University of Dayton Law Review

Volume 14 | Number 3 Article 3

5-1-1989

First Amendment, Newsracks and Public Property after City of Lakewood v. Plain Dealer Publishing Co.

Frederick W. Whatley
Cleveland-Marshall College of Law

Jeffrey R. Sadlowski

Follow this and additional works at: https://ecommons.udayton.edu/udlr

 Part of the Law Commons

Recommended Citation

Whatley, Frederick W. and Sadlowski, Jeffrey R. (1989) "First Amendment, Newsracks and Public Property after City of Lakewood v. Plain Dealer Publishing Co.," *University of Dayton Law Review*: Vol. 14: No. 3, Article 3.
Available at: https://ecommons.udayton.edu/udlr/vol14/iss3/3

This Article is brought to you for free and open access by the School of Law at eCommons. It has been accepted for inclusion in University of Dayton Law Review by an authorized editor of eCommons. For more information, please contact mschlangen1@udayton.edu, ecommons@udayton.edu.

THE FIRST AMENDMENT, NEWSRACKS AND PUBLIC PROPERTY AFTER *City of Lakewood v. Plain Dealer Publishing Co.*, 108 S. Ct. 2138 (interim ed. 1988)

Frederick W. Whatley and Jeffrey R. Sadlowski***

I. INTRODUCTION

> Each method of communicating ideas is "a law unto itself" and that law must reflect the "differing natures, values, abuses and danger" of each method.[1]

Undoubtedly, newspaper vending machines, or "newsracks," constitute a method of communicating ideas—whether it be the ideas contained within the newspapers being sold, or merely the marketing benefits of having an identifiable machine on a particular street corner.[2] The nature of newsracks, however, presents special problems for municipalities, and other governmental entities, attempting to regulate public property.

Newsracks are normally affixed to a specific portion of public property by chaining them to a fixed object or weighing them down.[3] They are then left on that portion of property, dispossessing the general public, until the publisher deems it wise, or profitable, to move them.[4]

---

* Mr. Whatley is a Senior Associate with the Cleveland law firm of Walter, Haverfield, Buescher & Chockley. He was one of the attorneys representing the City of Lakewood before the United States Supreme Court in City of Lakewood v. Plain Dealer Publishing Co., 108 S. Ct. 2138 (interim ed. 1988). He is a member of the adjunct faculty at Cleveland-Marshall College of Law, teaching a course on first amendment rights.

** Mr. Sadlowski recently graduated from Cleveland-Marshall College of Law, where he was an editor of the Law Review. He has accepted a position with the law firm of Gallagher, Sharp, Fulton & Norman, in Cleveland, Ohio.

1. Metromedia, Inc. v. San Diego, 453 U.S. 490, 501 (1981); *see also* Los Angeles v. Preferred Communications, Inc., 476 U.S. 488, 496 (1986) (Blackmun, J., concurring) ("Different communications media are treated differently for First Amendment purposes."); FCC v. Pacifica Found., 438 U.S. 726, 748 (1978); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 557 (1975) ("Each medium of expression . . . must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems."); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 503 (1952).

2. *See* Transcript of Proceedings at 64–66, Plain Dealer Publishing Co. v. City of Lakewood, No. C83-63, slip op. (N.D. Ohio July 19, 1984) (wherein the Plain Dealer's Director of Circulation testified that the Plain Dealer benefited from having identifiable newspaper vending machines on public property regardless of whether people bought newspapers from them).

3. *Id.* at 72–73.

4. *Id.* at 58.

Published by eCommons, 1988

Thus, the first amendment[5] right of a newspaper publisher to circulate its papers[6] collides head-on with a municipality's right to control its property.[7]

In the context of traditional first amendment analysis, the questions raised by newsracks located on public property may be framed as follows: Alma Lovell can, on city streets and sidewalks, peripatetically sell the "Golden Age" virtually regulation free,[8] but can she sell the "Golden Age" by erecting a structure on the same property, with the same freedom?[9] If not, what are the natures, values, abuses, and dangers of newsracks which must be reflected in the laws regulating such machines? Of late, various state and federal courts, including the United States Supreme Court, have struggled to answer these questions. These struggles, in turn, have led to some curious results.[10]

Additionally, the nature of the legislation regulating newsracks requires careful scrutiny of these laws by the courts. While the press is accorded great protection under the first amendment, its protection is

---

5. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .").

6. Lovell v. City of Griffin, 303 U.S. 444, 452 (1938) (" 'Liberty of circulating is as essential to [freedom of the press] as liberty of publishing; indeed, without the circulation, the publication would be of little value.' ") (quoting *Ex parte* Jackson, 96 U.S. 727, 733 (1878)); *see also* Martin v. Struthers, 319 U.S. 141, 143 (1943) (wherein the Court held that the protection of the first amendment "embraces the right to distribute literature.").

7. *See* Adderley v. Florida, 385 U.S. 39, 47 (1966) ("The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated."); Packard v. Banton, 264 U.S. 140, 144 (1924) ("The streets belong to the public and are primarily for the use of the public in the ordinary way."). Unless otherwise noted, it is assumed that the public property involved is public forum property, i.e. city streets and sidewalks. *See* Hague v. CIO, 307 U.S. 496, 515 (1939).

8. *Lovell*, 303 U.S. at 444.

9. While the majority in City of Lakewood v. Plain Dealer Publishing Co., 108 S. Ct. 2138, 2146 (interim ed. 1988), held that, for purposes of facially challenging licensing laws, newsracks should be analogized to leaflets (implying that they are equal to leafletters, such as Alma Lovell), that holding is extremely narrow in its scope.

Ten days after the *City of Lakewood* decision, the Court noted that leafletters *cannot be banned* from using public forum property in residential areas of a city to distribute their literature. *See* Frisby v. Shultz, 108 S. Ct. 2495, 2503 (interim ed. 1988) (citing Gregory v. Chicago, 394 U.S. 111 (1969); *Martin*, 319 U.S. at 141; Murdock v. Pennsylvania, 319 U.S. 105 (1943); Schneider v. State, 308 U.S. 147 (1939)). Yet, in *City of Lakewood*, 108 S. Ct. at 2146–47, the Court implied that, under proper circumstances, newsracks could be banned from *all* the public forum property of a city. Thus, newsracks cannot be analyzed as leafletters for all first amendment purposes.

10. For the apparently conflicting results of *City of Lakewood*, 108 S. Ct. at 2138 and *Frisby*, 108 S. Ct. at 2495, see *supra* note 9. For the apparently conflicting results of *City of Lakewood*, 108 S. Ct. at 2138, and Shuttlesworth v. City of Birmingham, 394 U.S. 147, 149–51 (1969), see *infra* note 71. Lower courts have apparently created two new fora in order to enable government entities to: 1) raise revenue from newsracks; or 2) ban newsracks from public forum property to protect the revenue raising capabilities of private concessionaires. *See infra* note 141.

https://ecommons.udayton.edu/udlr/vol14/iss3/3

not absolute.[11] For example, newspaper publishers, as businesses, are subject to the same generally applicable economic regulations as are other businesses.[12] Problems arise, however, when the press is singled out for differential treatment.[13] Recently, there has been an increasing trend of municipal regulation of newspaper/magazine vending machines on public property.[14] As other retailers who use vending machines, such as soft drink manufacturers, have not claimed a constitutional right to use public property to sell their products, regulations governing the use of public property for vending machines tend to single out the press.

Certain municipalities have prohibited newsracks on public property,[15] imposed licensing permit requirements on them,[16] charged rental fees for the amount of public property occupied by the machines,[17] and, have required owners of the newsracks to indemnify the municipality for any injuries caused by the machines.[18] These regulations have come

---

11. *See* Minneapolis Star and Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 581 (1983) ("Clearly, the First Amendment does not prohibit all regulation of the press. It is beyond dispute that the States and the Federal Government can subject newspapers to generally applicable economic regulations without creating constitutional problems.").

12. *Id.*; *see also* Associated Press v. National Labor Relations Bd., 301 U.S. 103, 132–33 (1937); Grosjean v. American Press Co., 297 U.S. 233, 250 (1936) ("It is not intended by anything we have said to suggest that the owners of newspapers are immune from any of the ordinary forms of taxation for support of the government.").

> The publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others. He must answer for libel. He may be punished for contempt of court. He is subject to the anti-trust laws. Like others he must pay equitable and nondiscriminatory taxes on his business.

Associated Press, 301 U.S. at 132–33 (footnotes omitted).

13. *See Minneapolis Star and Tribune Co.*, 460 U.S. at 585 ("[D]ifferential treatment, unless justified by some special characteristic of the press, suggests that the goal of the regulation is not unrelated to suppression of expression, and such a goal is presumptively unconstitutional.").

One of the "features" of the ordinance at issue in *City of Lakewood*, 108 S. Ct. at 2138, cited by the majority as a basis for allowing the Plain Dealer's facial challenge was that the ordinance was directed specifically at newspapers. *Id.* at 2145; *see* also *infra* note 56.

14. *See* 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, 185 (1985). "Since the first reported case in 1972, more than a dozen cases challenging newsrack regulations have been reported, most of them within the last seven years. Largely because of the marketing strategy behind *USA Today*, a nationally distributed newspaper published by the Gannett Company, additional litigation seems inevitable." *Id.* (footnotes omitted).

15. California Newspaper Publishers Ass'n v. City of Burbank, 51 Cal. App. 3d 50, 123 Cal. Rptr. 880 (1975); Remer v. City of El Cajon, 52 Cal. App. 3d 441, 125 Cal. Rptr. 116 (1975).

16. City of Lakewood v. Plain Dealer Publishing Co., 108 U.S. 2138 (interim ed. 1988); Jacobsen v. Harris, 869 F.2d 1172 (8th Cir. 1989); Jacobsen v. Crivaro, 851 F.2d 1067 (8th Cir. 1988).

17. Plain Dealer Publishing Co. v. City of Lakewood, 794 F.2d 1139 (6th Cir. 1986), *aff'd in part*, 108 S. Ct. at 2138.

18. *City of Lakewood*, 108 S. Ct. at 2138; *Harris*, 869 F.2d at 1172; Southern Conn. Newspapers v. Greenwich, 11 Media L. Rep. (BNA) 1051 (D. Conn. Aug. 28, 1984); Minnesota News-

Published by eCommons, 1988

under intense scrutiny by the courts. The focus of this article will be on the regulation of newsracks by municipalities on public property in the context of the aforementioned regulations.

II. REGULATING NEWSRACKS ON PUBLIC PROPERTY—CITY OF LAKEWOOD V. PLAIN DEALER PUBLISHING CO.

The United States Supreme Court's only decision regarding the regulation of newsracks is *City of Lakewood v. Plain Dealer Publishing Co.*[19] This decision is very narrow in its scope. The 4-3 majority opinion did not explicitly find a first amendment right to place newsracks on public property.[20] Moreover, the majority did not answer the question of whether, in the context of the *City of Lakewood* case, a total ban of vending machines on public property would be valid.[21] Indeed, the Court's decision in *City of Lakewood,* according to one commentator, is "most important for what it doesn't say,"[22] as it leaves unresolved more questions than it answers.

In order to be able to understand the few issues resolved by the *City of Lakewood* decision, a brief review of the case is necessary. In May 1982, the Plain Dealer Publishing Company sought permission to place its newsracks on public property within the city of Lakewood.[23] This request was denied by the City Law Director due to a generally applicable city ordinance prohibiting the erection of buildings or structures on public ground.[24] The Plain Dealer brought suit in the district court attacking the constitutionality of this ordinance.[25] The district court granted the Plain Dealer's motion for summary judgment, ruling that the ordinance was "an unconstitutional exercise of police power, and that it banned a reasonable means of newspaper distribution."[26]

The city of Lakewood did not appeal that decision. Instead, in Oc-

---

paper Ass'n v. City of Minneapolis, 9 Media L. Rep. (BNA) 2116 (D. Minn. Aug. 3, 1983); Gannett Co. v. City of Rochester, 69 Misc. 2d. 619, 330 N.Y.S.2d 648 (Sup. Ct. 1972).

19. 108 S. Ct. at 2138.

20. *Id.* at 2152 (White, J., dissenting) ("The Court quite properly does *not* establish any constitutional right of newspaper publishers to place newsracks on municipal property."); *see also Vending Machines,* 15 Media L. Rep. (BNA) (Nov. 29, 1988) (paraphrasing George Freeman of The New York Times Co. on the majority decision in City of Lakewood v. Plain Dealer Publishing Co.: "it does not enunciate a clear First Amendment right to place newsracks on public property . . . .").

21. *See supra* note 9.

22. *Vending Machines, supra* note 20 (quoting George Freeman of the New York Times Co.).

23. Plain Dealer Publishing Co. v. City of Lakewood, 794 F.2d 1139, 1141 (6th Cir. 1986), *aff'd in part,* 108 S. Ct. at 2138.

24. *Id.* at 1141.

25. *Id.*

26. *Id.*

https://ecommons.udayton.edu/udlr/vol14/iss3/3

tober 1983, it amended the ordinance at issue "to permit erection of a structure on public property with the consent of the City where permitted by city or state law."[27]

In January 1984, the city adopted a separate ordinance specifically directed toward newsracks.[28] The ordinance provided for the issuance

---

27. *Id.*

28. LAKEWOOD, OHIO ORDINANCES § 901.181 (quoted in *Plain Dealer Publishing Co.*, 794 F.2d at 1141 n.1) provides as follows:

901.181 NEWSPAPER DISPENSING DEVICES: PERMIT AND APPLICATION.

Applications may be made to and on forms approved by the Mayor for rental permits allowing the installation of newspaper dispensing devices on public property along the streets and thoroughfares within the City respecting newspapers having general circulation throughout the City.

The Mayor shall either deny the application, stating the reasons for such denial or grant said permit subject to the following terms:

(a) The term "newspaper dispensing device," as used in this Section, shall mean a mechanical, coin operated container constructed of metal or other material of substantially equivalent strength and durability, not more than fifty (50) inches in height and not more than twenty-five (25) inches in length and width. The design of such devices shall be subject to approval by the Architectural Board of Review.

(b) Newspaper dispensing devices shall not be placed in the residential use districts of the City and shall otherwise be placed adjacent and parallel to building walls not more than six (6) inches distant therefrom or near and parallel to the curb not less than eighteen (18) inches and not more than twenty-four (24) inches distant from the curb at such locations applied for and determined by the Mayor not to cause an undue health or safety hazard, interfere with the right of the public to the proper use of the streets and thoroughfares, or cause a nuisance as proscribed by Ohio Revised Code, Section 723.01. Provided further, however, that no newspaper dispensing device shall be placed, installed, used or maintained:

(1) so as to reduce the clear, continuous combined sidewalk and paved tree lawn to less than five (5) feet;

(2) within five (5) feet of any fire hydrant or other emergency facility;

(3) within five (5) feet of any intersecting driveway, alley, or street;

(4) within three (3) feet of any marked crosswalk;

(5) at any location where the width of paved clear space in any direction for the passageway of pedestrians is reduced to less than five (5) feet;

(6) within two hundred and fifty (250) feet of another newspaper dispensing device containing the same newspaper or news periodical, except that the Mayor may permit two such dispensing devices at an intersection where such placement would not impair traffic or otherwise create a hazardous condition; and

(7) at any location where three (3) newspaper dispensing devices are already located.

(c) The rental permit shall be granted upon the following conditions:

(1) the permittee shall pay a rental fee which shall be Ten Dollars ($10.00) per year or part thereof, for each location where a newspaper dispensing device is installed;

(2) the permittee, upon the removal of a newspaper dispensing device, shall restore the property of the City to the same condition as when the device was initially installed, ordinary wear and tear excepted;

(3) the permittee shall maintain the device in good working order and in a safe and clean condition and keep the immediate area surrounding the device free from litter and debris;

(4) the permittee shall not use a newspaper dispensing device for advertising signs or publicity purposes other than that dealing with the display, sale, or purchase of the

Published by eCommons, 1988

of an annual permit by the mayor, subject to certain terms and conditions.[29] Among the terms and conditions of the permit were: A ten dollar per year rental fee for each newsrack location; approval of the newsrack's design by the city's architectural review board; supplying a $100,000 insurance policy for purposes of protecting the city against any liability occasioned by the placement or use of newsracks on its property; a total ban of newsracks in the city's residential zones; and any "other terms and conditions deemed necessary and reasonable by the Mayor."[30]

The Plain Dealer was not satisfied with the new ordinance and amended its complaint to challenge the facial constitutionality of the new ordinance.[31] The Plain Dealer did not apply for, nor was it denied, a permit for placing its newsracks on city property.[32] The district court upheld the ordinance's constitutionality in all respects and entered judgment for the city.[33]

The Plain Dealer appealed this decision to the Sixth Circuit Court of Appeals.[34] The court of appeals reversed, finding three provisions of

---

newspaper sold therein;

(5) the permittee shall save and hold the City of Lakewood harmless from any and all liability for any reason whatsoever occasioned upon the installation and use of each newspaper dispensing device and shall furnish, at permittee's expense, such public liability insurance as will protect permittee and the City from all claims for damage to property or bodily injury, including death, which may arise from the operation under the permit or in connection therewith and such policy shall name the City of Lakewood as an additional insured, shall be in an amount not less than One Hundred Thousand Dollars ($100,000) combined single limit for any injury to persons and/or damaged property, and shall provide that the insurance coverage shall not be cancelled or reduced by the insurance carrier without thirty (30) days prior written notice to the City. A certificate of such insurance shall be provided to the City and maintained before and during the installation of such devices;

(6) rental permits shall be for a term of one year and shall not be assignable; and

(7) such other terms and conditions deemed necessary and reasonable by the Mayor.

. . . .

(e) A person aggrieved by a decision of the Mayor in refusing to grant or revoking a rental permit shall have the right to appeal to Council. Such appeal shall be taken by filing a notice of appeal including a statement of the grounds for the appeal with the Clerk of Council within ten (10) days after notice of the decision by the Mayor has been given. Council shall set the time and place for hearing such appeal and notice of such time and place shall be given in the same manner as specified herein above. The Council shall have the power to reverse, affirm, or modify the decision of the Mayor and any such decision made by the Council shall be final.

29. *City of Lakewood*, 108 S. Ct. at 2142.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. Plain Dealer Publishing Co. v. City of Lakewood, 794 F.2d 1139 (6th Cir. 1986), *aff'd in part*, 108 S. Ct. at 2138.

https://ecommons.udayton.edu/udlr/vol14/iss3/3

the ordinance unconstitutional.[35] First, the court held that the ordinance gave the mayor unlimited discretion over granting or denial of permit applications.[36] The court found this to be an unacceptable prior restraint on first amendment activity.[37] Second, the court found that the ordinance provided the Architectural Board of Review unfettered discretion without expressly providing standards to restrict the exercise of that discretion.[38] The court took the position that this provision of the ordinance was not narrowly tailored to serve a significant governmental interest and was therefore not a valid time, place and manner restriction.[39] Finally, the ordinance required the newspaper to provide insurance for its newsracks.[40] Since a similar burden was not placed on owners of other structures on public property,[41] the court held that the city could not constitutionally "impose more stringent requirements on first amendment rights than it does on others."[42]

The city of Lakewood appealed the Sixth Circuit's decision to the United States Supreme Court.[43] The city's requested plenary consideration of its appeal was granted on March 2, 1987.[44] Four questions

---

35. *Id.* As discussed, *infra* note 173, the circuit court upheld the $10 rental fee with scant legal analysis and held that the residential zone prohibition was a valid time, place and manner regulation. *Plain Dealer Publishing Co.*, 794 F.2d at 1147. The court so held because the prohibition was content-neutral, narrowly tailored to serve the significant governmental interests in traffic safety, the proper functioning of various city services, and pedestrian access to sidewalks and aesthetics, and it left open ample alternative channels of communication. *Id.*

36. *Id.* at 1145.

37. *Id.*

38. *Id.*

39. *Id.* at 1146.

40. *Id.*

41. *Id.*

42. *Id.* at 1147. Judge Unthank disagreed as to this holding, finding that other structures on public property were dissimilar to newsracks in that they were of a quasi-governmental nature: bus shelters, telephone and electric poles, and emergency phone boxes. *Id.* at 1148 (Unthank, J., concurring); *see also* Gannett Satellite Inf. Network v. Berger, 716 F. Supp. 140 (D.N.J. 1989), *aff'd in part*, 17 Media L. Rep. (BNA) 1302 (3d Cir. Jan. 12, 1990), where the court made a similar distinction. In *Gannett*, the Port Authority of New York & New Jersey banned newsracks from non-concession areas of the Newark International Airport. *Id.* at 144. The stated "significant government interests" of the Port Authority included, *inter alia*, aesthetics, safety, and security. *Id.* at 150–54. The Port Authority, however, allowed some objects in the airport, such as signs, telephones, mailboxes and trash receptacles, which would contribute to the very problems the Port Authority was seeking to avoid (visual clutter, obstructions to pedestrian traffic, and places to conceal explosives). *Id.* at 151–54. In responding to plaintiff's argument that the regulations banning newsracks were "grossly underinclusive", the court held: "[M]any of these additional objects are necessary for airport operations or provide additional services previously unavailable at the airport . . . . Newsracks do not fall into that category. Newsracks are not necessary to airport operations; the machines merely duplicate existing services of concessionaires." *Id.* at 153. On appeal, Gannett did not challenge this ruling. *Berger*, 17 Media L. Rep. (BNA) at 1304–05.

43. *See* City of Lakewood v. Plain Dealer Publishing Co., 107 S. Ct. 1345 (interim ed. 1987).

44. *Id.*

Published by eCommons, 1988

were presented by the city for review:

1) Whether the first amendment requires a municipality to grant immunity to a private publisher of newspapers from the city's general laws and regulations when renting city property to the private publisher for the erection of newsracks.[45]

2) Whether the first amendment is violated by requiring the newsrack's design to be approved by an architectural review board when such approval is subject to judicial review.[46]

3) Whether the first amendment is violated by allowing a mayor unfettered discretion in approving or denying applications for newsrack permits when his discretion is subject to judicial review.[47]

4) Whether the first amendment grants a property right to private newspaper publishers for the erection of vending machines on public property.[48]

Surprisingly, the Court addressed the issue from the standpoint of whether the Plain Dealer had standing to challenge the facial constitutionality of Lakewood's ordinance without first applying for, and being denied, a permit.[49] The difference between the four member majority opinion and the three member dissenting opinion would appear to be two-fold: focus and semantics. The focus by the Court's two factions on the Plain Dealer's activity varied greatly. Each individual faction's focus, by necessity, provided its own faction's definition of the Plain Dealer's activity. That definition, in turn, decided the underlying issue of whether the Plain Dealer could challenge the facial constitutionality of the ordinance without first applying for a permit. Thus, the question most vigorously argued by the members of the Court[50] consisted of:

---

45. *See* Appellant's Brief on the Merits at i, City of Lakewood v. Plain Dealer Publishing Co., 108 S. Ct. 2138 (interim ed. 1988) (No. 86-1042).

46. *See id.*

47. *See id.* at i–ii.

48. *See id.* at ii.

49. *City of Lakewood*, 108 S. Ct. at 2143.

50. The majority in *City of Lakewood*, 108 S. Ct. at 2149–50 argues:

> The dissent compounds its error by defining an 'activity protected by the First Amendment' by the time, place, or (in this case) manner by which the activity is exercised. The actual 'activity' at issue here is the circulation of newspapers, which is constitutionally protected . . . .
>
> The dissent's recharacterization of the issue is not merely semantic; substituting the time, place or manner for the activity itself allows the dissent to define away a host of activities commonly considered to be protected.

To this argument, the dissent replies:

> [T]he Court asserts that I do not understand the nature of the conduct at issue here. It is asserted that "[t]he actual 'activity' at issue here is the circulation of newspapers, which is constitutionally protected." But of course, this is wrong. Lakewood does not, by its ordinance, seek to license the circulation of newspapers within the city . . . . The Lakewood

https://ecommons.udayton.edu/udlr/vol14/iss3/3

Was the activity regulated by the ordinance "circulation of newspapers" (majority)[51] or was it taking "a portion of city property to erect a structure." (dissent)?[52]

Although the Plain Dealer did not apply for a newsrack permit, the majority found that it had standing to bring a facial challenge to the City of Lakewood's newspaper dispensing device ordinance.[53] The Court held that a "facial challenge lies whenever a licensing law gives a governmental official or agency substantial power to discriminate based on the content or viewpoint of speech by suppressing disfavored speech or disliked speakers."[54] In allowing the facial challenge to the Lakewood licensing law, the Court held that the Plain Dealer's activity was constitutionally protected because "[t]he [Lakewood ordinance had] . . . *a close enough nexus to expression,* or to conduct commonly associated with expression, to pose a real and substantial threat of . . . censorship risks."[55] The Court permitted the Plain Dealer's facial challenge because of the *combined* effects of two features of Lakewood's "regulatory scheme:" 1) the fact that licensing was annual; and 2) the fact that the licensing system was directed specifically at newsracks.[56]

---

ordinance must be considered for what it is: a license requirement for newsracks on city property.

Id. at 2159–60 (White, J., dissenting) (citations omitted).

51. *Id.* at 2145.

52. *Id.* at 2158 (White, J., dissenting).

53. The Majority in *City of Lakewood*, stated:

> In the area of freedom of expression it is well established that one has standing to challenge a statute on the ground that it delegates overly broad licensing discretion to an administrative office, *whether or not his conduct could be proscribed by a properly drawn statute, and whether or not he applied for a license.*

City of Lakewood, 108 S. Ct. at 2143 (quoting Freedman v. Maryland, 380 U.S. 51, 56 (1965)) (emphasis added); *see also* Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 798 (1984) (discussing Thornhill v. Alabama, 310 U.S. 88 (1940)). "[T]he [Thornhill] Court concluded that the very existence of some broadly written statutes may have such a deterrent effect on free expression that they should be subject to challenge even by a party whose own conduct may be unprotected." *Id.*

54. *City of Lakewood*, 108 S. Ct. at 2145.

55. *Id.* (emphasis added).

56. *Id.* The dissent notes, however, that the city may now repeal § 901.181 and, instead, rely on § 901.18, which, although vesting absolute discretion in City Council, is directed at all structures or devices that wish to use city property. *City of Lakewood*, 108 S. Ct. at 2161 (White, J., dissenting). As § 901.18 is a regulation of " 'general application', it should survive scrutiny under the Court's opinion. . . ." *City of Lakewood*, 108 S. Ct. at 2161 (White, J., dissenting).

In Gannett Satellite Inf. Network v. Berger, 716 F. Supp 140 (D.N.J. 1989), *aff'd in part*, 17 Media L. Rep. 1302 (3d Cir. Jan. 12, 1990), the court declined to facially invalidate regulations promulgated by the Port Authority of New York & New Jersey which banned newsracks at the Newark Airport, except for those newsracks located in manned concession areas. Unlike the ordinance in *City of Lakewood*, the regulations at issue in *Berger* were directed at "commercial activity" or "vending machines for sale of goods." *Id.* at 144. Relying heavily on the *City of Lakewood* decision, the Court held:

Published by eCommons, 1988

The Court held that since a newspaper publisher would have to apply annually for the license in question, such "a multiple or periodic licensing requirement is sufficiently threatening to invite judicial concern."[57] In addition, because the system was directed specifically toward newsracks, it "creates an agency or establishes an official charged particularly with reviewing speech, or conduct commonly associated with it, breeding an 'expertise' tending to favor censorship over speech."[58] These effects, the court held "at least in combination, justify the allowance of a facial challenge."[59]

The majority focused broadly on the Plain Dealer's regulated activity and defined it as "expression or conduct commonly associated with expression: *the circulation of newspapers.*"[60] Thus, by defining the Plain Dealer's activity as the circulation of newspapers and then using the close enough nexus to expression test, the Court was able to bring the mayor's discretion in granting or denying permits within the narrow exception which allows a facial challenge to licensing requirements without first applying for, and being denied, a license.[61]

The dissent in *Lakewood,* however, would not have permitted a facial challenge. The "peculiar doctrine"[62] which allows facial challenges under the first amendment "applies only when the *specific con-*

Since the scope and primary thrust of these regulations is directed toward commercial activity having nothing to do with the First Amendment, the regulations on their face are not directed narrowly and specifically at expressive activity and do not, *per se,* create a threat of censorship or the impact of a suppression of expressive activity without further review. As such, a facial attack on these regulations is not the appropriate constitutional challenge.

Id. at 145–46. On appeal, the Third Circuit Court of Appeals upheld the district court's ruling on the port authority's regulation governing persons carrying on commercial activity. The port authority's regulation banning all vending machines, including newsracks, was upheld on other grounds. *See infra* notes 72 and 74. While an "as-applied" challenge would always be available, Gannett's facial challenge failed because the regulation was directed, generally, at commercial activity, as opposed to being "narrowly and specifically" directed at expression. *Berger,* 17 Media L. Rep. (BNA) at 1308.

57. *City of Lakewood,* 108 S. Ct. at 2145.

Of course, the City may require periodic licensing, and may even have special licensing procedures for conduct commonly associated with expression; *but the Constitution requires that the City establish neutral criteria to insure that the licensing decision is not based on the content or viewpoint of the speech being considered.*

Id. (emphasis added).

58. *Id.*

59. *Id.*

60. *Id.* (emphasis added).

61. *See* Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 799 (1984) (quoting Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973)) regarding the exception to the general rule of not allowing such facial challenges: "This exception from the general rule is predicated on 'a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression.' "

62. *City of Lakewood,* 108 S. Ct. at 2152 (White, J., dissenting).

https://ecommons.udayton.edu/udlr/vol14/iss3/3

duct which the locality seeks to license is protected by the First Amendment."[63] The dissent narrowed its focus on the Plain Dealer's conduct, holding that, as opposed to general circulation of newspapers, "the placement of newsracks on city property is not so protected."[64] The Court further stated that "the First Amendment does not create a right of newspaper publishers to take city streets to erect structures to sell their papers."[65] The dissent argued further that the facial challenge exception under the first amendment had been allowed only where "the expressive conduct which a city sought to license was an activity which the locality could not prohibit altogether."[66] In order for license requirements to be struck down on their face, they must "effect the 'enjoyment of freedoms which the Constitution guarantees.' "[67] Thus, the requirements must have more than just "some amorphous 'nexus' to expression."[68] By limiting its focus, and, *per force,* its definition, of the regulated activity to placement of newsracks on city property the dissent focused narrowly on the commercial aspects of the conduct involved.[69]

Notably, the majority did not address the questions surrounding the ordinance's requirements of liability insurance or architectural review. Instead, the case was remanded to the court of appeals to decide whether the provision of the ordinance declared unconstitutional was severable.[70] The holding in *City of Lakewood* is thus a very narrow one: a municipality cannot vest unlimited discretion in a licensing official to grant or deny permit applications for newsracks.[71] The remain-

---

63. *Id.* at 2153. (White, J., dissenting) (emphasis added).

64. *Id.* (White, J., dissenting).

65. *Id.* at 2156 (White, J., dissenting). In a subsequent case, Gannett Satellite Inf. Network v. Berger, 716 F. Supp. 140 (D.N.J. 1989), *aff'd in part,* 17 Media L. Rep. (BNA) 1302 (3d Cir. Jan. 12, 1990), the court held that the Newark International Airport was a public forum. *Id.* at 149. Nonetheless, the court held that the distribution of newspapers by newsracks within the airport was not an activity protected by the first amendment. *Id.* at 146 n.5.

On appeal, the Third Circuit was silent on this portion of the district court's reasoning. *Berger,* 17 Media L. Rep. (BNA) at 1302. The appellate court upheld the district court's disallowance of a facial attack on two out of the three challenged regulations because they were not directly aimed at newsracks and because the port authority's total prohibition of newsracks granted no discretion to those officials charged with enforcing the regulations. *Id.* at 1307–08. The appellate court, however, did allow a facial challenge to the third regulation, which dealt with persons posting, distributing or displaying " 'written matter concerning or referring to commercial activity' ", *Id.* at 1309, because the regulation was standardless and because it "has 'a close enough nexus to expression, or to conduct commonly associated with expression, to pose a real and substantial threat' of censorship." *Id.* (citing *City of Lakewood,* 108 S. Ct. at 2138).

66. *City of Lakewood,* 108 S. Ct. at 2154 (White, J., dissenting).

67. *Id.* at 2155 (White, J., dissenting) (quoting Staub v. Baxley, 355 U.S. 313, 322 (1969)).

68. *Id.* (White, J., dissenting).

69. *Id.* at 2153 (White, J., dissenting).

70. *Id.* at 2152.

71. *See Id.* The Court seems to imply that, had the Mayor's discretion in denying permits

Published by eCommons, 1988

der of this article will discuss some of the issues concerning newsrack regulations left open after the *City of Lakewood* decision.

III. A TOTAL PROHIBITION OF NEWSRACKS

A. Introduction

In the context of an ordinance granting unlimited discretion to a licensor, the placement of newsracks on public property is defined as circulation of newspapers. In a limited discretion, content-neutral regulation, however, the commercial, and less protected, aspects of newsracks may prevail.[72]

The majority in *City of Lakewood v. Plain Dealer Publishing Co.*[73] found the threats posed by standardless discretion to be fatal.[74] A total prohibition of newsracks on public property, however, would vest no discretion in a licensor, thus there would be no threat of discrimination by, or improper motives on the part of, governmental officials.

Whether newspaper publishers have an absolute first amendment right to place newsracks on public property remains an open issue. The majority in *City of Lakewood* did not decide whether a municipality

---

or adding terms and conditions been limited by the phrase "for reasons related to the health, safety, or welfare of Lakewood citizens," the ordinance would have passed Constitutional muster. *Id.* at 2150. If, indeed, the Court means to say that such a phrase will suffice as neutral criteria for limiting the Mayor's discretion, then either: 1) the Court is making a major break from past precedents (*see* Shuttlesworth v. City of Birmingham, 394 U.S. 147, 149–151 (1969) (where, in the context of a commission's discretion in denying a permit for parade, an almost identical phrase—"the public welfare, peace, safety, health, . . . or convenience"—was held to grant the commission "virtually unbridled" discretion.)); or 2) the Court is further distancing newsracks from more traditional, peripatetic first amendment expression.

72. *See* Gannett Satellite Inf. Network v. Berger, 716 F. Supp. 140, 145–46 (D.N.J. 1989) (wherein the Court upheld the facial constitutionality of regulations banning newsracks in non-concession areas of the Newark Airport because the regulations were focused on "commercial activity" as opposed to being narrowly directed at newsracks.).

That portion of the district court's decision was upheld in Gannett Satellite Inf. Network v. Berger, 17 Media L. Rep. (BNA) 1302, 1308 (3d Cir. Jan. 12, 1990).

73. 108 S. Ct. 2138 (interim ed. 1988).

74. *Id.* at 2144 ("[W]ithout standards to fetter the licensor's discretion, the difficulties of proof and the case-by-case nature of 'as applied' challenges render the licensor's action in large measure effectively unreviewable.").

A flat prohibition on vending machines (non-specific as to newsracks), however, would be immune from such a "standardless discretion" challenge. As held by the Third Circuit:

> With respect to the regulation of vending machines, we would be required to entertain Gannett's argument were it the case that Rule 3 vested in Port Authority officials the unbridled discretion to choose among vending machines . . . . The simple fact, however, is that no such discretion is conferred by Rule 3. *On its face, this regulation prohibits altogether the installation of vending machines for the sale of goods . . . . Because Rule 3 grants no discretion at all to Port Authority officials, it is immune from Gannett's facial attack and therefore survives constitutional scrutiny.*

Berger, 17 Media L. Rep. (BNA) at 1302 (emphasis added).

https://ecommons.udayton.edu/udlr/vol14/iss3/3

can prohibit all newsracks on all public property.[75] The dissent in *City of Lakewood,* however, discussed this issue and found that "our precedents suggest that an outright ban on newsracks on city sidewalks would be constitutional . . . . "[76] The dissent based this proposition on the fact that while the Plain Dealer "has a right to distribute its newspapers on city's streets . . . this 'does not mean that [appellee] can . . . distribute [its newspapers] where, when and how [it] chooses.' "[77] The dissent agreed with the majority that, generally, the circulation of newspapers is a protected first amendment right.[78] However, by narrowing its focus on the publisher's activity, the dissent would uphold an outright ban on the particular manner of circulation the newspaper has chosen: placement of newsracks on city property.[79] The dissent argued that "[t]he First Amendment does not require Lakewood to make its property available to the Plain Dealer so that it may undertake the most effective possible means of selling newspapers . . . [and it] does not create a right of newspaper publishers to take a portion of city property to erect a structure to distribute their papers."[80]

B. A Total Prohibition as a Time, Place and Manner Restriction

Even if there is a first amendment right to place newsracks on public property, that activity is still subject to reasonable time, place and manner restrictions.[81] The applicable standard for time, place and manner restrictions is that they "are valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information."[82] When a regulation totally prohibits a particular manner of expression, an additional inquiry must be made as to "whether 'the manner of expression is basically incompatible with the

---

75. *City of Lakewood,* 108 S. Ct. at 2152 (White, J., dissenting); *see also supra* note 9.

76. *City of Lakewood,* 108 S. Ct. at 2152 (White, J., dissenting).

77. *Id.* at 2155 (White, J., dissenting) (quoting Breard v. Alexandria, 341 U.S. 622, 642 (1951)).

78. *Id.* at 2155 (White, J., dissenting) ("[Licensing] the distribution of all newspapers in the City, or . . . [requiring] licenses for all stores which [sell] newspapers. . . . are obviously newspaper circulation activities which a municipality cannot prohibit . . . .").

79. *Id.* at 2155 (White, J., dissenting); *see also* Gannett Satellite Inf. Network v. Berger, 716 F. Supp. 140, 146 n. 5 (D.N.J. 1989) (quoting *City of Lakewood,* 108 S. Ct. at 2153 (White, J., dissenting)), *aff'd in part,* 17 Med. L. Rep. (BNA) 1302 (3d Cir. Jan. 12, 1990); *supra* note 65.

80. *City of Lakewood,* 108 S. Ct. at 2158 (White, J., dissenting).

81. "Expression, whether oral or written or symbolized by conduct, is subject to reasonable time, place, and manner restrictions." Clark v. Community For Creative Non-Violence, 468 U.S. 288, 293 (1984).

82. *Id.*

Published by eCommons, 1988

normal activity of a particular place at a particular time.' "[83] A total prohibition of newsracks would pass this four-pronged test.

As noted by one commentator, "content-neutral restrictions limit expression without regard to the content or communicative impact of the message conveyed."[84] The majority in *City of Lakewood* stated that "[p]resumably in the case of an ordinance that completely prohibits a particular manner of expression, the law on its face is . . . content . . . neutral."[85] Thus, a total ban on newsracks would be a content-neutral restriction and would pass the first prong of the test.[86]

The city's interests in a total prohibition of newsracks are: "[t]o further upgrade the appearance of the City . . . and, . . . [t]o protect the public health, safety and general welfare and ensure that private use of City property does not interfere with public use of City property."[87] These interests have been held to be significant.[88] Indeed, similar interests, such as the elimination of visual blight, were advanced by the City of Los Angeles in defense of its total ban on the posting of political signs on public property in *City Council v. Taxpayers for Vincent*.[89]

In determining whether the ban on signs was narrowly tailored to serve the governmental interest, the United States Supreme Court in *Taxpayers for Vincent* was confronted with a possible conflict with its holding in *Schneider v. State*.[90] In *Schneider*, the Court had struck down a prohibition on the distribution of handbills since the substantive evil asserted by the city, namely, the prevention of litter, could have been addressed by penalizing those who actually litter.[91] Thus, in that case, the Court found that the city's aesthetic interests in avoiding litter could have been adequately protected without abridging free expression.[92]

The *Taxpayers for Vincent* Court distinguished *Schneider* in two

---

83. *City of Lakewood*, 108 S. Ct. at 2147 (quoting Grayned v. Rockford, 408 U.S. 104, 116 (1972)).

84. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 48 (1987).

85. *City of Lakewood*, 108 S. Ct. at 2147.

86. *See* Chicago Newspaper Publishers Ass'n v. Wheaton, 697 F. Supp. 1464, 1469 (N.D. Ill. 1988) ("The ban on residential newsracks applies equally to all newsracks and is therefore content-neutral on its face.").

87. Appellant's Brief on the Merits at 48, City of Lakewood v. Plain Dealer Publishing Co., 108 S. Ct. 2138 (interim ed. 1988) (No. 86-1042).

88. *See* Metromedia, Inc. v. San Diego, 453 U.S. 490, 507–08 (1981) ("Nor can there be substantial doubts that the twin goals that the ordinance seeks to further—traffic safety and the appearance of the city—are substantial government goals.").

89. 466 U.S. 789, 795 (1984).

90. 308 U.S. 147 (1939).

91. *Id.* at 162.

92. *See Taxpayers for Vincent*, 466 U.S. at 810.

https://ecommons.udayton.edu/udlr/vol14/iss3/3

ways. First, in *Schneider,* individual citizens were actively exercising their right to communicate directly with potential recipients of their message. The conduct continued only while the speakers or distributors remained on the scene.[93] In *Taxpayers for Vincent,* however, the signs would "remain unattended until removed."[94] Second, the substantive evil sought to be prevented, visual blight, "[was] not merely a by product of the activity, but [was] created by the medium of expression itself."[95]

In determining whether a total prohibition of newsracks on public property is narrowly tailored to the city's interests of aesthetics and public safety, the holdings in *Taxpayers for Vincent* are directly applicable. Newsracks, like posted signs, are not attended expression. Also, the substantive evils sought to be prevented, visual blight and threats to the public health, safety and welfare, are in the medium itself, not just a by-product of the medium.[96]

---

93. *Id.* at 809.

94. *Id.*

95. *Id.* at 810.

96. As to the aesthetic harm of newsracks, it should initially be noted that newsracks act as stationary advertisements, or "small billboards." *See* Appellant's Brief on the Merits at 26, City of Lakewood v. Plain Dealer Publishing Co., 108 S. Ct. 2138 (interim ed. 1988) (No. 86-1042). "[A newsbox] advertises its wares by conspicuously advertising its publisher and contests or features within its product and mutely solicits sales for profit." *Id.* at 25–26; *see also* Transcript of Proceedings at 68, Plain Dealer Publishing Co. v. City of Lakewood, No. C83-63, slip op. (N.D. Ohio July 19, 1984), wherein the Plain Dealer's Director of Circulation testified that newsracks were used as advertisements for the newspapers within:

> On the majority of the [newsracks] that we use we have a logo on either side of the box which can be construed as advertising, and there is a place in front of the [newsrack] for an identification card which is basically advertising, and may be a contest that we are having, or something is in the paper or a section of the paper, or something of that sort.

The aesthetic and safety hazards caused by newsracks were further commented on in Longhini, *Coping With High-Tech Headaches,* PLANNING, Mar. 1984, at 31:

> Glenn Erikson, the downtown plan coordinator for the city of San Francisco, notes, 'We have more newspaper racks selling more types of newspapers than any city in the world. Minority papers, business papers, advertising journals—they're all cluttering the sidewalks. It's not unusual to see 20 machines chained to each other in a row, totally blocking pedestrian movement.' . . .
>
> 'We spent $30 million to fix up Market Street,' Erikson adds, 'and the news shacks and the vending machines just came in and took over the whole area. They look atrocious.' Erikson's frustrations reflect a serious problem. The indiscriminate and uncoordinated proliferation of newspaper vending machines can have serious consequences for public right-of-way, urban design, and property defacement.
>
> *Planners and public officials throughout the country are unanimous in damning news vending machines.*

Id. (emphasis added).

As noted in *City of Lakewood,* 108 S. Ct. at 2157 n.8 (White, J., dissenting), newsracks placed on public streets and sidewalks can cause a multitude of public safety hazards. These hazards run the gamut from blocked ramps for the handicapped to an electrical shock received

Published by eCommons, 1988

Recently, in *Ward v. Rock Against Racism,*[97] the Court expanded upon the definition of the term "narrowly tailored":

> So long as the means chosen are not substantially broader than necessary to achieve the government's interest, . . . the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative. "The validity of [time, place, or manner] regulations does not turn on a judge's agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government interests" or the degree to which those interests should be promoted.[98]

A total prohibition of newsracks would not be substantially broader than necessary to serve a municipality's interests in aesthetics and public safety.[99] Indeed, such a prohibition would be directed toward the substantive evils sought to be prevented. Therefore, such a regulation would pass the second prong of the test as being narrowly tailored to serve significant government interests.

A total prohibition of newsracks on public property would also pass the third prong of the test by leaving open ample, alternative channels of communications. Indeed, a prohibition on newsracks would not foreclose the distribution of newspapers on a city's public property. Persons could still sell newspapers on public property, albeit peripatetically. Also, other effective alternatives for the distribution of newspapers would exist through home delivery, retail sales, and newsracks placed on private property.[100] The sale of newspapers through vending

---

from a newsrack whose bolts used to attach it to the sidewalk had penetrated electrical lines. *See id.*; Jacobsen v. Crivaro, 851 F.2d 1067, 1070 (8th Cir. 1988) (discussing the public safety interests); Gannett Satellite Inf. Network v. Berger, 716 F. Supp. 140, 153 (D.N.J. 1989) (discussing the public safety interests), *aff'd in part,* 17 Med. L. Rep. (BNA) 1302 (3d Cir. Jan. 12, 1990); *infra* note 151.

97. 109 S. Ct. 2746 (interim ed. 1989).

98. *Id.* at 2758 (citation omitted).

99. *See* Gannett Satellite Inf. Network v. Berger, 716 F. Supp. 140, 151–54 (D.N.J. 1989), *aff'd in part,* 17 Med. L. Rep. (BNA) 1302 (3d Cir. Jan. 12, 1990). The *Berger* court held that a ban of newsracks from non-concession areas of the Newark Airport was narrowly-tailored to serve the Port Authority of New York & New Jersey's significant government interests in: 1) revenue raising, *Id.* at 151; 2) aesthetics, *Id.* at 152–53; 3) safety, *Id.* at 153; and 4) security, *Id.* at 153–54:

> In the instant case, the problems associated with the placement of newsracks in the airport terminals are clear. . . . *Because defendants' newsrack ban targets and eliminates the exact source of the problems noted above, this Court concludes that the prohibition of newsracks in the airport terminals is narrowly tailored.*

Id. at 155 (emphasis added). This holding was not appealed by Gannett in *Berger,* 17 Media L. Rep. (BNA) at 1304–05.

100. *But see* Chicago Newspaper Publishers Ass'n v. Wheaton, 697 F. Supp. 1464, 1470 (N.D. Ill. 1988) (where, in the context of a residential ban on newsracks, the district court found "the availability of home delivery, commercial outlets, and 'numerous newsboxes which are legally

https://ecommons.udayton.edu/udlr/vol14/iss3/3

machines is not even a particularly effective means of distribution. The dissent in *City of Lakewood* found that the newsracks at issue would constitute only about one one-hundredth of one percent (0.01%) of the Plain Dealer's total circulation.[101]

Finally, a total prohibition of newsracks would pass the fourth prong of the test. When a regulation completely prohibits a particular manner of expression, in addition to the traditional time, place and manner test, an inquiry is made to determine the compatibility of the manner of expression with the normal activity of the particular place and time.[102] When a court makes this inquiry, it is not limited to considering only the activities of a single person or entity, but it may also consider the effect of allowing all individuals or entities access to a particular forum for similar expressive activity.[103] Thus, a court should consider the effect of all newspapers that could be reasonably expected to place newsracks on a city's sidewalks.[104]

In *Heffron v. International Society for Krishna Consciousness,*[105] the Supreme Court held that the "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."[106] The dissent in *City of Lakewood* viewed placement of newsracks on public property as being but one manner of circulating newspapers.[107] Locating newsracks on public sidewalks is incompatible with the normal activity that occurs on the sidewalk: the movement of people.[108] Indeed, the sites most likely to be

---

eligible for permits'[] . . . inadequate to justify a complete ban on residential newsracks.").

101. *City of Lakewood,* 108 S. Ct. at 2162 (White, J., dissenting). *But see* Brief of the American Civil Liberties Union Foundation as *Amicus Curiae* in Support of Appellee, Plain Dealer Publishing Co. at 21–22, City of Lakewood v. Plain Dealer Publishing Co., 108 S. Ct. at 2138 (interim ed. 1988):

> The relatively small proportion of newsrack sales of the Plain Dealer is certainly attributable to the fact that it is *the* newspaper in a one newspaper town. Other publications without that advantage rely on newsrack sales for their very existence. *See, e.g., The Washingtonian,* August 1984, at 77 (Two-thirds of *USA Today*'s daily sales are from newsracks and newsstands).

Id. (emphasis supplied).

102. *See* Grayned v. Rockford, 408 U.S. 104, 116 (1972).

103. *See* Heffron v. International Soc'y For Krishna Consciousness, Inc., 452 U.S. 640, 654 (1981).

104. *See* Gannett Satellite Inf. Network v. Berger, 716 F. Supp. 140, 150 (D.N.J. 1989) *aff'd in part,* 17 Med. L. Rep. (BNA) 1302, 1304–05 (3d Cir. Jan. 12, 1990). This holding was not appealed by Gannett.

105. 452 U.S. at 647.

106. *Id.*

107. *City of Lakewood,* 108 S. Ct. at 2158 (White, J., dissenting).

108. *See* Appellant's Brief on the Merits at 40, City of Lakewood v. Plain Dealer Publishing Co., 108 S. Ct. 2138 (interim ed. 1988) (No. 86-1042). "Public use of sidewalks and tree lawns includes: (1) Efficient movement of pedestrian traffic; (2) The provision of essential public services and services related to the public health, safety and welfare; and (3) Personal expression

Published by eCommons, 1988

chosen by a newspaper for its newsracks are sites where newsracks are most incompatible, such as sidewalks with the heaviest concentrations of pedestrian traffic and nearest to heavy concentrations of vehicular traffic.[109] The city has an 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."[110]

C. *Summary*

A total prohibition of newsracks on public property could very well be a valid time, place and manner restriction. The prohibition would be content-neutral, narrowly tailored to the city's significant interests in public safety and aesthetics, and it would leave open ample, alternative channels of communications. Further, it would restrict a manner of expression that is incompatible with the normal activity occurring at a particular place at a particular time.

IV. LICENSE FEES

A. *Introduction*

Licensing fees imposed solely for the purpose of recovering the government's administrative costs in regulating speech-related conduct have been upheld as falling within the parameters of constitutional police power of the state.[111] However, licensing fees have historically been used as thinly-veiled prior restraints on the dissemination of particular ideas or views.[112] Thus, courts have strictly scrutinized the underlying reasons for regulating the speech or activity involved, as well as the amount of the fee imposed.[113]

---

of First Amendment rights." *Id.*

109. *See* Transcript of Proceedings at 39, 71, Plain Dealer Publishing Co. v. City of Lakewood, No. C83-63, slip op. (N.D. Ohio July 19, 1984) (wherein the Plain Dealer's Director of circulation testified that a proposed site in Lakewood was especially desirable because it was "a very high commuter and pedestrian area" and that vehicles stop on roadways to purchase newspapers from nearby newsracks); *see also Berger*, 716 F. Supp. at 153, wherein the court notes:

> [T]o insure the economic viability of plaintiff's newsracks and those of plaintiff's competitors, the newsracks would be placed in public areas with a high concentration of pedestrian traffic. Such an addition to areas with high pedestrian traffic obviously would increase safety hazards.

This holding was not appealed by Gannett in Gannett Satellite Inf. Network v. Berger, 17 Media L. Rep. (BNA) 1302, 1304–05 (3d Cir. Jan. 12, 1990).

110. *City of Lakewood*, 108 S. Ct. at 2157.

111. *See* Neisser, *Charging For Free Speech: Insurance in the Marketplace of Ideas*, 74 GEO. L.J. 257, 347 (1985) (noting that application and licensing fees seem to be the only charges routinely approved by courts).

112. *See, e.g.*, Collin v. Smith, 578 F.2d 1197, 1208 (7th Cir. 1978) (Skokie ordinance requiring $300,000 liability insurance for march by Nazi party unable to obtain insurance was invalidated as applied).

113. *See* Shuttlesworth v. City of Birmingham, 394 U.S. 147, 151 (1969) (ordinance pro-

https://ecommons.udayton.edu/udlr/vol14/iss3/3

B. *The Historical Loathing of License Fees*

The use of licensing fees to regulate publication was one of the evils that the first amendment was designed to prevent.[114] The framers of the Constitution had experienced regulation of the press through the Stamp Act, which had imposed a stamp duty on newspapers and advertisements.[115] As noted by the United States Supreme Court in *Grosjean v. American Press Co.*,[116] under the Stamp Act, "revenue was of subordinate concern; . . . the dominant and controlling aim was to prevent, or curtail the opportunity for, the acquisition of knowledge by the people in respect of their governmental affairs."[117] The *Grosjean* Court further stated that "the taxes had, and were intended to have, the effect of curtailing the circulation of newspapers, and particularly the cheaper ones whose readers were generally found among the masses of the people."[118] Parliament's attempt to apply the Stamp Act to the American colonies in 1765 met with vehement opposition.[119] According to one scholar "the freshness of the experience [with the Stamp Act] and the evident threat to a vigorous press made 'taxes on knowledge' a major concern of those advocating an express guarantee of freedom of the press when the Constitution was proposed and ratified."[120] Thus, the use of a fee to limit the circulation of newspapers that professed unpopular beliefs is one of the dangers the first amendment was adopted to guard against.[121]

C. *License Fees as Prior Restraints*

By regulating the press through license fees, the licensor has the ability not only to limit the quantity of expressive activity but also to limit who is permitted to speak since "[t]he power to tax the exercise of a privilege is the power to control or suppress its enjoyment."[122] Thus, the imposition of license fees on publication or circulation acts as a prior restraint on speech and "[p]rior restraints on speech and publication are the most serious and the least tolerable infringement on First

---

viding standardless discretion over the issuance of licenses was invalidated because such a law could arbitrarily suppress free speech).

114. *See* Grosjean v. American Press Co., 297 U.S. 233, 248 (1936).

115. *Id.* at 247.

116. *Id.* at 233.

117. *Id.*

118. *Id.* at 246.

119. Neisser, *supra* note 111, at 263.

120. *Id.* at 264.

121. *See Id.* at 267–68 ("[T]axation of the press and other political communicators was an explicit concern of the Framers of the first amendment.").

122. Murdock v. Pennsylvania, 319 U.S. 105, 112 (1943).

Published by eCommons, 1988

Amendment rights."[123] The Court's distrust of licensing fees is reflected in its statement in *Murdock v. Pennsylvania*.[124] In *Murdock*, the Court stated that "[t]he power to impose a license tax on the exercise of these freedoms is indeed as potent as the power of censorship which this Court has repeatedly struck down."[125] By imposing a license fee on the press, a financial burden is imposed which, especially for small papers advocating unpopular views, may act as a total bar to circulation.[126] Thus, the courts have strictly scrutinized any attempt to impose license fees on expressive first amendment activity.[127]

D. Valid License Systems and Fees Must Be Non-Discriminatory and Involve Little or No Discretion

The Court first addressed the proper scope of licensing systems and fees as applied to first amendment activity in *Cox v. New Hampshire*.[128] In *Cox*, the state of New Hampshire had prohibited, by statute, parades or processions on public streets in the absence of obtaining a special license.[129] The Supreme Court of New Hampshire had construed the statute in a very limited way, holding that the licensing board had not been vested with arbitrary power or an unfettered discretion, but rather discretion to be exercised with "uniformity of method of treatment upon the facts of each application, free from improper or inappropriate considerations and from unfair discrimination."[130] The Court held that given this limited statutory construction, "[i]f a municipality has authority to control the use of its public streets for parades or processions, as it undoubtedly has, it cannot be denied authority to give consideration, without unfair discrimination, to time, place and manner in relation to the other proper uses of the streets."[131] Although the activity at issue, engaging in an informational march, was clearly within the protection of the first amendment, the municipality's interest in assuring the safety of the streets took precedence over the first amendment protection of the defendants so long as the "control is exerted so as not to deny or unwarrantedly abridge the right of assembly

123. Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976).

124. 319 U.S. at 105.

125. *Id.* at 113.

126. *See Grosjean*, 297 U.S. at 246.

127. *See* Chicago Newspaper Publishers Ass'n v. Wheaton, 697 F. Supp. 1464, 1469 (N.D. Ill. 1988) (quoting Freedman v. Maryland, 380 U.S. 51, 58 (1965)) ("[A]ny licensing system which operates as a prior restraint [will] 'avoid[] constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system.' ").

128. 312 U.S. 569 (1941).

129. *Id.* at 571.

130. *Id.* at 576.

131. *Id.*

https://ecommons.udayton.edu/udlr/vol14/iss3/3

and the opportunities for the communication of thought and the discussion of public questions immemorially associated with resort to public places."[132]

The requirement of non-discrimination is further illustrated by *Grosjean,* where the Court struck down on due process grounds a Louisiana statute which imposed a license tax upon publishers of newspapers and magazines having weekly circulations in excess of 20,000 copies.[133] The Court held that the form in which the tax was imposed was in itself suspicious because "[i]t is measured alone by the extent of the circulation of the publication in which the advertisements are carried, with the plain purpose of penalizing the publishers and curtailing the circulation of a selected group of newspapers."[134]

The Court further noted the judicial inclination to exercise strict control over the permissible degree of administrative discretion in considering license applications, "both by requiring explicit and specific standards to govern executive enforcement of permissible time, place and manner regulations and by applying the vagueness doctrine rigorously."[135] Thus, licensing systems and fees must be "non-discretionary. . . and content-neutral time, place or manner restrictions, which are narrowly tailored to serve significant public safety interests of the city."[136]

---

132. *Id.* at 574.

133. *Grosjean,* 297 U.S. at 244.

134. *Id.* at 251.

135. Neisser, *supra* note 111, at 292; *see also* Chicago Newspaper Publishers Ass'n v. Wheaton, 697 F.Supp. 1464, 1466–68 (N.D. Ill. 1988). "The question is not whether the ordinance expressly favors certain speakers (although that would also be improper), but whether the discretion built into the ordinance raises the specter or content-based censorship." *Id.* at 1468 (citations omitted).

136. Jacobsen v. Crivaro, 851 F.2d 1067, 1070 (8th Cir. 1988) (citing Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983)).

If the licensing scheme is aimed specifically at newsracks, then some, or all, of the three procedural safeguards set forth in Freedman v. Maryland, 380 U.S. 51, 58-60 (1965) may come into play. *See City of Lakewood,* 108 S. Ct. at 2151.

Following the Court's enigmatic decision in FW/PBS, Inc. v. Dallas, 110 S. Ct. 596 (interim ed. 1990), however, it is unclear how many, if any, of the safeguards may be necessary. In the context of licensing "adult" businesses, Justices O'Connor, Stevens and Kennedy opined that when a licensing system is "more onerous with respect to [first amendment protected businesses]. . .", then the first two of *Freedman's* three safeguards are necessary. *Id.* at 604–07. Justices Brennan, Marshall and Blackmun disagreed, arguing that all three of *Freedman's* safeguards are required when such a licensing system is ". . .applied to any First Amendment-protected business. . . ." *Id.* at 611–13 (Brennan, J., concurring). Justices White and Rehnquist, on the other hand, argued that none of *Freedman*'s safeguards are necessary absent a licensing system which allows content based determinations and/or a licensing system which vests government officials with standardless discretion. *Id.* at 614–17 (White, J., concurring in part and dissenting in part). Finally, Justice Scalia wrote that *Freedman* was inapplicable because the municipality could have "proscribed the commercial activities that it chose instead to license." *Id.* at 619 (Scalia, J., concurring in part and dissenting in part).

Published by eCommons, 1988

E. *The Proper Monetary Amount of License Fees*

Another United States Supreme Court decision regarding the amount of monetary fee that is permissible as a licensing fee is the *Cox* case. In *Cox*, the license fee to be charged was in the range of $300 to a nominal amount.[137] The Court held that "[t]here is nothing contrary to the Constitution in the charge of a fee limited to"[138] meeting "the expense incident to the administration of the Act and to the maintenance of public order in the matter licensed."[139]

The Court expanded upon its discussion of the proper scope of licensing fees in the *Murdock* case by striking down a licensing fee which was "not a nominal fee imposed as a regulatory measure to defray the expenses of policing the activities in question."[140] The monetary amount of a proper licensing fee is one that covers the actual administrative costs of the government in regulating the activity: "fees tied to the costs first of filing, reproducing, and distributing the license application to government agencies that require notice, and then of preparing and issuing the license to the applicant and distributing copies to relevant agencies would be appropriate."[141]

---

137. *Cox*, 312 U.S. at 576.

138. *Id.* at 577.

139. *Id.* (quoting the Supreme Court of New Hampshire in State v. Cox, 91 N.H. 136, 16 A.2d 508 (1940)).

140. *Murdock*, 319 U.S. at 113-14.

141. Neisser, *supra* note 111, at 349. *But see* Gannett Satellite Inf. Network v. Berger, 716 F. Supp. 140, 146 (D.N.J. 1989), *aff'd in part*, 17 Media L. Rep. (BNA) 1302 (3d Cir. Jan. 12, 1990). In *Berger*, the district court used "traditional concepts of First Amendment analysis," *Id.*, and found the Newark Airport to be a "public forum," *Id.* at 149, yet analyzed the Port Authority of New York & New Jersey's interest in revenue raising as being a "significant" government interest. *Id.* at 150. The court upheld the Port Authority's ability to ban newsracks from non-concession areas of the airport, at least in part, because newsracks would take sales from concessionaires, thereby reducing the airport's revenue, thereby reducing the airport's "ability to continue to service the primary purpose of the facility and the corresponding needs of the air-travelling public effectively and efficiently." *Id.* at 152. This holding was not appealed by Gannett in *Berger*, 17 Media L. Rep. (BNA) at 1304–05. Thus, we have the anomalous result of revenue raising on public forum property being viewed as a significant government interest for banning newsracks from the very same public forum.

A clue to the court's departure from the traditional first amendment principle that fees to use public forum property are not to be revenue raising but, instead, are supposed to only cover administrative costs, *see Murdock*, 319 U.S. at 105; *Cox*, 312 U.S. at 569; Neisser, *supra* note 111; at 349, may be its citation of, and unspoken analogy to, the decision in Gannett Satellite Inf. Network v. Metropolitan Transp. Auth., 745 F.2d 767 (2d Cir. 1984). In the *MTA* case, however, the court specifically found that the public areas of the MTA were not public forum property. *Id.* at 773. The court found, however, that the public areas were a proper "forum" for the sale of newspapers through newsracks. *Id.* at 772–73. The court then held that the MTA could raise revenue from renting its non-public forum (but proper "forum") property for the use of newsracks, because the MTA was acting in "a proprietary, not a governmental" role. *Id.* at 774–75.

The court in *Berger* does not specifically hold that the Port Authority is acting in a proprietary, as opposed to governmental, role in managing the Newark Airport. Assuming that the court

https://ecommons.udayton.edu/udlr/vol14/iss3/3

F. Licensing Permits and Fees on Newsracks as Valid Time, Place and Manner Regulations

The imposition of licensing permits and fees on newspapers and their related activities have frequently been tested. In order to be violative of the first amendment, such licensing need not be directed at publication alone.[142]

In order to be held valid, licensing regulations and fees governing newsracks must, in effect, pass a three-pronged test. Initially, such regulations must be practically discretionless and non-discriminatory.[143] The next step is to determine whether such regulations are valid time, place and manner regulations.[144] This means, as previously noted, that the regulation must be content-neutral, narrowly tailored to serve a significant governmental interest, and must leave open ample alternative channels of communication.[145] Finally, the fee charged in conjunction with the licensing regulation must be in an amount that covers only the city's administrative costs.[146]

As discussed previously, the only United States Supreme Court decision concerning the licensing of newsracks is *City of Lakewood v. Plain Dealer Publishing Co.*[147] The Court struck down the licensing requirement due to the lack of express standards by reasoning that "[o]nly standards limiting the licensor's discretion will eliminate [the] danger [of self-censorship] by adding an element of certainty. . . ."[148] In the context of licensing laws, the Court found that distribution of

---

drew the proprietary/governmental distinction, and assuming that this distinction is what the court relied on in its holding that the Port Authority's interest in raising revenue was a proper interest for its ban of newsracks from public forum property, we begin to see a curious splintering effect on traditional public forum theory, at least in the context of revenue raising and newsracks.

Traditionally, the Supreme Court has recognized three types of fora: 1) the traditional public forum; 2) the designated public forum; and 3) the non-public forum. Cornelius v. NAACP Legal Defense and Educ. Fund, Inc., 473 U.S. 788, 803 (1985). For purposes of revenue raising and newsracks, however, we now have two more "fora": 1) public forum property operated by government in a proprietary, as opposed to governmental, role (this appears to be somewhat of an oxymoron), *Berger*, 716 F. Supp. at 149–50; and 2) proper "forum" property for a particular expressive activity, operated by government in a proprietary, as opposed to governmental, role. *MTA*, 745 F.2d at 773–75.

Clearly, the courts are having difficulty fitting newsracks into traditional first amendment analysis, a feat akin to fitting the proverbial square peg into the proverbial round hole.

142. *Ex parte* Jackson, 96 U.S. 727, 733 (1877); *see also supra* note 6.

143. *See supra* notes 128–36.

144. Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789, 805–07 (1984); Jacobsen v. Harris, 869 F.2d 1172, 1173 (8th Cir. 1989) (citing Perry Educ. Ass'n v. Perry Local Educator's Ass'n, 460 U.S. 37, 45 (1983)); Jacobsen v. Crivaro, 851 F.2d 1067, 1070 (8th Cir. 1988).

145. *See supra* note 82.

146. *See supra* notes 137–41.

147. 108 S. Ct. 2138 (interim ed. 1988).

148. *Id.* at 2144.

Published by eCommons, 1988

newspapers by newsracks was within the realm of "circulation of newspapers, which is constitutionally protected."[149]

Subsequently, the Eighth Circuit Court of Appeals interpreted the *City of Lakewood* Court's holding in *Jacobsen v. Crivaro.*[150] The *Crivaro* court held that the city's licensing regulations and annual fee for each newsrack were both non-discretionary and valid time, place, or manner restrictions.[151] The court also found that the ten dollar annual licensing fee covered only the administrative costs of the license, thus it did not constitute a prior restraint.[152]

Recently, the Eighth Circuit was again faced with the recurring issue of a licensing fee for newsracks in *Jacobsen v. Harris.*[153] The court again held that the licensing regulation was a constitutional time, place and manner regulation with sufficient neutral criteria to limit discretion.[154] The permit fee requirement was upheld since the monetary amount involved covered only the administrative costs of the application process.[155]

Court decisions prior to the *City of Lakewood* case, however, had reached mixed conclusions. In *Southern Connecticut Newspapers v. Greenwich,*[156] a federal district court held invalid a permit requirement for newsracks, where there was the possibility of a three-day delay in issuance.[157] The court held that this delay constituted "a prior restraint unjustified by any significant interest of the Town."[158] Similarly in *Minnesota Newspaper Association v. City of Minneapolis,*[159] a Minnesota district court struck down license fee requirements on newsracks even though the license fees imposed by the ordinance did not exceed the reasonable costs of administering the ordinance.[160] The court held that the ordinance was "not justified by any substantial and compelling interest of the City in safeguarding and protecting the public safety or health, or the general welfare."[161]

---

149. *Id.* at 2149.

150. 851 F.2d 1067 (8th Cir. 1988).

151. *Id.* at 1070. The City's stated public safety interests included, *inter alia,* protecting against: obstruction or interference with pedestrian or vehicular traffic; obstruction of fire hydrants or other emergency facilities; restriction of access to bus shelters; and obstruction of ramps for the handicapped. *Id.* at 1068–69 n.2.

152. *Id.* at 1071.

153. 869 F.2d 1172 (8th Cir. 1989).

154. *Id.* at 1174.

155. *Id.*

156. 11 Media L. Rep. (BNA) 1051 (D. Conn. Aug. 28, 1984).

157. *Id.* at 1056.

158. *Id.*

159. 9 Media L. Rep. (BNA) 2116 (D. Minn. Aug. 3, 1983).

160. *Id.* at 2118.

161. *Id.* at 2119. The city has asserted its interests in "the safety of pedestrian and vehicu-

https://ecommons.udayton.edu/udlr/vol14/iss3/3

In *Gannett Co. v. City of Rochester,*[162] the trial court specifically upheld a permit requirement for newsracks where "the ordinance mandated that the cost of the permit was not to exceed the cost of processing the application to a maximum of $10.00."[163] The court, however, granted summary judgment for the plaintiff newspaper on other grounds.[164]

Gannett, the publisher of the nationwide newspaper, *USA Today,* brought an action against the Metropolitan Transportation Authority in *Gannett Satellite Information Network v. Metropolitan Transportation Authority.*[165] The Second Circuit Court of Appeals allowed a licensing fee of $75 per newsrack or $160 per Metropolitan Transportation Authority station.[166] The court found that because the licensing fees served the "significant governmental interest of raising revenue for the efficient, self-sufficient operation of the rail lines . . . they can be valid time, place and manner restrictions on Gannett's right to place its newsracks in those areas."[167]

G. *Summary*

After the decision in *City of Lakewood,* and in light of *Crivaro* and *Harris,* the courts will probably be more deferential to the concerns of a city council than the courts in *Southern Connecticut Newspapers* and *Minnesota Newspaper Association.* Thus, the laws passed by the various legislatures regarding the health, safety or general welfare of their citizens, together with their determinations to charge fees to cover administrative costs may well be upheld.

Licensing systems and fees for newsracks that are "non-discretionary, . . . and content-neutral time, place or manner restrictions, which are narrowly tailored to serve significant public safety interests of the City"[168] are appropriate. While the courts have differed as to the level

---

lar movement and traffic on and adjacent to city sidewalks. *Id.* at 2122.

162. 69 Misc. 2d 619, 330 N.Y.S.2d 648 (Sup. Ct. 1972).

163. *Id.* at 629, 330 N.Y.S.2d at 659 ("The municipality may charge a small fee sufficient to defray the expense of licensing if the license has a reasonable, discernible relationship to the police protection or the good order of the community.").

164. *Id.* at 630, 330 N.Y.S.2d at 659–60 (striking entire permit and insurance ordinance based on the fact that the insurance requirement could be waived at the discretion of the government officials authorized to grant or deny the permit).

165. 745 F.2d 767 (2d Cir. 1984).

166. *Id.* at 772.

167. *Id.* The Court specifically based its holding on the fact that the government was acting in a proprietary, not governmental function. *Id.* "When a government agency is engaged in a commercial enterprise, the raising of revenue is a significant interest." *Id.* at 775; *see also* Lehman v. City of Shaker Heights, 418 U.S. 298, 304 (1974). For a discussion of the type of "forum" property at issue in *MTA,* see *supra* note 141.

168. *Crivaro,* 851 F.2d at 1070.

Published by eCommons, 1988

of scrutiny to be applied in determining what constitutes a significant public safety interest, the most recent cases of *City of Lakewood, Crivaro,* and *Harris* indicate that where a denial of a permit application is "only for reasons related to the health, safety, or welfare of. . . citizens"[169] and where the reasons for denial are expressly provided for in the applicable regulation, such a denial would be constitutionally acceptable. Moreover, proper fees are acceptable, because "[w]hile it is true that ordinarily a governmental entity cannot profit by imposing a licensing fee on a first amendment right . . . fees that cover only the administrative costs of the license are permissible."[170]

V. RENTAL FEES

A. *Introduction*

In *Plain Dealer Publishing Co. v. City of Lakewood,*[171] the district court held:

> The City of Lakewood holds public property in trust for the citizens of the City of Lakewood and may not permit private persons to exclusively use such property without adequate consideration including streets which have been held in trust for the use of the public and are part of the privileges, rights, and liberties of citizens.[172]

This portion of the trial court's decision was not disturbed by the Sixth Circuit Court of Appeals. The Sixth Circuit stated in a footnote, with no discussion and no citation of legal authority, that "we believe the imposition of a rental fee [for newsracks on public property] withstands constitutional scrutiny."[173] Although the Plain Dealer sought a rehearing *en banc* before the Sixth Circuit on this issue,[174] the company did not cross-appeal nor did it seek a writ of certiorari before the United States Supreme Court. Thus, although the Supreme Court found Lakewood's ordinance unconstitutional on other grounds, it did not review the issue of Lakewood's rental fee.

B. *Reasons for Imposing Rental Fees*

While license fees, as applied to first amendment activity, are imposed only to recover the government's cost in administering the regu-

---

169. *City of Lakewood,* 108 S. Ct. at 2150; *see also supra* note 71.

170. *Crivaro,* 851 F.2d at 1071 (citation omitted).

171. No. C83-63, slip op. (N.D. Ohio July 12, 1984), *aff'd in part,* 794 F.2d 1139 (6th Cir. 1986), *aff'd in part,* 108 S. Ct. 2138 (interim ed. 1988).

172. *Id.* at 14.

173. *City of Lakewood,* 794 F.2d at 1143 n.2, *aff'd in part,* 108 S. Ct. at 2138.

174. Petition of Appellant Plain Dealer Publishing Company for Rehearing and Suggestion for Rehearing En Banc at 1, Plain Dealer Publishing Co. v. City of Lakewood, 794 F.2d 1139 (6th Cir. 1986).

https://ecommons.udayton.edu/udlr/vol14/iss3/3

latory measure, rental fees are imposed for the purpose of raising revenue in exchange for the use of city property.[175] The strongest argument for allowing cities to charge for the use of its streets and public places is "the general power of the public to exact compensation for the use of streets and roads."[176]

The fact that newsrack regulations may implicate the first amendment is of minimal importance when one views newsracks as permanently occupying public property. In *Board of Regents v. Roth*,[177] the United States Supreme Court held that, "Property interests . . . are not created by the Constitution . . . they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law."[178] Thus, it is doubtful whether a newspaper publisher has a constitutional right to claim portions of public property for his exclusive use to sell his newspaper.

In analyzing whether a private person has a first amendment right to place newsracks on public property, a newsrack secured to a fixed location should not be considered as being the equivalent of a person selling newspapers.[179] While a person selling newspapers may physically occupy space on a public sidewalk, his occupation of the space is necessarily temporary; his use of the sidewalk does not permanently exclude the general public from conducting expressive activity on the same portion of public property.[180] However, a newsrack which occupies public property deprives the general public of the use of that property for their expressive activity so long as the machine remains there.

In his dissent in *City of Lakewood v. Plain Dealer Publishing Co.*,[181] Justice White expanded upon the trial court's reasoning for allowing the imposition of rental fees. In dissenting, White stated that "the Plain Dealer's right to distribute its papers does not encompass the right to take city property—a part of the *public* forum . . . and appropriate it for its own exclusive use, on a semi-permanent basis, by means of the erection of a newsbox."[182] Justice White compared news-

175. St. Louis v. Western Union Tel. Co., 148 U.S. 92, 97, (1893).

176. *Id.* at 98.

177. 408 U.S. 564 (1972).

178. *Id.* at 577.

179. *See supra* note 9.

180. *See* Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 809 (1984) ("The rationale of *Schneider* is inapposite in the context of the instant case. There, individual citizens were actively exercising their right to communicate directly with potential recipients of their message. The conduct continued only while the speakers or distributors remained on the scene."). *But see* Gannett Co. v. City of Rochester, 69 Misc. 2d 619, 629, 330 N.Y.S.2d 648, 659 (Sup. Ct. 1972) ("The plaintiff's vending machines are not permanent nor are they absolutely stationary. Their location can be changed simply by turning a key in a lock.").

181. 108 S. Ct. 2138 (interim ed. 1988).

182. *Id.* at 2155 (White, J., dissenting).

Published by eCommons, 1988

racks with other commercial enterprises, such as bookstores and movie theaters, which do not have a first amendment right to take public property for their exclusive use.[183]

In *St. Louis v. Western Union Telegraph Co.*,[184] the city charged a rental fee of five dollars per year for each telegraph pole placed on public property in the city.[185] The Court characterized Western Union's use of city property as follows: "[I]n respect to so much of the space as it occupies with its poles, permanent and exclusive . . . it as effectually and permanently dispossesses the general public as if it had destroyed that amount of ground."[186] The Court expressed concern with the possible implications of allowing telegraph and telephone companies to take public property without compensation, stating that "[b]y sufficient multiplication of telegraph and telephone companies the whole space of the highway might be occupied, and that which was designed for general use purposes of travel entirely appropriated to the separate use of companies and for the transportation of messages."[187] The Court held that, when there is a permanent and exclusive appropriation of a part of the highway, there is nothing to inhibit the public from exacting rent for the space occupied:[188] "[i]t matters not for what that exclusive appropriation is taken . . . the State may if it chooses exact from the party or corporation given such exclusive use pecuniary compensation to the general public for being deprived of the common use of the portion thus appropriated."[189]

In *Gannett Co. v. Metropolitan Transportation Authority*,[190] the Second Circuit Court of Appeals upheld the Metropolitan Transportation Authority's right to impose revenue-raising fees on newsracks.[191] The court placed great emphasis on the fact that the property involved—subway stations—was deemed not to be a public forum.[192] The court also found that the Metropolitan Transportation Authority was "not acting in a traditional governmental capacity . . . . because the

183. *Id.* at 2156 (White, J., dissenting) ("Just as there is no First Amendment right to operate a bookstore or locate a movie theater however or wherever one chooses notwithstanding local laws to the contrary . . . the First Amendment does not create a right of newspaper publishers to take city streets to erect structures to sell their papers.") (citations omitted).

184. 148 U.S. 92 (1893).

185. *Id.* at 94.

186. *Id.* at 99.

187. *Id.*; *see also* Longhini, *supra* note 96, at 31 (wherein the City Planner for San Francisco states that it is not unusual to see 20 newsracks chained together on a sidewalk, totally blocking pedestrian movement).

188. *St. Louis*, 148 U.S. at 99.

189. *Id.* at 101-02

190. 745 F.2d 767 (2d Cir. 1984).

191. *Id.* at 775.

192. *Id.* at 773; *see also supra* note 141.

https://ecommons.udayton.edu/udlr/vol14/iss3/3

management of station facilities is a proprietary, not a governmental function."[193] Therefore, "[w]hen a government agency is engaged in a commercial enterprise, the raising of revenue is a significant interest."[194] The court ultimately utilized a balancing test, weighing the city's interest in producing revenues against the burden that the fees place on the publisher's right to distribute its newspapers.[195]

The imposition of a non-discriminatory rental fee for the amount of public property occupied by a newsrack is within the authority of the state.[196] There is no first amendment right to take city property and permanently appropriate it for the sale of newspapers by vending machines.[197]

C. *Scope of the Rental Fee*

It has long been held that the rental fee imposed upon easements and rights of way must be reasonable.[198] In *Group W Cable, Inc. v. City of Santa Cruz*,[199] the District Court for the Northern District of California had occasion to consider what constitutes a reasonable easement fee for a cable television company's use of utility poles on public property.[200] The court found that "[t]he First Amendment does not necessarily preclude allowing the marketplace to control the allocation of communication resources."[201] By statute, the city was limited to imposing a fee of not more than five percent of the gross revenue derived in the city.[202] The rental fee imposed must be content-neutral and nondiscriminatory.[203] It should also be noted that, while the court upheld the imposition of rental fees, it struck down the imposition of an administrative fee since the city did not charge administrative fees to other public service entities utilizing city property.[204]

In the *St. Louis* case, the United States Supreme Court discussed the reasonableness of rental fees as applied to telegraph poles on city

193. *MTA*, 745 F.2d at 774.
194. *Id.* at 775.
195. *Id.* at 775–76.
196. "[W]e believe the imposition of a rental fee withstands constitutional scrutiny." *City of Lakewood*, 794 F.2d at 1143 n.2. *But see* Chicago Newspaper Ass'n v. Wheaton, 697 F. Supp. 1464, 1471–72 (N.D. Ill. 1988) (where, though the fee charged was termed a "rental fee", the analysis utilized to strike the fee as unreasonable dealt with licensing fees).
197. *See City of Lakewood*, 108 S. Ct. at 2156 (White, J., dissenting).
198. *St. Louis*, 148 U.S. at 104–05; *see also* Group W. Cable, Inc. v. City of Santa Cruz, 679 F. Supp. 977, 980 (N.D. Cal. 1988).
199. 679 F. Supp. at 977.
200. *Id.* at 979.
201. *Id.* at 980.
202. *Id.*
203. *Id.*
204. *Id.* at 981.

Published by eCommons, 1988

property and held that it was not solely for the city to decide what constitutes a reasonable rental fee.[205] The court stated that "[t]he inquiry must be open in the courts, and it is an inquiry which must depend largely upon matters not apparent upon the face of the ordinance, but existing only in the actual state of affairs in the city."[206]

The monetary amount of a reasonable rental fee for newsracks necessarily depends upon the municipality involved. It may even depend upon the location of the machine within the municipality. The question of reasonableness in any given situation, however, is subject to judicial review.[207]

D. Summary

In summary, there are no constitutional grounds for newspaper publishers to claim a right to permanently occupy public property, rent free. Even if it were found that a publisher had a first amendment right to place newsracks on public property, it is extremely questionable whether a publisher has a right to use public property rent free. Governmental entities are not required to subsidize first amendment activities.[208] Thus, a reasonable rental fee for the use of public property could be charged. The reasonableness of the fee, however, would always be subject to judicial review.

VI. LIABILITY INSURANCE REQUIREMENTS

A. Introduction

With the cost of insurance sky-rocketing, many municipalities have required newsrack owners to provide liability insurance for personal injury or property damage caused by their newsracks.[209] By requiring liability insurance for objects placed on public property, municipalities are seeking to protect their citizens from the possible financial burdens caused by the placement of these objects, such as increases in taxes due to either higher municipal insurance premiums or judgments against the city due to injuries caused by newsracks.[210]

---

205. *St. Louis*, 148 U.S. at 105.

206. *Id.*

207. *Id.*

208. "We again reject the 'notion that First Amendment rights are somehow not fully realized unless they are subsidized by the State.' " Regan v. Taxation With Representation, 461 U.S. 540, 546 (1983) (quoting Cammarano v. United States, 358 U.S. 498, 515 (1959) (Douglas, J., concurring)).

209. Ball, *supra* note 14, at 199.

210. *See* Jacobsen v. Harris, 869 F.2d 1172, 1174 (8th Cir. 1989) ("The City has a legitimate interest in protecting itself from liability for injuries associated with the use of its property."); Neisser, *supra* note 111, at 299–300, which states that:

The first amendment does not require the public to bear all of the costs. But any financial

https://ecommons.udayton.edu/udlr/vol14/iss3/3

A strong argument for not allowing municipalities to require newsrack owners to obtain liability insurance is that such a requirement acts as a prior restraint on protected first amendment activity.[211] By requiring liability insurance of a given dollar amount, the city, in effect, prevents communication from groups that do not have the economic resources to obtain the requisite amount of insurance.[212] For commercial distributors of newspapers, however, liability insurance should be viewed as a cost of doing business which it can readily absorb.[213]

Another problem with requiring liability insurance is the role of the insurance company. By requiring newspaper publishers to obtain liability insurance, there is the danger that insurance companies will make constitutionally impermissible distinctions, such as those based on content or viewpoint, when determining the rate to be charged of a specific vendor.[214] By enacting the liability insurance requirement the city will necessarily be adopting the categories, rates, and practices of the private insurance market.[215]

B. Insurance Requirements as Prior Restraints

Several courts have viewed the imposition of insurance requirements on newsrack owners as prior restraints on protected first amendment rights.[216] In order to overcome the presumption against prior restraints, the infringement must be minimal and there must be a compelling governmental interest which cannot be protected by any other means.[217]

---

requirement for expressive activity in public requires careful economic analysis to assure uniformity of burdens among comparable activities, proper assessment of externalized benefits, and adequate protection of those willing to associate with an unpopular cause.

211. *See* Minnesota Newspaper Ass'n v. City of Minneapolis, 9 Media L. Rep. (BNA) 2116, 2123 (D. Minn. Aug. 3, 1983) ("The new ordinance here under scrutiny is a clear example of such previous restraint through its licensing scheme, its requirement of a hold harmless agreement and liability insurance . . . all of them . . . made a prerequisite to installing or maintaining a newsstand.").

212. *See* Neisser, *supra* note 111, at 298.

213. *See* Gannett Satellite Inf. Network, Inc. v. Metropolitan Transit Auth., 745 F.2d 767, 774 (2d Cir. 1984) ("As a large commercial distributor, it should be ready to absorb increases in the cost of doing business.").

214. *See* Neisser, *supra* note 111, at 317–19.

215. *Id.* at 318.

216. *See* Gard, Book Review, 32 HASTINGS L.J. 711, 729 (1981) (reviewing A. NEIER, DEFENDING MY ENEMY: AMERICAN NAZIS, THE SKOKIE CASE, AND THE RISKS OF FREEDOM (1979)) ("Large insurance requirements and permit fees effectively would preclude many, if not most, groups from using the public streets and parks for expressive purposes, the very means by which a free people governs itself.").

217. Minnesota Newspaper Ass'n v. City of Minneapolis, 9 Media L. Rep. (BNA) 2116, 2121 (D. Minn. Aug. 3, 1983) (discussing Rosen v. Port of Portland, 641 F.2d 1243 (9th Cir. 1981)).

Published by eCommons, 1988

Some cases decided prior to the decision in *City of Lakewood v. Plain Dealer Publishing Co.*[218] have held newsrack insurance requirements to be prior restraints. The United States District Court of Connecticut addressed the constitutionality of a municipal ordinance requiring newsrack owners to obtain liability insurance and to indemnify the town against any finding of liability resulting from the machines in *Southern Connecticut Newspapers v. Greenwich.*[219] In *Greenwich,* the court found that there was no history of injuries, claims or lawsuits related to newsracks.[220] The court struck down the insurance and indemnification requirements as prior restraints on protected first amendment expression, because "[a]lthough the Town surely has a significant interest in promoting public safety, it has not established a compelling need for the insurance or indemnity provisions."[221]

A state trial court in *Minnesota Newspapers Association v. Minneapolis*[222] also struck down a newsrack insurance requirement.[223] The court found that there had been "no reports of significant personal injury or property damage,"[224] and held that the requirement was "not justified by any substantial and compelling interest of the City in safeguarding and protecting the public safety . . . or the general welfare."[225]

The protection of taxpayers' money has not been viewed as a compelling state interest when courts find insurance requirements to constitute prior restraints. As noted above, the presumption against the validity of prior restraints is very difficult to overcome.[226] This presumption would need to be met, however, only if placement of newsracks on public property is a protected first amendment right,[227] and the insurance requirement is viewed as a prior restraint.

C. *Insurance Requirements as Time, Place and Manner Restrictions*

Recently, liability insurance requirements have been viewed as time, place and manner restrictions as opposed to prior restraints.[228] In

---

218. 108 S. Ct. 2138 (interim ed. 1988).
219. 11 Media L. Rep. (BNA) 1051 (D. Conn. Aug. 28, 1984).
220. *Id.* at 1055–56.
221. *Id.* at 1056.
222. 9 Media L. Rep. (BNA) 2116 (D. Minn. Aug. 3, 1983).
223. *Id.* at 2118.
224. *Id.*
225. *Id.* at 2119.
226. "[P]rior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights." Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976).
227. *See supra* note 20.
228. Plain Dealer Publishing Co. v. City of Lakewood, No. C83-63, slip op. at 15 (N.D. Ohio 1984) ("[I]t is not unreasonable to require indemnification and securing of insurance [for

https://ecommons.udayton.edu/udlr/vol14/iss3/3

order to be a valid time, place and manner restriction, a regulation must be content neutral, narrowly tailored to serve a significant governmental interest, and must leave open ample alternative methods of communication.[229]

The Eighth Circuit Court of Appeals recently upheld an insurance requirement for newsracks in *Jacobsen v. Harris*.[230] The ordinance in question required the newsrack owner to obtain liability insurance covering both personal injury and property damage.[231] The plaintiff did not challenge the district court's finding that the amount of coverage required was reasonable.[232] The court of appeals found that the city had an interest in protecting itself from liability for injuries occurring on city property.[233] The court held the insurance requirement was a reasonable time, place and manner restriction that was narrowly tailored to further significant government interests of safety, aesthetics, planning, and space allocation.[234]

The district court in *Plain Dealer Publishing Co. v. City of Lakewood*[235] upheld the liability insurance requirements imposed by the City:

> The City of Lakewood is mandated by Ohio Revised Code § 723.01 to maintain the streets, sidewalks, and public ways open to the public free of nuisance, is held civilly liable by such Section for failure of such duty, and its broad discretion should not be bridled nor should it be exposed to additional liability without indemnification by any private commercial use on such City . . . property.[236]

The Sixth Circuit in *Plain Dealer Publishing Co. v. City of Lakewood*[237] struck down the insurance requirement on the basis that the city did not require other permittees on public property to provide insurance.[238] The other permittees' objects located on the city's property, such as bus shelters, utility poles and emergency phone boxes, however, provided services of a generally quasi-governmental nature.[239] Never-

---

newsboxes]. . . ."), *aff'd in part*, 794 F.2d 1139 (6th Cir. 1986), *aff'd in part*, 108 S. Ct. at 2138; *see also* Jacobsen v. Harris, 869 F.2d 1172 (8th Cir. 1989).

229. *See supra* note 81.

230. 869 F.2d 1172 (8th Cir. 1989).

231. *Id.* at 1173.

232. *Id.* at 1174.

233. *Id.*

234. *Id.* at 1173.

235. No. C83-63, slip op. (N.D. Ohio 1984), *aff'd in part*, 794 F.2d 1139 (6th Cir. 1986), *aff'd in part*, 108 S. Ct. at 2138.

236. *Id.* at 11.

237. 794 F.2d at 1139.

238. *Id.* at 1147.

239. *City of Lakewood*, 108 S. Ct. at 2165 (White, J., dissenting); *see also supra* note 42.

Published by eCommons, 1988

theless, the court held that "[s]ince the City cannot impose more stringent requirements on First Amendment rights than it does on others, we believe the indemnification aspect of the ordinance places an undue burden on Plain Dealer."[240] In his concurrence, Judge Unthank distinguished newsracks from public services of a quasi-governmental nature and stated that the insurance and indemnification requirements could be permitted as "legitimate and reasonable provisions for the protection of the City from liability."[241]

The Supreme Court in *City of Lakewood,* did not address the issue of requiring newsrack owners to obtain insurance, holding the ordinance unconstitutional on other grounds. The dissent in *City of Lakewood,* however, discussed the implications of requiring insurance in this case and would have upheld the insurance requirement.[242] The fact that a municipality has no sovereign immunity under Ohio law[243] coupled with lack of agreement as to the substantiality of the city's risk of being held liable for newsrack injuries led the dissent to find that "there remains sufficient risk to suggest that avoiding such liability is a legitimate concern."[244] The dissent argued that the Sixth Circuit's holding that the city did not require other, similar permittees on public property to obtain insurance not to be substantiated by the facts of the case.[245] The dissenters noted that there was "nothing in the record to suggest that the city would not require such insurance of any

240. *City of Lakewood,* 794 F.2d at 1147.

241. *Id.* at 1148 (Unthank, J., concurring).

242. *City of Lakewood,* 108 S. Ct. at 2164–66 (White, J., dissenting).

243. *Id.* at 2165 (White, J., dissenting); *see also* Dickerhoof v. Canton, 6 Ohio St. 3d 128, 451 N.E.2d 1193 (1983); Haverlack v. Portage Homes, Inc., 2 Ohio St. 3d 26, 442 N.E.2d 749 (1982).

244. *City of Lakewood,* 108 S. Ct. at 2165 (White, J., dissenting). Justice White further commented on the reasonableness of requiring newspaper publishers to obtain insurance: "In fact, appellee acknowledges that, standing alone, the city's indemnification and insurance requirements would be constitutional; the Plain Dealer recognizes that there is no constitutional bar to requiring newspaper distributors to meet such requirements." *Id.* at 2165 (White, J., dissenting). Indeed, the Plain Dealer already had newsrack insurance covering itself and other named municipalities in the amount of $1,000,000. Appellant's Brief on the Merits at 11, City of Lakewood v. Plain Dealer Publishing Co., 108 S. Ct. 2138 (interim ed. 1988) (No. 86-1042).

245. *City of Lakewood,* 108 S. Ct. at 2166 (White, J., dissenting).

> In addition, it may be beyond Lakewood's control to impose indemnity and insurance requirements on those entities that have structures on public property that predate the city's recent legislation. According to appellant, many of these placements of utility poles, signal boxes, and the like are on property obtained by utilities from the city via easement grants several decades old. See Tr. of Oral Arg. 28.
>
> The city contended at Argument (without dispute from the Plain Dealer) that it is Lakewood's policy to place indemnification and insurance requirements in all city rental contracts at this time.

Id. at 2165 n.17 (White, J., dissenting).

https://ecommons.udayton.edu/udlr/vol14/iss3/3

applicant."[246]

When viewed as a time, place and manner restriction, a non-discriminatory insurance requirement is a valid regulation. It is content neutral since all newsracks would be subject to it. It is narrowly tailored to serve "the significant governmental interest of protecting the city's residents from being taxed for damages and/or injuries and legal fees caused by the . . . newsboxes."[247] Finally, it would leave open ample alternative means of newspaper distribution.

D. Insurance Requirements Must Be Non-Discretionary and Non-Discriminatory

The press is subject to generally applicable economic regulations.[248] However, "differential treatment, unless justified by some special characteristic of the press, suggests that the goal of the regulation is not unrelated to suppression of expression, and such a goal is presumptively unconstitutional."[249]

In a case predating the *City of Lakewood* decision, a New York state trial court in *Gannett Co. v. City of Rochester*[250] struck down a permit and insurance requirement even though there were two lawsuits by citizens pending against the plaintiff arising out of altercations with the vending machines[251] and a police officer had testified that he had seen two blind persons walk into the newspaper vending machines although without sustaining any injury.[252] The court found that the portion of the ordinance allowing the insurance requirement to "be dispensed with by the Commissioner of Public Works and the City Council for any reason whatsoever"[253] to be objectionable as "an opportunity for capricious, arbitrary favoritism."[254]

In discussing this facet of Lakewood's ordinance, the dissent in *City of Lakewood* would not have allowed a facial challenge to the insurance portion of the ordinance.[255] There was no evidence in the record suggesting that the city would not require insurance of other permittees on public property.[256] The dissent would have allowed a collat-

---

246. *Id.* at 2166 (White, J., dissenting).

247. Appellant's Brief on the Merits at 49, City of Lakewood v. Plain Dealer Publishing Co., 108 S. Ct. 2138 (interim ed. 1988) (No. 86-1042); *see also Harris*, 869 F.2d at 1174.

248. Minneapolis Star and Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 581 (1983).

249. *Id.* at 585.

250. 69 Misc. 2d 619, 330 N.Y.S.2d 648 (Sup. Ct. 1972).

251. *Id.* at 623, 330 N.Y.S.2d at 654.

252. *Id.*

253. *Id.* at 625, 330 N.Y.S.2d at 655.

254. *Id.*

255. 108 S. Ct. at 2166 (White, J., dissenting).

256. *Id.*

Published by eCommons, 1988

eral attack on constitutional grounds "[i]f the city . . . begin[s] to treat non-press permittees more favorably than newsrack permittees."[257]

The Eighth Circuit Court of Appeals, in *Harris,* discussed the non-discriminatory aspect of the subject regulation in upholding, *inter alia,* an insurance requirement for newsracks placed on public property.[258] The court relied on the fact that a city official had testified at trial that all individuals using city property were required to obtain liability insurance in upholding the requirement.[259]

E. Summary

To summarize, the existing decisions concerning a regulation requiring owners of newsracks to obtain liability insurance are split. If, however, such a requirement is reasonable, non-discretionary, and non-discriminatory, it would appear that it would be considered a valid time, place and manner regulation. Indeed, as held in *Harris:* "The City has a legitimate interest in protecting itself from liability . . . associated with the use of its property . . . . In addition, the City need not provide [a publisher] with the least expensive method of exercising his first amendment freedoms."[260]

VII. CONCLUSION

Newspaper publishers are in the business of selling newspapers. As in any business, they are subject to generally applicable economic regulations. Regulation of the use, by retailers, of public property is an example of a general economic regulation.

Newspaper publishers have a constitutional right to use public property to distribute their papers. However, the scope of that right has yet to be determined. If newspaper publishers have a constitutional right to place vending machines on public property, that right is subject to reasonable time, place and manner restrictions.

Under the proper circumstances, a total prohibition of newsracks on public property would be a valid time, place and manner restriction. The prohibition would have to be content neutral and narrowly tailored to the city's significant interests. Further, such a regulation would have to leave open ample alternative channels of newspaper distribution. Additionally, it would have to be shown that newsracks are incompatible with the normal activity occurring on the public property at issue.

Licensing regulations and fees for placing newsracks on public property are valid, provided that they are non-discretionary, non-dis-

257. *Id.*
258. *Harris,* 869 F.2d at 1174.
259. *Id.*
260. *Id.*

https://ecommons.udayton.edu/udlr/vol14/iss3/3

criminatory and proper time, place and manner regulations. Additionally, the fee imposed must cover only the administrative costs of the license.

Similarly, the imposition of a non-discriminatory rental fee for the amount of public property used by a newsrack would be within the authority of the state. The fee imposed, however, must be reasonable under the particular circumstances and would be subject to judicial review.

Finally, requiring newspaper publishers to obtain liability insurance for potential harm caused by newsracks would be a valid time, place and manner restriction. Such a requirement would be content neutral since it would apply to all publishers. It would be narrowly tailored to serve the significant governmental interest of protecting the financial interests of a municipality's citizens. Further, as discussed above, there are ample alternative channels for distributing newspapers. Finally, the insurance requirement would have to be mandatory for all similar users of public property.

The competing rights involved in municipal regulations governing newsracks are strong, and they are cherished by their respective possessors. Until and unless the United States Supreme Court more fully defines the law of newsracks, continued litigation over laws regulating newsracks is virtually certain. What effect this litigation will have on various municipalities' abilities to regulate the use of their property—and the future viability of newsracks as ersatz newsboys—is entirely uncertain.

Published by eCommons, 1988