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NOTES

NO NEWS(RACK) IS GOOD NEWS? THE CONSTITUTIONALITY OF A NEWSRACK BAN

In 1988 the Supreme Court struck down a newsrack-regulation ordinance in City of Lakewood v. Plain Dealer Publishing Company. *The Author argues though, that a complete ban on newsracks would survive constitutional scrutiny. Such a ban would be analyzed under the "macro" approach to defining first amendment rights. A total ban the author concludes, would even pass the heightened scrutiny of the "time, place, and manner" test.*

THE AGE-OLD conflict between the state police power and the first amendment has spread to another battlefield: the newsrack.[1] Safety, aesthetics, and other concerns have recently prompted municipalities,[2] through the use of revenue and license taxes, permit requirements, placement requirements, and other measures, to regulate the placement, size, shape, color, and safety of the newsracks that dot their streets.[3] While these governmental efforts have sparked lawsuits and constitutional questions,[4] a more controversial option for municipalities is to ban newsracks totally.

Until recently, a total ban was generally thought to be an unconstitutional infringement of first amendment rights,[5] but that

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1. The term "newsrack" refers to any vending machine that distributes newspapers, including those which are coin-operated as well as those which provide free publications.

2. The terms "municipality," "government," "state," and "city" will be used interchangeably throughout this Note, and will refer to the legislative and executive bodies within a governmental unit.

3. Ovelmen, Terilli & Paul, *Newsracks, Permits, Taxes, Regulations and the First Amendment*, 1987 COMM. LAW 7, 9.

4. *E.g.*, City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 781 n.7 (1988) (White, J., dissenting) (listing recently litigated cases involving newsracks).

5. *See, e.g.*, Ball, *Extra! Extra! Read All About It: First Amendment Problems in the Regulation of Coin Operated Newspaper Vending Machines*, 19 COLUM. J.L. & SOC. PROBS. 183, 192-93 (1985) (suggesting that total bans are always unconstitutional);

assumption became more speculative after the Supreme Court of the United States ruled on its first newsrack case: *City of Lakewood v. Plain Dealer Publishing Company*.[6] A total ban was not at issue in *Lakewood* because the city replaced its ban on newsracks after litigation had commenced with a less sweeping, but highly discretionary regulatory scheme.[7] The total ban question was nonetheless raised.[8] Justice White, joined by Justices Stevens and O'Connor, stated in a strong dissenting opinion that "an outright ban on newsracks on city sidewalks would be constitutional."[9] The majority of four, in its opinion by Justice Brennan, declined to "pass on [the dissent's] view that a city may constitutionally prohibit the placement of newsracks on public property."[10]

Because the constitutionality of a total ban remains undecided after *Lakewood*, municipalities might choose to solve the problems created by newsracks by enacting ordinances that ban the machines completely. The analysis undertaken in this Note indicates that newsracks, although afforded some protection by the first amendment, can constitutionally be banned from public rights of way.[11]

There are several reasons for this assertion. First, the Supreme Court has defined communicative activities broadly, so that first amendment protection is extended to the right to distribute or circulate newspapers.[12] Distribution by newsracks is merely a subclass of the protected right to circulate. As such, a newsrack ban is only a restriction on the manner in which the right to circulate

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Ovelmen, Terilli & Paul, *supra* note 3, at 9.

6. 486 U.S. 750 (1988).

7. In *Lakewood*, the city passed an ordinance allowing the placement of newsracks on public property, provided a permit was applied for and granted. The mayor had unfettered discretion to grant or deny these permits. *Id.* at 772. *The Plain Dealer*, the Cleveland daily newspaper, challenged the ordinance facially, *id.* at 754; and the Court, in a 4-3 decision, found the ordinance to be unconstitutional because of the discretion vested in the mayor. *Id.* at 772. The dissenters thought that the facial challenge doctrine was inapplicable to this case because the placement of newsracks on city property, as opposed to the circulation of newspapers in general, is not protected by the first amendment, and objected to the majority's ruling on such a challenge against the ordinance. *Id.* at 773-74 (White, J., dissenting). Chief Justice Rehnquist and Justice Kennedy took no part in the consideration of the case, *id.* at 752.

8. *Id.* at 778-84.

9. *Id.* at 773 (White, J., dissenting).

10. *Id.* at 762 n.7.

11. *See infra* notes 54-204 and accompanying text.

12. *See infra* note 16 and accompanying text.

can be exercised. Under its current methodology, the Court will therefore utilize the relatively relaxed time, place and manner test in reviewing a newsrack ordinance, rather than the stricter scrutiny reserved for cases where a communicative activity (*i.e.*, circulation) has been totally banned.[13] Second, the Court has shown an increased willingness to accept aesthetics and safety as significant state interests in support of regulatory ordinances.[14] Finally, the local government has a substantial interest in preventing private parties from appropriating public property by placing newsracks on municipal sidewalks and streets.[15] A newsrack ban, then, is not *per se* unconstitutional, but instead, will frequently be a permissible exercise of state police power.

I. When a Total Ban Isn't a Total Ban: The Macro Approach to First Amendment Rights

A. Examining the Macro and Micro Approaches

While there is little dispute that distribution or circulation of material protected by the first amendment is constitutionally protected,[16] it is problematic to determine what that protection encompasses. Does the first amendment protect the right to circulate, with such protection applying separately and equally to every distribution method available? Alternatively, does the first amendment protect the right to circulate generally, with each conceivable distribution method representing the dependent parts of the protected whole? A close reading of recent Supreme Court and

13. *See infra* note 62 and accompanying text.

14. *See infra* notes 102-129 and accompanying text.

15. *See infra* notes 130-59 and accompanying text.

16. The first amendment has been construed to include the right to circulate publications. More than a century ago, the Supreme Court of the United States declared that the "[l]iberty of circulating is as essential to [freedom of the press] as it is to the liberty of publishing; indeed, without the circulation, the publication would be of little value." *Ex parte* Jackson, 96 U.S. 727, 733 (1877). *See also* Lovell v. Griffin, 303 U.S. 444 (1938) (striking down as unconstitutional a statute that required a permit for the distribution of literature anywhere in the municipality). Freedom of the press is protected from state interference by the fourteenth amendment. *E.g.*, Gitlow v. New York, 268 U.S. 652, 666 (1925) ("[W]e may and do assume that freedom of speech and of the press — which are protected by the First Amendment from abridgment by Congress — are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States."). That newspapers and other circulated publications are sold commercially does not remove their first amendment protection. *See, e.g.*, Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 504 n.11 (1981) (noting the protection afforded to the commercial interest in speech).

lower federal court cases indicates that the right to circulate generally, as opposed to the right to circulate by newsracks, for example, is at the core of the first amendment.[17]

The question of what the first amendment protects is important to both those who support and oppose a total ban on newsracks. On one side of the question is the idea that the first amendment protects the right to distribute, and goes no further than that. This can be called the "macro" approach because it takes a look at the "big picture." On the other side, the first amendment is arguably not limited to the right to distribute, but particularly protects the right to distribute by newsracks, by delivery trucks, by newsboys, or by space shuttle. This can be called the "micro" approach because it shifts the focus from the "big picture" to all of its smaller components. The protected first amendment right is, in the former case, a singular, generalized one; the rights in the latter case are many and method-specific.

The distinction between macro and micro is an important one given the first amendment methodology adopted by the Supreme Court. The Court "embraced a presumption that laws that substantially or wholly prohibit particular means of expression are invalid unless they withstand intermediate [judicial] scrutiny."[18] This approach "places considerable weight on the determination of whether a challenged law bans a particular means of expression."[19] If a statute is deemed a total ban, it will be strictly reviewed, with the possibility that the Court will insist that the government demonstrate its "compelling" interest and show that the challenged statute is "necessary to achieve that interest."[20] Such strict scrutiny almost always leads to the statute's invalidation.[21] If the ordinance is a regulation of a particular means of expression, rather than a total ban, it will be subject to a more deferential level of review, ranging from rational basis scrutiny to a form of heightened scrutiny.[22] Deferential review increases the likeli-

17. *See infra* text accompanying notes 24-46.

18. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 66 (1987) [hereinafter Stone, *Restrictions*].

19. *Id.*

20. *Id.* at 53

21. *Id.*

22. According to Dean Stone, a mere regulation would be tested under rational basis review. However, if the regulation affects a "public forum", the level of scrutiny may well be raised. *Id.* at 51-53; *cf. id.* at 79-116 (listing other factors which shape the Court's analysis).

hood of the ordinance being upheld. It is crucial, therefore, for the proponents of a statute banning newsracks to characterize the restriction as a regulation, while a newsrack statute's opponents will characterize the restriction as a total ban.

Thus, the supporters of a newsrack ban, which is usually the municipality, will use the macro approach in defense of the ordinance, arguing that the communicative activity protected by the first amendment is the right to circulate generally. Consequently, a ban on newsracks is not a ban on a protected activity, circulation in this case, but merely a restriction on how that activity can be performed. The newspaper publishers can still distribute the papers, the supporters would argue, but not by newsracks.

Those opposed to the ordinance banning newsracks, which would most likely be newspaper publishers, will attack the newsrack ordinance using the micro approach, claiming that the first amendment activity at issue is not circulation generally, but circulation by newsracks. Therefore, they will argue that the ordinance serves as a total ban on the protected activity of circulating by newsracks.

If the Court uses the macro approach, the statute can be expected to survive judicial scrutiny. However, if the Court adopts the micro approach the ordinance will almost certainly be invalidated.

Obviously, the choice between the macro and micro conceptions of protected activity is "not [an] inconsiderable puzzle,"[23] and indeed, may be outcome determinative. In a recent case, the United States District Court for the District of Rhode Island directly addressed the micro/macro "puzzle." The case, *Providence Journal Co. v. City of Newport*,[24] considered a Newport, R.I. ordinance which totally banned newsracks on public rights of way. Although the ordinance was ultimately invalidated, the court adopted the macro approach in determining the validity of the newsrack ban, stating that:

> Since the city of Newport has totally banned newsracks from its public rights of way, the question of totality versus selectivity turns on whether newsracks can be deemed an all-inclusive class of communicative activity by themselves, or whether they constitute one sub-class of some more broadly defined species of communicative activity. Upon reflection, I find the latter view more

23. *Id.* at 67.
24. 665 F. Supp. 107 (D.R.I. 1987).

> persuasive than the former. For purposes of first amendment analysis, newsracks are functionally indistinguishable from newsstands and newsboys: all three serve as conduits for the distribution of newspapers in public spaces. Accordingly, I find that the city of Newport's prohibition of newsracks from its public rights of way cannot be deemed a total prohibition of communicative activity . . . .[25]

This language suggests that the *Providence Journal* court decided that the macro view was the correct one: newsracks, newsstands, and newsboys are included in the communicative activity of distributing newspapers, and are not communicative activities in and of themselves. As such, the total ban on newsracks was not really a total ban, but only a regulation of newspaper distribution.

Though it was less explicit than the district court in *Providence Journal*, the Supreme Court also endorsed the macro approach in *Lakewood*. Justice Brennan, writing for the majority, argued that "[t]he actual 'activity' at issue here is the circulation of newspapers."[26] Justice Brennan rejected the dissent's approach because it sought to define "an 'activity protected by the first amendment' by the . . . manner [newsracks] by which the activity is exercised."[27] Thus, the Court adopted the macro approach. Justice Brennan said that it is an "error" to break circulation down into its various component parts, each of which is protected activity.[28] The implication is clear: a total ban on newsracks would not be considered a total ban by a majority of the Court, but instead would be a regulation of the manner by which newspapers can be distributed. Consequently, any such ordinance would not be subject to strict scrutiny if challenged. Instead, a more lenient standard of scrutiny would be exercised.

B. The Macro Approach and Content-Neutral Restriction Cases

Justice Brennan's implicit adoption of the macro approach in

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25. *Id.* at 112.

26. City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 768 (1988).

27. *Id.* Although it is White who argues that a total ban is constitutional, Brennan's majority opinion adopts the macro approach, while White takes the micro approach. As discussed earlier, under the micro approach, a total ban on newsracks is virtually indefensible and, therefore, is not likely to survive the Court's scrutiny. Under the macro approach, the total ban stands a fighting chance. For a discussion of this seeming contradiction in White's opinion, see *infra* notes 47-49 and accompanying text.

28. *Lakewood*, 486 U.S. at 768-69.

Lakewood is consistent with other Supreme Court holdings in cases examining the validity of content-neutral restrictions.[29] In *Kovacs v. Cooper*,[30] Trenton, New Jersey prohibited the use of sound trucks on city streets. The Court rejected the plaintiffs' challenge to the ordinance, while also holding that the first amendment "freedom" involved was the "exchange of ideas."[31] Since the activity protected by the first amendment was defined broadly and generally by the Court as the "exchange of ideas," and not the exchange of ideas by sound trucks, the Court held it to be a "permissible exercise of legislative discretion to bar sound trucks . . . from the public ways of municipalities."[32]

A more recent demonstration of the Court's macro methodology occurred in *Clark v. Community for Creative Non-Violence*,[33] in which the plaintiffs sought to protest homelessness symbolically by sleeping in tents in Washington, D.C.'s LaFayette Park. LaFayette Park, located across from the White House, is public land controlled by the United States Park Service. The Service allowed the plaintiffs to demonstrate in the day, but refused to permit overnight sleeping pursuant to its regulations. This denial was upheld by the Court.[34] More importantly, the Court noted that the regulations challenged by the would-be campers, "including the ban on sleeping, are clearly limitations on the manner in which the demonstration could be carried out."[35] In other words, the Court recognized that the communicative activity protected by the first amendment was the right to demonstrate in general, and not the right to demonstrate by sleeping. The "ban" against sleeping was only a limitation on the manner of demonstrating.

Further illustrating the macro approach of the Court is *United States Postal Service v. Council of Greenburgh Civic Ass'ns*,[36] in which the Court upheld a law prohibiting the depositing of unstamped materials in the mailboxes of private homes.

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29. A total ban is a content-neutral restriction because it applies evenly to all who desire to distribute their publications by newsracks. *See infra* notes 80-99 and accompanying text. In this way, the content-neutral cases discussed *infra* notes 30-46 are analogous to a newsrack ban.

30. 336 U.S. 77 (1949) (sound trucks were routinely used on the city streets, broadcasting messages over loudspeakers).

31. *Id.* at 87.

32. *Id.*

33. 468 U.S. 288 (1984).

34. *Id.* at 292.

35. *Id.* at 294.

36. 453 U.S. 114 (1981).

This holding indicates that the Court did not view the statute as a total ban on distributing unstamped material to private homes, but rather, as a limited restriction on leaving unstamped material in mailboxes at private homes. Unstamped materials may be left at residences as long as mailboxes are not used. This is entirely consistent with the macro approach. Had the Court used micro methodology, a higher level of scrutiny would have been employed to analyze the total ban on such mailbox use, and the statute would most likely have been held invalid.

In *Heffron v. International Society for Krishna Consciousness [ISKCON]*,[37] the issue was whether a rule limiting distribution of material on state fairgrounds to duly-licensed booths was violative of a religious group's rights. The group, the Krishnas, wanted to distribute materials personally to fairgoers, in accordance with their religion's practices, but the fairground rule in question prohibited such methods of distribution. Had the Court used the micro approach, and defined the protected communicative activity as the right to distribute in person within the fairgrounds, the rule would have effected a total ban on that activity, and the Court would have almost certainly invalidated the rule, using strict scrutiny. However, the Court used a significantly lower level of review in upholding the rule,[38] indicating that it did not treat the rule as a total ban, but only as a limitation on the manner of performing the communicative activity. Once again, the Court, by broadly defining the communicative activity protected by the first amendment as distribution in general, implicitly accepted the principles behind the macro approach.

Schad v. Borough of Mount Ephraim[39] is further proof that a majority of the Justices subscribe to the macro methodology. Mt. Ephraim had totally banned live entertainment, and the Court found such a ban unconstitutional as it applied to live nude dancing.[40] The majority noted, however, that "[i]t may be that some forms of live entertainment would create problems,"[41] thereby hinting that a narrowly drawn statute prohibiting those forms of live entertainment might be valid.[42] In fact, a majority of

37. 452 U.S. 640 (1981).
38. *Id.* at 654.
39. 452 U.S. 61 (1981).
40. *Id.* at 72.
41. *Id* at 74.
42. *Id.*

the Justices endorsed the idea that "even if the live nude dancing is a form of expressive activity protected by the first amendment, the Borough may prohibit it."[43] The Court, consistent with the macro approach, defined the protected expressive activity as "live entertainment," and not as "live nude dancing," and found the total ban unconstitutional.

In contrast to the foregoing cases, *United States v. Grace*[44] seems to be inconsistent with the macro approach. A statute which banned the display of a "flag, banner, or device designed or adapted to bring into public notice any party, organization, or movement" on public sidewalks was struck down by the Court.[45] Arguably, if the communicative activity to be protected was, using macro methodology, demonstration generally, such a "narrow" statute would have passed muster as a mere limitation on the right to demonstrate. Since the statute was struck down as unconstitutional, it would appear that the Court utilized the micro approach. But such a conclusion is misguided. In *Grace*, the court specifically accepted the assertion that virtually any form of demonstration would have been banned by the statute.[46] Thus, the statute operated as a total ban on demonstration, and, consistent with the macro approach, was invalidated.

These cases demonstrate the Court's use of the macro methodology of the first amendment. Any total ban on a communicative activity, as defined under the macro approach (*e.g.*, demonstration, solicitation, distribution or live entertainment) will be reviewed under a high level of scrutiny and probably struck down. A ban on a sub-part of the defined communicative activity is only a limitation on how that communicative activity can be performed, and therefore will be subject to less stringent review.

C. The Micro Approach

The micro approach is not without its proponents. Justice

43. *Id.* at 83 n.9 (Stevens, J., concurring) (upholding a prohibition only if the business caused a dramatic change in the character of the community). This prohibition was also approved by Chief Justice Burger and Justice Rehnquist, *id.* at 86-87 (Burger, C.J. and Rehnquist, J., dissenting) and Justices Powell and Stewart as well, *id.* at 79 (Powell and Stewart, J.J., concurring) (some communities may regulate or ban "all commercial entertainment" if carefully drawn).

44. 461 U.S. 171 (1983).

45. *Id.* at 183.

46. *Id.* at 176 ("[A]lmost any sign or leaflet carrying a communication" would fall within the statutory prohibition.)

White, who asserted that newsracks could be banned,[47] appears to contradict himself in his dissent in *Lakewood*. He argues that the protected activity was not circulation generally, but circulation by newsracks.[48] If White indeed endorses the micro approach, as he seems to do here, it would be inconsistent for him to support a total ban. White escapes this quandary by breaking his communicative activity, circulation by newsracks, into two sub-parts: circulation by newsracks on public rights of way, and circulation by newsracks on private property.[49] A ban on circulation by newsracks on public rights of way, in accord with White's theory, is not really a total ban, since newsracks can still be placed on private premises.

The biggest supporters of micro methodology have been the California courts. In *Remer v. City of El Cajon*,[50] the court struck down an ordinance totally banning newsracks. The court was "concerned more with what the ordinance broadly proscribes than with what it permits. Removal of a reasonable means of distribution cannot be justified by the alternative means which remain."[51]

The Supreme Court of the United States, however, has adopted macro methodology in reviewing content-neutral restrictions similar to a total ban on newsracks.[52] The implications of the

47. City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. at 773 (White, J., dissenting) ("[A]n outright ban on newsracks on city sidewalks would be constitutional.").

48. *Id.* at 778 (focusing on determination of whether the publisher has a constitutional right to distribute its papers by means of newsracks affixed to the public sidewalks).

49. *Id.* at 778-80.

50. 52 Cal. App. 3d 441, 125 Cal. Rptr. 116 (1975).

51. *Id.* at 444, 125 Cal. Rptr. at 118 (citation omitted); *see also* California Newspaper Publishers Ass'n, Inc. v. City of Burbank, 51 Cal. App. 3d 50, 54, 123 Cal. Rptr. 880, 882 (1975) ("The appropriate focus is on the blanket prohibition and not on those areas left untouched."); Ball, *supra* note 5, at 192-93 (suggesting that total bans of newsracks are always unconstititutional even though alternative means of communication exist).

52. *Supra* notes 29-46 and accompanying text.

In unrelated areas, the Court has implicitly defined the issue broadly rather than narrowly. The Medicaid abortion cases are illustrative. Building on Roe v. Wade, 410 U.S. 113 (1973), which announced a woman's right to an abortion in some circumstances, the Court in Maher v. Roe, 432 U.S. 464 (1977), declared that the right to an abortion was a qualified one and established a particular limit to that right. The right to an abortion "protects a woman [only] from unduly burdensome interference with her freedom to decide whether or not to terminate her pregnancy." *Id.* at 473-74. The Court found no constitutional right violated by the state's refusal to reimburse costs of non-therapeutic abortions, even though the state would pay for childbirth related services under the Medicaid program. *Id.* at 474. By allowing Medicaid payments to be denied to people seeking abortions, the Court rejected the notion that the broad right to abortion can be broken down into smaller rights, such as the right to abortion through government funding. Breaking down an activity or right into its smaller components, and declaring each of those to be a fully

macro approach will be examined more closely in the next section.

II. THE NEWSRACK BAN: A REASONABLE MANNER REGULATION

As the Court's approval of the macro approach indicates, a municipal ordinance which bans newsracks from public property would not be considered a total ban of a protected communicative activity, but rather a ban on one of the sub-parts which comprises a communicative activity. Thus, under current first amendment methodology, the ordinance would be subject to something less than the rigorous scrutiny reserved for total bans.[53] Instead, a court would review the ordinance "under the criteria governing time, place and manner regulations of communicative activity."[54]

If a court considers an ordinance to effect a total prohibition of a communicative activity though, it will utilize a very stringent standard of review, possibly even strict scrutiny.[55] For example, where a public forum is involved, "the Court strictly scrutinizes a

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protected right is to declare an unqualified composite right. If the court had endorsed this narrow view, instead of rejecting it as they did in *Maher*, they would have directly contradicted their previous determination that the right to an abortion was qualified. *See also* Harris v. McRae, 448 U.S. 297 (1980) (federal government's refusal to reimburse states for the costs of therapeutic abortions, even if it reimburses childbirth-related costs under Medicaid programs, is not a constitutional violation); Poelker v. Doe, 432 U.S. 519 (1977) (city-owned hospital may refuse to provide public funds to indigents for non-therapeutic abortions even though it does provide such funds for childbirth-related costs).

A recent "takings" case also endorsed the macro approach. In Keystone Bituminous Coal Ass'n. v. DeBenedictus, 480 U.S. 470 (1987), a group of coal companies challenged a Pennsylvania law which denied them the right to mine a fraction of the total coal supply on land they owned. The Court, in an opinion written by Justice Stevens, held that the statute did not work a taking, and thus did not violate the fifth or fourteenth amendments of the Constitution. The loss of that coal (about two percent of the mineable coal), when viewed in light of the fact that ninety-eight percent of the coal was still recoverable, was not a sufficient economic diminution to constitute a taking. *Id.* at 499. Viewed within the micro/macro terminology, the majority would label the protected activity as the right to mine the coal contained on its property. *Id.* at 498 ("The 27 million tons of coal [that could not be mined] do not constitute a separate segment of property for takings law purposes."). As such, a government action which regulated two percent of the right is constitutionally permissible. Chief Justice Rehnquist's dissent would characterize the protected activity as the right to mine the two percent of the coal that statutorily cannot be mined. *Id.* at 514 (Rehnquist, C.J., dissenting) ("[P]etitioners' interests in particular coal deposits have been completely destroyed."). Following the Chief Justice's characterization, since all two percent of that coal cannot be mined, the right is totally abridged and the statute is invalid. The Court rejected Rehnquist's narrow focus, which can be characterized as the micro approach, in favor of the majority's broader view, a macro approach.

53. *See supra* text accompanying note 22.

54. Providence Journal Co. v. City of Newport, 665 F. Supp. 107, 112 (D.R.I. 1987).

55. *See supra* text accompanying note 20.

content-based regulation to see whether it is narrowly drawn to serve a compelling government interest."[56] Regarding content-neutral restrictions[57] in a *non-public* forum[58] "the Court has embraced a presumption that laws that substantially or wholly prohibit particular means of expression are invalid unless they withstand intermediate scrutiny."[59] The rationale behind this standard is that "substantial or total bans on particular means of expression pose significant dangers" to free speech.[60] The Supreme Court has held that in a *public* forum, a content-neutral ban would be judged under strict scrutiny.[61]

Under the macro approach, a city ordinance banning newsracks from public property would not be considered a total ban, but merely a limitation on the *manner* in which the protected communicative activity, distribution, can be performed. Characterized as such, the appropriate framework for review is the "time, place, and manner" test.[62] In the *Providence Journal* case,

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56. Farber & Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 VA. L. REV. 1219, 1220 (1984).

57. The Court has adopted a two-tier system, dividing restrictions on speech into either content-based or content-neutral categories. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 189 (1983). Content-based restrictions "limit communication because of the message conveyed." *Id.* at 190. On the other hand, "content-neutral restrictions limit communication without regard to the message conveyed." *Id.* at 189. Examples of this type of restriction would include a ban on billboards or a statute forbidding the distribution of leaflets in public places.

58. *See infra* note 71.

59. Stone, *Restrictions supra* note 18, at 66. *See generally id.* at 117 (publicness of affected forum is relevant to the Court's choice of a standard of review).

60. *Id.* at 65

61. *E.g.*, United States v. Grace, 461 U.S. 171, 177 (1983) (Government restrictions on expressive conduct in public forums must be "narrowly tailored to serve a significant government interest . . . .").

62. The "time, place, and manner" doctrine holds that the "State may not . . . enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly-tailored to serve a significant government interest, and leave open alternative channels of communication." Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

A ban on newsracks is a "manner" regulation of the protected activity of distribution. The newspaper publisher can still distribute his newspapers, but he cannot do so in the manner he pleases (distribution by newsracks on public property). While the terms "time" and "place" in the time, place, and manner test are well-defined, "manner" is the "most ambiguous." Lee, *Lonely Pamphleteers, Little People, and the Supreme Court: The Doctrine of Time, Place, and Manner Regulations of Expression*, 54 GEO. WASH. L. REV. 757, 757 n.2 (1986). "Manner" may refer to "the medium or method of communication, such as picketing," "a communicator's behavior while using a medium," the "physical attributes of the medium," the "use of particular words or symbols to express an idea," *id.*, or "the 'context of the circumstances' of production, sale, and publicity of a class of expression,"

where the district court expressly adopted the macro approach when faced with a newsrack ban,[63] the "time, place, and manner" test was used.[64] Similarly, the Sixth Circuit Court of Appeals considered a total ban on newsracks to be a time, place, and manner regulation in the *Lakewood* case.[65] Where the regulation is not a total ban on a communicative activity, the Supreme Court has routinely used the "time, place, and manner" test.[66]

It seems clear that a newsrack ban, then, is a time, place, and manner regulation (specifically, a manner regulation), and is therefore to be reviewed under the "time, place, and manner" test. Judicial scrutiny under this test can be described "as falling on a continuum . . . . The Court varies the level of scrutiny to accommodate the particular facts under review."[67] Thus, the scrutiny may vary from highly deferential to heightened review[68] depending upon the presence or absence of a number of factors, which include "disparate impact, public property, tradition, discrimination against speech, incidental effect, and communicative impact."[69] This lower level of scrutiny has been justified on grounds

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id. at 758 n.2. A "manner" regulation in the context of newsracks is clearly a limitation on the "medium or method of communication," since newsracks are a method by which publications are distributed.

63. *See supra* text accompanying notes 24-25.

64. Providence Journal Co. v. City of Newport, 665 F.Supp. 107, (D.R.I. 1987).

65. Plain Dealer Publishing Co. v. City of Lakewood, 794 F.2d 1139, 1147 (6th Cir. 1986) (ordinance giving mayor unbridled discretion over whether to permit newsracks was unconstitutional), *aff'd*, 486 U.S. 750 (1988).

66. The "time, place, and manner" doctrine holds that the "State may . . . enforce regulations of the time, place and manner of expression which are content-neutral, are narrowly-tailored to serve a significant government interest, and leave open ample alternative channels of communication." Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983). *See, e.g.*, Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984) (stating that expression "is subject to reasonable time, place or manner restrictions" which are upheld if they are content neutral, "narrowly tailored to serve a significant governmental interest, and leave open ample alternative channels for communication of the information."); *United States v. Grace*, 461 U.S. 171, 177 (1983) (same); Heffron v. ISKCON, 452 U.S. 640, 647-48 (1981) (same).

67. Goldberger, *Judicial Scrutiny in Public Forum Cases: Misplaced Trust in the Judgment of Public Officials*, 32 BUFFALO L. REV. 175, 177 (1983).

68. *See* Stone, *Restrictions, supra* note 18, at 50 (noting that the Court employs three standards of review under the "time, place, and manner" test: deferential, intermediate and strict).

69. *Id.* at 117. Stone lists these factors as considerations which may change the level of review the Court will use. The main factor to consider is the public property factor, since newsrack bans affect city streets and sidewalks. Tradition will also play a role (streets and sidewalks have long been centers of communication), *see infra* notes 71-76 and accompanying text, and it can be argued that a newsrack ban will have a disparate impact on certain speakers. This argument will be addressed later, *infra* notes 83-97 and accompanying text.

that "so long as a "time, place, and manner regulation does not effectively prohibit all communication of a message, but instead affects only one channel of communication, there is only a slight loss in the social, or 'marketplace,' values inherent in the first amendment."[70]

A newsrack ban would probably be reviewed under some form of heightened scrutiny, for several reasons. Primarily, a newsrack ban, because it bars the placement of the machines on public rights of way, would implicate the Court's "public forum" doctrine,[71] since the streets and sidewalks are considered traditional public forums. For example, the Court, in *Hague v. C.I.O*,[72] said that "[w]herever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."[73] When the streets and sidewalks are the target of regulation, the Court will be especially protective of the relevant first amendment interests at stake. "[T]he rights of the State to limit expressive activity [in traditional public forums] are sharply circumscribed."[74] Not only are streets and sidewalks traditional public forums, but they are the most sacred, and the most revered of these forums, and are steeped in tradition as centers for communicative activity.[75] This factor alone will heighten the level of scrutiny.[76] It is also conceivable that a newsrack ban, although con-

70. Farber & Nowak, *supra* note 56, at 1237.

71. Currently, the Court's public forum methodology breaks public property into three types: the traditional, or quintessential, public forum; the non-traditional or designated public forum; and the non-public forum. Public property which is not traditionally considered a public forum, such as a public school or public auditorium, but which has been opened by the state for use by the public as a place for expressive activity, requires equal access be given to all groups without consideration based on the content of a group's speech. *See* Perry Educ. Ass'n v. Perry local Educators Ass'n, 460 U.S. 37, 45-46 (1983). The traditional and designated public forums are viewed protectively by the Court, and any restriction on speech will be judged under intermediate review. Conversely, speech can be restricted in non-public forums "as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Perry*, 460 U.S. at 46. This is, in essence, highly deferential review, and the Court has upheld content-neutral restrictions of speech in every non-public forum case it has heard. *E.g.*, Stone, *Restrictions*, *supra* note 18, at 90-91.

72. 307 U.S. 496 (1939).

73. *Id.* at 515.

74. *Perry*, 460 U.S. at 45.

75. *See id.* at 45; *Hague*, 307 U.S. at 515.

76. Dean Stone argues that "it is unclear whether the Court applies diluted standards of review for nonpublic forums and unaltered standards for public forums, unaltered

tent-neutral, might well have a disparate impact on certain groups,[77] and thus may damage the marketplace of ideas. Further, newsracks, because of their potential communicative importance, should be afforded more protection from governmental regulation than a highly deferential standard of review can provide.[78]

In summary, the macro approach to defining communicative activities turns a newsrack ban into a "manner" restriction rather than a total ban. Whereas a total ban justifies strict scrutiny, a "manner" restriction is tested under a "time, place, and manner" test. When communicative activity in traditional public forums is affected, as it would be with a newsrack ban, a heightened scrutiny is utilized. Succinctly stated, the "time, place, and manner" doctrine says that "the government may enforce reasonable . . . manner regulations as long as the restrictions 'are [a] content-neutral, are [b] narrowly tailored to serve a significant government interest, and [c] leave open ample alternative channels of communication.' "[79] The rest of this section will be devoted to applying the "time, place, and manner" test to a newsrack ban based on current Supreme Court analysis.

A. Content-Neutrality

The first part of the "time, place, and manner" (TPM) test is whether the ban on newsracks is content-neutral. A total ban, because it applies evenhandedly to everyone who wishes to place newsracks on the sidewalks and streets, would generally be considered content-neutral.[80] For example, in *Heffron*, the Court held that the content-neutral requirement was satisfied because the Minnesota rule at issue applied "evenhandedly to all who wish to

standards for nonpublic forums and heightened standards for public forums, or diluted standards for nonpublic forums and heightened standards for public forums." Stone, *Restrictions*, *supra* note 18, at 91. What is clear is that a regulation involving a traditional public forum will be reviewed under a standard of review higher than it would have been had the regulation not involved a public forum. This Note will proceed under the assumption that an intermediate level of scrutiny will be utilized by the Court. Of course, because a newsrack ban is a manner regulation, the Court would not use strict scrutiny. *See, e.g.*, cases cited *supra* note 66.

77. *See infra* notes 80-99 and accompanying text (discussion of content-neutrality and the potential of disparate impact).

78. *See* Ball, *supra* note 5, at 183-84, 204-05.

79. United States v. Grace, 461 U.S. 171, 177 (1983) (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983)).

80. *See, e.g.*, Clark v. Community for Creative Non-Violence, 468 U.S. at 288, 295 (1984); *Grace*, 461 U.S. at 181 n.10; Heffron v. ISKCON, 452 U. S. 640, 649 (1981).

distribute and sell written materials or to solicit funds."[81] The *Providence Journal* court noted that "since the ban applies equally to all newsracks regardless of whose newspaper is carried inside and irrespective of the content of the particular newspaper," the ban was content-neutral.[82]

Anything less than a total ban is potentially open to charges of being discriminatory. For example, with a licensing scheme, even well-established guidelines and standards for denying or granting a permit might be susceptible to the biases of the scheme's administrators. Under a total ban ordinance, all the daily newspapers, conservative or liberal, owned by the mayor's brother or owned by the rival party leader's wife, cannot place newsracks on the sidewalks and streets.

Arguably ordinances such as newsrack bans, although facially neutral, might in fact be content discriminatory.[83] "For example, a law banning all billboards will have a disparate impact on those speakers who tend disproportionately to rely upon billboards to communicate their messages."[84] Similarly, a ban on newsracks will hurt newspapers whose sales primarily depend on newsracks. If a city has only one daily newspaper, it might be argued that a ban against newsracks is motivated by the city's dislike for the editorial policies of the publisher. Where there are several newspapers in a community (*e.g.*, the city daily, *USA Today*, the *New York Times*, the local underground newspaper, etc.), a newsrack ban might favor the well-financed publications that can afford to switch to alternate means of distribution. This presumes, of course, that distribution by newsrack is a more cost-efficient method of circulation than the possible alternatives.[85]

Occasionally, though, the Court "has been sensitive to the discriminatory effects of facially neutral regulations."[86] In *Martin v. Struthers*,[87] the Court struck down a city ban on door-to-door distribution of handbills, noting that this activity was "essential to

81. *Heffron*, 452 U. S. at 648-49.

82. Providence Journal Co. v. City of Newport, 665 F.Supp. 107, 112 (D.R.I. 1987).

83. *E.g.*, Day, *The Hybridization of the Content-Neutral Standards for the Free Speech Clause*, 19 ARIZ. ST. L.J. 195, 203 (1987); Lee, *supra* note 61, at 762; Stone, *Restrictions*, *supra* note 18, at 81.

84. Stone, *Restrictions*, supra note, 18 at 81.

85. *E.g.*, Ball, *supra* note 5, at 184 n.7 (noting that where sales are low, newsracks are less costly than newsboys or newstands).

86. Lee, *supra* note 62, at 765.

87. 319 U.S. 141 (1942).

the poorly financed causes of little people."[88] A review of other Supreme Court decisions on "content-neutral" regulations, however, reveals that *Martin* is an aberration.[89]

Despite a "significant likelihood that the government . . . is either deliberately or negligently distorting the 'marketplace of ideas,' "[90] the "Court routinely disregards disparate impact in considering the constitutionality" of content-neutral regulations such as newsrack bans.[91] For example, in *City Council of Los Angeles v. Taxpayers for Vincent*,[92] the Court upheld an ordinance prohibiting the posting of handbills or signs on the city streets as it applied to a political candidate. The Court ignored the argument that the regulation "seems to put the less well-financed political candidate at a greater disadvantage."[93] *Heffron v. International Society for Krishna Consciousness*[94] provides further evidence of the Court's reluctance to look beyond evenhandedness in determining content-neutrality. The Court upheld a state fairground rule limiting those areas in which people could distribute written materials to certain fixed locations. The Court reached this decision without "considering the fact that the rule was substantially more likely to impair the first amendment interests of those speakers who traditionally use this means of communication."[95] A similar result was reached in *Clark v. Community for Creative Non-Violence*.[96] In upholding a ban on sleeping in the park across the street from the White House, the Court never con-

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88. *Id.* at 146. *See* Marsh v. Alabama, 326 U.S. 501 (1946) (striking down a ban on distribution of religious materials in a company town); Lee, *supra* note 62, at 765-66 ("Justice Black's opinion (in Martin) implies that alternative means of communication, which are always available in theory, are of little value to those who cannot afford them.").

89. *See, e.g.*, Lee, *supra* note 62, at 765 (citing *Martin* as a rare example of the Court's sensitivity to the problem of disparate impact).

90. Farber & Nowak, *supra* note 56, at 1225.

91. Stone, *Restrictions*, supra note 18, at 83; *see also* Stone & Marshall, *Brown v. Socialist Workers: Inequality as a Command of the First Amendment*, 1983 SUP. CT. REV. 583, 595 ("[I]n considering the constitutionality of content-neutral restrictions, the Court has generally disregarded the fact that such restrictions often have unequal de facto effects.").

92. 466 U.S. 789 (1984).

93. Quadres, *Content-Neutral Public Forum Regulations: The Rise of the Aesthetic Interest, The Fall of Judicial Scrutiny*, 37 HASTINGS L.J. 439, 449 n.54 (criticizing the *Vincent* decision as a lowering of the Court's standard of review in free speech cases). Brennan's dissent in *Vincent* also reflected this concern. *Vincent*, 468 U.S. at 820 (Brennan, J., dissenting).

94. 452 U.S. 640 (1981).

95. Stone, *Restrictions*, *supra* note 18, at 83.

96. 468 U.S. 288 (1984).

sidered that a "content-neutral regulation that restricts an inexpensive mode of communication will fall most heavily upon relatively poor speakers and the points of view that such speakers typically espouse."[97]

Thus, while it is possible for "content-neutral" regulations to be construed as having discriminatory and disparate effects, the Court has been reluctant to consider those effects. Therefore, the Court would consider a total ban on newsracks content-neutral because it applies evenly to all concerned. Perhaps, though, the Court should review newsrack regulations "with a degree of skepticism to be sure that the government is not seeking to regulate content."[98] This skepticism would result in an incremental increase in judicial scrutiny, which is consistent with the assumption that a court should review a newsrack ban under heightened scrutiny.[99] However, the heightened scrutiny would not change the Court's analysis: the cases discussed above show that anything short of excessive disparate impact likely would not change the Court's conclusion that the ban is content neutral.

B. Narrowly Drawn to Serve Significant Government Interests

The second prong of the TPM test requires that a newsrack ban be "narrowly tailored" to serve significant government interests.[100] This prong can be broken down into two components: first, the assessment of the significance or substantiality of the governmental interests, and second, the determination of whether the ordinance at issue is narrowly tailored to serve those interests.[101]

1. Significant Government Interests

A newsrack ban can be justified by three governmental interests. Two of these interests have traditionally been proferred by municipalities in support of police regulations; the other is rela-

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97. *Id.* at 313-14 n.14 (Marshall, J., dissenting).

98. Quadres, *supra* note 93, at 449 n.54.

99. *See supra* notes 71-78 and accompanying text.

100. *See, e.g.*, United States v. Grace, 461 U.S. 171, 177 (1983) (citing Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983)).

101. *E.g.*, Providence Journal Co. v. City of Newport, 665 F.Supp. 107, 112 (D.R.I. 1987). The second component of the second prong can be broken down further into two parts: determining whether the regulation advances the governmental interests, and examining the narrowness of the restriction. Lee, *supra*, note 62, at 781 n.158. Since the line between these two sub-parts often blurs, leading to significant overlap, this Note, for purposes of simplicity, will treat the two sub-parts as one component.

tively novel.

i. The Aesthetics Interest

The first traditional governmental interest is aesthetics, which has increasingly gained the Court's favor as a legitimate and substantial state concern.[102] State cases have for some time indicated that aesthetic justifications are sufficient to support a total ban of a communicative activity.[103] In recent years, the Supreme Court also has seemed to accept the substantiality of aesthetic interests, as evidenced by its decisions in *Metromedia, Inc. v. City of San Diego*[104] and *City Council of Los Angles V. Taxpayers for Vincent.*[105]

A majority of the Court in *Metromedia* found a total ban on billboards could be sufficiently justified by a city's aesthetic interests.[106] Prior to *Metromedia,* "the state's interest in protecting the visual appearance of the public streets clearly would not have justified any limitations on the dissemination of speech in a public forum."[107] But the Court's decision in *Metromedia* "forecloses any further argument that concern with a neighborhood's visual appearance should not meet the substantiality requirement of the time, place, and manner test."[108]

In *Vincent*, the Court seemed to make some sense out of the virtually incomprehensible *Metromedia* decision, holding that a

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102. *See, e.g.*, City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 805 (1983) ("It is well settled that the state may legitimately exercise its police powers to advance aesthetic values."); Young v. American Mini-Theatres, Inc., 427 U.S. 50, 71 (1976) (Stevens, J., dissenting) ("[T]he city's interest in attempting to preserve the quality of urban life is one that must be accorded high respect.").

103. *See, e.g.*, United Advertising Corp. v. Borough of Metuchen, 42 N.J. 1, 5-6, 198 A.2d 447, 449-50 (1964) (upholding total ban on billboards resulting from an aesthetically-based zoning law); Mandelker, *The Free Speech Revolution in Land Use Control*, 60 CHI.-KENT L. REV. 51, 55-56, 59 (1984) (discussing state aesthetics laws which excluded billboards from certain areas).

104. 453 U.S. 490 (1981).

105. 466 U.S. 789 (1983).

106. *Metromedia*, 453 U.S. at 507-08 (White, J., plurality opinion) (An ordinance seeking to advance the "appearance of the city" is a "substantial governmental goal."); *Id.* at 552 (Stevens, J., dissenting in part) ("[T]he interests served by the ban [on outdoor advertising] are equally legitimate and substantial in all parts of the city."); *id.* at 559-61 (Burger, C.J., dissenting) (recognizing a city's legislative eradication of "eyesores" and "visual pollution" as a legitimate governmental interest); *id.* at 570 (Rehnquist, J., dissenting) ("[A]esthetic justification alone is sufficient to sustain a total prohibition of billboards within a community.").

107. Quadres, *supra* note 93, at 461.

108. *Id.*

city is constitutionally permitted to bar the posting of political signs on public property because of an aesthetic interest.[109] Thus, the Court "routinely reaffirmed the reasoning of *Metromedia* . . . that promotion of visual aesthetics constituted a substantial state interest."[110] Perhaps more importantly, *Vincent* made it clear that aesthetic interests are substantial enough to justify the abridgement of fully protected speech, like political speech. The *Metromedia* decision, which upheld the banning of partially-protected commercial speech from billboards, had left this issue unresolved.[111] *Vincent* held, however, that the kind of speech involved is irrelevant in determining the substantiality of the state's aesthetic interests.[112] The promotion of aesthetics, therefore, constitutes a substantial state interest irrespective of whether the type of speech involved is political or commercial or something else.[113]

Justice White, dissenting in *Lakewood*, accepted the substantiality of governmental aesthetic concerns as applied to newsracks, pointing out that "countless other American cities have invested substantial sums of money to renovate their urban centers and commercial districts. Increasingly, they find newsracks to be discordant with the surrounding area."[114] The aesthetics issue was also addressed in *Providence Journal*, which directly involved a total ban on newsracks from public property. The district court, while rejecting the city's aesthetics argument, made it clear that aesthetics are a significant government interest[115] even if the area from which newsracks are banned is less than a "pristine

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109. *Taxpayers for Vincent*, 466 U.S. at 816-17 ("[W]e accept the City's position that it may decide that the aesthetic interest in avoiding 'visual clutter' justifies a removal of signs creating or increasing that clutter."); *see also* Ball, supra note 5, at 189 (noting that the Court "explicitly held that aesthetic interests are sufficiently compelling to justify a 'time, place, and manner' regulation"); Quadres, *supra* note 93, at 496 (criticizing the *Vincent* holding which recognized a "visual aesthetic interest," as degrading the concepts of free speech and public forum).

110. Quadres, *supra* note 93, at 450.

111. *E.g.*, *id.* at 461-62 (pointing out that the "aesthetic interests that the *Metromedia* Court had applied only to commercial speech," were "suddenly applied universally to all speech" in *Vincent*).

112. *Taxpayers for Vincent*, 466 U.S. at 816.

113. *E.g.*, *id.*; Quadres, *supra* note 93, at 462 (stating that *Vincent* proclaimed that aesthetic interests apply to all types of speech).

114. City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 782 (1988) (White, J., dissenting).

115. Providence Journal Co. v. City of Newport, 665 F. Supp. 107, 113 (citing *Taxpayers for Vincent*, 466 U.S. 789 (1983), and *Metromedia*, 453 U.S. 490 (1981), to support proposition that aesthetics are "broadly recognized" as a significant governmental interest).

forest."[116]

Aesthetic interests are even more substantial when they are part of a comprehensive plan to address the problem of visual blight.[117] The presence of such a plan demonstrates that government "is addressing [the problem] in a widespread and cohesive manner"[118] rather than singling out newsracks. It may be important, then, for an ordinance banning newsracks to be accompanied by ordinances banning similar eyesores like vending machines. With or without the presence of a comprehensive plan, however, the Court has accepted the substantiality of aesthetic interests in recent years, and would likely do so if those same interests were used to justify a newsrack ban.

ii. The Safety Interest

The second traditional government interest in a newsrack ban is safety. "The Court has consistently recognized the important interest that localities have in insuring the safety of persons using city streets and public forums."[119] For example, in *Cox v. New*

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116. *E.g.*, *Providence Journal*, 665 F. Supp. at 115 ("None of this is meant to suggest that newsracks could never infringe aesthetic interests outside of a pristine forest.").

117. *See, e.g.*, *Metromedia*, 453 U.S. at 531 (Brennan, J., concurring) ("[B]efore deferring to a city's judgment, a court must be convinced that the city is seriously and comprehensively addressing aesthetic concerns with respect to its environment."). It seems that the plurality implicitly accepted Brennan's position by concentrating on the exceptions to the city's billboard ban as if they were reflective of the lack of a comprehensive plan to address the problem. *Id.* at 520-21 (plurality opinion) ("[T]he exceptions to the general prohibitions are of great significance in assessing the strength of the city's interest in prohibiting billboards."); *see also Providence Journal Co.*, 665 F.Supp. at 115-16 (a newsrack ban cannot be justified unless it is a "part of a serious and comprehensive attempt to address aesthetic concerns."); Quadres, *supra* note 93, at 474-75 (stating that a different result might have been reached in *Vincent* had a "comprehensive plan analysis" been used because no comprehensive plan existed to further the city's concern over visual blight).

118. Quadres, *supra* note 93, at 474; *see Providence Journal Co.*, 665 F. Supp. at 116 (newsrack ban cannot be justified unless it is "part of a serious and comprehensive attempt to address aesthetic concerns"); Southern N.J. Newspapers, Inc. v. New Jersey Dep't of Transp., 542 F.Supp. 173, 187 (D.N.J. 1982) (In finding that the statute prohibiting erection or maintenance of roadside signs unconstitutionally abridged first amendment rights, the district court pointed out that exceptions to the general ban indicated that the state was willing "to tolerate some detraction from aesthetics in order to serve other purposes.").

119. City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 781-82 (1988) (White, J., dissenting); *see also* Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 640, 650 (1981) ("[I]t is clear that a state's interest in protecting the 'safety and convenience' of persons using a public forum is a valid governmental objective."); Cox v. New Hampshire, 312 U.S. 569, 574 (1941) ("The authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use of public

Hampshire,[120] safety concerns supported the Court's conclusion that the state "may recoup the actual costs of governmental services [needed to insure the safety of the citizens] that are generated by the use of public property for speech activities. . . ."[121]

More recent cases have given added significance to the safety interests of the state as those interests impact on free speech. The *Metromedia* Court stated that there could be no doubt that safety is a "substantial governmental" goal.[122] In *Clark v. Community for Creative Non-Violence*,[123] the Court noted that the government has a substantial interest in "ensuring that the National Parks are adequately protected."[124] Similarly, the Court considered the safety interest asserted in *Heffron*,[125] namely "the need to maintain the orderly movement of the crowd given the large number of exhibitors and persons attending the Fair,"[126] to be a "substantial consideration."[127]

A number of safety problems are presented by newsracks. First, they pose inconveniences and dangers to pedestrians. Newsracks placed on sidewalks narrow the width of those sidewalks, making it more difficult for pedestrians to traverse the pathways. Bottlenecks could develop around clusters of newsracks, creating potentially dangerous crowding.[128] Handicapped people would be

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highways has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend.").

120. 312 U.S. 569 (1941) (members of a group of Jehovah's Witnesses, who marched along the sidewalks of a populous city, were charged with violating a state statute which prohibited a "parade or procession" upon a public street without a special license).

121. Goldberger, *A Reconsideration of* Cox v. New Hampshire: *Can Demonstrators Be Required to Pay the Costs of Using America's Public Forums?*, 62 TEX. L. REV. 403, 409-410 (1983). Several cases cited by Goldberger are helpful in understanding the development of this proposition. *See generally* Follett v. Town of McCormick, 321 U.S. 573 (1944) (holding that ordinance requiring all booksellers to pay a flat fee to procure a license to sell books was invalid); Murdock v. Pennsylvania, 319 U.S. 105 (1943) (holding that a municipal ordinance that exacted a flat license fee from Jehovah's Witness ministers who went from community to community selling religious literature was invalid); Schneider v. State, 308 U.S. 147 (1939) (holding that city-wide bans on the distribution of leaflets in public streets and parks were invalid).

122. Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 507-08 (1981).

123. 468 U.S. 288 (1984).

124. *Id.* at 297.

125. Heffron v. ISKCON, 452 U.S. 640 (1981).

126. *Id.* at 649-50.

127. *Id.* at 650. This safety consideration was substantial enough to uphold the fairground rule prohibiting in-person solicitation except when performed in booths set in fixed locations. *Id.* at 655.

128. *See, e.g.*, Gannett Co. v. City of Rochester, 69 Misc. 2d 619, 623, 330 N.Y.S.2d 648, 654 (Sup. Ct. 1972) (noting that two persons in the city filed claims involv-

particularly affected, both because of these crowded conditions, and the blockage of handicapped access ramps by newsracks. Injuries might result if newsracks, placed near the curb and left overhanging the street, are struck by passing cars and hurtled into pedestrians.[129]

Second, newsracks also threaten the safety of drivers. If a newsrack is chained to a pole or bolted into the ground, as they frequently are, an automobile crashing into it may suffer additional damage as could its occupants. Traffic flow might be affected, as motorists slow down or stop to buy a newspaper from a nearby newsrack. Thus, a newsrack ban can be justified by a state's interests in the safety of its citizenry.

iii. The Interest in Preserving Public Forums

The third government interest represents a novel legal argument advocated by Justice White in *Lakewood.* While not quite as simple to define as aesthetics or safety, the interest is basically the preservation of public property, particularly public forums, for the public.[130] This interest works on two levels: first, the government is naturally concerned with keeping its streets and sidewalks free from permanent encumbrances; and second, permanent structures situated on streets and sidewalks may have a negative effect on free speech, even though the offending structures themselves are involved in the dissemination of speech.[131]

Intuitively, it would seem wrong for a company to stake out a section of the city's sidewalks and build a factory without the city's permission. Certainly, if the company offers to pay for the sidewalk, and the city chooses to accept the offer, then such action would be permissible. But it seems well within the city's power to refuse to "sell" or give the sidewalk to the company. This is exactly the situation presented by the placement of the newsracks on the city's property. By placing a newsrack on a street corner, a newspaper publishing company is in essence "taking" public property for its own personal use.[132]

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ing newsracks).

129. *See, e.g.,* Bovio v. City of Miami Springs, 523 So.2d 1247 (Fla. 1988) (Woman filed suit after being injured by a newsrack which struck her after it was made airborne by the impact of an automobile.).

130. City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 780-81 (1988) (White, J., dissenting).

131. *See id.* at 779-81.

132. *Id.* at 780.

While a newsrack may not be the same imposing structure as a factory, it is, nonetheless, a structure; it does take up space; and since it is often bolted to the ground or chained to poles, it is at the very least, semi-permanent in nature.[133] While the newsrack is on that street corner, no one else can use that piece of public property. As such, the newsrack collides with the government interest in "keeping the streets and sidewalks free for the use of all members of the public, and not just the exclusive use of any one entity."[134]

There is no constitutional support for the proposition that newspaper publishers can cordon off portions of the sidewalk to increase circulation.[135] Granted, if the city decided to allow newsracks on its streets, then such appropriation of land would be permissible. But the city cannot be compelled to semi-permanently donate public property to private parties, even if those parties claim that the property is to be used for constitutionally protected purposes.

Since a street or sidewalk is a public forum, the city can be compelled to provide access for communicative purposes.[136] Newspaper publishers have a "right to distribute . . . newspapers on [city] streets, as others have a right to leaflet, solicit, speak, or proselytize in this same public forum area."[137] Access is quite different, however, from permanent occupation of the forum. Were a newspaper publishing company to be given the constitutional right to "take" public property, it would be free not only to place a newsrack on the sidewalk, but also to build a large printing facility in a public park, for example.

This result would be incongruous with the Court's holding in *Clark v. Community for Creative Non-Violence*[138] that extended, overnight protests could be prohibited. The *Clark* court, in upholding the prohibition, remarked that it was concerned with the prospect of "around-the-clock demonstrations lasting for days."[139]

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133. The district court in *Lakewood* found that the "placement of a [newsrack] on property is normally of a permanent nature, the device generally occupying a specific portion of property for months or years." *Id.* at 778, n.6 (White, J., dissenting).

134. *Id.* at 781 (White, J., dissenting).

135. *E.g., id.* at 773, 779 (White, J., dissenting).

136. *See, e.g.*, Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983). At the very least, denial of access to a public forum will be judged under strict scrutiny. *Id.*

137. *Lakewood*, 486 U.S. at 778 (White, J., dissenting).

138. 468 U.S. 288 (1984).

139. *Id.* at 297.

A city, then, consistent with *Clark*, can rightfully assert an interest in keeping public property open to the public by protecting that property from protracted occupation by protesters. "The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated."[140] As Justice White stated in *Lakewood*, "[p]reserving public forum space for the use by the public *generally*, as opposed to the exclusive use of one individual or corporation, is obviously one such 'lawfully dedicated' use."[141]

The principle that a private party cannot take public property has its foundation in the legal rules regulating the state's exercise of its eminent domain power. It is well established that a state "may not transform private property into public property without compensation . . . . This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent."[142] Thus, "[t]here is little doubt that if a State were to place an object of the size, weight, and permanence of a newsrack on private property, this 'physical occupation' would constitute a 'taking' of that property."[143] Were the state's and the private party's roles reversed, it seems the result would be the same: a taking would have occurred. "The character of the newsrack's intrusion on city sidewalks is not lessened by the fact that the property here is public, the occupation is by a private party, or that the purpose of the 'taking' is the communication of ideas."[144] It is important to remember that the "Constitution measures a taking of property not by what a . . . [party] says, or by what it intends, but by what it *does*."[145] Clearly, when a newspaper places a newsrack on public property, the newspaper is taking that property in such a way that no one else can use it.

The government interest in keeping public forums open to the general public also works on a level beyond property concerns. There is a genuine interest in maintaining freedom of speech and press on public rights of way. The use of streets and sidewalks

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140. Adderly v. Florida, 385 U.S. 39, 47 (1966).

141. *Lakewood*, 486 U.S. at 781 (White, J., dissenting).

142. Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 164 (1980).

143. *Lakewood*, 486 U.S. at 778 n.6 (White, J., dissenting); *see* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982). In *Loretto*, the Court held that a permanent physical occupation is a taking "without regard to whether the action achieves an important public benefit or has only minimal impact on the owner." *Id.* at 434-35.

144. *Lakewood*, 486 U.S. at 778 n.6 (White, J., dissenting).

145. Hughes v. Washington, 389 U.S. 290, 248 (1967) (Stewart, J. concurring).

"has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views . . . *may be regulated in the interest of all* . . . ."[146]

Given the importance of public rights of way to free speech, government action infringing upon the ability to use these forums is "sharply circumscribed."[147] Inversely, any government action taken to ensure that traditional public forums remain available to the general public for the purposes of free speech gains added significance. "Because the state has a strong welfare interest in protecting the fundamental rights of individuals, the police power may be used to require certain private actors to honor fundamental rights."[148] Thus, when the state "acts to enhance the quality of public debate, we should recognize its actions as consistent with the first amendment."[149]

For several reasons, a ban on newsracks may well be consistent with the Constitution. First, it "remains important to preserve the more traditional . . . means of communication,"[150] and a newsrack ban, by giving the streets back to the general public, accomplishes just that. The streets and sidewalks have traditionally been the stage for protesters, paraders, pamphleteers, solicitors, soapbox speakers, and the like. But the presence of newsracks on their "stage" may force them to move to other streets and sidewalks. Where the other forums do not fill their needs, the demonstrators may be forced to abandon their communicative activities completely.

For example, the sidewalks in front of city hall may be lined with newsracks. A cluster by the side door occupies the whole corner. A group of picketers protesting a mayoral action may be forced across the street or over to the next block because their desired forum is occupied by machines. If they move the protest, it may lose much of its impact. The mayor and other city officials

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146. Hague v. Committee for Indus. Org., 307 U.S. 196, 514-15 (1938) (emphasis added).

147. *E.g.*, Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1982).

148. Utter, *The Right to Speak, Write, and Publish Freely: State Constitutional Protection Against Private Abridgment*, 8 U. PUGET SOUND L. REV. 157, 186 (1985).

149. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1416 (1986).

150. Stone, *Restrictions*, *supra* note 18, at 66; *see also* Fiss, *supra* note 149, at 1408 (endorsing the Free Speech Tradition, which "can be understood as a protection of the street corner speaker.").

may not be bothered by it, and the appropriate backdrop of city hall is not there to drive home the message to bystanders and passers-by. "[T]he very fact that a speaker prefers . . . [a certain type] of expression suggests that something is lost in transition."[151]

Were the newsracks not permanent structures, the picketers could come back another day to protest in front of city hall. But newsracks, unlike fellow protesters or newsboys, are permanent structures. No matter when the protesters come back, the newsracks will be there. Thus, the newsrack may limit or prohibit other people from exercising their traditional first amendment rights. A newsrack ban may give the traditional means of communicating back to the people.

Just as it is important to maintain traditional modes of expressive activity, it is equally pressing that the "less expensive means of communication" be preserved.[152] Again, a newsrack ban serves this purpose. As Justice Black observed in *Martin v. Struthers*,[153] the communicative activities potentially affected by newsracks — picketing, leafleting, preaching, protesting, soliciting, pamphleteering — are "essential to the poorly financed causes of little people."[154] To the general public, most of whom cannot afford to publish or circulate their own newspaper, the "[i]nexpensive media . . . are simply more important."[155] Handbills, for example, may be the only "way for poor men to express ideas to the public."[156] Without access to effective means of communication, the poor man has no choice but to abdicate his first amendment rights to the newspaper publisher and others who can afford to get their ideas heard. This problem can be alleviated by a newsrack ban because, at least on the sidewalk, the poor man would stand on equal footing with the newspaper publisher in disseminating his message.

A final reason for asserting that a newsrack ban furthers the purpose of keeping the streets and sidewalks open to all for the purposes of free speech, and is thus consistent with the first amendment, concerns the concept of the marketplace of ideas.[157]

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151. Stone, *Restrictions*, *supra* note 18, at 65.
152. *Id.* at 66.
153. 319 U.S. 141 (1942).
154. *Id.* at 146.
155. Lee, *supra* note 61, at 765.
156. Z. CHAFEE, JR., FREE SPEECH IN THE UNITED STATES 406 (1941).
157. *See generally* J. MILL, ON LIBERTY 1048 (Oxford ed. 1946). *See also* Utter,

By allowing only newspaper publishers to exercise their first amendment rights on streets and sidewalks, the marketplace of ideas will be limited. The opinions and ideas expressed in the newspaper will be circulated without restrictions, but other ideas will be encumbered by the various limitations placed on them by the presence of newsracks. Ideas not expressed in the newspaper may well be unconventional, dissident, and perhaps unheard. The loss of such ideas would be unfortunate, since they "may play a critical role in local if not nationwide debate."[158] Obviously, when only the ideas in the newspaper are presented, discourse suffers. A newsrack ban might offer a remedy to the problem.

Clearly, then, the appropriation of sidewalks by newspaper publishers limits the opportunity for others to communicate their ideas. Although it could be argued that the newsracks create at most a *de minimis* effect on the speech of others, even a *de minimis* effect distorts the marketplace of ideas.[159] Moreover, a ban on newsracks may only have a *de minimis* effect on newspaper publishers, especially where alternative means of distribution exist.

Since competing interests exist and must be reconciled, perhaps the best approach would be to balance these interests with the costs of lost speech. Certainly, in some cases, the first amendment interests of the newspaper will outweigh the state interest in keeping the public forums open. It is equally certain, however, that the first amendment interests of the general public will outweigh the newspaper's rights in other cases. Where *de minimis* effects balance each other out, which will occur most of the time, a court is left with a policy decision: whose rights are to be valued more? There is no easy answer. Perhaps the best solution would be for a court, which would normally use heightened scrutiny in assessing the substantiality of the state's interest, to defer to the legislative determination of whose rights are paramount.

Summarizing, several substantial interests exist to justify a total ban on newsracks: aesthetics, safety, and the maintenance of the public forum for use not by just a select few, but by all citizens. This latter interest operates on two levels, the first being the

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supra note 148, at 188-89 n.159 ("Free trade in 'the marketplace of ideas' is the best test of truth because competition will eventually result in acceptance of the most truthful ideas and rejection of false ideas.").

158. Stone, *Restrictions*, *supra* note 18, at 66.

159. *Id.* at 81.

protection of property, and the second being the preservation of the general populace's first amendment rights. All three of these interests, if used by the state either separately or in combination with each other, will be viewed favorably by the Court. The next step in the Court's analysis is to determine how well those interests are served by a newsrack ban.

2. Narrowly Tailored to Advance State Interests

Having established the substantiality of the government interests in a ban on newsracks, the court must then determine if the ordinance at issue is narrowly tailored to serve those interests. It has been argued that the "narrowly tailored" test, even under heightened scrutiny, "is often devoid of meaning. If the state is able to define the harm it is attempting to alleviate with sufficient precision, and the court accepts the state's premise that the threatened harm exists, any regulation phrased to eliminate that particular threat would be narrowly tailored by definition."[160] For example, the *Metromedia* Court "dismissed the narrowly tailored requirement cavalierly, almost as if any regulation that directly served the city's interest would be, without question, sufficiently narrowly tailored."[161] Under this test, a newsrack ban would be narrowly tailored as long as it performed its function of alleviating visual blight, promoting safety, or maintaining public forums for the public.

Potential problems exist, however, particularly overbreadth and underinclusiveness. Opponents of a newsrack ban could argue that the ordinance is overbroad because it prohibits too much speech, or at least more speech than is necessary to achieve its purpose. Therefore, a total ban would be unnecessary and unconstitutional. In defending the ordinance under heightened scrutiny, "the government must prove that its use of a less restrictive alternative would seriously undermine substantial governmental interests."[162]

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160. Quadres, *supra* note 93, at 469.

161. *Id.*; *see also* City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789 (1983) (The Court, after finding a sufficient interest, simply found the regulation to be narrowly tailored.).

This standard has been the target of criticism, but a discussion of that criticism and potential solutions is beyond the scope of this Note. *See, e.g.*, Quadres, *supra* note 93, at 439. Note, however, that this is the approach the Court currently takes in determining whether an ordinance is narrowly drawn.

162. Stone, *Restrictions*, *supra* note 18, at 53.

This burden should be easily met, however. First, with regard to aesthetics, even a few newsracks in certain select corners might "seriously undermine" a city's effort to make itself visually more attractive. The city has made a determination that aesthetics are important, the Court has probably accepted the substantiality of the aesthetic interest,[163] and the only way to attack the problems presented by newsracks is to ban them. Regulation of placement, size, or number will not fully address the city's concern that newsracks make its streets and sidewalks unattractive. The saying, "beauty is in the eye of the beholder",[164] although a cliche, is nonetheless appropriate here.[165] The city might truly believe that one newsrack will only further the visual blight it seeks to stamp out, and that may very well be the case, depending upon the subjective opinion of the "beholder." Any uncertainty about overbreadth is further dissipated when the municipality seeking to ban newsracks is historical or residential. Justice Brennan, writing in *Metromedia*, used the restored colonial village of Williamsburg, Virginia, to illustrate this point.[166]

Safety interests may also be detrimentally affected by anything less than a total ban. Even if relatively few people are threatened or inconvenienced by newsracks, it will be in the best interests of all concerned to ban them since the city should be concerned about the safety of all its citizens. One newsrack on the street poses the same safety threat that many do.

Likewise, a street corner "taken" by a newsrack seriously undermines the city's property interest and its interest in keeping the corner available for use by all. It is questionable policy for a city to allow private parties to simply appropriate its property. The city might find itself without the necessary resources to provide required services and outlets for its people, but that problem is what a partial regulation, as opposed to a ban, seems to perpetuate. Similarly, a single corner occupied by a newsrack is potentially lost speech. A city also may be genuinely worried that any-

163. *See supra* notes 102-18 and accompanying text.

164. Although the phrase most certainly did not originate with the Supreme Court, Justice Brennan has used it in discussing aesthetic interests. *Taxpayers for Vincent*, 466 U.S. at 822 (Brennan, J., dissenting).

165. *See* Quadres, *supra* note 93, at 463.

166. Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 534 (1981) (Brennan, J., concurring) ("[A] historical community such as Williamsburg, Va., should be able to prove that its interests in aesthetics and historical authenticity are sufficiently important that the First Amendment value attached to billboards must yield.").

thing less than a total ban might invite charges of content discrimination. The *Vincent* Court "rejected the argument that the ban on posting handbills could have been narrower, with exceptions for certain categories of expression such as political campaign messages",[167] because such exceptions "might create a risk of engaging in constitutionally forbidden content discrimination."[168] Thus, the fear of content discrimination further supports the proposition that a newsrack ban is narrowly tailored and not overbroad.

Besides overbreadth, it might also be argued that a newsrack ban is underinclusive, because it does not fully address the problem it sets out to correct. For example, visual blight in the downtown area is not going to be improved merely because newsracks are banned while other eyesores, like billboards, trashcans, benches, fire hydrants, telephone booths, and telephone poles are left unregulated. Justice Brennan made a similar point in *Metromedia*, noting that the city "failed to demonstrate a comprehensive coordinated effort in its commercial and industrial areas to address other obvious contributors to an unattractive environment. In this sense the ordinance [banning billboards] is underinclusive."[169]

This argument is not without merit, especially where use of newsracks is the only banned private use of the streets and sidewalks. Such a focus on newsracks allows other sources of visual blight to subvert the aesthetic gains worked by the newsrack ban. Several powerful counter-arguments can be made, however. Initially, it is important to note that evidence of a comprehensive plan designed to alleviate visual blight will make a city's "narrowly tailored" burden much easier to meet.[170] Without such evidence, however, the city can still argue that it does not have to address "all aesthetic problems at the same time . . . . Indeed, from a planning point of view, attacking the problem incrementally and sequentially may represent the most sensible solution."[171] Thus, in order to preserve the aesthetics justification, the city would only have to show that the ban on newsracks is just the beginning of "cleaning up" the downtown area.

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167. Lee, *supra* note 62, at 770.
168. *Taxpayers for Vincent*, 466 U.S. at 812.
169. *Metromedia, Inc.*, 453 U.S. at 531 (Brennan, J., concurring).
170. *See supra* notes 117-18 and accompanying text.
171. *Metromedia, Inc.*, 453 U.S. at 531-32 (Brennan, J., concurring).

Moreover, many of the uses left unregulated, like benches, are "public services of a quasi-governmental nature."[172] An obvious distinction can be drawn "between those on-street objects that are essential to the public safety and welfare — such as bus shelters, telephone and electric wiring poles, and emergency phone boxes — and the preferred distribution means of a private newspaper company."[173] The public service structures are civic necessities, so any claim of underinclusiveness must be considered in relation to the other private uses that might have been regulated but were not, and not in relation to all of the public and private uses left unregulated.

It seems that in many cases a newsrack ban would be neither overbroad nor underinclusive, and therefore narrowly tailored.[174] It has been demonstrated so far that a newsrack ban is content-neutral, and is narrowly tailored to serve significant government interests. But it still must be shown that alternative means of distributing newspapers remain after the imposition of the ban.

C. The Availability of Alternate Means

The final prong of the "time, place, and manner" test requires that alternate means exist by which a newspaper publisher can distribute his newspapers after newsracks are banned. Behind

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172. Plain Dealer Publishing Co. v. City of Lakewood, 794 F.2d 1139, 1148 (6th Cir. 1986) (Unthank, J., concurring)), *aff'd on other grounds*, 486 U.S. 750 (1988).

173. City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 797 (1988) (White, J., dissenting).

174. Interestingly, some lower courts which have addressed the newsrack issue have limited their "narrowly drawn" inquiry to whether or not the newsrack ordinance grants unlimited discretion to city officials. In other words, the sole criterion for satisfying the "narrowly tailored" requirement is a limitation on the discretion wielded by whomever makes the newsrack decisions. For example, in Miami Herald Publishing Co. v. City of Hallandale, 734 F.2d 666, 673 (11th Cir. 1984), the court of appeals stated explicitly that "[i]n order to qualify as narrowly tailored, a content neutral ordinance must avoid vesting city officials with discretion to grant or deny licenses." *See also* Gannett Satellite Information Network v. Town of Norwood, 579 F. Supp. 108 (D. Mass. 1984) (by-laws which vested "virtually unbridled discretion in town officials to grant or deny permit requests" were declared unconstitutional); Philadelphia Newspapers, Inc. v. Borough of Swarthmore, 381 F. Supp. 228 (E.D. Pa. 1974) (privilege that is revocable "at anytime and without prior notice, or obligation to furnish reasons for such revocation" gave Borough Council too much discretion and was held unconstitutional); News Printing Co. v. Borough Council of Totowa, 211 N.J. Super. 121, 142, 511 A.2d 139, 152 (Super. Ct. Law Div. 1986) (ordinances that "give unfettered power to grant or deny permits . . ."); City of Burlington v. New York Times Co., 148 Vt. 275, 279, 532 A.2d 562, 564 (1987) (quoting *Hallandale*). Since a total ban removes the discretionary element, a total ban would always be narrowly drawn under the approach taken by these courts.

this "time, place, and manner" component is the theory that "[i]t is not unreasonable . . . to expect an individual who is prohibited from using one of these means of expression to shift to another",[175] as long as there is not a significant reduction in the quantity of speech.[176]

Since the Court has never clearly defined the alternate means test, two different interpretations have developed. First, the test "may mean no more than that the speaker must have some viable alternative for communicating his message to his audience, regardless of whether that option is public or private."[177] Generally, a newspaper publisher has many viable alternatives to newsracks. Newspapers can be sold at a store, at a newsstand, or on the street by a newsboy; newspapers can also be home-delivered. To meet the needs of those who want to purchase newspapers late at night, papers can be sold at twenty-four hour convenience stores. Further, a newsrack ban on public property would still leave the newspaper publishers the option of placing newsracks on private property. The district court in *Lakewood* found that "no person in [the town] live[d] more than a quarter-mile from a 24-hour newspaper outlet: either a store open all-night or a newsbox located on private property."[178]

Three valid criticisms of these alternatives can be voiced. The first is that newsracks are cheaper and more effective than other methods of distribution. Although alternative means of distribution are "available in theory," some will be inadequate for the poorly financed publisher.[179] However, this argument has generally not been accepted by the courts. "[T]he First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired."[180] Nor does the first amendment require that alternate distribution meth-

175. Stone, *Restrictions*, *supra* note 18, at 65.

176. *Id.*

177. Quadres, *supra* note 93, at 482-83.

178. City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 783 (1988) (White, J., dissenting).

179. Lee, *supra* note 62, at 806.

180. Heffron v. ISKCON, 452 U.S. 640, at 647 (1981); *see also* Gannett Satellite Information Network v. Metropolitan Transp. Auth., 745 F.2d 767 (2nd Cir. 1984) (holding that MTA's licensing fees were valid restrictions on newsrack distribution in the public areas of its stations); New York City v. American School Publishing, Inc., 69 N.Y.2d 576, 509 N.E.2d 311, 505 N.Y.S.2d 599 (1987) (absent any statute or regulation, the city could not prohibit newsracks from being installed on its streets, but these means of communication are not always free from governmental regulation).

ods be the least expensive means of expression.[181] In *Gannett Satellite Information Network v. Metropolitan Transportation Authority*,[182] a case involving a newsrack ban in mass transit stations, the court of appeals said that "Gannett cannot successfully argue that the more expensive alternative distribution methods deprive it of its first amendment right to distribute papers . . . . [I]t should be ready to absorb increases in the cost of doing business."[183] Occasionally, the Court will recognize the plight of the poor communicator,[184] but a newspaper publisher is not in the same position as the door-to-door leafletter. Most newspaper publishers are wealthy corporations which can afford the added costs of doing business without newsracks. Decreased profitability will not put such publishers out of business. In those rare cases where a newsrack ban may close down a newspaper, a sensitive case-by-case analysis by the reviewing court can address the free speech concern without the frustrating of the interests of municipalities that would result from prohibiting total bans of newsracks.

A second criticism of forcing newspaper publishers to use alternate means of distribution is that, by forcing the newspaper publisher to resort to private forums, a total ban will "enhance viewpoint discrimination because, unlike the city, the private property owner is not constitutionally bound to refrain from discriminating against unpopular points of view."[185] Censorship may indeed occur in the private sector, but the Court explicitly rejected the "notion that the First Amendment rights are somehow not fully realized unless they are subsidized by the State."[186] The

181. *See Heffron*, 452 U.S. at 654-55 (state not required to provide access to fairgrounds for solicitation at no cost); *Kovacs v. Cooper*, 336 U.S. 77, 88-89 (1948) (city may restrict soundtrucks even though they are cheapest means of communication); *Gannett Satellite*, 745 F.2d at 774 (city-run transit authority may ban newsracks in its train stations, even if they are the cheapest means of distribution).

182. 745 F.2d 767 (2d Cir. 1984).

183. *Id.* at 774.

184. *See* Martin v. Struthers, 319 U.S. 141, 146 (1977) (Court struck down ban on door-to-door distribution of circulars because this communicative activity is "essential to the poorly financed causes of little people"); *see also* Clark v. Community for Creative Non-Violence, 468 U.S. 288, 313 n.14 (1984) (Marshall, J., dissenting) (ban on sleeping in National Parks unfairly burdened poor organization's attempt to inexpensively communicate the plight of the homeless); Marsh v. Alabama, 326 U.S. 501 (1946) (first amendment prohibits a state from punishing a person with criminal sanction for distributing religious literature on the sidewalk of a town owned by a private corporation).

185. *Quadres*, *supra* note 93, at 478.

186. Reagan v. Taxation With Representation of Washington, 461 U.S. 540, 546 (1983) (quoting Cammarano v. United States, 358 U.S. 498, 515 (1959) (Douglas, J.,

right to distribute "does not mean that [a publisher] can . . . distribute [his newspapers] where, when and how [he] chooses."[187] To make up for lost sales caused by private viewpoint discrimination, a newspaper, unlike poorer communicators, can further explore distribution means free from control by private parties, such as home delivery, newsboys, and newstands.

A third criticism of the alternate means available to a publisher is that those means are inadequate compared to the unique advantages provided by newsracks.[188] The first amendment protects the right to "reach the minds of willing listeners and to do so there must be opportunity to win their attention."[189] Newsracks, with their windows displaying the paper's headlines, are "peculiarly suited to reach individuals who do not ordinarily seek out newspapers."[190]

This argument fails on several points though. First, there are other ways of catching a potential reader's attention. Although a bit trite, the newsboy yelling "Extra, Extra" will attract more interest than a metallic box. Posters advertising a newspaper may also be more appealing than a newsrack. In Great Britain, the dailies routinely hang posters heralding that day's headlines. Second, radio and television commercials are effective means of attracting attention. Even if these alternate methods are more expensive and less convenient, that does not mean that the first amendment right to circulate is being denied.[191] The first amendment makes no guarantee of profit maximization or cost efficiency. Consequently, a newsrack ban is able to meet the first formulation of the alternative means test despite the three criticisms discussed above.

The second alternate means test, a refinement of the first, requires "that the speaker have alternative access to his chosen public forum at some time or place."[192] This approach was endorsed

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concurring) (upholding Treasury regulation that denied deductions for business expenses arising from lobbying activities)).

187. Breard v. Alexandria, 341 U.S. 622, 642 (1951) (first and fourteenth amendments are not to be treated as absolutes).

188. Brief for Appellee at 39, City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750 (1988) (86-1042) (asserting that the unique nature of newsracks makes the availability of stores inadequate in comparison) [hereinafter Brief for Appellee].

189. *Id.* (quoting Heffron v. ISKCON, 452 U.S. 640, 655 (1981) (quoting Kovacs v. Cooper, 336 U.S. 77, 87 (1949))).

190. Brief for Appellee, *supra* note 188, at 35.

191. *See supra* notes 179-84 and accompanying text.

192. Quadres, *supra* note 93, at 483.

by the *Providence Journal* court: "[W]hen courts apply the alternative channels test to restrictions of expressive activity in a public forum, they consider the alternative channels left open within the public forum, not the alternatives available" elsewhere.[193]

The rationale for this variation on the first test is that "there are instances in which, for symbolic or other communicative purposes, a message must be presented in a certain place . . . to be effective . . . ." Nevertheless, the Court often minimizes the importance of a particular place . . . of expression."[194] Or, rather than viewing alternatives in a practical sense, the Court looks at them abstractly, as if the mere existence of alternatives in the same place makes them feasible and workable.[195] The net effect, then, is that the Court "barely considers the adequacy of alternative modes of communication."[196]

Under such cursory scrutiny, and even under heightened scrutiny, there are attractive and effective alternatives which exist within the particular public forum of sidewalks and streets. Newspaper publishers who wish to distribute their papers can utilize, for example, newstands and newsboys. Again, although these methods might not be as cost-effective or as desirable as newsracks, they are legitimate alternatives, the feasibility of which has been proven over the years. These alternatives might not provide the desired twenty-four hour service, but newsstands and newsboys can be used throughout the business day to provide sufficient circulation. As *Clark* demonstrated, communicative activities do not have to be exercised at every hour in order to be fully realized under the first amendment.[197] Moreover, there is nothing to prevent a newspaper publisher desiring twenty-four hour circulation capability from keeping his newsstands open all night.

Interestingly, the rationale behind testing for alternate means within the public forum is totally inapplicable to newsracks, because the sale of newspapers is not sufficiently tied to the manner

193. Providence Journal Co. v. City of Newport, 655 F.Supp. 107, 118 (D.R.I. 1987); *see also* Heffron v. ISKCON, 452 U.S. 640, 654-55 (1981) (regulation requiring printed and written material to be distributed only at fixed locations at a fairground was valid because distribution was permitted at other places in the fairground).

194. Lee, *supra* note 62, at 801-02 (emphasis omitted).

195. *E.g.*, Quadres, *supra* note 93, at 451 ("The Court, however, seemed to view such alternatives in an abstract, rather than in a practical sense.").

196. Lee, *supra* note 62, at 770.

197. Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984) (a regulation forbidding sleeping overnight in a national park was valid, even though it disrupted a demonstration, because it *did* permit the demonstration at a reasonable time).

or the place in which they are sold. It is fair to say that "speakers" who desire to sleep in Lafayette Park, or leaflet at a state fair, or protest in front of city hall, have messages directly tied to the location.[198] "By denying these speakers access to what are the most logical targets of their expression, such regulations deprive them of access to the most important audience and prevent them from utilizing especially dramatic and effective means of communication."[199] Similarly, "a regulation suggesting that a speaker use handbills rather than posters, or parades rather than handbills, will force the speaker to alter the form of the message merely to gain access to the forum. These alterations certainly could have an influence on the effectiveness of the message being conveyed."[200] A parade ban, even if content-neutral, would limit the effectiveness of the demonstrators' message, while also cutting deeply into the message behind the use of a parade, which is that "we are many."[201] A picketer, whose presence in front of city hall presents just as substantial a message as the sign he is carrying, would not be as effective protesting several blocks away.

It is apparent, then, that all media cannot express messages with equal force. Indeed, in some situations, the medium is so rich in symbolic value that it is inseparable from the message.[202] An argument has been made that if a special connection exists between the content of the expression and the manner or location of the expression, the ordinance should be automatically invalidated as it applies to those activities.[203] In essence, these symbolic activities would receive a constitutional exemption.[204]

Whatever these symbolic activities might be, circulation of newspapers on city streets by newsracks is not one of them. Whether the newspaper is sold on a sidewalk, or in a 7-Eleven, the

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198. *See* Stone, *Restrictions*, *supra* note 18, at 68 (arguing that prohibitions may have a significant impact or speakers whose messages are targeted at certain locations).

199. *Id.*

200. Quadres, *supra* note 93, at 484 (footnote omitted).

201. *Id.* at 484-85.

202. Lee, *supra* note 62, at 799. It is beyond the scope of this Note to enumerate when exactly the medium and message are inseparable.

203. *E.g.*, Baker, *Unreasoned Reasonableness: Mandatory Parade Permits and Time, Place, and Manner Regulations*, 78 Nw. U.L. REV. 937, 973 n.88 (1983) ("The argument accepts and sometimes requires permitting expression in otherwise restricted contexts if there is a special connection between the content of the expression and the location of the expression.").

204. *See, e.g.*, Stone, *Restrictions*, *supra* note 18, at 68-69 (making an argument for a constitutional exemption when an alternative manner or location of expression would significantly affect the expression).

character of the speech is not changed in the least way. The printed words remain the same, and the message does not gain significance if bought from a newsrack instead of at a store. Publishers, forced to compete in a very competitive business, do not particularly care about how their papers are sold, as long as they are sold. The newsrack has no symbolic value; it is merely an economical way of distributing newspapers.

With the newsrack lacking symbolic meaning, looking at the alternatives available in the public forum seems to be too narrow a focus for a court. Rather, a court should concern itself with whether the circulation of the newspaper is severely affected by the newsrack ban. Since circulation is a sum of its many parts, the entire range of alternatives, wherever or however they exist, should be the appropriate arena for assessing the availability of alternative means. Clearly, absent a marked drop in circulation directly attributable to the newsrack ban, the third prong of the "time, place, and manner" test would be satisfied.

CONCLUSION

An ordinance banning newsracks from public rights of way raises many first amendment issues, but in most cases, the ordinance would be upheld by a reviewing court if the court utilizes the methodology developed in this Note; methodology which is consistent with the current modes of analyses employed by the Supreme Court of the United States.

The road to proving the constitutionality of a newsrack ban begins with the simple statement that circulation of constitutionally protected material is itself protected by the first amendment. That simple statement, however, leads to a complex debate over what rights does that protection encompass in the context of newspaper circulation. The Court has implicitly adopted the "macro" approach in defining first amendment rights, so the debate ends with the determination that the protected activity is the broad right of circulation, as opposed to the narrower right of circulation by newsracks.

The implications of this definition of protected activity are important, because when newsracks are banned, the ordinance at issue only regulates the manner (newsracks) in which the first amendment right of circulation can be exercised. As such, a newsrack ban is not really a total "ban," but only a "time, place, and manner" regulation.

Under the "time, place, and manner" test, heightened scru-

tiny will be used to review the newsrack ordinance, largely because a newsrack ban impacts heavily on traditional public forums like sidewalks and streets. Heightened scrutiny is not the highly deferential review reserved for many "time, place, and manner" regulations, but neither is it the strict scrutiny used to assess the constitutionality of total bans.

Even using heightened scrutiny, a newsrack ban easily passes muster. It is content-neutral, it is narrowly tailored to serve the significant government interests of aesthetics, safety, and the preservation of public forums, and there are sufficiently suitable alternative means of distributing newspapers.

This is not to imply that all newsrack bans are constitutional. In fact, many potential problems exist to which the reviewing court must pay close attention. For example, the content-neutral newsrack ban may well mask intentional content discrimination. Similarly, the regulation may have the unintended effect of impacting disparately on certain groups, like poorly financed publishers. An even bigger problem is that the ordinance may not be narrowly tailored to serve the asserted state interests. It may be overbroad or underinclusive, but the presence of a comprehensive plan designed to alleviate the stated interests will help to allay any suspicions. Finally, in some cases, the available newsrack alternatives might not be sufficient to prevent a serious disruption in newspaper circulation.

Should any of these problems pose a significant threat to the freedoms guaranteed by the first amendment, a court must not hesitate to invalidate the newsrack ordinance. It seems that in many cases, however, a newsrack ban will be a constitutional exercise of government power.

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