Federal Government but permitting the imposition of an equivalent economic burden on the Government may not only justify the State's use of different methods of taxation, but may also force us, within limits, see *Washington, supra,* at —-, n. 11, 103 S.Ct., at 1350, n. 11, to compare the burdens of two different taxes. Nothing, however, prevents the State from taxing the press in the same manner that it taxes other enterprises. It can achieve its interest in requiring the press to bear its share of the burden by taxing the press as it taxes others, so differential taxation is not necessary to achieve its goals.

Justice WHITE insists that the Court regularly inquires into the economic effect of taxes, relying on a number of cases arising under the Due Process Clause and the Commerce Clause. In the cases cited, the Court has struck down state taxes only when "the inequality of the ... tax burden between in-state and out-of-state manufacturer-users [was] admitted," *Halliburton Oil Well Cementing Co. v. Reily,* 373 U.S. 64, 70, 83 S.Ct. 1201, 1204, 10 L.Ed.2d 202 (1963), and when the Court was able to see that the tax produced a "*grossly* distorted result," *Norfolk & Western Ry. Co. v. Missouri State Tax Comm'n,* 390 U.S. 317, 326, 88 S.Ct. 995, 1001, 19 L.Ed.2d 1201 (1968) (emphasis added). In these cases, the Court required the taxpayer to show "gross overreaching," recognizing "the vastness of the State's taxing power and the latitude that the exercise of that power must be given before it encounters constitutional restraints." *Id.,* at 326, 88 S.Ct., at 1001; see *Alaska v. Arctic Maid,* 366 U.S. 199, 205, 81 S.Ct. 929, 932, 6 L.Ed.2d 227 (1961). When delicate and cherished First Amendment rights are at stake, however, the constitutional tolerance for error diminishes drastically, and the risk increases that courts will prove unable to

apply accurately the more finely tuned standards.

FN13. If a State employed the same *method* of taxation but applied a lower *rate* to the press, so that there could be no doubt that the legislature was not singling out the press to bear a more burdensome tax, we would, of course, be in a position to evaluate the relative burdens. And, given the clarity of the relative burdens, as well as the rule that differential methods of taxation are not automatically permissible if less burdensome, a lower tax rate for the press would not raise the threat that the legislature might later impose an extra burden that would escape detection by the courts, see pp. 1373-1374, and note 11, *supra*. Thus, our decision does not, as the dissent suggests, require Minnesota to impose a greater tax burden on publications.

FN14. Disparaging our concern with the complexities of economic proof, Justice REHNQUIST'S dissent undertakes to calculate a hypothetical sales tax liability for Star Tribune for the years 1974 and 1975. *Post,* at 1378-1379. That undertaking, we think, illustrates some of the problems that inhere in any such inquiry, see generally R. Musgrave and P. Musgrave, Public Finance in Theory and Practice 461 (2d ed. 1976) (detailing some of the complexities of calculating the burden of a tax); cf. *id.*, at 475 (in evaluating excess burden of taxes, " quantitative evidence is sketchy and underlying procedures are necessarily crude "). First, the calculation for 1974 and 1975 for this newspaper tells us nothing about the relative impact of the tax on other newspapers or in other years. Since newspapers receive a substantial portion of their revenues from advertising, see generally Newsprint Information Committee, Newspaper and Newsprint Facts at a Glance 12 (24th ed. 1982), it is not necessarily true even for profitable newspapers that the price of the finished product will exceed the cost of inputs. Consequently, it is not necessary that a tax imposed on components is less burdensome than a tax at the same rate imposed on the price of the product. Although the relationship of Star Tribune's revenues from circulation and its revenues from advertising may result in a lower tax burden under the use tax in 1974 and 1975, that relationship need not hold for all newspapers or for all time.
Second, if, as the dissent assumes elsewhere, *post,* at 1381, the sales tax increases the price, that price increase presumably will cause a decrease in demand. The decrease in demand may lead to lower total revenues and, therefore, to a lower total sales tax burden than that calculated by the dissent. See generally P. Samuelson, Economics 381-383, 389-390 (10th ed. 1976); R. Musgrave and P. Musgrave, Public Finance in Theory and Practice 21 (3d ed. 1980) ("[I]t is necessary, in designing fiscal policies, to allow for how the private sector will respond."). The dissent's calculations, then, can only be characterized as hypothetical. Taking the chance that these calculations or others like them are erroneous is a risk that the First Amendment forbids.

*591 **1375 V

[10] 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. The effect of the $100,000 exemption enacted in 1974 is that only a handful of publishers pay any tax at all, and even fewer pay any significant amount of tax.[FN15] The State explains this exemption as part of a policy favoring an " equitable" tax system, although there are no comparable exemptions for small enterprises outside the press. Again, there is no legislative history supporting the State's view of the purpose of the amendment. Whatever the motive of the legislature in this *592 case, we think that

recognizing a power in the State not only to single out the press but also to tailor the tax so that it singles out a few members of the press presents such a potential for abuse that no interest suggested by Minnesota can justify the scheme. It has asserted no interest other than its desire to have an "equitable" tax system. The current system, it explains, promotes equity because it places the burden on large publications that impose more social costs than do smaller publications and that are more likely to be able to bear the burden of the tax. Even if we were willing to accept the premise that large businesses are more profitable and therefore better able to bear the burden of the tax, the State's commitment to this "equity" is questionable, for the concern has not led the State to grant benefits to small businesses in general.[FN16] And 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.

FN15. In 1974, 11 publishers paid the tax. Three paid less than $1,000, and another three paid less than $8,000. Star Tribune, one of only two publishers paying more than $100,000, paid $608,634. In 1975, 13 publishers paid the tax. Again, three paid less than $1,000, and four more paid less than $3,000. For that year, Star Tribune paid $636,113 and was again one of only two publishers incurring a liability greater than $100,000. See 314 N.W.2d, at 203-204 and nn. 4, 5.

FN16. Cf. *Mabee v. White Plains Publishing Co.*, 327 U.S. 178, 183, 184, 66 S.Ct. 511, 513, 514, 90 L.Ed. 607 (1946) (upholding exemption from Fair Labor Standards Act of small weekly and semi-weekly newspapers where the purpose of the exemption "was to put those papers more on a parity with other small town enterprises.")

**1376 VI

[11][12] We need not and do not impugn the motives of the Minnesota legislature in passing the ink and paper tax. Illicit legislative intent is not the *sine qua non* of a violation of the First Amendment. *See NAACP v. Button*, 371 U.S., at 439, 83 S.Ct., at 341; *NAACP v. Alabama*, 357 U.S. 449, 461, 78 S.Ct. 1163, 1171, 2 L.Ed.2d 1488 (1958); *Lovell v. Griffin*, 303 U.S. 444, 451, 58 S.Ct. 666, 668-69, 82 L.Ed. 949 (1938). We have long recognized that even regulations aimed at proper governmental concerns can restrict unduly the exercise of rights protected by the First Amendment. *E.g., Schneider v. State*, 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed. 155 (1939). A tax that singles out the press, or that targets individual publications within the press, places a *593 heavy burden on the State to justify its action. Since Minnesota has offered no satisfactory justification for its tax on the use of ink and paper, the tax violates the First Amendment,[FN17] and the judgment below is

FN17. This conclusion renders it unnecessary to address Star Tribune's arguments that the $100,000 exemption violates the principles of *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976), and *Stewart Dry Goods Co. v. Lewis*, 294 U.S. 550, 55 S.Ct. 525, 79 L.Ed. 1054 (1935).

Reversed.

Justice WHITE, concurring in part and dissenting in part.

This case is not difficult. The exemption for the first $100,000 of paper and ink limits the burden of the Minnesota tax to only a few papers. This feature alone is sufficient reason to invalidate the Minnesota tax and reverse the judgment of the Minnesota Supreme Court. The Court recognizes that Minnesota's tax violates the First Amendment for this reason, and I subscribe to Part V of the Court's opinion and concur in the judgment.

Having found fully sufficient grounds for decision, the Court need go no further. The question whether Minnesota or another state may impose a use tax on paper and ink that is not targeted on a small group of newspapers could be left for another

day.

The Court, however, undertakes the task today. The crux of the issue is whether Minnesota has justified imposing a use tax on paper and ink in lieu of applying its general sales tax to publications. The Court concludes that the State has offered no satisfactory explanation for selecting a substitute for a sales tax. *Ante,* at 1373. If this is so, that could be the end of the matter, and the Minnesota tax would be invalid for a second reason.

The Court nevertheless moves on to opine that the State could not impose such a tax even if "the effective burden was no different from that on other taxpayers or the burden on the press was lighter than that on other businesses." *594 *Ante,* at 1374. The fear is that the government might use the tax as a threatened sanction to achieve a censorial purpose. As Justice REHNQUIST demonstrates, *post,* at 1380-1381, the proposition that the government threatens the First Amendment by favoring the press is most questionable, but for the sake of argument, I let it pass.

Despite having struck down the tax for three separate reasons, the Court is still not finished. "A second reason" to eschew inquiry into the relative burden of taxation is presented. The Court submits that "courts as institutions are poorly equipped to evaluate with precision the relative burdens of various methods of taxation," *ante,* at 1374, except, it seems, in cases involving the sovereign immunity of the United States. Why this is so is not made clear, and I do not agree that the courts are so incompetent to evaluate the burdens of taxation that we must decline the task in this case.

The Court acknowledges that in cases involving state taxation of the Federal government and those with whom it does business, the Court has compared the burden of two different taxes. *Ante,* at 1374, n. 12. See, *e.g., United States v. County of Fresno,* 429 U.S. 452, 97 S.Ct. 699, 50 L.Ed.2d 683 (1977); **1377*United States v. City of Detroit,* 355 U.S. 466, 78 S.Ct. 474, 2 L.Ed.2d 424 (1958). It is not apparent to me why we are able to determine whether a state has imposed the economic incidence of a tax in a discriminatory fashion upon the federal government, but incompetent to determine whether a tax imposes discriminatory treatment upon the press. The Court's rationale that these are a unique set of cases which nevertheless "force us" to assume a duty we are incompetent to perform is wholly unsatisfactory. If convinced of its inherent incapacity for tax analysis, the Court could have taken the path chosen today and simply prohibited the states from imposing a compensatory "equivalent" economic burden on those who deal with the Federal government. It has not done so.

Moreover, the Court frequently has examined-without complaint-the actual effect of a tax in determining whether the state has imposed an impermissible burden on interstate *595 commerce or run afoul of the Due Process Clause. [FN1] In a number of cases concerning railroad taxes, for example, the Court considered the tax burden to decide whether it was the equivalent of a property tax or an invalid tax on interstate commerce.[FN2] The Court has compared the burden of use taxes on competing products from sister states with that of sales taxes on products sold in-state to decide whether the former constituted discrimination against interstate commerce. *Henneford v. Silas Mason Co.,* 300 U.S. 577, 57 S.Ct. 524, 81 L.Ed. 814 (1937).[FN3] We have also measured tax burdens in our cases considering whether state tax formulas are so out of proportion*596 to the amount of in-state business as to violate due process. See, *e.g. Moorman Mfg. v. Bair,* 437 U.S. 267, 98 S.Ct. 2340, 57 L.Ed.2d 197 (1978); *Hans Rees' Sons, Inc. v. North Carolina,* 283 U.S. 123, 51 S.Ct. 385, 75 L.Ed. 879 (1931). In sum, the Court's professed inability to determine when a tax poses an *actual* threat to constitutional principles is a novel concept, and one belied by the lessons of our experience.

FN1. See, *e.g., Alaska v. Arctic Maid,* 366 U.S. 199, 81 S.Ct. 929, 6 L.Ed.2d 227 (1961) (Alaska occupational tax collected from freezer ships at rate of 4% of value of salmon not discriminatory because Alaskan canneries pay a 6% tax on the value of salmon obtained for canning).

FN2. See *Norfolk & Western R. Co. v. Tax Comm'n,* 390 U.S. 317, 88 S.Ct. 995, 19 L.Ed.2d 1201 (1968), (holding property tax on rolling stock based on a mileage formula violated due process) ("[W]hen a taxpayer comes forward with strong evidence tending to prove that the mileage formula will yield a grossly distorted result in a particular case, the State is obliged to counter that evidence..."); *Great Northern R. v. Minnesota,* 278 U.S. 503, 509, 49 S.Ct. 191, 192, 73 L.Ed. 477 (1929) ("We find nothing in the record to indicate that the tax under consideration, plus that already collected, exceeds 'what would be legitimate as an ordinary tax on the property valued as part of a going concern, [or is] relatively higher than the taxes on other kinds of property.' *Pullman Co. v. Richardson,* 261 U.S. 330, 339 [43 S.Ct. 366, 368, 67 L.Ed. 682]"). See also *Pullman Co. v. Richardson,* 261 U.S. 330, 339, 43 S.Ct. 366, 368, 67 L.Ed. 682 (1923); *Cudahy Packing Co. v. Minnesota,* 246 U.S. 450, 453-455, 38 S.Ct. 373, 374-75, 62 L.Ed. 827 (1918); *United States Express Co. v. Minnesota,* 223 U.S. 335, 32 S.Ct. 211, 56 L.Ed. 459 (1912); *Galveston, Harrisburg & San Antonio R. Co. v. Texas,* 210 U.S. 217, 28 S.Ct. 638, 52 L.Ed. 1031 (1908).

FN3. In *Henneford,* a 2% tax was imposed on the privilege of using products coming from other states. Excepted from the tax was any property, the sale or use of which, had already been subjected to an equal or greater tax. The Court, speaking through Justice Cardozo, upheld the use tax, noting that "When the account is made up, the stranger from afar is subject to no greater burdens as a consequence of ownership than the dweller within the gates." 300 U.S. 583-584, 57 S.Ct. 527-28. See also *Halliburton Oil Co. v. Reily,* 373 U.S. 64, 83 S.Ct. 1201, 10 L.Ed.2d 202 (1963), (holding use tax burden went beyond sales tax and constituted invalid discriminatory burden on commerce); *Scripto v. Carson,* 362 U.S. 207, 80 S.Ct. 619, 4 L.Ed.2d 660 (1960) (upholding use tax as complement to sales tax).

There may be cases, I recognize, where the Court cannot confidently ascertain whether a differential method of taxation imposes a greater burden upon the press than a generally applicable tax. In these circumstances, I too may be unwilling to entrust freedom of the press to uncertain economic proof. But, as Justice REHNQUIST**1378 clearly shows, *post,* at 1378-1379, this is not such a case. Since it is plainly evident that Minneapolis Star is not disadvantaged and is almost certainly benefitted by a use tax vis-à-vis a sales tax, I cannot agree that the First Amendment forbids a state from choosing one method of taxation over another.

Justice REHNQUIST, dissenting.

Today we learn from the Court that a State runs afoul of the First Amendment proscription of laws " abridging the freedom of speech, or of the press" where the State structures its taxing system to the advantage of newspapers. This seems very much akin to protecting something so overzealously that in the end it is smothered. While the Court purports to rely on the intent of the "Framers of the First Amendment," I believe it safe to assume that in 1791 "abridge" meant the same thing it means today: to diminish or curtail. Not until the Court's decision in this case, nearly two centuries after adoption of the First Amendment has it been read to prohibit activities which in no way diminish or curtail the freedoms it protects.

I agree with the Court that the First Amendment does not *per se* prevent the State of Minnesota from regulating the press even though such regulation imposes an economic burden. It is evident from the numerous cases relied on by the *597 Court, which I need not repeat here, that this principle has been long settled. *Ante,* at 1370. I further agree with the Court that application of general sales and use taxes to the press would be sanctioned under this line of cases. *Id.,* at 1372-1373, n. 9. Therefore, I also agree with the Court to the extent it holds that any constitutional attack on the Minnesota scheme must be aimed at the classifications used in that taxing scheme. *Id.,* at

1370-1371. But it is at this point that I part company with my colleagues.

The Court recognizes in several parts of its opinion that the State of Minnesota could avoid constitutional problems by imposing on newspapers the 4% sales tax that it imposes on other retailers. *Id.*, at 1372-1375 and nn. 9, 13. Rather than impose such a tax, however, the Minnesota legislature decided to provide newspapers with an exemption from the sales tax and impose a 4% use tax on ink and paper; thus, while both taxes are part of one "system of sales and use taxes," 314 N.W.2d 201, 203 (1981), newspapers are classified differently within that system.[FN*] The problem the Court finds too difficult to deal with is whether this difference in treatment results in a significant burden on newspapers.

FN* The sales tax exemption and use tax liability are not, strictly speaking, for newspapers alone. The term of art used in the Minnesota taxing scheme is " publications." Publications is defined to include such materials as magazines, advertising supplements, shoppers guides, house organs, trade and professional journals, and serially issued comic books. See Minn.Stat. § 331.02 (1982); 13 Minn.Code of Agency Rules, Tax S & U 409(b) (1979).

The record reveals that in 1974 the Minneapolis Star & Tribune had an average daily circulation of 489,345 copies. *Id.*, at 203-204, nn. 4 and 5. Using the price we were informed of at argument of 25¢ per copy, see Tr. of Oral Arg. at 46, gross sales revenue for the year would be $38,168,910. The Sunday circulation for 1974 was 640,756; even assuming that it did not sell for more than the daily paper, gross sales revenue for the year would be at least $8,329,828. Thus, total sales revenues in 1974 would be $46,498,738. Had a 4% sales tax *598 been imposed, the Minneapolis Star & Tribune would have been liable for $1,859,950 in 1974. The same "complexities of factual economic proof" can be analyzed for 1975. Daily circulation was 481,789; at 25¢ per copy, gross sales revenue for the year would be $37,579,542. The Sunday circulation for 1975 was 619,154; at 25¢ per copy, gross sales revenue for the year would be $8,049,002. Total sales revenues in 1975 would be $45,628,544; at a 4% rate, the sales tax for 1975 would be $1,825,142. Therefore, had the sales tax been imposed, as the Court agrees would have been permissible,**1379 the Minneapolis Star & Tribune's liability for 1974 and 1975 would have been $3,685,092.

The record further indicates that the Minneapolis Star & Tribune paid $608,634 in use taxes in 1974 and $636,113 in 1975-a total liability of $1,244,747. See 314 N.W., at 203-204, nn. 4 and 5. We need no expert testimony from modern day Euclids or Einsteins to determine that the $1,224,747 paid in use taxes is significantly less burdensome than the $3,685,092 that could have been levied by a sales tax. *A fortiori*, the Minnesota taxing scheme which singles out newspapers for "differential treatment" has benefited, not burdened, the "freedom of speech, [and] of the press."

Ignoring these calculations, the Court concludes that "differential treatment" alone in Minnesota's sales and use tax scheme requires that the statutes be found "presumptively unconstitutional" and declared invalid "unless the State asserts a counterbalancing interest of compelling importance that it cannot achieve without differential taxation." *Id.*, at 1372. The "differential treatment" standard that the Court has conjured up is unprecedented and unwarranted. To my knowledge this Court has never subjected governmental action to the most stringent constitutional review solely on the basis of "differential treatment" of particular groups. The case relied on by the Court, *Police Department of the City of Chicago v. Mosley*, 408 U.S. 92, 95-96, 92 S.Ct. 2286, 2289-90, 33 L.Ed.2d 212 (1972), certainly does not stand for this proposition. In *Mosley* all picketing except "peaceful picketing" was prohibited within a particular public area. *599 Thus, "differential treatment" was not the key to the Court's decision; rather the essential fact was that unless a person was considered a "peaceful picketer" his speech through this form of expression would be totally abridged within the area.

Of course, all governmentally created classifications must have some "rational basis." See *Williamson v. Lee Optical Co.*, 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955); *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 69 S.Ct. 463, 93 L.Ed. 533 (1949). The fact that they have been enacted by a presumptively rational legislature, however, arms them with a presumption of rationality. We have shown the greatest deference to state legislatures in devising their taxing schemes. As we said in *Allied Stores of Ohio, Inc. v. Bowers:*

"The States have a very wide discretion in the laying of their taxes. When dealing with their proper domestic concerns, and not trenching upon the prerogatives of the National Government or violating the guaranties of the Federal Constitution, the States have the attribute of sovereign powers in devising their fiscal systems to ensure revenue and foster their local interests.... The State may impose different specific taxes upon different trades and professions and may vary the rate of excise upon various products. It is not required to resort to close distinctions or to maintain a precise, scientific uniformity with reference to composition, use or value. [Citations omitted]. 'To hold otherwise would be to subject the essential taxing power of the State to an intolerable supervision, hostile to the basic principles of our government....' " 358 U.S. 522, 526-527, 79 S.Ct. 437, 440, 3 L.Ed.2d 480 (1959) (quoting *Ohio Oil Co. v. Conway*, 281 U.S. 146, 159, 50 S.Ct. 310, 314, 74 L.Ed. 775 (1930)).

See also *Kahn v. Shevin*, 416 U.S. 351, 94 S.Ct. 1734, 40 L.Ed.2d 189 (1974); *Independent Warehouses, Inc. v. Scheele*, 331 U.S. 70, 67 S.Ct. 1062, 91 L.Ed. 1346 (1947); *Madden v. Kentucky*, 309 U.S. 83, 60 S.Ct. 406, 84 L.Ed. 590 (1940); *Fox v. Standard Oil Co. of New Jersey*, 294 U.S. 87, 55 S.Ct. 333, 79 L.Ed. 780 (1935); *New York Rapid Transit Corp. v. City of New York*, 303 U.S. 573, 58 S.Ct. 721, 82 L.Ed. 1024 (1938).

*600 Where the State devises classifications that infringe on the fundamental guaranties protected by the Constitution the Court has demanded more of the State in **1380 justifying its action. But there is no *infringement*, and thus the Court has never required more, unless the State's classifications *significantly burden* these specially protected rights. As we said in *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 312, 96 S.Ct. 2562, 2566, 49 L.Ed.2d 520 (1976) (*per curiam*) (emphasis added), "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 *California Medical Ass'n v. FEC*, 453 U.S. 182, 101 S.Ct. 2712, 69 L.Ed.2d 567 (1981); *Maher v. Roe*, 432 U.S. 464, 97 S.Ct. 2376, 53 L.Ed.2d 484 (1977); *Storer v. Brown*, 415 U.S. 724, 94 S.Ct. 1274, 39 L.Ed.2d 714 (1974); *American Party of Texas v. White*, 415 U.S. 767, 94 S.Ct. 1296, 39 L.Ed.2d 744 (1974); *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973). To state it in terms of the freedoms at issue here, no First Amendment issue is raised unless First Amendment rights have been infringed; for if there has been no infringement, then there has been no "abridgment" of those guaranties. See *Branzburg v. Hayes*, 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972).

Today the Court departs from this rule, refusing to look at the record and determine whether the classifications in the Minnesota use and sales tax statutes significantly burden the First Amendment rights of petitioner and its fellow newspapers. The Court offers as an explanation for this failure the self-reproaching conclusion that

"courts as institutions are poorly equipped to evaluate with precision the relative burdens of various methods of taxation. The complexities of factual economic proof always present a certain potential for error, and courts have little familiarity with the process of evaluating the relative economic burden of taxes. In sum, the possibility of error inherent in the proposed rule poses too great a threat to concerns at the heart of the First Amendment, and we cannot tolerate that possibility. Minnesota,*601 therefore, has offered no adequate justification for the special treatment of newspapers." *Ante*, at 1374-1375 (footnotes omitted).

Considering the complexity of issues this Court resolves each Term, this admonition as a general rule is difficult to understand. Considering the specifics of this case, this confession of inability is incomprehensible.

Wisely not relying solely on its inability to weigh the burdens of the Minnesota tax scheme, the Court also says that even if the resultant burden on the press is lighter than on others:

"[T]he very selection of the press for special treatment threatens the press not only with the current *differential* treatment, but with the possibility of subsequent differentially *more burdensome* treatment. Thus, even without actually imposing an extra burden on the press, the government might be able to achieve censorial effects, for '[t]he threat of sanctions may deter [the] exercise of [First Amendment] rights almost as potently as the actual application of sanctions.' " *Ante,* at 1374.

Surely the Court does not mean what it seems to say. The Court should be well aware from its discussion of *Grosjean v. American Press Co., Inc.,* 297 U.S. 233, 56 S.Ct. 444, 80 L.Ed. 660 (1936), that this Court is quite capable of dealing with changes in state taxing laws which are intended to penalize newspapers. As Justice Holmes aptly put it, "[T]his Court which so often has defeated the attempt to tax in certain ways can defeat an attempt to discriminate or otherwise go too far without wholly abolishing the power to tax. The power to tax is not the power to destroy while this Court sits." *Panhandle Oil Co. v. Knox,* 277 U.S. 218, 223, 48 S.Ct. 451, 453, 72 L.Ed. 857 (1928) (Holmes, J., dissenting). Furthermore, the Court itself intimates that if the State had employed "the same *method* of taxation but applied a lower *rate* to the press, so that there could be no doubt that the legislature was not singling out the **1381 press to bear a more burdensome*602 tax" the taxing scheme would be constitutionally permissible. *Ante,* at 1375, n. 13. This obviously has the same potential for "the threat of sanctions," because the legislature could at any time raise the taxes to the higher rate. Likewise, the newspapers' absolute exemption from the sales tax, which the Court acknowledges is used by many other States, would be subject to the same attack; the exemption could be taken away.

The State is required to show that its taxing scheme is rational. But in this case that showing can be made easily. The Court states that "[t]he court below speculated that the State might have been concerned that collection of a [sales] tax on such small transactions would be impractical." *Id.,* at 1373. But the Court finds this argument " unpersuasive," because "sales of other low-priced goods" are subject to the sales tax. *Ibid.* I disagree. There must be few such inexpensive items sold in Minnesota in the volume of newspaper sales. Minneapolis Star & Tribune alone, as noted above, sold approximately 489,345 papers every day in 1974 and sold another 640,756 papers every Sunday. In 1975 it had a daily circulation of 481,789 and a Sunday circulation of 619,154. Further, newspapers are commonly sold in a different way than other goods. The legislature could have concluded that paper boys, corner newstands, and vending machines provide an unreliable and unsuitable means for collection of a sales tax. Must everyone buying a paper put 26¢ in the vending machine rather than 25¢; or should the price of a paper be raised to 30¢, giving the paper 4¢ more profit; or should the price be kept at 25¢ with the paper absorbing the tax? In summary, so long as the State can find another way to collect revenue from the newspapers, imposing a sales tax on newspapers would be to no one's advantage; not the newspaper and its distributors who would have to collect the tax, not the State who would have to enforce collection, and not the consumer who would have to pay for the paper in odd amounts. The reasonable alternative Minnesota chose was to impose the use tax on ink and paper. "There is no reason *603 to believe that this legislative choice is insufficiently tailored to achieve the goal of raising revenue or that it burdens the first amendment in any way whatsoever." 314 N.W.2d, at 207. *Cf. Minnesota v. Clover Leaf Creamery Co.,* 449 U.S. 456, 101 S.Ct. 715, 66 L.Ed.2d 659 (1981).

The Court finds in very summary fashion that the exemption newspapers receive for the first $100,000 of ink and paper used also violates the First Amendment because the result is that only a few of the newspapers actually pay a use tax. I cannot agree. As explained by the Minnesota Supreme Court, the exemption is in effect a $4,000 credit which benefits all newspapers. 314 N.W.2d, at 203. Minneapolis Star & Tribune was benefited to the amount of $16,000 in the two years in question; $4,000 each year for its morning paper

and $4,000 each year for its evening paper. *Ibid.* Absent any improper motive on the part of the Minnesota legislature in drawing the limits of this exemption, it cannot be construed as violating the First Amendment. See *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 194, 66 S.Ct. 494, 498, 90 L.Ed. 614 (1946). Cf. *Mabee v. White Plains Publishing Co.*, 327 U.S. 178, 66 S.Ct. 511, 90 L.Ed. 607 (1946). The Minnesota Supreme Court specifically found that the exemption was not a "deliberate and calculated device" designed with an illicit purpose. 314 N.W.2d, at 208. There is nothing in the record which would cast doubt on this conclusion. The Minnesota court further explained:

"[I]t is necessary for the legislature to construct economically sound taxes in order to raise revenue. In order to do so, the legislature must classify or grant exemptions to insure that the burden upon the taxpayer in paying the tax or upon the state in collecting the tax does not outweigh the benefit of the revenues to the state. 'Traditionally classification has been a device for fitting tax programs**1382 to local needs and usages in order to achieve an equitable distribution of the tax burden.' *Madden v. Kentucky*, 309 U.S. 83, 88 [60 S.Ct. 406, 408, 84 L.Ed. 590] (1940)." *Id.*, at 209-210.

*604 There is no reason to conclude that the State, in drafting the $4,000 credit, acted other than reasonably and rationally to fit its sales and use tax scheme to its own local needs and usages.

To collect from newspapers their fair share of taxes under the sales and use tax scheme and at the same time avoid abridging the freedoms of speech and press, the Court holds today that Minnesota must subject newspapers to millions of additional dollars in sales tax liability. Certainly this is a hollow victory for the newspapers and I seriously doubt the Court's conclusion that this result would have been intended by the "Framers of the First Amendment."

For the reasons set forth above, I would affirm the judgment of the Minnesota Supreme Court.

U.S.,1983.
Minneapolis Star and Tribune Co. v. Minnesota Com'r of Revenue
460 U.S. 575, 103 S.Ct. 1365, 75 L.Ed.2d 295, 9 Media L. Rep. 1369

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Westlaw.

63 S.Ct. 870

319 U.S. 105, 63 S.Ct. 870, 146 A.L.R. 81, 87 L.Ed. 1292
(Cite as: 319 U.S. 105, 63 S.Ct. 870)

MURDOCK v. COMMONWEALTH OF PENNSYLVANIA
U.S. 1943.

Supreme Court of the United States.
MURDOCK
v.
COMMONWEALTH OF PENNSYLVANIA and seven other cases.
Nos. 480-487.

Argued March 10, 11, 1943.
Decided May 3, 1943.

On Writs of Certiorari to the Superior Court of the Commonwealth of Pennsylvania.

Robert Murdock, Jr., Anna Perisich, Willard L. Mowder, Charles Seders, Robert Lamborn, Anthony Maltezos, Anastasia Tzanes and Ellaine Tzanes were convicted of violating an ordinance of the City of Jeannette, Commonwealth of Pennsylvania prohibiting the sale of goods, wares and merchandise of any kind within the city by canvassing for, or soliciting without a license. The convictions were affirmed by the Superior Court of Pennsylvania, 149 Pa.Super. 175, 27 A.2d 666, and they bring certiorari.

Reversed and remanded with directions.

See, also, Jones v. City of Opelika, 319 U.S. 105,63 S.Ct. 891, 87 L.Ed. 1292;Douglas v. City of Jeannette, 319 U.S. 157; 63 S.Ct. 882, 87 L.Ed. 1324.

Mr. Justice REED, Mr. Justice FRANKFURTER, Mr. Justice JACKSON, and Mr. Justice ROBERTS, dissenting.

West Headnotes

[1] Constitutional Law 92 ⟹3851

92 Constitutional Law
92XXVII Due Process
92XXVII(A) In General
92k3848 Relationship to Other Constitutional Provisions; Incorporation
92k3851 k. First Amendment. Most Cited Cases
(Formerly 92k251)
The Fourteenth Amendment of the Federal Constitution makes the First Amendment applicable to the states. U.S.C.A.Const. Amends. 1, 14.

[2] Constitutional Law 92 ⟹1389

92 Constitutional Law
92XIII Freedom of Religion and Conscience
92XIII(B) Particular Issues and Applications
92k1389 k. Solicitation; Distribution of Literature. Most Cited Cases
(Formerly 92k84.5(16), 92k84)

Constitutional Law 92 ⟹1879

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(M) Soliciting, Canvassing, Pamphletting, Leafletting, and Fundraising
92k1879 k. Charities or Religious Organizations. Most Cited Cases
(Formerly 92k90.1(1.1), 92k90.1(1), 92k90)
Spreading one's religious beliefs or preaching the Gospel through distribution of religious literature and through personal visitations is an age-old type of evangelism which is entitled to protection under Constitution guaranteeing "freedom of speech", " freedom of press" and "freedom of religion". U.S.C.A.Const.Amends. 1, 14.

[3] Constitutional Law 92 ⟹4105(5)

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications

319 U.S. 105, 63 S.Ct. 870, 146 A.L.R. 81, 87 L.Ed. 1292
(Cite as: 319 U.S. 105, 63 S.Ct. 870)

92XXVII(G)4 Government Property, Facilities, and Funds
92k4103 Transportation
92k4105 Streets, Highways, and Sidewalks
92k4105(5) k. Non-Transportation Use; Parades and Demonstrations. Most Cited Cases
(Formerly 92k274(5), 92k274)
A state can prohibit the use of a street for distribution of purely commercial leaflets even though such leaflets may have a civic appeal or a moral platitude appended to them. U.S.C.A.Const. Amends. 1, 14.

[4] Constitutional Law 92 ⇐1389

92 Constitutional Law
92XIII Freedom of Religion and Conscience
92XIII(B) Particular Issues and Applications
92k1389 k. Solicitation; Distribution of Literature. Most Cited Cases
(Formerly 92k274(5), 92k274)
The state may not prohibit distribution of handbills on the streets in pursuit of a clearly religious activity merely because the handbills invite the purchase of books for improved understanding of religion, or because handbills seek in a lawful fashion to promote the raising of funds for religious purposes. U.S.C.A.Const. Amends. 1, 14.

[5] Constitutional Law 92 ⇐1310

92 Constitutional Law
92XIII Freedom of Religion and Conscience
92XIII(B) Particular Issues and Applications
92k1310 k. In General. Most Cited Cases
(Formerly 92k274.1(2.1), 92k84.5(16), 92k84)
The mere fact that religious literature is sold by itinerant preachers rather than donated does not transform evangelism into a "commercial enterprise", and the constitutional rights of those spreading their religious beliefs through the printed and spoken word are not to be gauged by standards governing retailers or wholesalers of books. U.S.C.A.Const.Amends. 1, 14.

[6] Constitutional Law 92 ⇐1389

92 Constitutional Law
92XIII Freedom of Religion and Conscience
92XIII(B) Particular Issues and Applications
92k1389 k. Solicitation; Distribution of Literature. Most Cited Cases
(Formerly 92k274.1(2.1), 92k274.1(2), 92k274)

Constitutional Law 92 ⇐1879

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(M) Soliciting, Canvassing, Pamphletting, Leafletting, and Fundraising
92k1879 k. Charities or Religious Organizations. Most Cited Cases
(Formerly 92k274.1(2.1), 92k274.1(2), 92k274)

Licenses 238 ⇐7(3)

238 Licenses
238I For Occupations and Privileges
238k7 Constitutionality and Validity of Acts and Ordinances
238k7(3) k. Uniformity as to Occupations or Privileges of Same Class. Most Cited Cases
(Formerly 92k274.1(2.1), 92k274.1(2), 92k274)
Where defendants went about from door to door in city distributing literature and soliciting people to purchase religious books and pamphlets, and in connection with such activities defendants used a phonograph on which they played a record expounding certain of their views on religion, defendants were engaged in a "religious venture" rather than in a "commercial venture", for purpose of determining validity of licensing ordinance. U.S.C.A.Const. Amends. 1, 14.

[7] Constitutional Law 92 ⇐4135

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)6 Taxation
92k4135 k. In General. Most Cited Cases
(Formerly 92k283)
The power to tax the exercise of a privilege is the

power to control or suppress its enjoyment. U.S.C.A.Const. Amends. 1, 14.

[8] Constitutional Law 92 ⇐4135

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)6 Taxation
92k4135 k. In General. Most Cited Cases
(Formerly 92k283)
A state may not impose a charge for the enjoyment of a right granted by the Federal Constitution. U.S.C.A.Const. Amends. 1, 14.

[9] Constitutional Law 92 ⇐1391

92 Constitutional Law
92XIII Freedom of Religion and Conscience
92XIII(B) Particular Issues and Applications
92k1390 Licenses
92k1391 k. In General. Most Cited Cases
(Formerly 92k274(2), 92k274)

Constitutional Law 92 ⇐1879

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(M) Soliciting, Canvassing, Pamphletting, Leafletting, and Fundraising
92k1879 k. Charities or Religious Organizations. Most Cited Cases
(Formerly 92k274(2), 92k274)

Constitutional Law 92 ⇐2079

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(U) Press in General
92k2079 k. Distribution of Materials in Public Places. Most Cited Cases
(Formerly 92k274(2), 92k274)
The fact that city ordinance requiring religious colporteurs to pay a license tax as a condition to the pursuit of their activities was nondiscriminatory did not render it constitutional, since the protection afforded by the Constitution is not so restricted and freedom of press, freedom of speech and freedom of religion are in a preferred position. U.S.C.A.Const. Amends. 1, 14.

[10] Constitutional Law 92 ⇐1391

92 Constitutional Law
92XIII Freedom of Religion and Conscience
92XIII(B) Particular Issues and Applications
92k1390 Licenses
92k1391 k. In General. Most Cited Cases
(Formerly 92k274(2), 92k274)

Constitutional Law 92 ⇐1879

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(M) Soliciting, Canvassing, Pamphletting, Leafletting, and Fundraising
92k1879 k. Charities or Religious Organizations. Most Cited Cases
(Formerly 92k274(2), 92k274)

Constitutional Law 92 ⇐2079

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(U) Press in General
92k2079 k. Distribution of Materials in Public Places. Most Cited Cases
(Formerly 92k274(2), 92k274)
City ordinance requiring colporteurs to pay a license tax as a condition to the pursuit of their activities violates Constitution guaranteeing " freedom of press", "freedom of speech" and " freedom of religion" where the fee is not a nominal one imposed as a regulatory measure and calculated to defray the expense of protecting those on the streets and at home against the abuse of solicitors. U.S.C.A.Const. Amends. 1, 14.

*106 Mr. Hayden C. Covington, of Brooklyn, N.Y.,

for petitioners.
Mr. Fred B. Trescher, of Greensburg, Pa., for respondent.
Mr. Justice DOUGLAS delivered the opinion of the Court.
The City of Jeannette, Pennsylvania, has an ordinance, some forty years old, which provides in part:

'That all persons canvassing for or soliciting within said Borough, orders for goods, paintings, pictures, wares, or merchandise of any kind, or persons delivering such articles under orders so obtained or solicited, shall be required to procure from the Burgess a license to transact said business**872 and shall pay to the Treasurer of said Borough therefore the following sums according to the time for which said license shall be granted.

'For one day $1.50, for one week seven dollars ($7.00), for two weeks twelve dollars ($12.00), for three weeks twenty dollars ($20.00), provided that the provisions of this ordinance shall not apply to persons selling by sample to manufacturers or licensed merchants or dealers doing business in said Borough of Jeannette.'

Petitioners are 'Jehovah's Witnesses'. They went about from door to door in the City of Jeannette distributing literature and soliciting people to ' purchase' certain religious books and pamphlets, all published by the *107 Watch Tower Bible & Tract Society.[FN1] The 'price' of the books was twenty-five cents each, the 'price' of the pamphlets five cents each. [FN2] In connection with these activities petitioners used a phonograph [FN3] on which they played a record expounding certain of their views on religion. None of them obtained a license under the ordinance. Before they were arrested each had made 'sales' of books. There was evidence that it was their practice in making these solicitations to request a 'contribution' of twenty-five cents each for the books and five cents each for the pamphlets but to accept lesser sums or even to donate the volumes in case an interested person was without funds. In the present case some donations of pamphlets were made when books were purchased. Petitioners were convicted and fined for violation of the ordinance. Their judgments of conviction were sustained by the Superior Court of Pennsylvania, 149 Pa.Super. 175, 27 A.2d 666, against their contention that the ordinance deprived them of the freedom of speech, press, and religion guaranteed by the First Amendment. Petitions for leave to appeal to the Supreme Court of Pennsylvania were denied. The cases are here on petitions for writs of certiorari which we granted along with the petitions for rehearing of Jones v. Opelika, 316 U.S. 584, 62 S.Ct. 1231, 86 L.Ed. 1691, 141 A.L.R. 514, and its companion cases.

FN1 Two religious books-Salvation and Creation-were sold. Others were offered in addition to the Bible. The Watch Tower Bible & Tract Society is alleged to be a non-profit charitable corporation.

FN2 Petitioners paid three cents each for the pamphlets and, if they devoted only their spare time to the work, twenty cents each for the books. Those devoting full time to the work acquired the books for five cents each. There was evidence that some of the petitioners paid the difference between the sales price and the cost of the books to their local congregations which distributed the literature.

FN3 Purchased along with the record from the Watch Tower Bible & Tract Society.

*108 [1] The First Amendment, which the Fourteenth makes applicable to the states, declares that 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press * * *.' It could hardly be denied that a tax laid specifically on the exercise of those freedoms would be unconstitutional. Yet the license tax imposed by this ordinance is in substance just that.

Petitioners spread their interpretations of the Bible and their religious beliefs largely through the hand distribution of literature by full or part time workers. [FN4] They claim to follow the example of Paul,

teaching 'publickly, and from house to house.' Acts 20:20. They take literally the mandate of the Scriptures, 'Go ye into all the world, and preach the gospel to every creature.' Mark 16:15. In doing so they believe that they are obeying a commandment of God.

FN4 The nature and extent of their activities throughout the world during the years 1939 and 1940 are to be found in the 1941 Yearbook of Jehovah's Witnesses, pp. 62-243.

The hand distribution of religious tracts is an age-old form of missionary evangelism-as old as the history of printing presses.[FN5] It has been a potent force in various religious movements down through the years.[FN6] This form of evangelism is utilized today on a large scale by various religious sects whose colporteurs carry the **873 Gospel to thousands*109 upon thousands of homes and seek through personal visitations to win adherents to their faith.[FN7] It is more than preaching; it is more than distribution of religious literature. It is a combination of both. Its purpose is as evangelical as the revival meeting. This form of religious activity occupies the same high estate under the First Amendment as do worship in the churches and preaching from the pulpits. It has the same claim to protection as the more orthodox and conventional exercises of religion. It also has the same claim as the others to the guarantees of freedom of speech and freedom of the press.

FN5 Palmer, The Printing Press and the Gospel (1912).

FN6 White, The Colporteur Evangelist (1930); Home Evangelization (1850); Edwards, The Romance of the Book (1932) c. V; 12 Biblical Repository (1944) Art. VIII; 16 The Sunday Magazine (1887) pp. 43-47; 3 Meliora (1861) pp. 311-319; Felice, Protestants of France (1853) pp. 53, 513; 3 D'Aubigne, History of The Reformation (1849) pp. 103, 152, 436-437; Report of Colportage in Virginia, North Carolina & South Carolina, American Tract Society (1855). An early type of colporteur was depicted by John Greenleaf Whittier in his legendary poem, The Vaudois Teacher. And see, Wylie, History of the Waldenses.

FN7 The General Conference of Seventh-Day Adventists who filed a brief amicus curiae on the reargument of Jones v. Opelika has given us the following data concerning their literature ministry: This denomination has 83 publishing houses throughout the world issuing publications in over 200 languages. Some 9,256 separate publications were issued in 1941. By printed and spoken word the Gospel is carried into 412 countries in 824 languages. 1942 Year Book, p. 287. During December 1941 a total of 1018 colporteurs operated in North America. They delivered during that month $97,997.19 worth of gospel literature and for the whole year of 1941 a total of $790,610.36-an average per person of about $65 per month. Some of these were students and temporary workers. Colporteurs of this denomination receive half of their collections from which they must pay their traveling and living expenses. Colporteurs are specially trained and their qualifications equal those of preachers. In the field each worker is under the supervision of a field missionary secretary to whom a weekly report is made. After fifteen years of continuous service each colporteur is entitled to the same pension as retired ministers. And see Howell, The Great Advent Movement (1935), pp. 72-75.

[2] The integrity of this conduct or behavior as a religious practice has not been challenged. Nor do we have presented any question as to the sincerity of petitioners in their religious beliefs and practices, however misguided they may be thought to be Moreover, we do not intimate or suggest in respecting their sincerity that any conduct can be made a religious rite and by the zeal of the

practitioners swept into the First Amendment. Reynolds v. *110 United States, 98 U.S. 145, 161, 167, 25 L.Ed. 244, and Davis v. Beason, 133 U.S. 333, 10 S.Ct. 299, 33 L.Ed. 637, denied any such claim to the practice of polygamy and bigamy. Other claims may well arise which deserve the same fate. We only hold that spreading one's religious beliefs or preaching the Gospel through distribution of religious literature and through personal visitations is an age-old type of evangelism with as high a claim to constitutional protection as the more orthodox types. The manner in which it is practiced at times gives rise to special problems with which the police power of the states is competent to deal. See for example Cox v. New Hampshire 312 U.S. 569, 61 S.Ct. 762, 85 L.Ed. 1049, 133 A.L.R. 1396, and Chaplinsky v. New Hampshire, 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031. But that merely illustrates that the rights with which we are dealing are not absolutes. Schneider v. State, 308 U.S. 147, 160, 161, 60 S.Ct. 146, 150, 84 L.Ed. 155. We are concerned, however, in these cases merely with one narrow issue. There is presented for decision no question whatsoever concerning punishment for any alleged unlawful acts during the solicitation. Nor is there involved here any question as to the validity of a registration system for colporteurs and other solicitors. The cases present a single issue-the constitutionality of an ordinance which as construed and applied requires religious colporteurs to pay a license tax as a condition to the pursuit of their activities.

[3][4][5][6] The alleged justification for the exaction of this license tax is the fact that the religious literature is distributed with a solicitation of funds. Thus it was stated**874 in Jones v. Opelika, supra, 316 U.S. at page 597, 62 S.Ct. at page 1239, 86 L.Ed. 1691, 141 A.L.R. 514, that when a religious sect uses 'ordinary commercial methods of sales of articles to raise propaganda funds', it is proper for the state to charge ' reasonable fees for the privilege of canvassing'. Situations will arise where it will be difficult to determine whether a particular activity is religious or purely commercial. The distinction at times is vital. As we stated only the other day in Jamison v. Texas, 318 U.S. 413, 63 S.Ct. 669, 672, 87 L.Ed. 869, 'The state can prohibit the use of the street for *111 the distribution of purely commercial leaflets, even though such leaflets may have 'a civil appeal, or a moral platitude' appended. Valentine v. Chrestensen, 316 U.S. 52, 55, 62 S.Ct. 920, 922, 86 L.Ed. 1262. They may not prohibit the distribution of handbills in the pursuit of a clearly religious activity merely because the handbills invite the purchase of books for the improved understanding of the religion or because the handbills seek in a lawful fashion to promote the raising of funds for religious purposes.' But the mere fact that the religious literature is 'sold' by itinerant preachers rather than 'donated' does not transform evangelism into a commercial enterprise. If it did, then the passing of the collection plate in church would make the church service a commercial project. The constitutional rights of those spreading their religious beliefs through the spoken and printed word are not to be gauged by standards governing retailers or wholesalers of books. The right to use the press for expressing one's views is not to be measured by the protection afforded commercial handbills. It should be remembered that the pamphlets of Thomas Paine were not distributed free of charge. It is plain that a religious organization needs funds to remain a going concern. But an itinerant evangelist however misguided or intolerant he may be, does not become a mere book agent by selling the Bible or religious tracts to help defray his expenses or to sustain him. Freedom of speech, freedom of the press, freedom of religion are available to all, not merely to those who can pay their own way. As we have said, the problem of drawing the line between a purely commercial activity and a religious one will at times be difficult. On this record it plainly cannot be said that petitioners were engaged in a commercial rather than a religious venture. It is a distortion of the facts of record to describe their activities as the occupation of selling books and pamphlets. And the Pennsylvania court did not rest the judgments of conviction on that basis, though it did find *112 that petitioners 'sold' the literature. The Supreme Court of Iowa in State v. Mead, 230 Iowa 1217, 300 N.W. 523, 524, described the selling activities of members of this same sect as 'merely incidental and collateral' to their 'main object which was to preach and publicize the doctrines of their order.' And see State v. Meredith, 197 S.C. 351, 15 S.E.2d

678; People v. Barber, 289 N.Y. 378, 385-386, 46 N.E.2d 329. That accurately summarizes the present record.

[7] We do not mean to say that religious groups and the press are free from all financial burdens of government. See Grosjean v. American Press Co., 297 U.S. 233, 250, 56 S.Ct. 444, 449, 80 L.Ed. 660. We have here something quite different, for example, from a tax on the income of one who engages in religious activities or a tax on property used or employed in connection with those activities. It is one thing to impose a tax on the income or property of a preacher. It is quite another thing to exact a tax from him for the privilege of delivering a sermon. The tax imposed by the City of Jeannette is a flat license tax, the payment of which is a condition of the exercise of these constitutional privileges. The power to tax the exercise of a privilege is the power to control or suppress its enjoyment. Magnano Co. v. Hamilton, 292 U.S. 40, 44, 45, 54 S.Ct. 599, 601, 78 L.Ed. 1109, and cases cited. Those who can tax the exercise of this religious practice can make its exercise so costly as to deprive it of the resources necessary for its maintenance. Those who can tax the privilege of engaging in this form of missionary evangelism can close its doors to all those who do not have a full purse. Spreading religious beliefs in this ancient and honorable manner would thus be denied the needy. Those who can deprive religious groups of their colporteurs can take from them a part of the vital power of the press which has survived from the Reformation.

**875 [8] It is contended, however, that the fact that the license tax can suppress or control this activity is unimportant*113 if it does not do so. But that is to disregard the nature of this tax. It is a license tax-a flat tax imposed on the exercise of a privilege granted by the Bill of Rights. A state may not impose a charge for the enjoyment of a right granted by the federal constitution. Thus, it may not exact a license tax for the privilege of carrying on interstate commerce (McGoldrick v. Berwind-White Co., 309 U.S. 33, 56-58, 60 S.Ct. 388, 397, 398, 84 L.Ed. 565, 128 A.L.R. 876), although it may tax the property used in, or the income derived from, that commerce, so long as those taxes are not discriminatory. Id., 309 U.S. at page 47, 60 S.Ct. at page 392, 84 L.Ed. 565, 128 A.L.R. 876 and cases cited. A license tax applied to activities guaranteed by the First Amendment would have the same destructive effect. It is true that the First Amendment, like the commerce clause, draws no distinction between license taxes, fixed sum taxes, and other kinds of taxes. But that is no reason why we should shut our eyes to the nature of the tax and its destructive influence. The power to impose a license tax on the exercise of these freedoms is indeed as potent as the power of censorship which this Court has repeatedly struck down. Lovell v. Griffin, 303 U.S. 444, 58 S.Ct. 666, 82 L.Ed. 949; Schneider v. State, supra; Cantwell v. Connecticut, 310 U.S. 296, 306, 60 S.Ct. 900, 904, 84 L.Ed. 1213, 128 A.L.R. 1352; Largent v. Texas, 318 U.S. 418, 63 S.Ct. 667, 87 L.Ed. 873; Jamison v. Texas, supra. It was for that reason that the dissenting opinions in Jones v. Opelika, supra, stressed the nature of this type of tax. 316 U.S. at pages 607-609, 620, 623, 62 S.Ct. at pages 1243, 1244, 1250, 1251, 86 L.Ed. 1691, 141 A.L.R. 514. In that case, as in the present ones, we have something very different from a registration system under which those going from house to house are required to give their names, addresses and other marks of identification to the authorities. In all of these cases the issuance of the permit or license is dependent on the payment of a license tax. And the license tax is fixed in amount and unrelated to the scope of the activities of petitioners or to their realized revenues. It is not a nominal fee *114 imposed as a regulatory measure to defray the expenses of policing the activities in question.[FN8] It is in no way apportioned. It is a flat license tax levied and collected as a condition to the pursuit of activities whose enjoyment is guaranteed by the First Amendment. Accordingly, it restrains in advance those constitutional liberties of press and religion and inevitably tends to suppress their exercise. That is almost uniformly recognized as the inherent vice and evil of this flat license tax. As stated by the Supreme Court of Illinois in a case involving this same sect and an ordinance similar to the present one, a person cannot be compelled 'to purchase, through a license fee or a license tax, the privilege freely granted by the constitution.'[FN9] Blue Island v. Kozul, 379 Ill.

511, 519, 41 N.E.2d 515, 519. So it may not be said that proof is lacking that these license taxes either separately or cumulatively have restricted or are likely to restrict petitioners' religious activities. On their face they are a restriction of the free exercise of those freedoms which are protected by the First Amendment.

FN8 The constitutional difference between such a regulatory measure and a tax on the exercise of a federal right has long been recognized. While a state may not exact a license tax for the privilege of carrying on interstate commerce (McGoldrick v. Berwind-White Co., supra, 309 U.S. at pages 56-58, 60 S.Ct. at pages 397, 398, 84 L.Ed. 565, 128 A.L.R. 876) it may, for example, exact a fee to defray the cost of purely local regulations in spite of the fact that those regulations incidentally affect commerce. 'So long as they do not impede the free flow of commerce and are not made the subject of regulation by Congress, they are not forbidden.' Clyde-Mallory Lines v. Alabama, 296 U.S. 261, 267, 56 S.Ct. 194, 196, 80 L.Ed. 215, and cases cited. And see Sough Carolina v. Barnwell Bros., Inc., 303 U.S. 177, 185-188, 625, 58 S.Ct. 510, 513-515, 82 L.Ed. 734.

FN9 That is the view of most state courts which have passed on the question. McConkey v. Fredericksburg, 179 Va. 556, 19 S.E.2d 682; State v. Greaves, 112 Vt. 222, 22 A.2d 497; People v. Banks, 168 Misc. 515, 6 N.Y.S.2d 41. Contra: Cook v. Harrison, 180 Ark. 546, 21 S.W.2d 966.

**876 The taxes imposed by this ordinance can hardly help but be as severe and telling in their impact on the freedom *115 of the press and religion as the 'taxes on knowledge' at which the First Amendment was partly aimed. Grosjean v. American Press Co., supra, 297 U.S. at pages 244-249, 56 S.Ct. at pages 446-449, 80 L.Ed. 660. They may indeed operate even more subtly. Itinerant evangelists moving throughout a state or from state to state would feel immediately the cumulative effect of such ordinances as they become fashionable. The way of the religious dissenter has long been hard. But if the formula of this type of ordinance is approved, a new device for the suppression of religious minorities will have been found. This method of disseminating religious beliefs can be crushed and closed out by the sheer weight of the toll or tribute which is exacted town by town, village by village. The spread of religious ideas through personal visitations by the literature ministry of numerous religious groups would be stopped.

[9] The fact that the ordinance is 'nondiscriminatory ' is immaterial. The protection afforded by the First Amendment is not so restricted. A license tax certainly does not acquire constitutional validity because it classifies the privileges protected by the First Amendment along with the wares and merchandise of hucksters and peddlers and treats them all alike. Such equality in treatment does not save the ordinance. Freedom of press, freedom of speech, freedom of religion are in a preferred position.

It is claimed, however, that the ultimate question in determining the constitutionality of this license tax is whether the state has given something for which it can ask a return. That principle has wide applicability. State Tax Commission v. Aldrich, 316 U.S. 174, 62 S.Ct. 1008, 86 L.Ed. 1358, 139 A.L.R. 1436, and cases cited. But it is quite irrelevant here. This tax is not a charge for the enjoyment of a privilege or benefit bestowed by the state. The privilege in question exists apart from state authority. It is guaranteed the people by the federal constitution.

[10] Considerable emphasis is placed on the kind of literature which petitioners were distributing-its provocative, *116 abusive, and ill-mannered character and the assault which it makes on our established churches and the cherished faiths of many of us. See Douglas v. City of Jeannette, 319 U.S. 157, 63 S.Ct. 877, 87 L.Ed. 1324, concurring opinion, decided this day. But those considerations are no justification for the license tax which the

ordinance imposes. Plainly a community may not suppress, or the state tax, the dissemination of views because they are unpopular, annoying or distasteful. If that device were ever sanctioned, there would have been forged a ready instrument for the suppression of the faith which any minority cherishes but which does not happen to be in favor. That would be a complete repudiation of the philosophy of the Bill of Rights.

Jehovah's Witnesses are not 'above the law'. But the present ordinance is not directed to the problems with which the police power of the state is free to deal. It does not cover, and petitioners are not charged with, breaches of the peace. They are pursuing their solicitations peacefully and quietly. Petitioners, moreover, are not charged with or prosecuted for the use of language which is obscene, abusive, or which incites retaliation. Cf. Chaplinsky v. New Hampshire, supra. Nor do we have here, as we did in Cox v. New Hampshire, supra, and Chaplinsky v. New Hampshire, supra, state regulation of the streets to protect and insure the safety, comfort, or convenience of the public. Furthermore, the present ordinance is not narrowly drawn to safeguard the people of the community in their homes against the evils of solicitations. See Cantwell v. Connecticut, supra, 310 U.S. at 306, 60 S.Ct. at page 904, 84 L.Ed. 1213, 128 A.L.R. 1352. As we have said, it is not merely a registration ordinance calling for an identification of the solicitors so as to give the authorities some basis for investigating strangers coming into the community. And the fee is not a nominal one, imposed as a regulatory measure and calculated to defray the expense of protecting those on the streets and at home against the abuses of solicitors. See Cox v. New Hampshire,*117 supra, 312 U.S. at pages 576, 577, 61 S.Ct. at pages 765, 766, 85 L.Ed. 1049, 133 A.L.R. 1396. Nor can the present ordinance strued to apply only to solicitation from survive if we assume that it has been con-**877 house to house.[FN10] The ordinance is not narrowly drawn to prevent or control abuses or evils arising from that activity. Rather, it sets aside the residential areas as a prohibited zone, entry of which is denied petitioners unless the tax is paid. That restraint and one which is city wide in scope (Jones v. Opelika) are different only in degree. Each is an abridgment of freedom of press and a restraint on the free exercise of religion. They stand or fall together.

FN10 The Pennsylvania Superior Court stated that the ordinance has been ' enforced' only to prevent petitioners from canvassing 'from door to door and house to house' without a license and not to prevent them from distributing their literature on the streets. 149 Pa.Super. at page 184, 27 A.2d at page 670.

The judgment in Jones v. Opelika has this day been vacated. Freed from that controlling precedent, we can restore to their high, constitutional position the liberties of itinerant evangelists who disseminate their religious beliefs and the tenets of their faith through distribution of literature. The judgments are reversed and the causes are remanded to the Pennsylvania Superior Court for proceedings not inconsistent with this opinion.

Reversed.

The dissenting opinions of Mr. Justice REED and Mr. Justice FRANKFURTER in Jones v. City of Opelika, 63 S.Ct. at page 891 cover these cases also.
For dissenting opinion of Mr. Justice JACKSON, see 63 S.Ct. 882.
U.S. 1943.
Murdock v. Com. of Pennsylvania
319 U.S. 105, 63 S.Ct. 870, 146 A.L.R. 81, 87 L.Ed. 1292

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461 U.S. 540, 103 S.Ct. 1997, 76 L.Ed.2d 129, 51 A.F.T.R.2d 83-1294, 83-1 USTC P 9365, 1983-2 C.B. 90
(Cite as: 461 U.S. 540, 103 S.Ct. 1997)

Regan v. Taxation With Representation of Washington
U.S.Dist.Col.,1983.

Supreme Court of the United States
Donald T. REGAN, Secretary of the Treasury, et al., Appellants,
v.
TAXATION WITH REPRESENTATION OF WASHINGTON.
TAXATION WITH REPRESENTATION OF WASHINGTON, Appellant,
v.
Donald T. REGAN, Secretary of the Treasury, et al.
Nos. 81-2338, 82-134.

Argued March 22, 1983.
Decided May 23, 1983.[FN*]

FN* Together with No. 82-134, *Taxation With Representation of Washington v. Regan, Secretary of the Treasury, et al.*, also on appeal from the same court.

Suit was brought by nonprofit organization seeking a declaratory judgment that it qualified for tax exempt status after its application was denied by Internal Revenue Service because it appeared that substantial part of its activities would consist of attempting to influence legislation. The United States District Court for the District of Columbia granted summary judgment for defendants, and plaintiff appealed. The Court of Appeals for the District of Columbia Circuit, 676 F.2d 715, reversed, and cross appeals were taken. The Supreme Court, Justice Rehnquist, held that: (1) internal revenue statute which grants tax exemption for certain nonprofit organizations that do not engage in substantial lobbying activities does not violate the First Amendment, and (2) tax exemption statute does not violate the equal protection component of the Fifth Amendment since it was rational for Congress to decide that, even though it would not subsidize substantial lobbying by charities generally, it would subsidize lobbying by veterans' organizations.

Reversed.

Justice Blackmun filed a concurring opinion in which Justice Brennan and Justice Marshall joined.

West Headnotes

[1] Constitutional Law 92 ⇐1721

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(F) Politics and Elections
92k1721 k. Lobbying. Most Cited Cases
(Formerly 92k90.1(1))

Internal Revenue 220 ⇐4046

220 Internal Revenue
220V Income Taxes
220V(W) Exempt Organizations
220k4046 k. Constitutional and Statutory Provisions. Most Cited Cases
Congress in granting tax exemption to certain nonprofit organizations that did not engage in substantial lobbying activities simply chose not to pay for nonprofit corporation's lobbying and did not regulate any First Amendment activity, and thus Internal Revenue Code exemption provision did not violate the First Amendment. 26 U.S.C.A. § 501(c)(3); U.S.C.A. Const.Amend. 1.

[2] Constitutional Law 92 ⇐3051

92 Constitutional Law
92XXVI Equal Protection
92XXVI(A) In General
92XXVI(A)6 Levels of Scrutiny
92k3051 k. Differing Levels Set Forth or Compared. Most Cited Cases
(Formerly 92k213.1(2))

Generally, statutory classifications are valid if they bear a rational relation to legitimate governmental purpose but statutes are subjected to higher level of scrutiny if they interfere with exercise of fundamental right, such as freedom of speech, or employ suspect classification, such as race. U.S.C.A. Const.Amend. 5.

[3] Internal Revenue 220 ⇐3022

220 Internal Revenue
220I Nature and Extent of Taxing Power in General
220I(C) Validity of Statutes in General
220k3022 k. Equality and Uniformity of Taxes. Most Cited Cases
Legislatures have especially broad latitude in creating classifications and distinctions in tax statutes.

[4] Constitutional Law 92 ⇐3067

92 Constitutional Law
92XXVI Equal Protection
92XXVI(A) In General
92XXVI(A)6 Levels of Scrutiny
92k3063 Particular Rights
92k3067 k. Privacy, Travel, Speech, and Association. Most Cited Cases
(Formerly 92k229.2)

Constitutional Law 92 ⇐3573

92 Constitutional Law
92XXVI Equal Protection
92XXVI(E) Particular Issues and Applications
92XXVI(E)6 Taxation
92k3571 Income Taxes
92k3573 k. Exemptions. Most Cited Cases
(Formerly 92k229.2)
Internal Revenue Code provision granting tax exemption to certain nonprofit organizations that do not engage in substantial lobbying activities was not intended to suppress any ideas nor was there any demonstration that it had that effect, and thus statutory provision did not employ any suspect classification that warranted higher level of scrutiny to determine whether prohibition against substantial lobbying was invalid under equal protection component of Fifth Amendment than determination whether it had rational relation to legitimate governmental purpose. 26 U.S.C.A. § 501(c)(3); U.S.C.A. Const.Amend. 5.

[5] Constitutional Law 92 ⇐2500

92 Constitutional Law
92XX Separation of Powers
92XX(C) Judicial Powers and Functions
92XX(C)2 Encroachment on Legislature
92k2499 Particular Issues and Applications
92k2500 k. In General. Most Cited Cases
(Formerly 92k70.3(3))

Constitutional Law 92 ⇐3067

92 Constitutional Law
92XXVI Equal Protection
92XXVI(A) In General
92XXVI(A)6 Levels of Scrutiny
92k3063 Particular Rights
92k3067 k. Privacy, Travel, Speech, and Association. Most Cited Cases
(Formerly 92k213.1(1))
Strict scrutiny of statute in equal protection case does not apply whenever Congress subsidizes some but not all speech but, rather, congressional selection of particular entities or persons for entitlement to its largesse is matter of policy and discretion not generally open to judicial review. U.S.C.A. Const.Amends. 1, 5.

[6] Constitutional Law 92 ⇐3062

92 Constitutional Law
92XXVI Equal Protection
92XXVI(A) In General
92XXVI(A)6 Levels of Scrutiny
92k3059 Heightened Levels of Scrutiny
92k3062 k. Strict Scrutiny and Compelling Interest in General. Most Cited Cases
(Formerly 92k213.1(1))
Legislature's decision not to subsidize exercise of fundamental right does not infringe right, and thus

is not subject to strict scrutiny in an equal protection case. U.S.C.A. Const.Amend. 5.

[7] Constitutional Law 92 ⇐3573

92 Constitutional Law
92XXVI Equal Protection
92XXVI(E) Particular Issues and Applications
92XXVI(E)6 Taxation
92k3571 Income Taxes
92k3573 k. Exemptions. Most Cited Cases
(Formerly 92k229.2)

Internal Revenue 220 ⇐4046

220 Internal Revenue
220V Income Taxes
220V(W) Exempt Organizations
220k4046 k. Constitutional and Statutory Provisions. Most Cited Cases
It was rational for Congress, which had authority to determine whether advantage public would receive from additional lobbying by charities was worth money public would pay to subsidize that lobbying and other disadvantages that might accompany lobbying, to decide that tax exempt charities should not benefit at expense of taxpayers at large by obtaining further subsidy for lobbying, and thus internal revenue tax exemption for nonprofit organizations which do not engage in substantial lobbying did not violate the equal protection component of the Fifth Amendment. 26 U.S.C.A. § 501(c)(3); U.S.C.A. Const.Amend. 5.

[8] Constitutional Law 92 ⇐4149

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)6 Taxation
92k4149 k. Federal Taxes; Internal Revenue. Most Cited Cases
(Formerly 92k286)
It was rational for Congress to decide that, even though it would not subsidize substantial lobbying by charities generally, it would subsidize lobbying by veterans organizations in light of legitimate long-standing policy of compensating veterans for their past contributions by providing them with numerous advantages. 26 U.S.C.A. § 501(c)(3); U.S.C.A. Const.Amend. 5.

540 **1998 Syllabus* FN

FN** The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

Section 501(c)(3) of the Internal Revenue Code of 1954 (Code) grants tax exemption to certain nonprofit organizations "no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation." Section 170(c)(2) permits taxpayers who contribute to § 501(c)(3) organizations to deduct the amount of their contributions on their federal income tax returns. Section 501(c)(4) grants tax-exempt status to certain nonprofit organizations but contributions to these organizations are not deductible. Taxation With Representation of Washington (TWR) is a nonprofit corporation organized to promote its view of the "public interest" in the area of federal taxation; it was formed to take over the operation of two other nonprofit organizations, one of which had tax-exempt status under § 501(c)(3) and the other under § 501(c)(4). The Internal Revenue Service denied TWR's application for tax-exempt status under § 501(c)(3), because it appeared that a substantial part of TWR's activities would consist of attempting to influence legislation. TWR then brought suit in Federal District Court against the Commissioner of Internal Revenue, the Secretary of the Treasury, and the United States, claiming that § 501(c)(3)' s prohibition against substantial lobbying is unconstitutional under the First Amendment by imposing an "unconstitutional burden" on the receipt of tax-deductible contributions, and is also unconstitutional under the equal protection component of the Fifth Amendment's Due Process Clause because the Code permits taxpayers to deduct contributions to veterans' organizations that qualify for tax exemption under § 501(c)(19). The District Court granted summary judgment for the

defendants, but the Court of Appeals reversed, holding that § 501(c)(3) does not violate the First Amendment but does violate the Fifth Amendment.

Held:

1. Section 501(c)(3) does not violate the First Amendment. Congress has not infringed any First Amendment rights or regulated any First *541 Amendment activity but has simply chosen not to subsidize TWR's lobbying out of public funds. *Cammarano v. United States,* 358 U.S. 498, 79 S.Ct. 524, 3 L.Ed.2d 462. Pp. 2001-2002.

2. Nor does § 501(c)(3) violate the equal protection component of the Fifth Amendment. The sections of the Code at **1999 issue do not employ any suspect classification. A legislature's decision not to subsidize the exercise of a fundamental right does not infringe that right and thus is not subject to strict scrutiny. It was not irrational for Congress to decide that tax-exempt organizations such as TWR should not further benefit at the expense of taxpayers at large by obtaining a further subsidy for lobbying. Nor was it irrational for Congress to decide that, even though it will not subsidize lobbying by charities generally, it will subsidize lobbying by veterans' organizations. Pp. 2002-2004.

219 U.S.App.D.C. 117, 676 F.2d 715, reversed.

Solicitor General Lee argued the cause for appellants in No. 81-2338. With him on the briefs were *Assistant Attorney General Archer, Deputy Solicitor Wallace, Stuart A. Smith, Richard Farber,* and *Robert S. Pomerance.*

John Cary Sims argued the cause for appellee in No. 81-2338. With him on the brief were *Alan B. Morrison* and *Thomas F. Field.*†

† Briefs of *amici curiae* urging reversal were filed by *Sheldon S. Cohen, Julie Noel Gilbert, Dennis B. Draplkin, George H. Gangwere,* and *Wilmer S. Schantz, Jr.*, for the Veteran of Foreign Wars of the United States; by *Joseph C. Zengerle* and *Zachary R. Karol* for the Disabled American Veterans et al.; and by *Mitchell Rogovin* and *George T. Frampton, Jr.*, for the American Legion.

Thomas A. Troyer, H. David Rosenbloom, Albert G. Lauber, Jr., and *John G. Milliken* filed a brief for the American Association of Museums et al. as *amici curiae* urging affirmance.

Justice REHNQUIST delivered the opinion of the Court.

Appellee Taxation With Representation of Washington (TWR) is a nonprofit corporation organized to promote what it conceives to be the "public interest" in the area of federal *542 taxation. It proposes to advocate its point of view before Congress, the Executive Branch, and the Judiciary.

This case began when TWR applied for tax exempt status under § 501(c)(3) of the Internal Revenue Code, 26 U.S.C. § 501(c)(3). The Internal Revenue Service denied the application because it appeared that a substantial part of TWR's activities would consist of attempting to influence legislation, which is not permitted by § 501(c)(3).[FN1]

FN1. Section 501(c)(3) grants exemption to:

"Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition ..., or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, *no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation* (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office." (emphasis supplied).

TWR then brought this suit in District Court against the appellants, the Commissioner of Internal Revenue, the Secretary of the Treasury, and the United States, seeking a declaratory judgment that it qualifies for the exemption granted by § 501(c)(3).

It claimed the prohibition against substantial lobbying is unconstitutional under the First Amendment and the equal protection component of the Fifth Amendment's Due Process Clause.[FN2] The District Court granted summary judgment for appellants. On appeal, the *en banc* Court of Appeals for the District of Columbia Circuit reversed, holding that § 501(c)(3) does not violate the First Amendment but does violate the Fifth Amendment. 219 U.S.App.D.C. 117, 676 F.2d 715 (CADC 1982). Appellants appealed pursuant to 28 U.S.C. § 1252, and TWR cross-*543 appealed. We noted probable jurisdiction of the appeal, 459 U.S. 819, 103 S.Ct. 47, 74 L.Ed.2d 55 (1982).[FN3]

FN2. The Due Process Clause imposes on the Federal Government requirements comparable to those that the Equal Protection Clause of the Fourteenth Amendment imposes on the states. *E.g., Schweiker v. Wilson,* 450 U.S. 221, 226 n. 6, 101 S.Ct. 1074, 1079, n. 6, 67 L.Ed.2d 186 (1981).

FN3. Appellants contend that we lack jurisdiction of the cross-appeal because 28 U.S.C. § 1252 refers only to appeals, and this Court's Rule 12.4 only establishes a procedure for taking a cross-appeal. Section 1252 provides:
"*Any party* may appeal to the Supreme Court from an interlocutory or final judgment, decree or order of any court of the United States ... holding an Act of Congress unconstitutional in any civil action ... to which the United States or any of its agencies ... is a party." (emphasis supplied). This language is broad enough to encompass appellee's cross-appeal. We hold that it does. Therefore, we deny the appellants' motion to dismiss, and decide the cross-appeal together with the appeal.

TWR was formed to take over the operations of two other non-profit corporations. **2000 One, Taxation With Representation Fund, was organized to promote TWR's goals by publishing a journal and engaging in litigation; it had tax exempt status under § 501(c)(3). The other, Taxation With Representation, attempted to promote the same goals by influencing legislation; it had tax exempt status under § 501(c)(4).[FN4] Neither predecessor organization was required to pay federal income taxes. For purposes of our analysis, there are two principal differences between § 501(c)(3) organizations and § 501(c)(4) organizations. Taxpayers who contribute to § 501(c)(3) organizations are permitted by § 170(c)(2) to deduct the amount of their contributions on their federal income tax returns, while contributions to § 501(c)(4) organizations are not deductible. Section 501(c)(4) organizations, but not § 501(c)(3) organizations, are permitted to engage in substantial lobbying to advance their exempt purposes.

FN4. Unless otherwise indicated, all citations to statutes in this opinion refer to the Internal Revenue Code, 26 U.S.C. Section 501(c)(4) grants exemption to:
"Civic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare, ... and the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes."

In this case, TWR is attacking the prohibition against substantial lobbying in § 501(c)(3) because it wants to use tax-*544 deductible contributions to support substantial lobbying activities. To evaluate TWR's claims, it is necessary to understand the effect of the tax exemption system enacted by Congress.

Both tax exemptions and tax-deductibility are a form of subsidy that is administered through the tax system. A tax exemption has much the same effect as a cash grant to the organization of the amount of tax it would have to pay on its income. Deductible contributions are similar to cash grants of the amount of a portion of the individual's contributions.[FN5] The system Congress has enacted provides this kind of subsidy to non profit civic welfare organizations generally, and an additional subsidy to those charitable organizations that do not engage in substantial lobbying. In short, Congress chose

not to subsidize lobbying as extensively as it chose to subsidize other activities that non profit organizations undertake to promote the public welfare.

FN5. In stating that exemptions and deductions, on one hand, are like cash subsidies, on the other, we of course do not mean to assert that they are in all respects identical. See, *e.g., Walz v. Tax Commission,* 397 U.S. 664, 674-676, 90 S.Ct. 1409, 1414-1415, 25 L.Ed.2d 697 (1970); *id.,* at 690-691, 90 S.Ct., at 1422 (Brennan, J., concurring); *id.,* at 699, 90 S.Ct., at 1427 (opinion of Harlan, J.).

It appears that TWR could still qualify for a tax exemption under § 501(c)(4). It also appears that TWR can obtain tax deductible contributions for its non-lobbying activity by returning to the dual structure it used in the past, with a § 501(c)(3) organization for non-lobbying activities and a § 501(c)(4) organization for lobbying. TWR would, of course, have to ensure that the § 501(c)(3) organization did not subsidize the § 501(c)(4) organization; otherwise, public funds might be spent on an activity Congress chose not to subsidize. FN6

FN6. TWR and some *amici* are concerned that the IRS may impose stringent requirements that are unrelated to the congressional purpose of ensuring that no tax-deductible contributions are used to pay for substantial lobbying, and effectively make it impossible for a § 501(c)(3) organization to establish a § 501(c)(4) lobbying affiliate. No such requirement in the code of regulations has been called to our attention, nor have we been able to discover one. The IRS apparently requires only that the two groups be separately incorporated and keep records adequate to show that tax deductible contributions are not used to pay for lobbying. This is not unduly burdensome.

We also note that TWR did not bring this suit because it was unable to operate with the dual structure and seeks a less stringent set of bookkeeping requirements. Rather, TWR seeks to force Congress to subsidize its lobbying activity. See Tr. of Oral Arg. 37-39.

[1] *545 TWR contends that Congress' decision not to subsidize its lobbying violates the First Amendment. It claims, relying on **2001*Speiser v. Randall,* 357 U.S. 513, 78 S.Ct. 1332, 2 L.Ed.2d 1460 (1958), that the prohibition against substantial lobbying by § 501(c)(3) organizations imposes an "unconstitutional condition" on the receipt of tax-deductible contributions. In *Speiser,* California established a rule requiring anyone who sought to take advantage of a property tax exemption to sign a declaration stating that he did not advocate the forcible overthrow of the Government of the United States. This Court stated that "[t]o deny an exemption to claimants who engage in speech is in effect to penalize them for the same speech." *Id.,* at 518, 78 S.Ct., at 1338.

TWR is certainly correct when it states that we have held that the government may not deny a benefit to a person because he exercises a constitutional right. See *Perry v. Sindermann,* 408 U.S. 593, 597, 92 S.Ct. 2694, 2697, 33 L.Ed.2d 570 (1972). But TWR is just as certainly incorrect when it claims that this case fits the *Speiser-Perry* model. The Code does not deny TWR the right to receive deductible contributions to support its non-lobbying activity, nor does it deny TWR any independent benefit on account of its intention to lobby. Congress has merely refused to pay for the lobbying out of public monies. This Court has never held that the Court must grant a benefit such as TWR claims here to a person who wishes to exercise a constitutional right.

*546 This aspect of the case is controlled by *Cammarano v. United States,* 358 U.S. 498, 79 S.Ct. 524, 3 L.Ed.2d 462 (1959), in which we upheld a Treasury Regulation that denied business expense deductions for lobbying activities. We held that Congress is not required by the First Amendment to subsidize lobbying. *Id.,* at 513, 79

S.Ct., at 533. In this case, like in *Cammarano,* Congress has not infringed any First Amendment rights or regulated any First Amendment activity. Congress has simply chosen not to pay for TWR's lobbying. We again reject the "notion that First Amendment rights are somehow not fully realized unless they are subsidized by the State." *Id.,* at 515, 79 S.Ct., at 534 (Douglas, J., concurring).[FN7]

FN7. *Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley,* 454 U.S. 290, 102 S.Ct. 434, 70 L.Ed.2d 492 (1981), upon which TWR relies, is not to the contrary. In that case the challenged ordinance regulated First Amendment activity by limiting individuals' expenditures of their own money on political speech.
TWR contends that Congress has overruled *Cammarano* by enacting § 162(e), which permits businesses to deduct certain lobbying expenses that are " ordinary and necessary [business] expenses. " See Brief for Appellee 13. It is elementary that Congress' decision to permit deductions does not affect this Court's holding that refusing to permit them does not violate the Constitution.

TWR also contends that the equal protection component of the Fifth Amendment renders the prohibition against substantial lobbying invalid. TWR points out that § 170(c)(3) permits taxpayers to deduct contributions to veterans' organizations that qualify for tax exemption under § 501(c)(19). Qualifying veterans' organizations are permitted to lobby as much as they want in furtherance of their exempt purposes.[FN8] *547 TWR argues that because Congress has chosen to subsidize the substantial lobbying activities of veterans' organizations, it must also subsidize the lobbying of § 501(c)(3) organizations.

FN8. The rules governing deductibility of contributions to veterans' organizations are not the same as the analogous rules for § 501(c)(3) organizations. For example, an individual may generally deduct up to 50% of his adjusted gross income in contributions to § 501(c)(3) organizations, but only 20% in contributions to veterans' organizations. *Compare* § 170(b)(1)(A) *with* § 170(b)(1)(B). Taxpayers are permitted to carry over excess contributions to § 501(c)(3) organizations, but not veterans' organizations, to the next year. § 170(d). There are other differences. If it were entitled to equal treatment with veterans' organizations, TWR would, of course, be entitled only to the benefits they receive, not to more.

[2][3] Generally, statutory classifications are valid if they bear a rational relation to a legitimate governmental purpose. Statutes are subjected to a higher level of scrutiny if they interfere with the exercise **2002 of a fundamental right, such as freedom of speech, or employ a suspect classification, such as race. *E.g., Harris v. McRae,* 448 U.S. 297, 322, 100 S.Ct. 2671, 2690, 65 L.Ed.2d 784 (1980). Legislatures have especially broad latitude in creating classifications and distinctions in tax statutes. More than forty years ago we addressed these comments to an equal protection challenge to tax legislation:
"The broad discretion as to classification possessed by a legislature in the field of taxation has long been recognized.... The passage of time has only served to underscore the wisdom of that recognition of the large area of discretion which is needed by a legislature in formulating sound tax policies. Traditionally classification has been a device for fitting tax programs to local needs and usages in order to achieve an equitable distribution of the tax burden. It has, because of this, been pointed out that in taxation, even more than in other fields, legislatures possess the greatest freedom in classification. Since the members of a legislature necessarily enjoy a familiarity with local conditions which this Court cannot have, 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. The burden is *548 on the one attacking the legislative arrangement to negative every conceivable basis which might

support it." *Madden v. Kentucky,* 309 U.S. 83, 87-88, 60 S.Ct. 406, 407-408, 84 L.Ed. 590 (1940) (footnotes omitted).

See also *San Antonio School District v. Rodriguez,* 411 U.S. 1, 40-41, 93 S.Ct. 1278, 1300-1301, 36 L.Ed.2d 16 (1973); *Lehnhausen v. Lake Shore Auto Parts Co.,* 410 U.S. 356, 359-360, 93 S.Ct. 1001, 1003-1004, 35 L.Ed.2d 351 (1973).

[4] We have already explained why we conclude that Congress has not violated TWR's First Amendment rights by declining to subsidize its First Amendment activities. The case would be different if Congress were to discriminate invidiously in its subsidies in such a way as to " 'aim[ ] at the suppression of dangerous ideas.' " *Cammarano, supra,* 358 U.S., at 513, 79 S.Ct., at 533, quoting *Speiser, supra,* at 519, 78 S.Ct., at 1338. But the veterans' organizations that qualify under § 501(c)(19) are entitled to receive tax-deductible contributions regardless of the content of any speech they may use, including lobbying. We find no indication that the statute was intended to suppress any ideas or any demonstration that it has had that effect. The sections of the Internal Revenue Code here at issue do not employ any suspect classification. The distinction between veterans' organizations and other charitable organizations is not at all like distinctions based on race or national origin.

[5] The Court of Appeals nonetheless held that " strict scrutiny" is required because the statute " *affect[s]* First Amendment rights on a discriminatory basis." 219 U.S.App.D.C., at ---, 676 F.2d, at 728 (emphasis supplied). Its opinion suggests that strict scrutiny applies whenever Congress subsidizes some speech, but not all speech. This is not the law. Congress could, for example, grant funds to an organization dedicated to combatting teenage drug abuse, but condition the grant by providing that none of the money received from Congress should be used to lobby state legislatures. Under *Cammarano,* such a statute would be valid. Congress might also enact a statute providing public money *549 for an organization dedicated to combatting teenage alcohol abuse, and impose no condition against using funds obtained from Congress for lobbying. The existence of the second statute would not make the first statute subject to strict scrutiny.

Congressional selection of particular entities or persons for entitlement to this sort of largesse "is obviously a matter of policy and discretion not open to judicial review unless in circumstances which here we are **2003 not able to find. *United States v. Realty Co.,* [163 U.S. 427,] 444 [16 S.Ct. 1120, 1127, 41 L.Ed. 215] [(1896)]." *Cincinnati Soap Co. v. United States,* 301 U.S. 308, 317, 57 S.Ct. 764, 768, 81 L.Ed. 1122 (1937). See also, *id.,* at 313, 57 S.Ct., at 766; *Alabama v. Texas,* 347 U.S. 272, 74 S.Ct. 481, 98 L.Ed. 689 (1954). For the purposes of this case appropriations are comparable to tax exemptions and deductions, which are also "a matter of grace [that] Congress can, of course, disallow ... as it chooses." *Commissioner v. Sullivan,* 356 U.S. 27, 78 S.Ct. 512, 2 L.Ed.2d 559 (1958).

[6] These are scarcely novel principles. We have held in several contexts 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. *Buckley v. Valeo,* 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976), upheld a statute that provides federal funds for candidates for public office who enter primary campaigns, but does not provide funds for candidates who do not run in party primaries. We rejected First Amendment and equal protection challenges to this provision without applying strict scrutiny. *Id.,* at 93-108, 96 S.Ct., at 670-677. *Harris v. McRae,* 448 U.S. 297, 100 S.Ct. 2671, 65 L.Ed.2d 784 (1980), and *Maher v. Roe,* 432 U.S. 464, 97 S.Ct. 2376, 53 L.Ed.2d 484 (1977), considered legislative decisions not to subsidize abortions, even though other medical procedures were subsidized. We declined to apply strict scrutiny and rejected equal protection challenges to the statutes.

The reasoning of these decisions is simple: " although government may not place obstacles in the path of a [person's] exercise of ... freedom of [speech], it need not remove those *550 not of its own creation." *Harris, supra,* 448 U.S., at 316, 100 S.Ct., at 2688. Although TWR does not have

as much money as it wants, and thus cannot exercise its freedom of speech as much as it would like, the Constitution "does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom." *Id.*, at 318, 100 S.Ct., at 2688. As we said in *Maher*, "[c]onstitutional concerns are greatest when the State attempts to impose its will by force of law...." 432 U.S., at 476, 97 S.Ct., at 2383. Where governmental provision of subsidies is not "aimed at the suppression of dangerous ideas," *Cammarano, supra*, 358 U.S., at 513, 79 S.Ct., at 533, its "power to encourage actions deemed to be in the public interest is necessarily far broader." *Maher, supra*, at 476, 97 S.Ct., at 2383.

[7] We have no doubt but that this statute is within Congress' broad power in this area. TWR contends that § 501(c)(3) organizations could better advance their charitable purposes if they were permitted to engage in substantial lobbying. This may well be true. But Congress-not TWR or this Court-has the authority to determine whether the advantage the public would receive from additional lobbying by charities is worth the money the public would pay to subsidize that lobbying, and other disadvantages that might accompany that lobbying. It appears that Congress was concerned that exempt organizations might use tax-deductible contributions to lobby to promote the private interests of their members. See 78 Cong.Rec. 5861 (1934) (remarks of Senator Reed); *Id.*, at 5959 (remarks of Senator La Follette). It is not irrational for Congress to decide that tax exempt charities such as TWR should not further benefit at the expense of taxpayers at large by obtaining a further subsidy for lobbying.

[8] It is also not irrational for Congress to decide that, even though it will not subsidize substantial lobbying by charities generally, it will subsidize lobbying by veterans' organizations. Veterans have "been obliged to drop their own affairs and take up the burdens of the nation," *Boone v. Lightner*, 319 *551 U.S. 561, 575, 63 S.Ct. 1223, 1231, 87 L.Ed. 1587 (1943), "subjecting themselves to the mental and physical hazards as well as the economic and family detriments which are peculiar to military service and which do not exist in normal civil life." **2004*Johnson v. Robison*, 415 U.S. 361, 380, 94 S.Ct. 1160, 1172, 39 L.Ed.2d 389 (1974). Our country has a long standing policy of compensating veterans for their past contributions by providing them with numerous advantages.[FN9] This policy has "always been deemed to be legitimate." *Personnel Administrator v. Feeney*, 442 U.S. 256, 279, n. 25, 99 S.Ct. 2282, 2296, n. 25, 60 L.Ed.2d 870 (1979).

FN9. See, *e.g.*, *Personnel Administrator v. Feeney*, 442 U.S. 256, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1979) (veterans' preference in Civil Service employment); *Johnson v. Robison*, 415 U.S. 361, 94 S.Ct. 1160, 39 L.Ed.2d 389 (1974) (educational benefits).

The issue in this case is not whether TWR must be permitted to lobby, but whether Congress is required to provide it with public money with which to lobby. For the reasons stated above, we hold that it is not. Accordingly, the judgment of the Court of Appeals is

Reversed.

Justice BLACKMUN, with whom Justice BRENNAN and Justice MARSHALL join, concurring.

I join the Court's opinion. Because 26 U.S.C. § 501 's discrimination between veterans' organizations and charitable organizations is not based on the content of their speech, *ante*, at 2002, I agree with the Court that § 501 does not deny charitable organizations equal protection of the law. The benefit provided to veterans' organizations is rationally based on the Nation's time-honored policy of "compensating veterans for their past contributions." *Ante*, at 2004. As the Court says, *ante*, at 2002 and 2003, a statute designed to discourage the expression of particular views would present a very different question.

I also agree that the First Amendment does not require the Government to subsidize protected activity, *ante*, at 2001, *552 and that this principle controls disposition of TWR's First Amendment claim. I write separately to make clear that in my view the result under the First Amendment depends

entirely upon the Court's necessary assumption-which I share-about the manner in which the Internal Revenue Service administers § 501.

If viewed in isolation, the lobbying restriction contained in § 501(c)(3) violates the principle, reaffirmed today, *ante,* at 2001, "that the Government may not deny a benefit to a person because he exercises a constitutional right." Section 501(c)(3) does not merely deny a subsidy for lobbying activities, see *Cammarano v. United States,* 358 U.S. 498, 79 S.Ct. 524, 3 L.Ed.2d 462 (1959); it deprives an otherwise eligible organization of its tax-exempt status and its eligibility to receive tax-deductible contributions for all its activities, whenever one of those activities is " substantial lobbying." Because lobbying is protected by the First Amendment, *Eastern Railroad Presidents Conf. v. Noerr Motor Freight, Inc.,* 365 U.S. 127, 137-138, 81 S.Ct. 523, 529-530, 5 L.Ed.2d 464 (1961), § 501(c)(3) therefore denies a significant benefit to organizations choosing to exercise their constitutional rights.[FN*]

FN* See *Speiser v. Randall,* 357 U.S. 513, 518-519, 78 S.Ct. 1332, 1338, 2 L.Ed.2d 1460 (1958); *Cammarano v. United States,* 358 U.S. 498, 515, 79 S.Ct. 524, 534, 3 L.Ed.2d 462 (Douglas, J., concurring) (denial of business-expense deduction for lobbying is constitutional, but an attempt to deny all deductions for business expenses to a taxpayer who lobbies would penalize unconstitutionally the exercise of First Amendment rights); cf. *Harris v. McRae,* 448 U.S. 297, 317 n. 19, 100 S.Ct. 2671, 2688, n. 19, 65 L.Ed.2d 784 (1980) (denial of welfare benefits for abortion is constitutional, but an attempt to withhold all welfare benefits from one who exercises right to an abortion probably would be impermissible); *Maher v. Roe,* 432 U.S. 464, 474-475, n. 8, 97 S.Ct. 2376, 2382-2383, n. 8, 53 L.Ed.2d 484 (1977) (same).

The constitutional defect that would inhere in § 501(c)(3) alone is avoided by § 501(c)(4). As the Court notes, *ante,* at 2000, TWR may use its present § 501(c)(3) organization for its nonlobbying activities and may create a § 501(c)(4) affiliate to pursue its charitable goals through lobbying. *553 The § 501(c)(4) affiliate would not be eligible to receive tax-deductible contributions.

**2005 Given this relationship between § 501(c)(3) and § 501(c)(4), the Court finds that Congress' purpose in imposing the lobbying restriction was merely to ensure that "no tax-deductible contributions are used to pay for substantial lobbying." *Ante,* at 2000, n. 6; see *ante,* at 2001. Consistent with that purpose, "[t]he IRS apparently requires only that the two groups be separately incorporated and keep records adequate to show that tax deductible contributions are not used to pay for lobbying." *Ante,* at 2000, n. 6. As long as the IRS goes no further than this, we perhaps can safely say that "[t]he Code does not deny TWR the right to receive deductible contributions to support its nonlobbying activity, nor does it deny TWR any independent benefit on account of its intention to lobby." *Ante,* at 2001. A § 501(c)(3) organization's right to speak is not infringed, because it is free to make known its views on legislation through its § 501(c)(4) affiliate without losing tax benefits for its nonlobbying activities.

Any significant restriction on this channel of communication, however, would negate the saving effect of § 501(c)(4). It must be remembered that § 501(c)(3) organizations retain their constitutional right to speak and to petition the Government. Should the IRS attempt to limit the control these organizations exercise over the lobbying of their § 501(c)(4) affiliates, the First Amendment problems would be insurmountable. It hardly answers one person's objection to a restriction on his speech that another person, outside his control, may speak for him. Similarly, an attempt to prevent § 501(c)(4) organizations from lobbying explicitly on behalf of their § 501(c)(3) affiliates would perpetuate § 501(c)(3) organizations' inability to make known their views on legislation without incurring the unconstitutional penalty. Such restrictions would extend far beyond Congress' mere refusal to

subsidize lobbying. See *ante*, at 2000, n. 6. In my view, *554 any such restriction would render the statutory scheme unconstitutional.

I must assume that the IRS will continue to administer §§ 501(c)(3) and 501(c)(4) in keeping with Congress' limited purpose and with the IRS' duty to respect and uphold the Constitution. I therefore agree with the Court that the First Amendment questions in this case are controlled by *Cammarano v. United States*, 358 U.S. 498, 513, 79 S.Ct. 524, 533, 3 L.Ed.2d 462 (1959), rather than by *Speiser v. Randall*, 357 U.S. 513, 518-519, 78 S.Ct. 1332, 1338, 2 L.Ed.2d 1460 (1958), and *Perry v. Sindermann*, 408 U.S. 593, 597, 92 S.Ct. 2694, 2697, 33 L.Ed.2d 570 (1972).

U.S.Dist.Col.,1983.
Regan v. Taxation With Representation of Washington
461 U.S. 540, 103 S.Ct. 1997, 76 L.Ed.2d 129, 51 A.F.T.R.2d 83-1294, 83-1 USTC P 9365, 1983-2 C.B. 90

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B. FEDERAL TAX CASES

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535 U.S. 425, 122 S.Ct. 1728, 152 L.Ed.2d 670, 70 USLW 4369, 30 Media L. Rep. 1769, 02 Cal. Daily Op. Serv. 4067, 2002 Daily Journal D.A.R. 5167, 15 Fla. L. Weekly Fed. S 267
(Cite as: 535 U.S. 425, 122 S.Ct. 1728)

City of Los Angeles v. Alameda Books, Inc.
U.S.,2002.

Supreme Court of the United States
CITY OF LOS ANGELES, Petitioner,
v.
ALAMEDA BOOKS, INC., et al.
No. 00-799.

—Argued Dec. 4, 2001.
Decided May 13, 2002.

Adult businesses brought § 1983 action, challenging city ordinance prohibiting operation of multiple adult businesses in single building. The United States District Court for the Central District of California, Dean D. Pregerson, J., granted summary judgment for businesses. City appealed. The Ninth Circuit Court of Appeals, Michael Daly Hawkins, Circuit Judge, 222 F.3d 719, affirmed. Certiorari was granted. The Supreme Court, Justice O'Connor, held that city could reasonably rely on police department study correlating crime patterns with concentrations of adult businesses when opposing businesses' First Amendment challenge.

Reversed and remanded.

Justice Scalia concurred and filed opinion.

Justice Kennedy concurred in judgment and filed opinion.

Justice Souter filed dissenting opinion, in which Justices Stevens and Ginsburg joined and Justice Breyer joined in part.

West Headnotes

[1] Constitutional Law 92 ⟹1509

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)1 In General
92k1508 Time, Place, or Manner Restrictions
92k1509 k. In General. Most Cited Cases
(Formerly 92k90(3))
Reducing crime is a substantial government interest, for purpose of justifying time, place and manner regulation of speech. U.S.C.A. Const.Amend. 1.

[2] Constitutional Law 92 ⟹2213

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Y) Sexual Expression
92k2203 Sexually Oriented Businesses; Adult Businesses or Entertainment
92k2213 k. Secondary Effects. Most Cited Cases
(Formerly 92k90.4(3))

Public Amusement and Entertainment 315T⟹9(1)

315T Public Amusement and Entertainment
315TI In General
315Tk4 Constitutional, Statutory and Regulatory Provisions
315Tk9 Sexually Oriented Entertainment
315Tk9(1) k. In General. Most Cited Cases
(Formerly 376k3 Theaters and Shows)
City could reasonably rely on police department study correlating crime patterns with concentrations of adult businesses when opposing First Amendment challenge to ordinance barring more than one adult entertainment business in same building, even though study had focused on single-use establishments; study fairly supported city's rationale for ordinance. (Per Justice O'Connor, with the Chief Justice and two Justices

concurring and one Justice concurring in judgment). U.S.C.A. Const.Amend. 1.
***1728 *425 Syllabus* FN*

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

Based on its 1977 study concluding that concentrations of adult entertainment establishments are associated with higher crime rates in surrounding communities, petitioner city enacted an ordinance prohibiting such enterprises within 1,000 feet of each other or within 500 feet of a religious institution, school, or public park. Los Angeles Municipal Code § 12.70(C) (1978). Because the ordinance's method of calculating distances created a loophole permitting the concentration of multiple adult enterprises in a single structure, the **1729 city later amended the ordinance to prohibit "more than one adult entertainment business in the same building." § 12.70(C) (1983). Respondents, two adult establishments that openly operate combined bookstores/video arcades in violation of § 12.70(C), as amended, sued under 42 U.S.C. § 1983 for declaratory and injunctive relief, alleging that the ordinance, on its face, violates the First Amendment. Finding that the ordinance was not a content-neutral regulation of speech, the District Court reasoned that neither the 1977 study nor a report cited in *Hart Book Stores v. Edmisten*, a Fourth Circuit case upholding a similar statute, supported a reasonable belief that multiple-use adult establishments produce the secondary effects the city asserted as content-neutral justifications for its prohibition. Subjecting § 12.70(C) to strict scrutiny, the court granted respondents summary judgment because it felt the city had not offered evidence demonstrating that its prohibition was necessary to serve a compelling government interest. The Ninth Circuit affirmed on the different ground that, even if the ordinance were content neutral, the city failed to present evidence upon which it could reasonably rely to demonstrate that its regulation of multiple-use establishments was designed to serve its substantial interest in reducing crime. The court therefore held the ordinance invalid under *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29.

Held: The judgment is reversed, and the case is remanded.

222 F.3d 719, reversed and remanded.

Justice O'CONNOR, joined by THE CHIEF JUSTICE, Justice SCALIA, and Justice THOMAS, concluded that Los Angeles may reasonably rely *426 on its 1977 study to demonstrate that its present ban on multiple-use adult establishments serves its interest in reducing crime. Pp. 1733-1738.

(a) The 1977 study's central component is a Los Angeles Police Department report indicating that, from 1965 to 1975, crime rates for, *e.g.*, robbery and prostitution grew much faster in Hollywood, which had the city's largest concentration of adult establishments, than in the city as a whole. The city may reasonably rely on the police department's conclusions regarding crime patterns to overcome summary judgment. In finding to the contrary on the ground that the 1977 study focused on the effect on crime rates of a concentration of establishments-not a concentration of operations within a single establishment-the Ninth Circuit misunderstood the study's implications. While the study reveals that areas with high concentrations of adult establishments are associated with high crime rates, such areas are also areas with high concentrations of adult operations, albeit each in separate establishments. It was therefore consistent with the 1977 study's findings, and thus reasonable, for the city to infer that reducing the concentration of adult operations in a neighborhood, whether within separate establishments or in one large establishment, will reduce crime rates. Neither the Ninth Circuit nor respondents nor the dissent provides any reason to question the city's theory. If this Court were to accept their view, it would

535 U.S. 425, 122 S.Ct. 1728, 152 L.Ed.2d 670, 70 USLW 4369, 30 Media L. Rep. 1769, 02 Cal. Daily Op. Serv. 4067, 2002 Daily Journal D.A.R. 5167, 15 Fla. L. Weekly Fed. S 267
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effectively require that the city provide evidence that not only supports the claim that its ordinance serves an important government interest, but also does not provide support for any other approach to serve that interest. *Renton* specifically refused to set such a high bar for municipalities that want to address merely the secondary effects of protected speech. The Court there held that a municipality may rely on any evidence that is "reasonably believed to be relevant" for demonstrating a connection between speech and a substantial, independent government interest. 475 U.S., at 51-52, 106 S.Ct. 925. This is not to say that a municipality can get away with shoddy data or reasoning. The municipality's evidence must fairly support its rationale for its ordinance. If plaintiffs **1730 fail to cast direct doubt on this rationale, either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings, the municipality meets the *Renton* standard. If plaintiffs succeed in casting doubt on a municipality's rationale in either manner, the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance. See, *e.g., Erie v. Pap's A.M.*, 529 U.S. 277, 298, 120 S.Ct. 1382, 146 L.Ed.2d 265. This case is at a very early stage in this process. It arrives on a summary judgment motion by respondents defended only by complaints that the 1977 study fails to prove that the city's justification for its ordinance is necessarily*427 correct. Therefore, it must be concluded that the city, at this stage of the litigation, has complied with *Renton's* evidentiary requirement. Pp. 1733-1738.

(b) The Court need not resolve the parties' dispute over whether the city can rely on evidence from *Hart Book Stores* to overcome summary judgment, nor respondents' alternative argument that the ordinance is not a time, place, and manner regulation, but is effectively a ban on adult video arcades that must be subjected to strict scrutiny. P. 1738.

Justice KENNEDY concluded that this Court's precedents may allow Los Angeles to impose its regulation in the exercise of the zoning authority, and that the city is not, at least, to be foreclosed by summary judgment. Pp. 1739-1744.

(a) Under *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29, if a city can decrease the crime and blight associated with adult businesses by exercising its zoning power, and at the same time leave the quantity and accessibility of speech substantially undiminished, there is no First Amendment objection, even if the measure identifies the problem outside the establishments by reference to the speech inside-that is, even if the measure is content based. On the other hand, a city may not regulate the secondary effects of speech by suppressing the speech itself. For example, it may not impose a content-based fee or tax, see *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 230, 107 S.Ct. 1722, 95 L.Ed.2d 209, even if the government purports to justify the fee by reference to secondary effects, see *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134-135, 112 S.Ct. 2395, 120 L.Ed.2d 101. That the ordinance at issue is more a typical land-use restriction than a law suppressing speech is suggested by the fact that it is not limited to expressive activities, but extends, *e.g.*, to massage parlors, which the city has found to cause the same undesirable secondary effects; also, it is just one part of an elaborate web of land-use regulations intended to promote the social value of the land as a whole without suppressing some activities or favoring others. Thus, the ordinance is not so suspect that it must be subjected to the strict scrutiny that content-based laws demand in other instances. Rather, it calls for intermediate scrutiny, as *Renton* held. Pp. 1739-1741.

(b) *Renton's* description of an ordinance similar to Los Angeles' as "content neutral," 475 U.S., at 48, 106 S.Ct. 925, was something of a fiction. These ordinances are content based, and should be so described. Nevertheless, *Renton's* central holding is sound. P. 1741.

(c) The necessary rationale for applying intermediate scrutiny is the promise that zoning ordinances like the one at issue may reduce the costs of secondary effects without substantially reducing speech. If two adult businesses are under

535 U.S. 425, 122 S.Ct. 1728, 152 L.Ed.2d 670, 70 USLW 4369, 30 Media L. Rep. 1769, 02 Cal. Daily Op. Serv. 4067, 2002 Daily Journal D.A.R. 5167, 15 Fla. L. Weekly Fed. S 267
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the same roof, an ordinance requiring*428 them to separate will have one of two results: One business will either move elsewhere or close. The city's premise cannot be the latter. The premise must be that businesses-even those that have always been under one roof-will for the most part disperse rather than shut down, that the quantity of speech will be substantially **1731 undiminished, and that total secondary effects will be significantly reduced. As to whether there is sufficient evidence to support this proposition, the Court has consistently held that a city must have latitude to experiment, at least at the outset, and that very little evidence is required. See, *e.g., Renton, supra,* at 51-52, 106 S.Ct. 925. Here, the proposition to be shown is supported by common experience and a study showing a correlation between the concentration of adult establishments and crime. Assuming that the study supports the city's original dispersal ordinance, most of the necessary analysis follows. To justify the ordinance at issue, the city may infer from its study and from its own experience that two adult businesses under the same roof are no better than two next door, and that knocking down the wall between the two would not ameliorate any undesirable secondary effects of their proximity to one another. If the city's first ordinance was justified, therefore, then the second is too. Pp. 1741-1743.

(d) Because these considerations seem well enough established in common experience and the Court's case law, the ordinance survives summary judgment. Pp. 1743-1744.

O'CONNOR, J., announced the judgment of the Court and delivered an opinion, in which REHNQUIST, C.J., and SCALIA and THOMAS, JJ., joined. SCALIA, J., filed a concurring opinion, *post,* p. 1738. KENNEDY, J., filed an opinion concurring in the judgment, *post,* p. 1739. SOUTER , J., filed a dissenting opinion, in which STEVENS and GINSBURG, JJ., joined, and in which BREYER, J., joined as to Part II, *post,* p. 1744.

Michael L. Klekner, Los Angeles, CA, for petitioner.

John H. Weston, Los Angeles, CA, for respondents.For U.S. Supreme Court briefs, see:2001 WL 535665 (Pet.Brief)2001 WL 1575796 (Resp.Brief)2001 WL 1104728 (Reply.Brief)

*429 Justice O'CONNOR announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE, Justice SCALIA, and Justice THOMAS join.

Los Angeles Municipal Code § 12.70(C) (1983), as amended, prohibits "the establishment or maintenance of more than one adult entertainment business in the same building, structure or portion thereof." Respondents, two adult establishments that each operated an adult bookstore and an adult video arcade in the same building, filed a suit under Rev. Stat. § 1979, 42 U.S.C. § 1983 (1994 ed., Supp. V), alleging that § 12.70(C) violates the First Amendment and seeking declaratory and injunctive relief. The District Court granted summary judgment to respondents, finding that the city of Los Angeles' prohibition was a content-based regulation of speech that failed strict scrutiny. The Court of Appeals for the Ninth Circuit affirmed, but on different grounds. It held that, even if § 12.70(C) were a content-neutral regulation, the city failed to demonstrate that the *430 prohibition was designed to serve a substantial government interest. Specifically, the Court of Appeals found that the city failed to present evidence upon which it could reasonably rely to demonstrate a link between multiple-use adult establishments and negative secondary effects. Therefore, the Court of Appeals held the Los Angeles prohibition on such establishments invalid under *Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986), and its precedents interpreting that case. 222 F.3d 719, 723-728 (2000). We reverse and remand. The city of Los Angeles may reasonably rely on a study it conducted some years before enacting the present version of § 12.70(C) to demonstrate that its ban on multiple-use adult establishments serves its interest in reducing crime.

**1732 I

In 1977, the city of Los Angeles conducted a comprehensive study of adult establishments and

535 U.S. 425, 122 S.Ct. 1728, 152 L.Ed.2d 670, 70 USLW 4369, 30 Media L. Rep. 1769, 02 Cal. Daily Op. Serv. 4067, 2002 Daily Journal D.A.R. 5167, 15 Fla. L. Weekly Fed. S 267
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concluded that concentrations of adult businesses are associated with higher rates of prostitution, robbery, assaults, and thefts in surrounding communities. See App. 35-162 (Los Angeles Dept. of City Planning, Study of the Effects of the Concentration of Adult Entertainment Establishments in the City of Los Angeles (City Plan Case No. 26475, City Council File No. 74-4521-S.3, June 1977)). Accordingly, the city enacted an ordinance prohibiting the establishment, substantial enlargement, or transfer of ownership of an adult arcade, bookstore, cabaret, motel, theater, or massage parlor or a place for sexual encounters within 1,000 feet of another such enterprise or within 500 feet of any religious institution, school, or public park. See Los Angeles Municipal Code § 12.70(C) (1978).

There is evidence that the intent of the city council when enacting this prohibition was not only to disperse distinct adult establishments housed in separate buildings, but also to disperse distinct adult businesses operated under common ownership and housed in a single structure. See App. 29 *431 (Los Angeles Dept. of City Planning, Amendment-Proposed Ordinance to Prohibit the Establishment of More than One Adult Entertainment Business at a Single Location (City Plan Case No. 26475, City Council File No. 82-0155, Jan. 13, 1983)). The ordinance the city enacted, however, directed that "[t]he distance between any two adult entertainment businesses shall be measured in a straight line ... from the closest exterior structural wall of each business." Los Angeles Municipal Code § 12.70(D) (1978). Subsequent to enactment, the city realized that this method of calculating distances created a loophole permitting the concentration of multiple adult enterprises in a single structure.

Concerned that allowing an adult-oriented department store to replace a strip of adult establishments could defeat the goal of the original ordinance, the city council amended § 12.70(C) by adding a prohibition on "the establishment or maintenance of more than one adult entertainment business in the same building, structure or portion thereof." Los Angeles Municipal Code § 12.70(C) (1983). The amended ordinance defines an "Adult Entertainment Business" as an adult arcade, bookstore, cabaret, motel, theater, or massage parlor or a place for sexual encounters, and notes that each of these enterprises "shall constitute a separate adult entertainment business even if operated in conjunction with another adult entertainment business at the same establishment." § 12.70(B)(17). The ordinance uses the term " business" to refer to certain types of goods or services sold in adult establishments, rather than the establishment itself. Relevant for purposes of this case are also the ordinance's definitions of adult bookstores and arcades. An "Adult Bookstore" is an operation that "has as a substantial portion of its stock-in-trade and offers for sale" printed matter and videocassettes that emphasize the depiction of specified sexual activities. § 12.70(B)(2)(a). An adult arcade is an operation where, "for any form of consideration," five or fewer patrons together may view films or videocassettes *432 that emphasize the depiction of specified sexual activities. § 12.70(B)(1).

Respondents, Alameda Books, Inc., and Highland Books, Inc., are two adult establishments operating in Los Angeles. Neither is located within 1,000 feet of another adult establishment or 500 feet of any religious institution, public park, or school. Each establishment occupies less than 3,000 square feet. Both respondents rent and sell sexually oriented products, including videocassettes. Additionally, both provide booths where patrons can view videocassettes for a fee. Although respondents are located in different buildings, each operates its retail sales and rental operations in the same commercial space in which its video booths are located. There are no **1733 physical distinctions between the different operations within each establishment and each establishment has only one entrance. 222 F.3d, at 721. Respondents concede they are openly operating in violation of § 12.70(C) of the city's code, as amended. Brief for Respondents 7; Brief for Petitioner 9.

After a city building inspector found in 1995 that Alameda Books, Inc., was operating both as an adult bookstore and an adult arcade in violation of

the city's adult zoning regulations, respondents joined as plaintiffs and sued under 42 U.S.C. § 1983 for declaratory and injunctive relief to prevent enforcement of the ordinance. 222 F.3d, at 721. At issue in this case is count I of the complaint, which alleges a facial violation of the First Amendment. Both the city and respondents filed cross-motions for summary judgment.

The District Court for the Central District of California initially denied both motions on the First Amendment issues in count I, concluding that there was "a genuine issue of fact whether the operation of a combination video rental and video viewing business leads to the harmful secondary effects associated with a concentration of separate businesses in a single urban area." App. 255. After respondents filed a motion for reconsideration, however, the District *433 Court found that Los Angeles' prohibition on multiple-use adult establishments was not a content-neutral regulation of speech. App. to Pet. for Cert. 51. It reasoned that neither the city's 1977 study nor a report cited in *Hart Book Stores v. Edmisten,* 612 F.2d 821 (C.A.4 1979) (upholding a North Carolina statute that also banned multiple-use adult establishments), supported a reasonable belief that multiple-use adult establishments produced the secondary effects the city asserted as content-neutral justifications for its prohibition. App. to Pet. for Cert. 34-47. Therefore, the District Court proceeded to subject the Los Angeles ordinance to strict scrutiny. Because it felt that the city did not offer evidence to demonstrate that its prohibition is necessary to serve a compelling government interest, the District Court granted summary judgment for respondents and issued a permanent injunction enjoining the enforcement of the ordinance against respondents. *Id.,* at 51.

The Court of Appeals for the Ninth Circuit affirmed, although on different grounds. The Court of Appeals determined that it did not have to reach the District Court's decision that the Los Angeles ordinance was content based because, even if the ordinance were content neutral, the city failed to present evidence upon which it could reasonably rely to demonstrate that its regulation of multiple-use establishments is "designed to serve" the city's substantial interest in reducing crime. The challenged ordinance was therefore invalid under *Renton,* 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29. 222 F.3d, at 723-724. We granted certiorari, 532 U.S. 902, 121 S.Ct. 1223, 149 L.Ed.2d 134 (2001), to clarify the standard for determining whether an ordinance serves a substantial government interest under *Renton, supra.*

II

In *Renton v. Playtime Theatres, Inc., supra,* this Court considered the validity of a municipal ordinance that prohibited any adult movie theater from locating within 1,000 feet of any residential zone, family dwelling, church, park, *434 or school. Our analysis of the ordinance proceeded in three steps. First, we found that the ordinance did not ban adult theaters altogether, but merely required that they be distanced from certain sensitive locations. The ordinance was properly analyzed, therefore, as a time, place, and manner regulation. *Id.,* at 46, 106 S.Ct. 925. We next considered whether the ordinance was content neutral or content based. If the regulation were content based, it would be considered presumptively invalid and subject to strict scrutiny. **1734*Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.,* 502 U.S. 105, 115, 118, 112 S.Ct. 501, 116 L.Ed.2d 476 (1991); *Arkansas Writers' Project, Inc. v. Ragland,* 481 U.S. 221, 230-231, 107 S.Ct. 1722, 95 L.Ed.2d 209 (1987). We held, however, that the Renton ordinance was aimed not at the content of the films shown at adult theaters, but rather at the secondary effects of such theaters on the surrounding community, namely, at crime rates, property values, and the quality of the city's neighborhoods. Therefore, the ordinance was deemed content neutral. *Renton, supra,* at 47-49, 106 S.Ct. 925. Finally, given this finding, we stated that the ordinance would be upheld so long as the city of Renton showed that its ordinance was designed to serve a substantial government interest and that reasonable alternative avenues of communication remained available. 475 U.S., at 50, 106 S.Ct. 925. We concluded that Renton had

met this burden, and we upheld its ordinance. *Id.*, at 51-54, 106 S.Ct. 925.

The Court of Appeals applied the same analysis to evaluate the Los Angeles ordinance challenged in this case. First, the Court of Appeals found that the Los Angeles ordinance was not a complete ban on adult entertainment establishments, but rather a sort of adult zoning regulation, which *Renton* considered a time, place, and manner regulation. 222 F.3d, at 723. The Court of Appeals turned to the second step of the *Renton* analysis, but did not draw any conclusions about whether the Los Angeles ordinance was content based. It explained that, even if the Los Angeles ordinance were content neutral, the city had failed to demonstrate,*435 as required by the third step of the *Renton* analysis, that its prohibition on multiple-use adult establishments was designed to serve its substantial interest in reducing crime. The Court of Appeals noted that the primary evidence relied upon by Los Angeles to demonstrate a link between combination adult businesses and harmful secondary effects was the 1977 study conducted by the city's planning department. The Court of Appeals found, however, that the city could not rely on that study because it did not " 'suppor[t] a reasonable belief that [the] combination [of] businesses ... produced harmful secondary effects of the type asserted.' " 222 F.3d, at 724. For similar reasons, the Court of Appeals also rejected the city's attempt to rely on a report on health conditions inside adult video arcades described in *Hart Book Stores, supra,* a case that upheld a North Carolina statute similar to the Los Angeles ordinance challenged in this case.

The central component of the 1977 study is a report on city crime patterns provided by the Los Angeles Police Department. That report indicated that, during the period from 1965 to 1975, certain crime rates grew much faster in Hollywood, which had the largest concentration of adult establishments in the city, than in the city of Los Angeles as a whole. For example, robberies increased 3 times faster and prostitution 15 times faster in Hollywood than citywide. App. 124-125.

[1] The 1977 study also contains reports conducted directly by the staff of the Los Angeles Planning Department that examine the relationship between adult establishments and property values. These staff reports, however, are inconclusive. Not surprisingly, the parties focus their dispute before this Court on the report by the Los Angeles Police Department. Because we find that reducing crime is a substantial government interest and that the police department report's conclusions regarding crime patterns may reasonably be relied upon to overcome summary judgment against *436 the city, we also focus on the portion of the 1977 study drawn from the police department report.

The Court of Appeals found that the 1977 study did not reasonably support the inference that a concentration of adult operations within a single adult establishment produced greater levels of criminal activity because the study focused on the **1735 effect that a concentration of establishments-not a concentration of operations within a single establishment-had on crime rates. The Court of Appeals pointed out that the study treated combination adult bookstore/arcades as single establishments and did not study the effect of any separate-standing adult bookstore or arcade. 222 F.3d, at 724.

[2] The Court of Appeals misunderstood the implications of the 1977 study. While the study reveals that areas with high concentrations of adult establishments are associated with high crime rates, areas with high concentrations of adult establishments are also areas with high concentrations of adult operations, albeit each in separate establishments. It was therefore consistent with the findings of the 1977 study, and thus reasonable, for Los Angeles to suppose that a concentration of adult establishments is correlated with high crime rates because a concentration of operations in one locale draws, for example, a greater concentration of adult consumers to the neighborhood, and a high density of such consumers either attracts or generates criminal activity. The assumption behind this theory is that having a number of adult operations in one single adult establishment draws the same dense foot traffic as having a number of distinct adult

establishments in close proximity, much as minimalls and department stores similarly attract the crowds of consumers. Brief for Petitioner 28. Under this view, it is rational for the city to infer that reducing the concentration of adult operations in a neighborhood, whether within separate establishments or in one large establishment, will reduce crime rates.

*437 Neither the Court of Appeals, nor respondents, nor the dissent provides any reason to question the city's theory. In particular, they do not offer a competing theory, let alone data, that explains why the elevated crime rates in neighborhoods with a concentration of adult establishments can be attributed entirely to the presence of permanent walls between, and separate entrances to, each individual adult operation. While the city certainly bears the burden of providing evidence that supports a link between concentrations of adult operations and asserted secondary effects, it does not bear the burden of providing evidence that rules out every theory for the link between concentrations of adult establishments that is inconsistent with its own.

The error that the Court of Appeals made is that it required the city to prove that its theory about a concentration of adult operations attracting crowds of customers, much like a minimall or department store does, is a necessary consequence of the 1977 study. For example, the Court of Appeals refused to allow the city to draw the inference that "the expansion of an adult bookstore to include an adult arcade would increase" business activity and " produce the harmful secondary effects identified in the Study." 222 F.3d, at 726. It reasoned that such an inference would justify limits on the inventory of an adult bookstore, not a ban on the combination of an adult bookstore and an adult arcade. The Court of Appeals simply replaced the city's theory-that having many different operations in close proximity attracts crowds-with its own-that the size of an operation attracts crowds. If the Court of Appeals' theory is correct, then inventory limits make more sense. If the city's theory is correct, then a prohibition on the combination of businesses makes more sense. Both theories are consistent with the data in the 1977 study. The Court of Appeals' analysis, however, implicitly requires the city to prove that its theory is the only one that can plausibly explain the data *438 because only in this manner can the city refute the Court of Appeals' logic.

Respondents make the same logical error as the Court of Appeals when they suggest that the city's prohibition on multiuse establishments will raise crime rates in certain neighborhoods because it will **1736 force certain adult businesses to relocate to areas without any other adult businesses. Respondents' claim assumes that the 1977 study proves that all adult businesses, whether or not they are located near other adult businesses, generate crime. This is a plausible reading of the results from the 1977 study, but respondents do not demonstrate that it is a compelled reading. Nor do they provide evidence that refutes the city's interpretation of the study, under which the city's prohibition should on balance reduce crime. If this Court were nevertheless to accept respondents' speculation, it would effectively require that the city provide evidence that not only supports the claim that its ordinance serves an important government interest, but also does not provide support for any other approach to serve that interest.

In *Renton*, we specifically refused to set such a high bar for municipalities that want to address merely the secondary effects of protected speech. We held that a municipality may rely on any evidence that is "reasonably believed to be relevant" for demonstrating a connection between speech and a substantial, independent government interest. 475 U.S., at 51-52, 106 S.Ct. 925; see also, *e.g.*, *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 584, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991) (SOUTER, J., concurring in judgment) (permitting municipality to use evidence that adult theaters are correlated with harmful secondary effects to support its claim that nude dancing is likely to produce the same effects). This is not to say that a municipality can get away with shoddy data or reasoning. The municipality's evidence must fairly support the municipality's rationale for its ordinance. If plaintiffs fail to cast direct doubt on this rationale, either by

demonstrating that the municipality's*439 evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings, the municipality meets the standard set forth in *Renton*. If plaintiffs succeed in casting doubt on a municipality's rationale in either manner, the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance. See, *e.g.*, *Erie v. Pap's A.M.*, 529 U.S. 277, 298, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000) (plurality opinion). This case is at a very early stage in this process. It arrives on a summary judgment motion by respondents defended only by complaints that the 1977 study fails to prove that the city's justification for its ordinance is necessarily correct. Therefore, we conclude that the city, at this stage of the litigation, has complied with the evidentiary requirement in *Renton*.

Justice SOUTER faults the city for relying on the 1977 study not because the study fails to support the city's theory that adult department stores, like adult minimalls, attract customers and thus crime, but because the city does not demonstrate that freestanding single-use adult establishments reduce crime. See *post*, at 1747-1749 (dissenting opinion). In effect, Justice SOUTER asks the city to demonstrate, not merely by appeal to common sense, but also with empirical data, that its ordinance will successfully lower crime. Our cases have never required that municipalities make such a showing, certainly not without actual and convincing evidence from plaintiffs to the contrary. See, *e.g.*, *Barnes, supra*, at 583-584, 111 S.Ct. 2456 (SOUTER, J., concurring in judgment). Such a requirement would go too far in undermining our settled position that municipalities must be given a " 'reasonable opportunity to experiment with solutions' " to address the secondary effects of protected speech. *Renton, supra*, at 52, 106 S.Ct. 925 (quoting *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 71, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976) (plurality opinion)). A municipality considering an innovative solution may not have data that could demonstrate the efficacy of its proposal because *440 the solution would, by definition, not have been implemented previously. The city's ordinance banning multiple-use**1737 adult establishments is such a solution. Respondents contend that there are no adult video arcades in Los Angeles County that operate independently of adult bookstores. See Brief for Respondents 41. But without such arcades, the city does not have a treatment group to compare with the control group of multiple-use adult establishments, and without such a comparison Justice SOUTER would strike down the city's ordinance. This leaves the city with no means to address the secondary effects with which it is concerned.

Our deference to the evidence presented by the city of Los Angeles is the product of a careful balance between competing interests. On the one hand, we have an "obligation to exercise independent judgment when First Amendment rights are implicated." *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 666, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994) (plurality opinion); see also *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843-844, 98 S.Ct. 1535, 56 L.Ed.2d 1 (1978). On the other hand, we must acknowledge that the Los Angeles City Council is in a better position than the Judiciary to gather and evaluate data on local problems. See *Turner, supra*, at 665-666, 114 S.Ct. 2445; *Erie, supra*, at 297-298, 120 S.Ct. 1382 (plurality opinion). We are also guided by the fact that *Renton* requires that municipal ordinances receive only intermediate scrutiny if they are content neutral. 475 U.S., at 48-50, 106 S.Ct. 925. There is less reason to be concerned that municipalities will use these ordinances to discriminate against unpopular speech. See *Erie, supra*, at 298-299, 120 S.Ct. 1382.

Justice SOUTER would have us rethink this balance, and indeed the entire *Renton* framework. In *Renton*, the Court distinguished the inquiry into whether a municipal ordinance is content neutral from the inquiry into whether it is "designed to serve a substantial government interest and do not unreasonably limit alternative avenues of communication." 475 U.S., at 47-54, 106 S.Ct. 925. The former requires courts to verify that the "

predominate concerns" motivating the *441 ordinance "were with the secondary effects of adult [speech], and not with the content of adult [speech]. " *Id.*, at 47, 106 S.Ct. 925 (emphasis deleted) The latter inquiry goes one step further and asks whether the municipality can demonstrate a connection between the speech regulated by the ordinance and the secondary effects that motivated the adoption of the ordinance. Only at this stage did *Renton* contemplate that courts would examine evidence concerning regulated speech and secondary effects. *Id.*, at 50-52, 106 S.Ct. 925. Justice SOUTER would either merge these two inquiries or move the evidentiary analysis into the inquiry on content neutrality, and raise the evidentiary bar that a municipality must pass. His logic is that verifying that the ordinance actually reduces the secondary effects asserted would ensure that zoning regulations are not merely content-based regulations in disguise. See *post,* at 1746.

We think this proposal unwise. First, none of the parties request the Court to depart from the *Renton* framework. Nor is the proposal fairly encompassed in the question presented, which focuses on the sorts of evidence upon which the city may rely to demonstrate that its ordinance is designed to serve a substantial governmental interest. Pet. for Cert. i. Second, there is no evidence suggesting that courts have difficulty determining whether municipal ordinances are motivated primarily by the content of adult speech or by its secondary effects without looking to evidence connecting such speech to the asserted secondary effects. In this case, the Court of Appeals has not yet had an opportunity to address the issue, having assumed for the sake of argument that the city's ordinance is content neutral. 222 F.3d, at 723. It would be inappropriate for this Court to reach the question of content neutrality before permitting the lower court to pass upon it. Finally, Justice SOUTER does **1738 not clarify the sort of evidence upon which municipalities may rely to meet the evidentiary burden he would require. It is easy to say that courts must demand evidence *442 when "common experience" or " common assumptions" are incorrect, see *post,* at 1747, but it is difficult for courts to know ahead of time whether that condition is met. Municipalities will, in general, have greater experience with and understanding of the secondary effects that follow certain protected speech than will the courts. See *Erie,* 529 U.S., at 297-298, 120 S.Ct. 1382 (plurality opinion). For this reason our cases require only that municipalities rely upon evidence that is " 'reasonably believed to be relevant' " to the secondary effects that they seek to address. *Id.*, at 296.

III

The city of Los Angeles argues that its prohibition on multiuse establishments draws further support from a study of the poor health conditions in adult video arcades described in *Hart Book Stores,* a case that upheld a North Carolina ordinance similar to that challenged here. See 612 F.2d, at 828-829, n. 9. Respondents argue that the city cannot rely on evidence from *Hart Book Stores* because the city cannot prove it examined that evidence before it enacted the current version of § 12.70(C). Brief for Respondents 21. Respondents note, moreover, that unsanitary conditions in adult video arcades would persist regardless of whether arcades were operated in the same buildings as, say, adult bookstores. *Ibid.*

We do not, however, need to resolve the parties' dispute over evidence cited in *Hart Book Stores.* Unlike the city of Renton, the city of Los Angeles conducted its own study of adult businesses. We have concluded that the Los Angeles study provides evidence to support the city's theory that a concentration of adult operations in one locale attracts crime, and can be reasonably relied upon to demonstrate that Los Angeles Municipal Code § 12.70(C) (1983) is designed to promote the city's interest in reducing crime. Therefore, the city need not present foreign studies to overcome the summary judgment against it.

*443 Before concluding, it should be noted that respondents argue, as an alternative basis to sustain the Court of Appeals' judgment, that the Los Angeles ordinance is not a typical zoning regulation. Rather, respondents explain, the

prohibition on multiuse adult establishments is effectively a ban on adult video arcades because no such business exists independently of an adult bookstore. Brief for Respondents 12-13. Respondents request that the Court hold that the Los Angeles ordinance is not a time, place, and manner regulation, and that the Court subject the ordinance to strict scrutiny. This also appears to be the theme of Justice KENNEDY's concurrence. He contends that "[a] city may not assert that it will reduce secondary effects by reducing speech in the same proportion." *Post,* at 1742 (opinion concurring in judgment). We consider that unobjectionable proposition as simply a reformulation of the requirement that an ordinance warrants intermediate scrutiny only if it is a time, place, and manner regulation and not a ban. The Court of Appeals held, however, that the city's prohibition on the combination of adult bookstores and arcades is not a ban and respondents did not petition for review of that determination.

Accordingly, we reverse the Court of Appeals' judgment granting summary judgment to respondents and remand the case for further proceedings.

It is so ordered.

Justice SCALIA, concurring.

I join the plurality opinion because I think it represents a correct application of our jurisprudence concerning regulation of the "secondary effects" of pornographic speech. As I have said elsewhere, however, in a case such as this our First Amendment **1739 traditions make "secondary effects" analysis quite unnecessary. The Constitution does not prevent those communities that wish to do so from regulating, or indeed entirely suppressing, the business of pandering*444 sex. See, *e.g., Erie v. Pap's A.M.,* 529 U.S. 277, 310, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000) (SCALIA, J., concurring in judgment); *FW/PBS, Inc. v. Dallas,* 493 U.S. 215, 256-261, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990) (SCALIA, J., concurring in part and dissenting in part).

Justice KENNEDY, concurring in the judgment.

Speech can produce tangible consequences. It can change minds. It can prompt actions. These primary effects signify the power and the necessity of free speech. Speech can also cause secondary effects, however, unrelated to the impact of the speech on its audience. A newspaper factory may cause pollution, and a billboard may obstruct a view. These secondary consequences are not always immune from regulation by zoning laws even though they are produced by speech.

Municipal governments know that high concentrations of adult businesses can damage the value and the integrity of a neighborhood. The damage is measurable; it is all too real. The law does not require a city to ignore these consequences if it uses its zoning power in a reasonable way to ameliorate them without suppressing speech. A city's "interest in attempting to preserve the quality of urban life is one that must be accorded high respect." *Young v. American Mini Theatres, Inc.,* 427 U.S. 50, 71, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976) (plurality opinion).

The question in this case is whether Los Angeles can seek to reduce these tangible, adverse consequences by separating adult speech businesses from one another-even two businesses that have always been under the same roof. In my view our precedents may allow the city to impose its regulation in the exercise of the zoning authority. The city is not, at least, to be foreclosed by summary judgment, so I concur in the judgment.

This separate statement seems to me necessary, however, for two reasons. First, *Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986), described a similar ordinance as "content neutral," and I agree with the dissent that the designation *445 is imprecise. Second, in my view, the plurality's application of *Renton* might constitute a subtle expansion, with which I do not concur.

I

In *Renton,* the Court determined that while the material inside adult bookstores and movie theaters is speech, the consequent sordidness outside is not.

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The challenge is to correct the latter while leaving the former, as far as possible, untouched. If a city can decrease the crime and blight associated with certain speech by the traditional exercise of its zoning power, and at the same time leave the quantity and accessibility of the speech substantially undiminished, there is no First Amendment objection. This is so even if the measure identifies the problem outside by reference to the speech inside-that is, even if the measure is in that sense content based.

On the other hand, a city may not regulate the secondary effects of speech by suppressing the speech itself. A city may not, for example, impose a content-based fee or tax. See *Arkansas Writers' Project, Inc. v. Ragland,* 481 U.S. 221, 230, 107 S.Ct. 1722, 95 L.Ed.2d 209 (1987) ("[O]fficial scrutiny of the content of publications as the basis for imposing a tax is entirely incompatible with the First Amendment's guarantee of freedom of the press "). This is true even if the government purports to justify the fee by reference to secondary effects. See *Forsyth County v. Nationalist Movement,* 505 U.S. 123, 134-135, 112 S.Ct. 2395, 120 L.Ed.2d 101 (1992). Though the inference may be inexorable that a city could reduce secondary effects by reducing speech, this is not a permissible **1740 strategy. The purpose and effect of a zoning ordinance must be to reduce secondary effects and not to reduce speech.

A zoning measure can be consistent with the First Amendment if it is likely to cause a significant decrease in secondary effects and a trivial decrease in the quantity of speech. It is well documented that multiple adult businesses in close proximity may change the character of a neighborhood *446 for the worse. Those same businesses spread across the city may not have the same deleterious effects. At least in theory, a dispersal ordinance causes these businesses to separate rather than to close, so negative externalities are diminished but speech is not.

The calculus is a familiar one to city planners, for many enterprises other than adult businesses also cause undesirable externalities. Factories, for example, may cause pollution, so a city may seek to reduce the cost of that externality by restricting factories to areas far from residential neighborhoods. With careful urban planning a city in this way may reduce the costs of pollution for communities, while at the same time allowing the productive work of the factories to continue. The challenge is to protect the activity inside while controlling side effects outside.

Such an ordinance might, like a speech restriction, be "content based." It might, for example, single out slaughterhouses for specific zoning treatment, restricting them to a particularly remote part of town. Without knowing more, however, one would hardly presume that because the ordinance is specific to that business, the city seeks to discriminate against it or help a favored group. One would presume, rather, that the ordinance targets not the business but its particular noxious side effects. But cf. *Slaughter-House Cases,* 16 Wall. 36, 21 L.Ed. 394 (1872). The business might well be the city's most valued enterprise; nevertheless, because of the pollution it causes, it may warrant special zoning treatment. This sort of singling out is not impermissible content discrimination; it is sensible urban planning. Cf. *Village of Euclid v. Ambler Realty Co.,* 272 U.S. 365, 388, 47 S.Ct. 114, 71 L.Ed. 303 (1926) ("A nuisance may be merely a right thing in the wrong place,-like a pig in the parlor instead of the barnyard. If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control").

*447 True, the First Amendment protects speech and not slaughterhouses. But in both contexts, the inference of impermissible discrimination is not strong. An equally strong inference is that the ordinance is targeted not at the activity, but at its side effects. If a zoning ordinance is directed to the secondary effects of adult speech, the ordinance does not necessarily constitute impermissible content discrimination. A zoning law need not be blind to the secondary effects of adult speech, so long as the purpose of the law is not to suppress it.

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The ordinance at issue in this case is not limited to expressive activities. It also extends, for example, to massage parlors, which the city has found to cause similar secondary effects. See Los Angeles Municipal Code . §§ 12.70(B)(8) (1978), 12.70(B)(17) (1983), 12.70(C) (1986), as amended. This ordinance, moreover, is just one part of an elaborate web of land-use regulations in Los Angeles, all of which are intended to promote the social value of the land as a whole without suppressing some activities or favoring others. See § 12.02 ("The purpose of this article is to consolidate and coordinate all existing zoning regulations and provisions into one comprehensive zoning plan ... in order to encourage the most appropriate use of land ... and to promote the health, safety, and the general welfare ..."). All this further suggests that the ordinance is more in the nature of a typical land-use restriction and less in the nature of a law suppressing speech.

**1741 For these reasons, the ordinance is not so suspect that we must employ the usual rigorous analysis that content-based laws demand in other instances. The ordinance may be a covert attack on speech, but we should not presume it to be so. In the language of our First Amendment doctrine it calls for intermediate and not strict scrutiny, as we held in *Renton*.

*448 II

In *Renton*, the Court began by noting that a zoning ordinance is a time, place, or manner restriction. The Court then proceeded to consider the question whether the ordinance was "content based." The ordinance "by its terms [was] designed to prevent crime, protect the city's retail trade, maintain property values, and generally protec[t] and preserv[e] the quality of [the city's] neighborhoods, commercial districts, and the quality of urban life, not to suppress the expression of unpopular views." 475 U.S., at 48, 106 S.Ct. 925 (internal quotation marks omitted). On this premise, the Court designated the restriction "content neutral." *Ibid.*

The Court appeared to recognize, however, that the designation was something of a fiction, which, perhaps, is why it kept the phrase in quotes: After all, whether a statute is content neutral or content based is something that can be determined on the face of it; if the statute describes speech by content then it is content based. And the ordinance in *Renton* "treat[ed] theaters that specialize in adult films differently from other kinds of theaters." *Id.*, at 47, 106 S.Ct. 925. The fiction that this sort of ordinance is content neutral-or "content neutral"-is perhaps more confusing than helpful, as Justice SOUTER demonstrates, see *post*, at 1745 (dissenting opinion). It is also not a fiction that has commanded our consistent adherence. See *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 322, and n. 2, 122 S.Ct. 775, 151 L.Ed.2d 783 (2002) (suggesting that a licensing scheme targeting only those businesses purveying sexually explicit speech is not content neutral). These ordinances are content based, and we should call them so.

Nevertheless, for the reasons discussed above, the central holding of *Renton* is sound: A zoning restriction that is designed to decrease secondary effects and not speech should be subject to intermediate rather than strict scrutiny. Generally, the government has no power to restrict speech based on content, but there are exceptions to the rule. See *449*Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 126-127, 112 S.Ct. 501, 116 L.Ed.2d 476 (1991) (KENNEDY, J., concurring in judgment). And zoning regulations do not automatically raise the specter of impermissible content discrimination, even if they are content based, because they have a prima facie legitimate purpose: to limit the negative externalities of land use. As a matter of common experience, these sorts of ordinances are more like a zoning restriction on slaughterhouses and less like a tax on unpopular newspapers. The zoning context provides a built-in legitimate rationale, which rebuts the usual presumption that content-based restrictions are unconstitutional. For this reason, we apply intermediate rather than strict scrutiny.

III

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The narrow question presented in this case is whether the ordinance at issue is invalid "because the city did not study the negative effects of such combinations of adult businesses, but rather relied on judicially approved statutory precedent from other jurisdictions." Pet. for Cert. i. This question is actually two questions. First, what proposition does a city need to advance in order to sustain a secondary-effects ordinance? Second, how much evidence is required to support the proposition? The plurality skips to the second question and gives the correct answer; but in my view more attention must be given to the first.

**1742 At the outset, we must identify the claim a city must make in order to justify a content-based zoning ordinance. As discussed above, a city must advance some basis to show that its regulation has the purpose and effect of suppressing secondary effects, while leaving the quantity and accessibility of speech substantially intact. The ordinance may identify the speech based on content, but only as a shorthand for identifying the secondary effects outside. A city may not assert that it will reduce secondary effects by reducing speech in the same proportion. On this point, I agree with Justice SOUTER. See *post,* at 1746. The rationale of *450 the ordinance must be that it will suppress secondary effects-and not by suppressing speech.

The plurality's statement of the proposition to be supported is somewhat different. It suggests that Los Angeles could reason as follows: (1) "a concentration of operations in one locale draws ... a greater concentration of adult consumers to the neighborhood, and a high density of such consumers either attracts or generates criminal activity"; (2) "having a number of adult operations in one single adult establishment draws the same dense foot traffic as having a number of distinct adult establishments in close proximity"; (3) " reducing the concentration of adult operations in a neighborhood, whether within separate establishments or in one large establishment, will reduce crime rates." *Ante,* at 1735.

These propositions all seem reasonable, and the inferences required to get from one to the next are sensible. Nevertheless, this syllogism fails to capture an important part of the inquiry. The plurality's analysis does not address how speech will fare under the city's ordinance. As discussed, the necessary rationale for applying intermediate scrutiny is the promise that zoning ordinances like this one may reduce the costs of secondary effects without substantially reducing speech. For this reason, it does not suffice to say that inconvenience will reduce demand and fewer patrons will lead to fewer secondary effects. This reasoning would as easily justify a content-based tax: Increased prices will reduce demand, and fewer customers will mean fewer secondary effects. But a content-based tax may not be justified in this manner. See *Arkansas Writers' Project, Inc. v. Ragland,* 481 U.S. 221, 107 S.Ct. 1722, 95 L.Ed.2d 209 (1987); *Forsyth County v. Nationalist Movement,* 505 U.S. 123, 112 S.Ct. 2395, 120 L.Ed.2d 101 (1992). It is no trick to reduce secondary effects by reducing speech or its audience; but a city may not attack secondary effects indirectly by attacking speech.

The analysis requires a few more steps. If two adult businesses are under the same roof, an ordinance requiring them *451 to separate will have one of two results: One business will either move elsewhere or close. The city's premise cannot be the latter. It is true that cutting adult speech in half would probably reduce secondary effects proportionately. But again, a promised proportional reduction does not suffice. Content-based taxes could achieve that, yet these are impermissible.

The premise, therefore, must be that businesses-even those that have always been under one roof-will for the most part disperse rather than shut down. True, this premise has its own conundrum. As Justice SOUTER writes, "[t]he city ... claims no interest in the proliferation of adult establishments." *Post,* at 1748. The claim, therefore, must be that this ordinance will cause two businesses to split rather than one to close, that the quantity of speech will be substantially undiminished, and that total secondary effects will be significantly reduced. This must be the rationale of a dispersal statute.

Only after identifying the proposition to be proved can we ask the second part of the question presented: is there sufficient evidence to support the proposition? As to this, we have consistently held that a city must have latitude to experiment, at **1743 least at the outset, and that very little evidence is required. See, *e.g., Renton,* 475 U.S., at 51-52, 106 S.Ct. 925 ("The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses"); *Young,* 427 U.S., at 71, 96 S.Ct. 2440 ("[T]he city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems"); *Erie v. Pap's A.M.,* 529 U.S. 277, 300-301, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000) (plurality opinion). As a general matter, courts should not be in the business of second-guessing fact-bound empirical assessments of city planners. See *Renton, supra,* at 51-52, 106 S.Ct. 925. The Los Angeles City Council*452 knows the streets of Los Angeles better than we do. See *Turner Broadcasting System, Inc. v. FCC,* 512 U.S. 622, 665-666, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994); *Erie, supra,* at 297-298, 120 S.Ct. 1382 (plurality opinion). It is entitled to rely on that knowledge; and if its inferences appear reasonable, we should not say there is no basis for its conclusion.

In this case the proposition to be shown is supported by a single study and common experience. The city's study shows a correlation between the concentration of adult establishments and crime. Two or more adult businesses in close proximity seem to attract a critical mass of unsavory characters, and the crime rate may increase as a result. The city, therefore, sought to disperse these businesses. Los Angeles Municipal Code § 12.70(C) (1983), as amended. This original ordinance is not challenged here, and we may assume that it is constitutional.

If we assume that the study supports the original ordinance, then most of the necessary analysis follows. We may posit that two adult stores next door to each other attract 100 patrons per day. The two businesses split apart might attract 49 patrons each. (Two patrons, perhaps, will be discouraged by the inconvenience of the separation-a relatively small cost to speech.) On the other hand, the reduction in secondary effects might be dramatic, because secondary effects may require a critical mass. Depending on the economics of vice, 100 potential customers/victims might attract a coterie of thieves, prostitutes, and other ne'er-do-wells; yet 49 might attract none at all. If so, a dispersal ordinance would cause a great reduction in secondary effects at very small cost to speech. Indeed, the very absence of secondary effects might increase the audience for the speech; perhaps for every two people who are discouraged by the inconvenience of two-stop shopping, another two are encouraged by hospitable surroundings. In that case, secondary effects might be eliminated at no cost to *453 speech whatsoever, and both the city and the speaker will have their interests well served.

Only one small step remains to justify the ordinance at issue in this case. The city may next infer-from its study and from its own experience-that two adult businesses under the same roof are no better than two next door. The city could reach the reasonable conclusion that knocking down the wall between two adult businesses does not ameliorate any undesirable secondary effects of their proximity to one another. If the city's first ordinance was justified, therefore, then the second is too. Dispersing two adult businesses under one roof is reasonably likely to cause a substantial reduction in secondary effects while reducing speech very little.

IV

These propositions are well established in common experience and in zoning policies that we have already examined, and for these reasons this ordinance is not invalid on its face. If these assumptions **1744 can be proved unsound at trial, then the ordinance might not withstand intermediate scrutiny. The ordinance does, however, survive the summary judgment motion that the Court of Appeals ordered granted in this case.

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Justice SOUTER, with whom Justice STEVENS and Justice GINSBURG join, and with whom Justice BREYER joins as to Part II, dissenting.

In 1977, the city of Los Angeles studied sections of the city with high and low concentrations of adult business establishments catering to the market for the erotic. The city found no certain correlation between the location of those establishments and depressed property values, but it did find some correlation between areas of higher concentrations of such business and higher crime rates. On that basis, Los Angeles followed the examples of other cities in adopting a zoning ordinance requiring dispersion of adult *454 establishments. I assume that the ordinance was constitutional when adopted, see, *e.g., Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976), and assume for purposes of this case that the original ordinance remains valid today.[FN1]

FN1. Although *amicus* First Amendment Lawyers Association argues that recent studies refute the findings of adult business correlations with secondary effects sufficient to justify such an ordinance, Brief for First Amendment Lawyers Association as *Amicus Curiae* 21-23, the issue is one I do not reach.

The city subsequently amended its ordinance to forbid clusters of such businesses at one address, as in a mall. The city has, in turn, taken a third step to apply this amendment to prohibit even a single proprietor from doing business in a traditional way that combines an adult bookstore, selling books, magazines, and videos, with an adult arcade, consisting of open viewing booths, where potential purchasers of videos can view them for a fee.

From a policy of dispersing adult establishments, the city has thus moved to a policy of dividing them in two. The justification claimed for this application of the new policy remains, however, the 1977 survey, as supplemented by the authority of one decided case on regulating adult arcades in another State. The case authority is not on point, see *infra*, at 1748, n. 4, and the 1977 survey provides no support for the breakup policy. Its evidentiary insufficiency bears emphasis and is the principal reason that I respectfully dissent from the Court's judgment today.

I

This ordinance stands or falls on the results of what our cases speak of as intermediate scrutiny, generally contrasted with the demanding standard applied under the First Amendment to a content-based regulation of expression. The variants of middle-tier tests cover a grab bag of restrictive statutes, with a corresponding variety of justifications. *455 While spoken of as content neutral, these regulations are not uniformly distinct from the content-based regulations calling for scrutiny that is strict, and zoning of businesses based on their sales of expressive adult material receives mid-level scrutiny, even though it raises a risk of content-based restriction. It is worth being clear, then, on how close to a content basis adult business zoning can get, and why the application of a middle-tier standard to zoning regulation of adult bookstores calls for particular care.

Because content-based regulation applies to expression by very reason of what is said, it carries a high risk that expressive limits are imposed for the sake of suppressing a message that is disagreeable to listeners or readers, or the government. See *Consolidated Edison Co. of N.Y. v. Public Serv. Comm'n of N. Y.*, 447 U.S. 530, 536, 100 S.Ct. 2326, 65 L.Ed.2d 319 (1980) ("[W]hen regulation is based on the content of speech, governmental action must be scrutinized more carefully to ensure **1745 that communication has not been prohibited merely because public officials disapprove the speaker's views" (internal quotation marks omitted)). A restriction based on content survives only on a showing of necessity to serve a legitimate and compelling governmental interest, combined with least restrictive narrow tailoring to serve it, see *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813, 120 S.Ct. 1878, 146 L.Ed.2d 865 (2000); since merely protecting listeners from offense at the message is not a

legitimate interest of the government, see *Cohen v. California*, 403 U.S. 15, 24-25, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971), strict scrutiny leaves few survivors.

The comparatively softer intermediate scrutiny is reserved for regulations justified by something other than content of the message, such as a straightforward restriction going only to the time, place, or manner of speech or other expression. It is easy to see why review of such a regulation may be relatively relaxed. No one has to disagree with any message to find something wrong with a loudspeaker at three in the morning, see *456 *Kovacs v. Cooper*, 336 U.S. 77, 69 S.Ct. 448, 93 L.Ed. 513 (1949); the sentiment may not provoke, but being blasted out of a sound sleep does. In such a case, we ask simply whether the regulation is "narrowly tailored to serve a significant governmental interest, and ... leave[s] open ample alternative channels for communication of the information." *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984). A middle-tier standard is also applied to limits on expression through action that is otherwise subject to regulation for nonexpressive purposes, the best known example being the prohibition on destroying draft cards as an act of protest, *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968); here a regulation passes muster "if it furthers an important or substantial governmental interest ... unrelated to the suppression of free expression" by a restriction "no greater than is essential to the furtherance of that interest," *id.*, at 377, 88 S.Ct. 1673. As mentioned already, yet another middle-tier variety is zoning restriction as a means of responding to the "secondary effects" of adult businesses, principally crime and declining property values in the neighborhood. *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 49, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986).[FN2]

FN2. Limiting such effects qualifies as a substantial governmental interest, and an ordinance has been said to survive if it is shown to serve such ends without unreasonably limiting alternatives. *Renton*, 475 U.S., at 50, 106 S.Ct. 925. Because *Renton* called its secondary-effects ordinance a mere time, place, or manner restriction and thereby glossed over the role of content in secondary-effects zoning, see *infra*, at 1745, I believe the soft focus of its statement of the middle-tier test should be rejected in favor of the *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968), formulation quoted above. *O'Brien* is a closer relative of secondary-effects zoning than mere time, place, or manner regulations, as the Court has implicitly recognized. *Erie v. Pap's A.M.*, 529 U.S. 277, 289, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000) (plurality opinion).

Although this type of land-use restriction has even been called a variety of time, place, or manner regulation, *id.*, at 46, 106 S.Ct. 925, equating a secondary-effects zoning regulation with a mere regulation of time, place, or manner jumps over an important difference between them. A restriction on loudspeakers has no obvious relationship to the substance of *457 what is broadcast, while a zoning regulation of businesses in adult expression just as obviously does. And while it may be true that an adult business is burdened only because of its secondary effects, it is clearly burdened only if its expressive products have adult content. Thus, the Court has recognized that this kind of regulation, though called content neutral, occupies a kind of limbo between full-blown, content-based restrictions and regulations that apply without any reference to the substance of what is said. *Id.*, at 47, 106 S.Ct. 925.

**1746 It would in fact make sense to give this kind of zoning regulation a First Amendment label of its own, and if we called it content correlated, we would not only describe it for what it is, but keep alert to a risk of content-based regulation that it poses. The risk lies in the fact that when a law applies selectively only to speech of particular content, the more precisely the content is identified, the greater is the opportunity for government

censorship. Adult speech refers not merely to sexually explicit content, but to speech reflecting a favorable view of being explicit about sex and a favorable view of the practices it depicts; a restriction on adult content is thus also a restriction turning on a particular viewpoint, of which the government may disapprove.

This risk of viewpoint discrimination is subject to a relatively simple safeguard, however. If combating secondary effects of property devaluation and crime is truly the reason for the regulation, it is possible to show by empirical evidence that the effects exist, that they are caused by the expressive activity subject to the zoning, and that the zoning can be expected either to ameliorate them or to enhance the capacity of the government to combat them (say, by concentrating them in one area), without suppressing the expressive activity itself. This capacity of zoning regulation to address the practical problems without eliminating the speech is, after all, the only possible excuse for speaking of secondary-effects zoning as akin to time, place, or manner regulations.

*458 In examining claims that there are causal relationships between adult businesses and an increase in secondary effects (distinct from disagreement), and between zoning and the mitigation of the effects, stress needs to be placed on the empirical character of the demonstration available. See *Metromedia, Inc. v. San Diego,* 453 U.S. 490, 510, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981) ("[J]udgments ... defying objective evaluation ... must be carefully scrutinized to determine if they are only a public rationalization of an impermissible purpose"); *Young,* 427 U.S., at 84, 96 S.Ct. 2440 (Powell, J., concurring) ("[C]ourts must be alert ... to the possibility of using the power to zone as a pretext for suppressing expression"). The weaker the demonstration of facts distinct from disapproval of the "adult" viewpoint, the greater the likelihood that nothing more than condemnation of the viewpoint drives the regulation.[FN3]

FN3. Regulation of commercial speech, which is like secondary-effects zoning in being subject to an intermediate level of First Amendment scrutiny, see *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N. Y.,* 447 U.S. 557, 569, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980), provides an instructive parallel in the cases enforcing an evidentiary requirement to ensure that an asserted rationale does not cloak an illegitimate governmental motive. See, *e.g., Rubin v. Coors Brewing Co.,* 514 U.S. 476, 487, 115 S.Ct. 1585, 131 L.Ed.2d 532 (1995); *Edenfield v. Fane,* 507 U.S. 761, 113 S.Ct. 1792, 123 L.Ed.2d 543 (1993). The government's "burden is not satisfied by mere speculation or conjecture," but only by "demonstrat[ing] that the harms [the government] recites are real and that its restriction will in fact alleviate them to a material degree." *Id.,* at 770-771, 113 S.Ct. 1792. For unless this "critical" requirement is met, *Rubin, supra,* at 487, 115 S.Ct. 1585, "a State could with ease restrict commercial speech in the service of other objectives that could not themselves justify a burden on commercial expression," *Edenfield, supra,* at 771, 113 S.Ct. 1792.

Equal stress should be placed on the point that requiring empirical justification of claims about property value or crime is not demanding anything Herculean. Increased crime, like prostitution and muggings, and declining property values in areas surrounding adult businesses, are all readily observable, often to the untrained eye and certainly to the police officer and urban planner. These harms can be shown by police reports, crime statistics, and studies of market*459 value, all of which are within a municipality's capacity or available from the distilled experiences of comparable communities. See, *e.g.,* **1747 *Renton, supra,* at 51, 106 S.Ct. 925; *Young, supra,* at 55, 96 S.Ct. 2440.

And precisely because this sort of evidence is readily available, reviewing courts need to be wary

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when the government appeals, not to evidence, but to an uncritical common sense in an effort to justify such a zoning restriction. It is not that common sense is always illegitimate in First Amendment demonstration. The need for independent proof varies with the point that has to be established, and zoning can be supported by common experience when there is no reason to question it. We have appealed to common sense in analogous cases, even if we have disagreed about how far it took us. See *Erie v. Pap's A.M.*, 529 U.S. 277, 300-301, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000) (plurality opinion); *id.*, at 313, and n. 2, 120 S.Ct. 1382 (SOUTER, J., concurring in part and dissenting in part). But we must be careful about substituting common assumptions for evidence, when the evidence is as readily available as public statistics and municipal property valuations, lest we find out when the evidence is gathered that the assumptions are highly debatable. The record in this very case makes the point. It has become a commonplace, based on our own cases, that concentrating adult establishments drives down the value of neighboring property used for other purposes. See *Renton*, 475 U.S., at 51, 106 S.Ct. 925; *Young*, *supra*, at 55, 96 S.Ct. 2440. In fact, however, the city found that general assumption unjustified by its 1977 study. App. 39, 45.

The lesson is that the lesser scrutiny applied to content-correlated zoning restrictions is no excuse for a government's failure to provide a factual demonstration for claims it makes about secondary effects; on the contrary, this is what demands the demonstration. See, *e.g.*, *Schad v. Mount Ephraim*, 452 U.S. 61, 72-74, 101 S.Ct. 2176, 68 L.Ed.2d 671 (1981). In this case, however, the government has not shown that bookstores containing viewing booths, isolated from other adult establishments, increase*460 crime or produce other negative secondary effects in surrounding neighborhoods, and we are thus left without substantial justification for viewing the city's First Amendment restriction as content correlated but not simply content based.
By the same token, the city has failed to show any causal relationship between the breakup policy and elimination or regulation of secondary effects.

II

Our cases on the subject have referred to studies, undertaken with varying degrees of formality, showing the geographical correlations between the presence or concentration of adult business establishments and enhanced crime rates or depressed property values. See, *e.g.*, *Renton*, *supra*, at 50-51, 106 S.Ct. 925; *Young*, 427 U.S., at 55, 96 S.Ct. 2440. Although we have held that intermediate scrutiny of secondary-effects legislation does not demand a fresh evidentiary study of its factual basis if the published results of investigations elsewhere are "reasonably" thought to be applicable in a different municipal setting, *Renton*, *supra*, at 51-52, 106 S.Ct. 925, the city here took responsibility to make its own enquiry, App. 35-162. As already mentioned, the study was inconclusive as to any correlation between adult business and lower property values, *id.*, at 45, 106 S.Ct. 925, and it reported no association between higher crime rates and any isolated adult establishments. But it did find a geographical correlation of higher concentrations of adult establishments with higher crime rates, *id.*, at 43, 106 S.Ct. 925, and with this study in hand, Los Angeles enacted its 1978 ordinance requiring dispersion of adult stores and theaters. This original position of the ordinance is not challenged today, and I will assume its justification on the theory accepted in *Young*, that eliminating concentrations of adult establishments will spread out the documented secondary effects and render them more manageable that way.

**1748 The application of the 1983 amendment now before us is, however, a different matter. My concern is not with the *461 assumption behind the amendment itself, that a conglomeration of adult businesses under one roof, as in a minimall or adult department store, will produce undesirable secondary effects comparable to what a cluster of separate adult establishments brings about, *ante*, at 1735. That may or may not be so. The assumption that is clearly unsupported, however, goes to the city's supposed interest in applying the amendment to the book and video stores in question, and in applying it to break them up. The city, of course,

claims no interest in the proliferation of adult establishments, the ostensible consequence of splitting the sales and viewing activities so as to produce two stores where once there was one. Nor does the city assert any interest in limiting the sale of adult expressive material as such, or reducing the number of adult video booths in the city, for that would be clear content-based regulation, and the city was careful in its 1977 report to disclaim any such intent. App. 54.[FN4]

FN4. Finally, the city does not assert an interest in curbing any secondary effects within the combined bookstore-arcades. In *Hart Book Stores, Inc. v. Edmisten,* 612 F.2d 821 (1979), the Fourth Circuit upheld a similar ban in North Carolina, relying in part on a county health department report on the results of an inspection of several of the combined adult bookstore-video arcades in Wake County, North Carolina. *Id.,* at 828-829, n. 9. The inspection revealed unsanitary conditions and evidence of salacious activities taking place within the video cubicles. *Ibid.* The city introduces this case to defend its breakup policy although it is not clear from the opinion how separating these video arcades from the adult bookstores would deter the activities that took place within them. In any event, while *Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986), allowed a city to rely on the experiences and studies of other cities, it did not dispense with the requirement that "whatever evidence the city relies upon [be] reasonably believed to be relevant to the problem that the city addresses," *id.,* at 51-52, 106 S.Ct. 925, and the evidence relied upon by the Fourth Circuit is certainly not necessarily relevant to the Los Angeles ordinance. Since November 1977, five years before the enactment of the ordinance at issue, Los Angeles has regulated adult video booths, prohibiting doors, setting minimum levels of lighting, and requiring that their interiors be fully visible from the entrance to the premises. Los Angeles Municipal Code §§ 103.101(i), (j). Thus, it seems less likely that the unsanitary conditions identified in *Hart Book Stores* would exist in video arcades in Los Angeles, and the city has suggested no evidence that they do. For that reason, *Hart Book Stores* gives no indication of a substantial governmental interest that the ban on multiuse adult establishments would further.

*462 Rather, the city apparently assumes that a bookstore selling videos and providing viewing booths produces secondary effects of crime, and more crime than would result from having a single store without booths in one part of town and a video arcade in another.[FN5] But the city neither says this in so many words nor proffers any evidence to support even the simple proposition that an otherwise lawfully located adult bookstore combined with video booths will produce any criminal effects. The Los Angeles study treats such combined stores as one, see *id.,* at 81-82, 96 S.Ct. 2440, and draws no general conclusion that individual stores spread apart from other adult establishments (as under the basic Los Angeles ordinance) are associated with any degree of criminal activity above the general norm; nor has the city called the Court's attention to any other empirical study, or even anecdotal police evidence, that supports the city's assumption. In fact, if the Los Angeles study sheds any light whatever on the city's position, it is the light of skepticism, for we may fairly suspect that the study said nothing about the secondary effects of **1749 freestanding stores because no effects were observed. The reasonable supposition, then, is that splitting some of them up will have no consequence for secondary effects whatever.[FN6]

FN5. The plurality indulges the city's assumption but goes no further to justify it than stating what is obvious from what the city's study says about concentrations of adult establishments (but not isolated

ones): the presence of several adult businesses in one neighborhood draws "a greater concentration of adult consumers to the neighborhood, [which] either attracts or generates criminal activity." *Ante,* at 1735.

FN6. In *Renton,* the Court approved a zoning ordinance "aimed at preventing the secondary effects caused by the presence of even one such theater in a given neighborhood." 475 U.S., at 50, 106 S.Ct. 925. The city, however, does not appeal to that decision to show that combined bookstore-arcades isolated from other adult establishments, like the theaters in *Renton,* give rise to negative secondary effects, perhaps recognizing that such a finding would only call into doubt the sensibility of the city's decision to proliferate such businesses. See *ante,* at 1736. Although the question may be open whether a city can rely on the experiences of other cities when they contradict its own studies, that question is not implicated here, as Los Angeles relies exclusively on its own study, which is tellingly silent on the question whether isolated adult establishments have any bearing on criminal activity.

*463 The inescapable point is that the city does not even claim that the 1977 study provides any support for its assumption. We have previously accepted studies, like the city's own study here, as showing a causal connection between concentrations of adult business and identified secondary effects.[FN7] Since that is an acceptable basis for requiring adult businesses to disperse when they are housed in separate premises, there is certainly a relevant argument to be made that restricting their concentration at one spacious address should have some effect on sales and traffic, and effects in the neighborhood. But even if that argument may justify a ban on adult "minimalls," *ante,* at 1735, it provides no support for what the city proposes to do here. The bookstores involved here are not concentrations of traditionally separate adult businesses that have been studied and shown to have an association with secondary effects, and they exemplify no new form of concentration like a mall under one roof. They are combinations of selling and viewing activities that have commonly been combined, and the plurality itself recognizes, *ante,* at 1736, that no study conducted by the city has reported that this type of traditional business, any more than any other adult business, has a correlation with secondary effects *464 in the absence of concentration with other adult establishments in the neighborhood. And even if splitting viewing booths from the bookstores that continue to sell videos were to turn some customers away (or send them in search of video arcades in other neighborhoods), it is nothing but speculation to think that marginally lower traffic to one store would have any measurable effect on the neighborhood, let alone an effect on associated crime that has never been shown to exist in the first place.[FN8]

FN7. As already noted, n. 1, *supra, amicus* First Amendment Lawyers Association argues that more recent studies show no such thing, but this case involves no such challenge to the previously accepted causal connection.

FN8. Justice KENNEDY would indulge the city in this speculation, so long as it could show that the ordinance will "leav[e] the quantity and accessibility of speech substantially intact." *Ante,* at 1742 (opinion concurring in judgment). But the suggestion that the speculated consequences may justify content-correlated regulation if speech is only slightly burdened turns intermediate scrutiny on its head. Although the goal of intermediate scrutiny is to filter out laws that unduly burden speech, this is achieved by examining the asserted governmental interest, not the burden on speech, which must simply be no greater than necessary to further that interest. *Erie,* 529 U.S., at 301, 120 S.Ct. 1382; see also n. 2, *supra.*

Nor has Justice KENNEDY even shown that this ordinance leaves speech " substantially intact." He posits an example in which two adult stores draw 100 customers, and each business operating separately draws 49. *Ante,* at 1743. It does not follow, however, that a combined bookstore-arcade that draws 100 customers, when split, will yield a bookstore and arcade that together draw nearly that many customers. Given the now double outlays required to operate the businesses at different locations, see *infra,* at 1751, the far more likely outcome is that the stand-alone video store will go out of business. (Of course, the bookstore owner could, consistently with the ordinance, continue to operate video booths at no charge, but if this were always commercially feasible then the city would face the separate problem that under no theory could a rule simply requiring that video booths be operated for free be said to reduce secondary effects.)

**1750 Nor is the plurality's position bolstered, as it seems to think, *ante,* at 1736, by relying on the statement in *Renton* that courts should allow cities a " 'reasonable opportunity to experiment with solutions to admittedly serious problems,' " 475 U.S., at 52, 106 S.Ct. 925. The plurality overlooks a key distinction between the zoning regulations at issue in *Renton* and *465 *Young* (and in Los Angeles as of 1978), and this new Los Angeles breakup requirement. In those two cases, the municipalities' substantial interest for purposes of intermediate scrutiny was an interest in choosing between two strategies to deal with crime or property value, each strategy tied to the businesses' location, which had been shown to have a causal connection with the secondary effects: the municipality could either concentrate businesses for a concentrated regulatory strategy, or disperse them in order to spread out its regulatory efforts. The limitations on location required no further support than the factual basis tying location to secondary effects; the zoning approved in those two cases had no effect on the way the owners of the stores carried on their adult businesses beyond controlling location, and no heavier burden than the location limit was approved by this Court.

The Los Angeles ordinance, however, does impose a heavier burden, and one lacking any demonstrable connection to the interest in crime control. The city no longer accepts businesses as their owners choose to conduct them within their own four walls, but bars a video arcade in a bookstore, a combination shown by the record to be commercially natural, if not universal. App. 47-51, 229-230, 242. Whereas *Young* and *Renton* gave cities the choice between two strategies when each was causally related to the city's interest, the plurality today gives Los Angeles a right to " experiment" with a First Amendment restriction in response to a problem of increased crime that the city has never even shown to be associated with combined bookstore-arcades standing alone. But the government's freedom of experimentation cannot displace its burden under the intermediate scrutiny standard to show that the restriction on speech is no greater than essential to realizing an important objective, in this case policing crime. Since we cannot make even a best guess that the city's breakup policy will have any effect on crime *466 or law enforcement, we are a very far cry from any assurance against covert content-based regulation.[FN9]

FN9. The plurality's assumption that the city's "motive" in applying secondary-effects zoning can be entirely compartmentalized from the proffer of evidence required to justify the zoning scheme, *ante,* at 1737, is indulgent to an unrealistic degree, as the record in this case shows. When the original dispersion ordinance was enacted in 1978, the city's study showing a correlation between concentrations of adult business and higher crime rates showed that the dispersal of adult businesses was causally related to the city's law enforcement interest, and that in turn was a fair indication that the city's concern was with the secondary effect of

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> higher crime rates. When, however, the city takes the further step of breaking up businesses with no showing that a traditionally combined business has any association with a higher crime rate that could be affected by the breakup, there is no indication that the breakup policy addresses a secondary effect, but there is reason to doubt that secondary effects are the city's concern. The plurality seems to ask us to shut our eyes to the city's failings by emphasizing that this case is merely at the stage of summary judgment, *ante,* at 1736, but ignores the fact that at this summary judgment stage the city has made it plain that it relies on no evidence beyond the 1977 study, which provides no support for the city's action.

And concern with content-based regulation targeting a viewpoint is right to the point here, as witness a fact that involves no guesswork. If we take the city's breakup policy at its face, enforcing it will mean that in every case two establishments will operate instead of the traditional one. Since the city presumably does not wish **1751 merely to multiply adult establishments, it makes sense to ask what offsetting gain the city may obtain from its new breakup policy. The answer may lie in the fact that two establishments in place of one will entail two business overheads in place of one: two monthly rents, two electricity bills, two payrolls. Every month business will be more expensive than it used to be, perhaps even twice as much. That sounds like a good strategy for driving out expressive adult businesses. It sounds, in other words, like a policy of content-based regulation.

I respectfully dissent.

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