

THE FIRST AMENDMENT AND NEWSPAPER VENDING MACHINE REGULATION

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*Newspaper racks raise more ire from people than anything else
out there.*

—Don Gardner¹

INTRODUCTION

Newspaper vending machines. Hot pink, glossy black, bright purple, lime green, beige, royal blue, white, and canary yellow. They come in every imaginable color; and like a thousand pieces of confetti, they pepper our sidewalks, street corners, airports, subway stations, and neighborhoods. They stand in clusters, chained to each other, to traffic signs, bus stops, street lamps, park benches, trees, fences, and handrails. But like a line of children taunting, “Red Rover, Red Rover,” they have made many public rights-of-way all but impossible to cross over. Eyesores and nuisances to some,² newspaper vending machines are an essential marketing tool for publishers who do not want the government thwarting their readers’ efforts to buy newspapers.³ Thus, a First Amendment battle has emerged, pitting municipalities that wish to regulate the safety, accessibility, and aesthetic appearance of public sidewalks against publishers who wish to distribute their newspapers when and where they please.

This comment demonstrates that the present Supreme Court case law affecting the placement of newspaper vending machines on public property is uncertain and fails to provide adequate guidance for cities and publishers wrestling with the issue.

1. Interview by Michael Rose with Don Gardner, City Official, Portland, Or., in Michael Rose, *Growing Cost of Cafe Society*, BUS. J.-PORTLAND, Jan. 20, 1995, at 1 (quoting Gardner who supports sidewalk user fees to curb the city’s cluttered sidewalks).

2. See Tony Munroe, *SJC Supports Beacon Hill Box Ban*, B. HERALD, Jan. 5, 1996, at 23 (discussing the newspaper box ban in the historic Beacon Hill area of Boston, Mass.).

3. See Alan Cherry, *Coconut Creek Considers Uniform Look for News Racks; Officials Say Aesthetics, Safety Are Concerns*, SUN-SENTINEL (Ft. Lauderdale), June 13, 1996, at 4B.

Consequently, this comment argues that, given the Supreme Court's past holdings, the problem is best addressed by innovative solutions that combine private sector involvement with public regulation, thereby protecting and promoting the legitimate rights of all parties involved.⁴

Part I of this comment documents the problems posed by newspaper vending machine placement from both the municipalities' and the publishers' viewpoints. Part II analyzes existing legal precedent in the area of newspaper vending machine regulation. Finally, Part III considers innovative solutions to the newspaper vending machine issue. While many of these programs are relatively new and have yet to be tested by the courts, they appear to offer an alternative to the pitfalls of prior regulation.

I. THE CONFLICT: THE RIGHT TO REGULATE THE USE OF PUBLIC PROPERTY VERSUS THE RIGHT TO FREEDOM OF SPEECH AND OF THE PRESS

Municipalities and publishers face complex problems when addressing the newspaper box issue. On one hand, cities defend their regulations citing public safety issues, accessibility, and community aesthetics. On the other hand, publishers fear that regulation will lead to governmental interference with their First Amendment right to freedom of speech and of the press and with their right to market, distribute, and sell their publications as an extension of those First Amendment guarantees.⁵ A closer analysis of both sides of this conflict reveals the competing interests that communities must balance when deciding whether regulation is the appropriate response.

4. For a discussion of the issues and case law as they existed prior to the Supreme Court decisions in *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988) and *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993), see Peter 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 (1985), which summarizes early newspaper vending machine case law and proposes a model ordinance for the regulation of the placement of coin-operated newspaper vending machines on public property.

5. On several occasions, the Supreme Court has recognized the right to distribute as an extension of the right to free speech. See, e.g., *Ex parte Jackson*, 96 U.S. 727, 733 (1877) ("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."); see also *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938).

A. *Municipalities' Viewpoint*

Public safety is the primary municipal concern regarding the placement of newspaper vending machines on public property. For example, in Boulder, Colorado, eighteen newspaper vending machines, chained to one another, run in a continuous line from the corner of the street to mid-block in front of the Hotel Boulderado.⁶ Sid Anderson, general manager of the hotel, explained the safety hazard created by the boxes stating:

When our loading zone is full with taxis or guests, the only way to go is around the corner to drop off or load bags, but there's a wall of newspaper boxes there and you can't get around it. So people are forced to walk in the street or stop illegally.⁷

Tom Eldridge, owner of Tom's Tavern, which sits on the corner of Eleventh and Pearl Streets in Boulder, said the newspaper boxes crowded in front of his door are a safety hazard because they make it difficult for drivers to see the street onto which they are turning.⁸ In addition, Eldridge noted that the boxes protrude into the sidewalk making pedestrian accessibility difficult.⁹

Other cities express similar safety concerns. In Coconut Creek, Florida, one City Commissioner explained: "At some sites motorists cause traffic problems when they pull over to the side of the road to buy newspapers There also are problems with the cars tearing up swales . . ." ¹⁰ In New York City, a pedestrian walking along the sidewalk on Madison Avenue was injured when a bicycle messenger, in the aftermath of an argument with a cab driver, shoved a four-foot-high, eighty-pound, unchained newspaper vending machine that overturned and landed on the pedestrian's foot.¹¹ And in Cincinnati, Ohio, city officials complain that

6. See Telephone Interview with Sid Anderson, General Manager, Hotel Boulderado (Nov. 6, 1996) [hereinafter Anderson Interview] (notes on file with author).

7. *Id.*

8. Telephone Interview with Tom Eldridge, Owner, Tom's Tavern (Nov. 5, 1996) [hereinafter Eldridge Interview] (notes on file with author).

9. *Id.*

10. Interview by Alan Cherry with a City Commissioner, Coconut Creek, Fla. in Cherry, *supra* note 3.

11. See *Gerdowsky v. Crain's N.Y. Bus.*, 593 N.Y.S.2d 514, 515 (App. Div. 1993). Newspapers vending machines have been involved in other tort claims as well. See,

newspaper boxes interfere with crosswalks and handicap ramps and are often attached to light poles with chains that cause the poles to rust.¹²

A secondary concern, although not as pressing as public safety, is community aesthetics.¹³ Referring to the boxes in front of the Hotel Boulderado, Sid Anderson noted: "The boxes are terribly ugly, high-profile, and a bad welcome to people visiting our city. The boxes get beat up by traffic and pedestrians and are targets for vandalism and graffiti."¹⁴ Boulder's Tom Eldridge expressed a similar opinion: "The newspaper boxes are visually gaudy and meant to be so They are not kept, are stuffed with trash, kicked over, bolted to the sidewalk, chained to trees, and collect litter at their bases."¹⁵ A recent newspaper article indicated that the same aesthetic problems abound in New York City.¹⁶ Similarly, in Boston, Massachusetts, the Beacon Hill

e.g., *Tua v. Brentwood Motor Coach Co.*, 92 A.2d 209, 210 (Pa. 1952) (involving a claim by a plaintiff who was injured "while standing on a busy street corner in the city of Pittsburgh when a heavy, metal news stand on the sidewalk was thrown against her when struck by a passing bus"); *McDermott v. Engstrom*, 81 So. 2d 553, 553 (Fla. 1955) (concerning an incident in which the toe of a pedestrian's shoe became caught in the wire supports of a newsrack, causing her to fall "with such force that her kneecap was broken and she was painfully injured").

12. See Joan Biskupic, *Handbill Law is First Amendment Test; Ban on News Boxes for Commercial Speech at Issue before Justices*, WASH. POST, Nov. 8, 1992, at A8.

13. The Supreme Court has recognized the regulation of community aesthetics as a substantial government interest. See *Members of the City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 805 (1984) ("It is well settled that the state may legitimately exercise its police powers to advance esthetic values."); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 507-08 (1981) (holding that there is no "substantial doubt" that an ordinance regulating the "appearance of the city" is a substantial government interest); see also *infra* Part II.A.2 discussing *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 418 (finding Cincinnati's interest in regulating newspaper box placement in order to improve community aesthetics valid).

14. Anderson Interview, *supra* note 6.

15. Eldridge Interview, *supra* note 8.

16. *Boxed-in City*, FIN. TIMES (London), June 9, 1995 at 19. In admitting to the *Financial Times'* role in the newspaper box problem, the author noted:

Mayor Rudolph Giuliani's campaign to turn New York into a nicer, cleaner city has turned its attention to the newspaper industry. No, Giuliani is not trying to rein in the tabloids, but tidy up the newspaper vending boxes adorning virtually every Manhattan street corner.

.....
[Admittedly, t]he boxes are an eyesore. Many street corners are cluttered with up to a half-a-dozen of them, sometimes taking up so much room that it's difficult to cross the street. But as the *Financial Times* is responsible for many more than 100 of the things, perhaps we should keep quiet.

Architectural Commission banned newspaper vending machines in the historical district, calling them eyesores and nuisances.¹⁷ In Fort Lauderdale, Florida, officials are attempting to make “messy newsracks . . . a thing of the past” by requiring that no more than sixteen newsracks be placed on any city block and that the machines not obstruct sidewalks, driveways, or be placed within five feet of fire hydrants or bus benches.¹⁸ Coral Springs, Florida, is attempting to limit newspaper vending machines to three in a group.¹⁹ At one Coral Springs location there were as many as twenty-three newspaper vending machines chained together.²⁰

But the uncertain state of the law in this area and the cost of potential First Amendment litigation over ordinances attempting to regulate the placement of newspaper boxes on public property have rendered many cities, like Boulder, unwilling to respond to the problem. City of Boulder Assistant Attorney Walter Fricke said of the Boulder newspaper boxes, “Over the years, we’ve received complaints, but the complainers get disheartened when I tell them that the City isn’t doing anything about it and isn’t planning on doing anything about it.”²¹ In defense of the city’s position, Fricke cites the “soup of different legal concepts at work” and the Supreme Court “bruising that Lakewood and Cincinnati took” when they attempted to regulate newspaper boxes.²² Fricke further notes that, by necessity, cities must be cautious of creating regulations that will likely be challenged in court: “You’re always worried about what some random trial court judge will do—if you guess wrong, you’ve allocated scarce resources and may be subject to attorney fees—all for the pleasure of being the

Id.

17. See Munroe, *supra* note 2; see also *infra* note 89 (summarizing *Globe Newspaper Co. v. Beacon Hill Architectural Comm’n*, 100 F.3d 175 (1st Cir. 1996)).

18. *Messy Newsrack Getting Attention*, SUN-SENTINEL (Ft. Lauderdale), Sept. 1, 1996, at 5.

19. See *Springs to Limit Racks*, SUN-SENTINEL (Ft. Lauderdale), June 19, 1995, at 3B.

20. See *id.*

21. Telephone Interview with Walter Fricke, City of Boulder Assistant Attorney (Nov. 5, 1996) (making reference to complaints received regarding newspaper vending machines placed on city sidewalks) (notes on file with author).

22. *Id.* (referring to *City of Lakewood v. Plain Dealer Publ’g Co.*, 486 U.S. 750, 772 (1988) and *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 430-431 (1993) in which the Supreme Court held against those cities’ regulation of the placement of newspaper vending machines on public property).

guinea pig city."²³ Officials in Chicago, Illinois, cited similar concerns: "You must assume whatever changes we do make, we're going to end up in federal court sooner or later. The question you must ask is whether newspaper boxes are as offensive as the council first thought they were."²⁴

B. Publishers' Viewpoint

Publishers generally defend the placement of newspaper vending machines on public property in one of two ways: focusing either on First Amendment censorship concerns or on economic concerns. The American Newspaper Publishers Association and numerous other news organizations issued a statement defending the use of all newsracks: "The right to distribute and receive news and information, even purely commercial information, is protected under the First Amendment, and public streets are traditional public forums for distribution of news and information."²⁵ The *Boston Herald*, one of the newspapers fighting a newspaper box ban in Beacon Hill, called the ban "ridiculous."²⁶ Publisher and President Patrick J. Purcell expressed the paper's position by contending, "We ought to be held responsible to keep [the boxes] neat and clean, but we still should be able to make them available to people there."²⁷

Publishers also oppose regulations that make it too costly or impractical to sell newspapers from machines.²⁸ In reference to Mayor Rudolph Giuliani's plans to regulate the placement of boxes in New York City, a *New York Times* representative was quoted as saying that the regulation "prevents us businessmen from selecting the most appropriate locations to service our customers."²⁹ In response to newspaper box regulations in Coral Gables, Florida, a representative from the *Tampa Tribune* was

23. *Id.*

24. Interview by Wayne Baker with Donald Rose, City Manager, Chicago, Ill., in Wayne Baker, *Vending Boxes Vex Wheaton*, CHI. TRIB., May 16, 1990, at D3.

25. American Newspaper Publishers Association, et al., Statement (regarding the use of newsracks) in Biskupic, *supra* note 12. The public forum doctrine, alluded to by the American Newspaper Publishers Association, is discussed in depth, *infra* Part II.

26. Munroe, *supra* note 2.

27. *Id.*

28. See Cherry, *supra* note 3.

29. Jonathan P. Hicks, *Papers Fight Giuliani Newsstand Overhaul*, N.Y. TIMES, June 7, 1995, at B4.

concerned that “[o]ther communities could jump in with the same idea That could mean extensive refurbishing of our newsracks and a loss of identity if we had to change our orange and white colors.”³⁰ The fact that newsracks are revenue generators was highlighted in a recent article in the *Puget Sound Business Journal* which detailed newspaper vending machines with “electronic ‘brain’ implants” that are being used to record when papers are purchased and how much money is being collected.³¹ The article also described the importance of newspaper vending machines as marketing tools:

Visibility . . . is a key role for the vending machines. Primarily designed as unattended newsstands for distributing newspapers, they are also “mini-billboards” that hawk each paper’s presence in the community. Newspaper editors . . . often arrange their front-page stories, photos and headlines to maximize visual impact in their vending machine showcases.

. . . .
[V]ending machines [are] becoming even more important because of people’s changing lifestyles. As more people opt to buy papers on the way to work rather than subscribing to home delivery, individuals [sic] paper sales in vending machines and retail distribution stands will increase.³²

Clearly, single-copy sales are thriving, and consequently, newspaper publishers argue that they have a protected right to market their product.

Thus, a conflict exists between cities’ desire to provide safe, accessible, and aesthetically pleasing public rights-of-way and publishers seeking to exercise their right to freedom of speech and of the press. While many cities have responded to this tension by regulating the placement of newspaper boxes, only two such regulations have been reviewed by the Supreme Court. A closer analysis of both of these cases in Part II reveals the uncertain state of the law in this area, while providing a framework in which to understand the importance of cooperation between the private and public sectors in finding a workable solution to this problem.

30. Robert Trigaux, *Court Rules Coral Gables Can Regulate Look of Newsracks*, ST. PETERSBURG TIMES, Oct. 17, 1995, at 6E.

31. John Wolcott, *Not All News Racks Are the Dumb Boxes of Yore*, PUGET SOUND BUS. J., Nov. 11, 1991, at 28.

32. *Id.*

II. LEGAL PRECEDENT: THE PUBLIC FORUM DOCTRINE

Since newspaper box regulations are typically challenged under the public forum doctrine, it is necessary to survey Supreme Court and Circuit Court of Appeals case law addressing the First Amendment as it applies to the regulation of newspaper boxes placed on public property. The First Amendment to the United States Constitution reads: "Congress shall make no law . . . abridging the freedom of speech, or of the press"³³ However, while freedom of speech is one of our most basic and important rights, the Supreme Court has never held that the First Amendment guarantees citizens an absolute right to exercise free speech when and where they please.³⁴ In particular, the government has routinely restricted free speech that makes use of public property.³⁵ As one commentator described it, limiting speech on public property commonly brings two important interests into conflict.³⁶ On one side, the government has a duty to preserve public property for the purposes for which it has been lawfully dedicated.³⁷ On the other side, the First Amendment is commonly regarded as one of the most important freedoms in a democratic society and "any restriction on otherwise protected speech necessarily infringes upon this end."³⁸ Thus, the Supreme Court has developed the "public forum doctrine" to achieve the appropriate balance between these competing interests.³⁹

The threshold question in any case analyzed under the public forum doctrine is whether the expressive activity being regulated is protected by the First Amendment.⁴⁰ Once a court has determined that a particular expressive activity is protected, it must

33. U.S. CONST. amend. I.

34. See *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983).

35. See *id.*

36. See Edward J. Neveril, "Objective" Approaches to the Public Forum Doctrine: *The First Amendment at the Mercy of Architectural Chicanery*, 90 NW. U. L. REV. 1185, 1186 (1996).

37. See *id.*

38. *Id.*

39. See *id.* at 1186-87.

40. See *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788, 799 (1985) (noting that the conclusion that a particular expressive activity is "protected speech merely begins our inquiry"); see also Neveril, *supra* note 36, at 1186.

then determine "the character of the property at issue."⁴¹ Public areas such as streets, sidewalks, or parks, which have "immemorably been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions," characterize the traditional public forum.⁴² In places such as city sidewalks, which "by long tradition or by government fiat have been devoted to assembly and debate, the rights of the State to limit expressive activity are sharply circumscribed."⁴³

In order to enforce "content-based" restrictions of free speech, the state must show first that its regulation is necessary to serve a "compelling" interest and second, that the regulation is "narrowly drawn" to achieve that end.⁴⁴ Or, the state may enforce "content-neutral" restrictions regulating the time, place, and manner of free speech if such restrictions are narrowly tailored to serve a "significant" government interest, and leave open "ample alternative channels of communication."⁴⁵ As newspaper boxes are usually placed alongside streets on public sidewalks, they are generally analyzed under one of these two standards. A closer investigation of the Supreme Court cases applying the content-based standard of review⁴⁶ and lower court cases applying the content-neutral standard of review⁴⁷ to the regulation of newspaper vending machines on public property reveals the uncertain state of the law in this area.

41. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44 (1983); see also *Neveril*, *supra* note 36, at 1190-91 (explaining that the level of scrutiny used to evaluate a regulation depends on whether the expressive activity is being conducted in a "traditional public forum," a "limited or designated public forum," or a "nonpublic forum"). This comment analyzes the placement of newspaper vending machines in the traditional public forum only. Although the placement of newspaper vending machines in designated public fora or nonpublic fora is also a growing concern, a discussion of the newspaper box issue as it relates to areas other than the traditional public forum requires separate constitutional analysis and is, therefore, outside the scope of this comment.

42. *Perry*, 460 U.S. at 45 (quoting *Hague v. CIO*, 307 U.S. 496, 515 (1939) (internal quotation marks omitted)).

43. *Id.*

44. *See id.*

45. *Id.* But see Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 48-50 (1987) (identifying at least seven "seemingly distinct standards of review" articulated by the Supreme Court in its content-neutral decisions, which make it difficult to determine "where one formulation ends and the next begins").

46. *See infra* Part II.A.

47. *See infra* Part II.B.

A. *Content-Based Regulation: First Amendment
Censorship Analysis*

On two occasions, the Supreme Court has considered the placement of newspaper vending machines on public property. In both cases, the Court ultimately applied the content-based standard of review. However, there was an important difference between them: while *City of Lakewood v. Plain Dealer Publishing Co.*⁴⁸ involved traditional, protected, noncommercial newspapers sold out of coin-operated newspaper vending machines, *City of Cincinnati v. Discovery Network, Inc.*⁴⁹ involved commercial handbills which were distributed free of charge through newspaper dispensing boxes. The following review of both cases analyzes the importance of this distinction and the applicability of these holdings to cities facing this issue today.

1. Traditional, Noncommercial Publications

Beginning in the 1980s, a number of cities, citing safety, accessibility, and aesthetic concerns, passed ordinances regulating the placement of newspaper vending machines on public sidewalks. Among them was the city of Lakewood, Ohio ("Lakewood").⁵⁰ Prior to 1983, Lakewood prohibited the placement of any privately owned structure on public property.⁵¹ Consequently, the Plain Dealer Publishing Company ("Plain Dealer"), which published the local newspaper, was denied permission to place its coin-operated newspaper vending machines on city sidewalks.⁵² In response, Plain Dealer challenged the constitutionality of the ordinance.⁵³

The District Court found the "absolute prohibition" of newspaper boxes unconstitutional, but delayed entering a permanent injunction so that Lakewood might amend its law.⁵⁴ Rather than appealing the District Court's decision, Lakewood enacted a new ordinance giving the mayor the authority to grant

48. 486 U.S. 750 (1988).

49. 507 U.S. 410 (1993).

50. See *City of Lakewood*, 486 U.S. at 752.

51. See *id.* at 753.

52. See *id.*

53. See *id.*

54. See *id.*

or deny applications for annual newsrack permits.⁵⁵ Under the new law, if the mayor denied an application, he or she had to state the reasons for the denial.⁵⁶ If the mayor approved an application, an annual permit was issued to the publisher subject to the following conditions: (1) approval of the newsrack design by the city's Architectural Board of Review; (2) an agreement by the newsrack owner to indemnify the city against any liability arising from the newsrack, guaranteed by a \$100,000 insurance policy to that effect; and (3) any "other terms and conditions deemed necessary and reasonable by the mayor."⁵⁷ Dissatisfied with the new ordinance, Plain Dealer refused to apply for a permit and instead amended its complaint in the District Court to facially challenge the constitutionality of the new law.⁵⁸ The District Court upheld the new ordinance.⁵⁹ The Court of Appeals re-

55. *See id.*

56. *See id.*

57. *See id.* at 753-54. The relevant portions of the ordinance are:

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 design of [newsracks] 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

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

. . . .
 (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 be in an amount not less than One Hundred Thousand Dollars (\$100,000)

(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
 LAKEWOOD, OHIO, CODIFIED ORDINANCES § 901.181 (1984).

58. *See City of Lakewood*, 486 U.S. at 754.

59. *See id.*

versed,⁶⁰ and Lakewood appealed to the United States Supreme Court, which upheld the Court of Appeals' decision.⁶¹

The Court began its opinion by addressing the issue of whether Plain Dealer had standing to bring a facial challenge to Lakewood's ordinance.⁶² Concluding that Plain Dealer did have standing to facially challenge Lakewood's ordinance, the Court relied on its long line of First Amendment jurisprudence holding that when a licensing statute "allegedly vests unbridled discretion in a government official" to regulate expressive activity, one who is subject to the law may challenge it facially without first applying for a license.⁶³ The reason for this procedural allowance, the Court explained, is rooted in the belief that in the area of free expression, a licensing statute which places unbridled discretion in the hands of government officials or agencies "constitutes a prior restraint and may result in censorship."⁶⁴ Such a risk to free expression can only be alleviated through a facial challenge for two reasons:

First, the mere existence of the licensor's unfettered discretion, coupled with the power of prior restraint, intimidates parties into censoring their own speech, even if the discretion and power are never actually abused. . . .

Second, the absence of express standards makes it difficult to distinguish, "as applied," between a licensor's legitimate denial of a permit and its illegitimate abuse of censorial power.⁶⁵

When a statute threatens these two risks to a "significant degree . . . courts must entertain an immediate facial attack on the law."⁶⁶

Therefore, the Court held that "a facial challenge lies whenever a licensing law gives a government official or agency substantial power to discriminate based on the content or

60. See *Plain Dealer Publ'g Co. v. City of Lakewood*, 794 F.2d 1139 (6th Cir. 1986).

61. See *City of Lakewood*, 486 U.S. at 751-52. Justice Brennan delivered the opinion of the Court and was joined by Justices Marshall, Blackmun, and Scalia; Justices White, Stevens, and O'Connor dissented; Justices Kennedy and Rehnquist took no part in the consideration or decision of the case. *Id.* at 752.

62. See *id.* at 755.

63. *Id.* at 755-56.

64. *Id.* at 757.

65. *Id.* at 757-58.

66. *Id.* at 759.

viewpoint of speech by suppressing disfavored speech or disliked speakers."⁶⁷ The Court noted, however, that this did not mean that a newspaper could challenge as censorship any law involving "discretion to which it is subject."⁶⁸ Instead, the Court set forth the following test to determine whether a law gives a government official substantial power to discriminate: "The law must have a close enough nexus to expression, or to conduct commonly associated with expression, to pose a real and substantial threat of the identified censorship risks."⁶⁹ Applying this standard to the facts in *City of Lakewood*, the Court found that two features of Lakewood's regulatory scheme justified a facial challenge. First, because Lakewood's ordinance required newspapers to apply annually for newsrack licenses, the licensor was placed in a position in which it could indirectly measure the content of speech already spoken and might later deny a license based on a dislike of the previously expressed viewpoint.⁷⁰ Second, the ordinance established the need for a government official to review speech or conduct commonly associated with free speech such as the circulation of newspapers, thus, in the words of the Court, "breeding an 'expertise' [in the government official] tending to favor censorship over speech."⁷¹

Having determined that Plain Dealer had standing, the Court went on to hold that the ordinance was unconstitutional because on its face it contained no explicit limits on the mayor's discretion.⁷² The Court noted that nothing in the ordinance required the "mayor to do more than make the statement 'it is not in the public interest' when denying a permit application."⁷³ Similarly, the Court was concerned that the ordinance gave the mayor the power to require that the newsrack be placed in an inaccessible location without providing any explanation whatsoever.⁷⁴ Although Lakewood argued that the mayor would only deny a permit "for reasons related to the health, safety, or welfare of Lakewood citizens," the Court noted that the law itself made no explicit textual requirements as to how the mayor must base his

67. *Id.*

68. *Id.*

69. *Id.*

70. *See id.*

71. *Id.* at 760.

72. *See id.* at 772.

73. *Id.*

74. *See id.* at 769.

or her decision, thereby giving him or her unbridled and unconstitutional discretion over the content of the publishers' speech.⁷⁵

However, the Court declined to resolve the remaining questions presented for review regarding newsrack design and insurance indemnification, as its conclusion regarding mayoral discretion was alone enough to sustain the Court of Appeals' judgment.⁷⁶ Furthermore, the Court left open the question whether a total ban of newspaper boxes would be unconstitutional. This was particularly disturbing to the dissenters, led by Justice White, who argued that "an outright ban on newsracks on city sidewalks would be constitutional, particularly where (as is true here) ample alternative means of 24-hour distribution of newspapers exist."⁷⁷

Unfortunately, as one commentator observed, it is "questionable whether the holding provides adequate guidance for lower courts."⁷⁸ First, the bulk of the opinion was devoted to the

75. *Id.* at 769-70.

76. *See id.* Since the severability of a local ordinance is a question of state law, the Court remanded the provisions regarding design and indemnification for a lower court determination as to whether they were severable from the portions of the ordinance declared unconstitutional. *See id.*

77. *Id.* at 773. Justice White further argued that the "scope of the peculiar doctrine that governs facial challenges to local laws in the First Amendment area" applies only when:

the specific conduct which the locality seeks to license is protected by the First Amendment. Because the placement of newsracks on city property is not so protected (as opposed to the circulation of newspapers as a general matter), the exception to our usual facial challenge doctrine does not apply here.

Id. at 774 (White, J., dissenting). *See supra* notes 40-43 and accompanying text (explaining that the threshold question in any case analyzed under the public forum doctrine is whether the expressive activity being regulated is protected by the First Amendment—arguably, the majority opinion failed to determine whether the placement of newspaper boxes on public property is a protected activity).

In the dissent's opinion, publishers have a protected right to distribute newspapers on city streets just as others have a right to "leaflet, solicit, speak or proselytize in this same public forum area." *City of Lakewood*, 486 U.S. at 778 (White, J., dissenting). This right, however, "does not encompass the right to take city property . . . and appropriate it for its own exclusive use, on a semipermanent basis, by means of the erection of a newsbox." *Id.* The dissent noted that while there is a right to sell books, the Court "would not accept an argument that a city must allow a bookseller to construct a bookshop . . . on a city sidewalk." *Id.* at 780. And, if a governmental entity placed an object of the "size, weight, and permanence of a newsrack on private property, this 'physical occupation' would constitute a 'taking' of that property" and the owner of the private property would be entitled to just compensation from the governmental entity. *Id.* at 779 n.6.

78. Anthony M. Barlow, Case Note, *The First Amendment Protection of Free Press and Expression—State Licensing Laws for Newspaper Vending Machines*, 58

technical procedural question of standing while the substantive issues in the case were given little attention.⁷⁹ Second, while the Court found Lakewood's ordinance invalid because it vested unbridled discretion to regulate the content of newspaper speech in the hands of the mayor,⁸⁰ the decision was only loosely framed in traditional public forum language, consequently making it difficult for lower courts to apply the appropriate standard of review. Finally, the Court refused to rule on the design and insurance provisions,⁸¹ thus leaving regulation of newspaper boxes in a continuing state of uncertainty and confusion.

As precedent, *City of Lakewood* appears to stand primarily for the proposition that a facial challenge lies whenever a licensing law gives a government official or agency substantial power to discriminate based on the content or viewpoint of speech by suppressing disfavored speech or disliked speakers. Thus, *City of Lakewood* arguably increased the likelihood that cities will be subject to litigation if they attempt to regulate the placement of newspaper boxes on public property.⁸² Furthermore, *City of Lakewood* stands for the related proposition that an ordinance giving a government official or agency substantial power to discriminate based on the content or viewpoint of speech by suppressing disfavored speech or disliked speakers is unconstitutional. Therefore, cities must be particularly careful that their newspaper vending machine regulations do not violate the content-based standard under the public forum doctrine or their regulations will be found unconstitutional.

2. Non-Traditional, Commercial Publications

In recent years, free, commercial publications (or handbills) have joined traditional newspapers in distributing via newspaper dispensing machines placed on public property. However, these

U. CIN. L. REV. 285, 299 (1989).

79. See *id.* at 296.

80. See *City of Lakewood*, 486 U.S. at 769-70.

81. See *id.* at 772.

82. Not surprisingly, *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993), discussed *infra* Part II.A.2, and *Gold Coast Publishing v. Corrigan*, 42 F.3d 1336 (11th Cir. 1994), discussed *infra* Part II.B, and *Globe Newspaper Co. v. Beacon Hill Architectural Commission*, 100 F.3d 175 (1st Cir. 1996), discussed *infra* note 89, were all brought as facial challenges under the standard set forth in *City of Lakewood*.

commercial publications require separate consideration because, historically, the Supreme Court has held that the First Amendment accords lesser protection to commercial speech than to other constitutionally guaranteed expression.⁸³

In 1993, the Supreme Court reviewed a Cincinnati ordinance banning the distribution of commercial handbills through freestanding newsracks located on public property.⁸⁴ Initially, Discovery Network, Inc. ("Discovery"), which published information about adult educational, recreational, and social programs in a free magazine, and Harmon Publishing Company ("Harmon"), which distributed free magazines advertising real estate for sale throughout the United States, were both given permission to install newsracks on public property at approved locations.⁸⁵ However, shortly thereafter, Cincinnati's Director of Public Works notified Discovery and Harmon that their permits to place newsracks on public property were revoked and ordered their

83. For a detailed history of the First Amendment as it relates to commercial speech, see *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 420-24 (1993). See also Robert T. Cahill, Jr., *City of Cincinnati v. Discovery Network, Inc.: Towards Heightened Scrutiny for Truthful Commercial Speech?* 28 U. RICH. L. REV. 225 (1994). Fifty years ago, the Supreme Court afforded commercial speech little, if any, First Amendment protection. See *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942) (holding that the distribution of commercial handbills was unprotected by the First Amendment and that "the Constitution imposes no . . . restraint on government as respects purely commercial advertising"). In the last twenty years, however, the Court has shifted its position, giving commercial speech an increasing amount of First Amendment protection. For instance, in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 761 (1976), the Court held that "speech does not lose its First Amendment protection because money is spent to project it, as in a paid advertisement of one form or another." However, the Court failed to provide a standard of review to determine whether commercial speech is protected. Four years later, in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980), the Court revisited the issue and attempted to clarify the level of scrutiny courts should use when reviewing commercial speech regulations. Applying an intermediate level of scrutiny, the Court created the following four-part test to determine whether restrictions on commercial speech are warranted: (1) the speech cannot be misleading or related to unlawful activity; (2) the state must assert a "substantial interest" to be achieved by such restrictions; (3) the limitation must be in proportion with the state's interest; and (4) the limitation must be carefully designed to achieve the state's purpose. *Id.* at 566. The last part of the standard was interpreted in *Board of Trustees of State University of New York v. Fox*, 492 U.S. 469, 480 (1989) (citing *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 341 (1986)) as requiring the state actor to establish a "reasonable fit" between the legislature's ends and the means chosen to accomplish those ends.

84. *Discovery Network*, 507 U.S. at 412.

85. See *id.* at 412-13.

newsracks removed.⁸⁶ Each notice explained that the publications were “‘commercial’ handbill[s] within the meaning of § 714-1-C of the Municipal Code” and, therefore, distribution was prohibited on public property.⁸⁷ The publishers filed suit and the District Court ruled in their favor.⁸⁸ On appeal, Cincinnati argued that since a complete ban of all newsracks would be unconstitutional,⁸⁹ and because the Supreme Court accords less

86. *See id.* at 413.

87. *Id.* The relevant section of the code, which was enacted well before the problem of newspaper boxes on public property became an issue in Cincinnati, provides:

“Commercial Handbill” shall mean any printed or written matter, dodger, circular, leaflet, pamphlet, paper, booklet or any other printed or otherwise reproduced original or copies of any matter of literature:

- (a) Which advertises for sale any merchandise, product, commodity or thing; or
- (b) Which directs attention to any business or mercantile or commercial establishment, or other activity, for the purpose of directly promoting the interest thereof by sales; or
- (c) Which directs attention to or advertises any meeting, theatrical performance, exhibition or event of any kind for which an admission fee is charged for the purpose of private gain or profit.

CINCINNATI, OHIO, MUNICIPAL CODE § 714-1-C (1992) (cited in *Discovery Network*, 507 U.S. at 413).

The Code also provides:

No person shall throw or deposit any commercial or non-commercial handbill in or upon any sidewalk, street or other public place within the city. Nor shall any person hand out or distribute or sell any commercial handbill in any public place. Provided, however, that it shall not be unlawful on any sidewalk street or other public place within the city for any person to hand out or distribute, without charge to the receiver thereof, any non-commercial handbill to any person willing to accept it, except within or around the city hall building.

CINCINNATI, OHIO, MUNICIPAL CODE § 714.23 (1992) (cited in *Discovery Network*, 507 U.S. at 413).

88. *See Discovery Network*, 507 U.S. at 414.

89. It should be noted that Cincinnati’s conclusion that a complete ban of all newsracks would be unconstitutional has never been decided by the Supreme Court. Several lower courts have agreed with Cincinnati, holding that such a ban would be unconstitutional. *See Sentinel Communications Co. v. Watts*, 936 F.2d 1189, 1196-97 (11th Cir. 1991); *Gannett Satellite Info. Network v. Metropolitan Transp. Auth.*, 745 F.2d 767, 772 (2d Cir. 1984); *Miami Herald Publ’g Co. v. City of Hallendale*, 734 F.2d 666, 673 (11th Cir. 1984); *Jacobsen v. Petersen*, 728 F. Supp. 1415, 1419 (D.S.D. 1990); *Gannet Satellite Info. Network v. Berger*, 716 F. Supp. 140, 146 (D.N.J. 1989), *aff’d in part and rev’d in part on other grounds*, 894 F.2d 61 (3d Cir. 1990); *Gannett Satellite Info. Network v. Township of Pennsauken*, 709 F. Supp 530, 535-36 (D.N.J. 1989); *Chicago Tribune Co. v. City of Chicago*, 705 F. Supp. 1345, 1347 (N.D.Ill. 1989); *Chicago Newspaper Publishers Ass’n v. City of Wheaton*, 697 F. Supp. 1464, 1466 (N.D.Ill. 1988); *Gannett Satellite Info. Network v. Town of Norwood*, 579 F.Supp. 108, 114 (D.Mass. 1984); *Miller Newspapers v. City of Keene*, 546 F. Supp. 831, 833 (D.N.H. 1982); *Southern N.J. Newspapers, Inc. v. New Jersey Dept. of Transp.*, 542 F.Supp. 173,183 (D.N.J. 1982); *Philadelphia Newspapers, Inc. v.*

protection to commercial speech than to other constitutionally guaranteed expression, the city's preferential treatment of traditional publishers' newspaper boxes over vending machines dispensing commercial publications was a valid method of serving its interest in ensuring safe streets and regulating "visual blight."⁹⁰ Nevertheless, the Court of Appeals rejected this argument and agreed with the District Court.⁹¹ The case was then appealed to the United States Supreme Court.⁹²

The Supreme Court began its opinion by analyzing the case under its line of commercial speech cases. Applying the tests created in *Central Hudson Gas & Electric v. Public Service Commission of New York*⁹³ and *Board of Trustees of State University of New York v. Fox*,⁹⁴ the Court noted that the contents of Discovery and Harmon's publications were not false or misleading and that there was no question as to the substantiality of Cincinnati's interest in safety and aesthetics, thereby satisfying the first two prongs of the *Central Hudson* test.⁹⁵ Thus, the Court concluded that the case required review solely to decide whether there was a "reasonable fit" between [Cincinnati's] legitimate interests in safety and esthetics and its choice of a limited and selective prohibition of newsracks [distributing commercial publications] as the means to serve those interests.⁹⁶ The Court explained that perfection is not necessary in order to establish a reasonable fit between the legislature's ends and the means chosen to accomplish those ends.⁹⁷ Additionally, the Court stated

Borough Council, 381 F.Supp. 228, 241 (E.D.Pa. 1974). *But see* *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 778 (1988) (White, J., dissenting); *Globe Newspaper Co. v. Beacon Hill Architectural Comm'n*, 100 F.3d 175, 183, 186 (1st Cir. 1996) (holding that an ordinance regulating "Street Furniture" in the historic Beacon Hill District in Boston, Mass., which effectively bans newspaper distribution boxes from the public streets in the district, is a valid content-neutral regulation because it is "narrowly tailored" to serve the district's "significant interest" in regulating community aesthetics, and leaves open "ample alternative channels" of distribution).

90. *Discovery Network*, 507 U.S. at 415.

91. *See Discovery Network, Inc. v. City of Cincinnati*, 946 F.2d 464 (6th Cir. 1991).

92. *See Discovery Network*, 507 U.S. at 415-16. Justice Stevens delivered the opinion of the Court and was joined by Justices Blackmun, O'Connor, Scalia, Kennedy, and Souter. Justices Rehnquist, White, and Thomas dissented. *Id.* at 411.

93. 447 U.S. 557 (1980).

94. 492 U.S. 469 (1989). For a discussion of the *Central Hudson* and *Fox* tests see *supra* note 83.

95. *See Discovery Network*, 507 U.S. at 416.

96. *Id.*

97. *See id.* at 416 n.12.

that reasonable fit does not mean the regulation must be the "single best disposition but one whose scope is in proportion to the interest served" and is "narrowly tailored to achieve the desired objective."⁹⁸ Furthermore, the government's goal must be "substantial" and the cost must be "carefully calculated."⁹⁹

Applying these principles, the Court found that Cincinnati did not establish the reasonable fit required under *Fox*.¹⁰⁰ Cincinnati contended that a limited "prohibition on the use of newsracks to disseminate commercial information burdens no more speech than is necessary to further its interest in limiting the number of newsracks"¹⁰¹ However, the Court considered the city's proposition insufficient to justify its discrimination against Discovery and Harmon's use of newsracks because the use of newsracks for commercial handbills was no more harmful than permitted newsracks and had only a minimal impact on the reduction of the overall number of newsracks.¹⁰² The Court found that the major premise supporting Cincinnati's distinction between commercial and traditional speech was the assumption that commercial speech has only a "low value."¹⁰³ Noting that Cincinnati attached more importance to the distinction between commercial and noncommercial speech than precedent warranted, the Court explained that Cincinnati had underestimated

98. *Id.*

99. *Id.*

100. *See id.* at 417. In holding that Cincinnati did not establish a reasonable fit, the Court explained:

The ordinance on which [Cincinnati] relied was an outdated prohibition against the distribution of any commercial handbills on public property. It was enacted long before any concern about newsracks developed. Its apparent purpose was to prevent the kind of visual blight caused by littering, rather than any harm associated with permanent, freestanding dispensing devices. The fact that the city failed to address its recently developed concern about newsracks by regulating their size, shape, appearance, or number indicates that it has not "carefully calculated" the costs and benefits associated with the burden on speech imposed by its prohibition. The benefit to be derived from the removal of 62 newsracks while about 1,500 to 2,000 remain in place was considered "minute" by the District Court and "paltry" by the Court of Appeals. We share their evaluation of the "fit" between the city's goal and its method of achieving it.

Id. at 417-18.

101. *Id.* at 418.

102. *See id.*

103. *See id.* at 418-19.

the value of commercial speech and misinterpreted previous Supreme Court rulings on the issue.¹⁰⁴

Reviewing the last fifty years of its precedential holdings in the area of commercial speech, the Court noted that commercial publications share important characteristics with the publications that Cincinnati classified as newspapers, and that First Amendment protection of commercial speech differs from protection of such traditional expressive activity only as a matter of degree.¹⁰⁵ In the absence of some basis for distinguishing between newspapers and commercial handbills that was relevant to the interests asserted by the city, the Court was "unwilling to recognize Cincinnati's bare assertion that the 'low value' of commercial speech [was] sufficient justification for its selective and categorical ban on newsracks dispensing 'commercial handbills.'"¹⁰⁶

The Court then turned to analyze the case under the public forum doctrine. Cincinnati argued that its "prohibition was a valid 'time, place, and manner' regulation" because it was content-neutral and left open "ample alternative channels of communication."¹⁰⁷ The Court, however, disagreed noting that the very basis for the regulation was the difference in content between ordinary newspapers and commercial handbills, indicating that the ordinance was, in fact, a purely "content-based" regulation.¹⁰⁸ In addition, the Court found that the ordinance left open no alternative channels of communication as it enacted a "sweeping ban" on the use of newsracks for commercial handbills but not on ordinary newspapers.¹⁰⁹ Therefore, it was not narrowly tailored.¹¹⁰ This, the Court noted, raised some of the same concerns as the newsrack ordinance struck down in *City of Lakewood* because the responsibility for distinguishing between commercial and traditionally protected speech "carries with it the potential for invidious discrimination of disfavored subjects."¹¹¹

As precedent, *Discovery Network* discourages cities from distinguishing newsracks that distribute commercial handbills

104. *See id.* at 419.

105. *See id.*

106. *Id.* at 428.

107. *Id.* at 418.

108. *See id.* at 429.

109. *See id.* at 429.

110. *See id.* at 430.

111. *Id.* at 423. *See supra* note 57 for the text of the ordinance in *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750 (1988).

from newsracks that distribute traditional, noncommercial newspapers. Although the Supreme Court deemed the number of newsracks distributing commercial handbills in Cincinnati to be "paltry" in comparison to the number of newsracks distributing traditional publications, the reverse is true in most cities facing a newspaper box crisis.¹¹² Nevertheless, this case stands for the proposition that an ordinance regulating commercial publications alone will not pass constitutional muster. Arguably, the *Discovery Network* case, like *City of Lakewood* before it, provides inadequate guidance for communities addressing the newspaper box issue. First, the Court again failed to determine whether publishers have a constitutionally protected right to distribute their publications via newsracks. Similarly, the Court failed to indicate whether a total ban of all newsracks, both commercial and noncommercial, would survive constitutional scrutiny.¹¹³ Although the Court hinted that cities may regulate the size, shape, appearance, and number of newsracks,¹¹⁴ it had no cause to formally do so, leaving that question open as well.

B. Content-Neutral Regulation: Time, Place, and Manner Restrictions

Under the public forum doctrine, the government may enforce content-neutral regulations of the time, place, and manner of expression which (1) are "narrowly tailored to serve a significant government interest" and (2) "leave open ample alternative channels of communication."¹¹⁵ While the Supreme Court has never reviewed a newspaper box regulatory scheme that it found to be content-neutral, many lower courts have done so. Most recently, the Court of Appeals for the Eleventh Circuit upheld a

112. Many communities, including Manhattan, whose program is discussed *infra* Part III.A., have identified a disproportionate number of free publications to paid publications.

113. However, the Court did state, "[E]ven if we assume, arguendo, that the city might entirely prohibit the use of newsracks on public property, as long as this avenue of communication remains open, these devices continue to play a significant role in the dissemination of protected speech." *Id.* at 427-28.

114. In analyzing whether Cincinnati had established the "reasonable fit" required under *Fox*, the Court noted that "[t]he fact that the city failed to address its recently developed concern about newsracks by regulating their size, shape, appearance, or number indicates that it has not 'carefully calculated' the costs and benefits associated with the burden on speech imposed by its prohibition." *Id.* at 417.

115. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

Coral Gables, Florida, ordinance regulating the placement of newspaper vending machines in *Gold Coast Publishing, Inc. v. Corrigan*.¹¹⁶

In the late 1980s, a Coral Gables task force¹¹⁷ began studying the condition of newsracks in the city, as well as the way other cities dealt with the placement of newsracks on public property, in order to propose an ordinance regulating newsracks in the local business district as part of a citywide effort to improve the appearance of Coral Gables.¹¹⁸ The ordinance, which was revised several times based on input from newspaper publishers and public hearings, prescribed the procedure for obtaining permits to place newsracks on public sidewalks throughout the city as well as specific provisions regulating the location, design, lettering, and color of newsracks.¹¹⁹

116. 42 F.3d 1336 (11th Cir. 1994), *cert. denied*, 116 S. Ct. 337 (1995) (providing no explanation for denying the petition for writ of certiorari).

117. The task force consisted of Chamber of Commerce members, merchants, property owners, and citizens. *Id.* at 1340 n.1.

118. *See id.* at 1340.

119. *See id.* The stated purposes of the ordinance were to:

- (1) "[p]rovide for pedestrian and driving safety and convenience"; (2) "[r]estrict unreasonable interference with the flow of pedestrian or vehicular traffic"; (3) "[p]rovide for public and property safety during hurricane conditions"; (4) "[p]rovide reasonable access for the use and maintenance of poles, posts, traffic signs or signals, hydrants, [and] mail boxes"; (5) "[r]elocate and/or replace newsracks which result in a visual blight"; and (6) "[m]aintain and protect the values of surrounding properties."

Id. (citing Ordinance 2911, (May 15, 1990), as amended by Ordinance 2984 (Mar. 31, 1992) in CORAL GABLES, FLA., CODE ch. 22, art VII, § 22-157 (1992)).

The ordinance requires publishers to obtain a certificate of insurance and a one-time refundable bond deposit based on the number of newsracks owned by that publisher. *See Gold Coast*, 42 F.3d. at 1430. Publishers are also assessed a number of fees which are used to defray administrative costs associated with the regulation. *See id.* The section of the ordinance governing the placement of the newsracks specifies that all newsracks must be placed parallel to the curb between eight and twenty-four inches from the edge of the curb or parallel to a building no more than six inches from the building's wall, and must be within certain distances of crosswalks, bus stops, benches, fire hydrants, emergency call boxes, driveways, display windows, street signs, parking meters, street lamps, and utility poles. *See id.* Publishers are also required to use a particular make and model of newsrack which must have "gloss brown pedestals, gloss beige sides and door and gloss brown coin box[es]." *Id.* at 1341. Finally, the ordinance prohibits card holders or advertisements on newsracks, but allows the name of the newspaper to be displayed on the sides, front, and back of the newsrack provided that the lettering is no larger than 1.75 inches in height and is centered at fifteen inches from the top of the box. *See id.*

In 1991, Gold Coast Publications, Inc. ("Gold Coast") began publishing *¡Exito!*, a weekly paper which was distributed free of charge in Coral Gables solely by means of newsracks.¹²⁰ Because the paper was new and relatively unknown, Gold Coast's newsracks were painted deep purple and prominently displayed the *¡Exito!* logo in lime green, bright orange, or hot pink lettering.¹²¹ Coral Gables notified *¡Exito!* that its newsracks did not comply with the ordinance and, therefore, had to be brought into compliance or the city would confiscate them.¹²² Shortly thereafter, Gold Coast filed suit against Coral Gables, claiming that the newsrack ordinance violated its right to freedom of the press under the First Amendment.¹²³ On the merits of the case, the Court of Appeals for the Eleventh Circuit determined that the Coral Gables ordinance was constitutional. The court began its discussion by noting that the validity of the ordinance depended on the type of speech and the type of forum being regulated.¹²⁴ First, the court found that the "precise classification" of speech as noncommercial or commercial was irrelevant because "the challenged provisions are upheld under either commercial or noncommercial speech standards."¹²⁵ Second, the court concluded that the traditional public forum was the type of forum being regulated. The court then turned to determine whether the ordinance was content-based or content-neutral, finding that

120. See *id.* (describing *¡Exito!* as a Spanish-language newspaper directed at young, educated Hispanic professionals).

121. See *id.*

122. See *id.* Gold Coast attempted to obtain an exemption from the ordinance, but was unsuccessful, prompting the city to confiscate six of *¡Exito!*'s newsracks. *Id.*

123. See *id.* at 1342. Before turning to the merits of the First Amendment claim, the court determined that Gold Coast could properly bring a facial challenge to the ordinance under the standard set forth in *City of Lakewood*. The court based its conclusion on the following analysis:

Although the Coral Gables Ordinance does not include the annual licensing renewal found in *Lakewood*, the requirement of a certificate of compliance before installing any new newsracks or moving an old newsrack and the periodic inspections of existing newsracks, when coupled with the "equivalent" language of Section 22-164(a), could arguably provide the opportunity to discriminate based on the content of speech contained in the newspapers. Similarly, the Coral Gables Ordinance is directed at the very same expression at issue in *Lakewood*—the distribution of newspapers through newsracks on public rights-of-way.

Id. at 1343 (citation omitted). *City of Lakewood* is discussed in full, *supra* Part II.A.1.

124. See *Gold Coast*, 42 F.3d. at 1344.

125. *Id.*

because Coral Gables required all owners of newsracks to “comply with the various provisions of the ordinance,” no distinction was made between publications based on their content.¹²⁶ Therefore, the court concluded that the ordinance was content-neutral and was subjected to the content-neutral standard of review set forth in *Perry Education Ass’n v. Perry Local Educators’ Ass’n*.¹²⁷

Applying the first prong of the content-neutral standard, the court found that Coral Gables’ ordinance was narrowly tailored to serve a significant government interest. Regarding the city’s interest in safety, the Court of Appeals upheld the District Court’s conclusion that “[t]he evidence linking the regulation to the pedestrian and vehicular safety interests in this case is substantiated and definitive.”¹²⁸ Regarding the city’s interest in aesthetics, the court noted that the Supreme Court “has repeatedly deferred to the aesthetic judgments of municipalities and other government bodies when evaluating restrictions on protected expression” as have numerous lower courts.¹²⁹ Because the ordinance does not completely ban newsracks from public sidewalks or prohibit the distribution of newspapers, and because publishers are still permitted to display their name on their newsracks, the court concluded that the uniform color and size of lettering requirements were narrowly tailored to achieve the city’s interest in regulating the aesthetic appearance of the newsracks.¹³⁰

Applying the second prong of the “content-neutral” standard, the court determined that provisions of the ordinance left open ample alternative channels of communication because the ordinance did not amount to a complete ban of newsracks on

126. *Id.*

127. 460 U.S. 37, 45 (1983) (stating that a content-neutral ordinance limiting the time, place, or manner of expression must: (1) be “narrowly tailored to serve a significant government interest”; and (2) provide “ample alternative channels of communication”).

128. *Gold Coast*, 42 F.3d at 1345 (citing the District Court’s opinion in *Gold Coast Publ’g, Inc. v. Corrigan*, 798 F. Supp. 1558, 1570 (S.D. Fla. 1992)).

129. *Id.* at 1346.

130. *See id.* *Gold Coast* argued that the color and lettering restrictions were invalid because they applied only to newsracks and did not apply to other fixtures in the public right-of-way, such as awnings and trash receptacles. *See id.* The court found the publisher’s argument unpersuasive, however, noting that the Supreme Court allows “cities to enact partial solutions to further their aesthetic interests” and has rejected the notion that “such solutions be part of a ‘comprehensive plan’ to improve aesthetics” (citation omitted). *Id.* at 1347.

public property.¹³¹ Likewise, the court concluded that the “color and size of lettering restrictions still allow publishers to display the name and logo of the newspaper in their choice of colors.”¹³² Thus, because the regulations were narrowly tailored to address the city’s safety and aesthetic interests and because they left open ample alternative channels of communication, the court found the ordinance a valid time, place, and manner restriction.

Next, the court reviewed the provisions of the ordinance regarding the color and size of lettering on the newsracks to determine whether they were valid restrictions on commercial speech.¹³³ First, the court concluded that the ordinance satisfied the three prongs of the *Central Hudson* test,¹³⁴ finding that the validity of the restrictions “ultimately turns on whether they reach no further than necessary” to accomplish Coral Gables’ aesthetic goals.¹³⁵ Second, the court emphasized the non-arbitrary nature of Coral Gables’ decision to specify uniform color and lettering requirements because they “represent a decision by the task force and the City Commission after considerable study and input from interested parties.”¹³⁶ Third, the court reiterated its earlier position that the city’s decision to regulate the aesthetic appearance of newsracks but not to regulate awnings or trash receptacles represented a constitutionally valid “partial solution.”¹³⁷ Finally, the court distinguished the Coral Gables ordinance from the Cincinnati ordinance struck down in *Discov-*

131. *See id.*

132. *Id.*

133. *See id.* Gold Coast argued that the restrictions on color and lettering on newsracks could be considered advertisements for the newspaper and, therefore, the court was called to determine whether the restrictions violated the *Central Hudson* and *Fox* tests for evaluating restrictions on commercial speech. *See id.* at 1347-48.

134. *Gold Coast*, 42 F.3d at 1347-48. The *Central Hudson* and *Fox* tests are discussed *supra* note 83. In finding that the ordinance satisfied the first three parts of the *Central Hudson* test, the court explained:

[T]he color and lettering on newsracks concerns lawful activity—the identification of newspapers—and is not misleading, assuming that the color and lettering properly identify the newspaper contained in the newsrack. As discussed above, the aesthetic concerns advanced by the City are a substantial governmental interest. In addition, the uniform color and limitation on the size of lettering directly advances the City’s interest in minimizing visual blight and ensuring that newsracks blend into the City’s Mediterranean theme.

Gold Coast, 42 F.3d at 1347-48.

135. *Id.* at 1348.

136. *Id.*

137. *See id.*

ery Network, noting that, unlike the Coral Gables ordinance, the Cincinnati ordinance "provided no basis for the distinction between commercial and noncommercial speech, and the resultant ban had a minimal impact on aesthetics because the vast majority of the newsracks contained newspapers classified as noncommercial speech."¹³⁸ Thus, the court held that the ordinance provisions regulating the color and size of lettering on newsracks were valid restrictions on commercial speech.

In 1995, *Gold Coast* was denied certiorari by the Supreme Court.¹³⁹ As a result, many municipalities interpreted the Court's refusal to review this case as a favorable indication that cities could regulate newsracks like Coral Gables had. Similarly, many newspaper publishers interpreted the refusal as a blow to their First Amendment right to distribute protected speech. Still, the Coral Gables ordinance seems to achieve a workable "middle ground" in which newspapers may continue to distribute via newsracks and cities may address their valid concerns regarding the safety, accessibility, and aesthetics of their public rights-of-way. Nevertheless, as the Supreme Court has yet to definitively rule on a content-neutral regulation of the placement of newspaper vending machines on public property, potential regulations of this type will undoubtedly continue to suffer from the constant threat of litigation. Consequently, Part III of this comment suggests that innovative solutions combining the resources of both the public and private sectors in addressing this issue may be even better than the *Gold Coast* solution.

III. FUTURE SOLUTIONS: COOPERATIVE REGULATION

Part III of this comment discusses two innovative approaches taken by communities currently facing a newspaper vending machine placement crisis. These programs deserve attention because they provide new options for city governments: they are safe, aesthetically pleasing, and they avoid the problems of the content-based restrictions invalidated by the Supreme Court in *City of Lakewood* and *Discovery Network*. Furthermore, these programs, like the ordinances in the *Gold Coast* and *Beacon Hill* cases, appear to be content-neutral and are, therefore, valid time,

138. *Id.*

139. 116 S. Ct. 337 (1995) (providing no explanation for denying petition for writ of certiorari).

place, and manner restrictions. Most importantly, however, these programs are a cooperative hybrid of private sector innovation and public regulation and, as such, are arguably stronger than those programs which rely on public regulation alone. The following two programs are analyzed below: the Grand Central Partnership program¹⁴⁰ and the City Solutions program.¹⁴¹

A. *The Grand Central Partnership Program*

As a result of the uncertainty and confusion inherent in drafting newspaper box regulations, many cities have begun to explore non-regulatory alternatives. For example, the Grand Central Partnership, Inc. ("Partnership"), working in conjunction with the 34th Street Partnership, Inc. and Bryant Park Restoration Corp., all business improvement districts in the Manhattan borough of New York, has privately negotiated a solution with area publishers.¹⁴² After meeting with over thirty publishers, the New York City Department of Transportation, and local business people, the Partnership designed a program whereby it purchases multiple-unit newspaper boxes which are safely placed at least ten feet from street corners and at least five feet from other existing street fixtures.¹⁴³ All of the units are aesthetically uniform: they are made of metal, painted green, are designed to dispense six or more publications, and can be reconfigured to accommodate any ratio of free to coin-operated boxes.¹⁴⁴ The Partnership orders, installs, and manages the units.¹⁴⁵ To handle the problems of vandalism and graffiti, the organization also provides daily maintenance on the units.¹⁴⁶

Publishers can obtain space in the multiple-unit newspaper boxes at no cost if they agree to remove their single-unit newspaper boxes from the area.¹⁴⁷ Paid publications get a whole box

140. *See infra* Part III.A.

141. *See infra* Part III.B.

142. *See* Telephone Interview with Kathy Kahng, Marketing Manager, Grand Central Partnership (Nov. 6, 1996) [hereinafter Kahng Interview I] (notes on file with author). The program was the brain-child of Andrew M. Manshel, General Counsel for the Grand Central Partnership.

143. *See id.*

144. *See id.*

145. *See id.*

146. *See* Letter from Kathy Kahng, Marketing Manager, Grand Central Partnership, to Heidi C. Fletemeyer (Sept. 23, 1996) (on file with author).

147. *See* Telephone Interview with Kathy Kahng, Marketing Manager, Grand

within each unit; free publications get a half box.¹⁴⁸ If an occupied box goes unused for more than seven consecutive days, the box will be turned over to another publication.¹⁴⁹ Prior to installation of the units, all participating publishers were sent a block-by-block blueprint showing unit location and box availability.¹⁵⁰ Publishers requested and were assigned boxes on a first come, first served basis, regardless of the content of their publications.¹⁵¹ No publisher may have more than one box per unit.¹⁵² The program operates under a set of guidelines established by the Partnership and agreed to by the publishers.¹⁵³

The program is a positive alternative to public regulation for a number of reasons. First and foremost, the Partnership's program was carefully designed to avoid the problems of the Lakewood and Cincinnati ordinances¹⁵⁴ and, like the ordinances in *Gold Coast* and *Beacon Hill*, is arguably content-neutral.¹⁵⁵

Central Partnership (Feb. 5, 1997) [hereinafter Kahng Interview II] (notes on file with author). Publishers do pay for their own doors (painted with their name and logo—although the artwork is subject to prior approval from the Partnership) and coin mechanisms. In general, it is cheaper for a publisher to participate in the program than to purchase and maintain individual boxes. At the time of publication, the cost of doors on the boxes dispensing free publications was approximately \$18.80 per door. The cost of doors on the boxes dispensing paid publications was approximately \$190 to \$210 per door. It should also be noted that publishers are responsible for delivering their product and maintaining their own doors and coin collection. See Telephone Interview with Kathy Kahng, Marketing Manager, Grand Central Partnership (Aug. 26, 1997) [hereinafter Kahng Interview III] (notes on file with author).

148. See Kahng Interview III, *supra* note 147.

149. See Kahng Interview I, *supra* note 142.

150. See *id.*

151. See *id.*

152. See Kahng Interview II, *supra* note 147.

153. See *id.*

154. For the text of the Lakewood and Cincinnati ordinances, see *supra* notes 57 and 87.

155. See Telephone Interview with Andrew M. Manshel, General Counsel, Grand Central Partnership (Sept. 3, 1997) [hereinafter Manshel Interview] (notes on file with author). The program does not place any official, let alone a government official (since the program is run by a private non-profit agency and publishers agree to participate in the program), in the position of discriminating based on the content or viewpoint of a particular publication. See *id.* A box is awarded to any publisher, regardless of publication content, as space becomes available. See *id.* Furthermore, the program does not differentiate in any way between commercial and non-commercial publications. See *id.* It is interesting to note, however, that the program was created prior to the latest round of opinions in *Gold Coast* or *Beacon Hill*. See *id.*

Furthermore, the program can work in the absence of regulations or, as has been the case in New York City, while regulations are pending. Thus, municipalities can play a role in developing a newspaper vending machine program (as the New York City Department of Transportation did in Manhattan) but need not provide public funding to support the program or open themselves up to the threat of potential litigation. Non-regulatory programs, like the one in Manhattan, are also more flexible because they are not subject to the same procedural requirements that publicly funded programs are, and they operate as a contract between two private parties. In other words, the non-regulatory program is a result of negotiation and, therefore, reflects a compromise deemed workable by both sides but which is also subject to change and renegotiation should circumstances dictate. Therefore, the program has a better chance of survival because the interested parties can "work the kinks out" over time.

It should be noted, however, that non-regulatory programs have their drawbacks as well. First, program costs can be high. The Grand Central Partnership, Inc., the 34th Street Partnership, Inc., and the Bryant Park Restoration Corp., have a combined operating budget of twenty million dollars.¹⁵⁶ It costs roughly four thousand dollars to purchase each multiple-unit box and several hundred thousand dollars a year to maintain and manage the program.¹⁵⁷ Smaller towns and cities without wealthy business improvement districts may not have the necessary capital to sustain a non-regulatory program like the one in Manhattan.

Second, enforcement may be an issue. Since participation in a non-regulatory program is voluntary, there is always the chance that someone will not comply with the program. In Manhattan, for instance, four publishers have chosen not to distribute via the multiple-unit boxes and consequently, they continue to chain individual-unit boxes to existing street fixtures on corners and near intersections.¹⁵⁸ Fortunately, the number of non-participating publishers is low in comparison to the number of participating publishers, and the overall effect of the program

156. *See id.*

157. *See id.*

158. *See id.* Interestingly, three of the four hold-outs are out-of-town publications. *See Kahng Interview III, supra* note 147.

is the desired one. But, should those numbers reverse, regulation might be the only viable alternative.¹⁵⁹

Finally, there may be a supply and demand problem. The director of the Manhattan program explained the fine line between supply and demand stating: "The only way the program can be successful is if all of the boxes are always full and someone is waiting to fill the next available box. But if the waiting list is too long, publishers may get frustrated and choose not to participate."¹⁶⁰ The number of traditional publications remains relatively constant while the number of free commercial publications continues to grow. Simply put, some cities may experience a situation where the demand for more boxes is greater than available sidewalk space will allow. Nevertheless, the Partnership's program suggests a viable non-regulatory alternative for cities addressing this issue in the future.

B. *The City Solutions Program*

The newest effort to solve the newspaper box problem in American cities comes from private industry. City Solutions,¹⁶¹ a Florida-based company, has designed an "Information Center" that it claims will end "rakblight" on public rights-of-way.¹⁶²

159. New York City plans to implement city-wide regulations later this year. See Telephone Interview with Deborah Glikin, Attorney, New York City Department of Transportation (Sept. 2, 1997) [hereinafter Glikin Interview] (notes on file with author). If passed, these regulations would allow business improvement districts, such as the Grand Central Partnership, to continue placing multiple-unit newspaper boxes on city sidewalks as long as they meet specific placement criteria (which they already do). See *id.* However, in business improvement districts with a multiple-unit box program, existing single newsracks would no longer be allowed within a 300-foot radius of a multiple-unit newsbox. *Id.* In effect, this legislation would force single newsrack hold-outs to participate in the Grand Central Partnership program if they wish to distribute via newsracks within the business improvement district. See Manshel Interview, *supra* note 155. In other areas of the city where a multiple-unit newsbox program is not in place, individual newsracks are still allowed in the public right-of-way so long as they meet specific placement criteria. See Glikin Interview, *supra*.

160. See Glikin Interview, *supra* note 159.

161. City Solutions was founded by Tom Trento, formerly in the publishing business, in response to a decision in his hometown of Delray Beach, Fla., to regulate the placement of newsracks in that community. See Telephone Interview with Tom Trento, Founder, City Solutions (Sept. 4, 1997) [hereinafter Trento Interview] (notes on file with author). In his words, "After the decisions in *Gold Coast* and *Beacon Hill*, it was clear that cities are going to kick newsracks out if publishers don't clean up their act." *Id.*

162. See *id.*

First, the company consults with city governments to help them enact content-neutral newspaper box regulations¹⁶³ which are carefully drafted to avoid the problems of the Lakewood and Cincinnati ordinances and which require publishers to place their publications within a multiple-unit dispenser like the Information Center. City Solutions then installs its Information Centers and works with publishers to make the move from their individual boxes to the centers.

Each center is a unique, modular, multiple-unit structure which can be modified to hold any ratio of free to paid publications¹⁶⁴ and is placed on public sidewalks in safe, accessible locations. As demand for distribution space increases or decreases, the center may be enlarged or reduced accordingly. Surprisingly, cities pay nothing for the centers. Instead, publishers pay a monthly rental fee for each box in each center from which they distribute their publications.¹⁶⁵ To keep publishers' rental fees low, City Solutions sells advertising space on the back of every Information Center.¹⁶⁶ City Solutions also provides weekly maintenance on all of its centers and works closely with publishers and distributors to ensure ordinance compliance. Rather than dealing with each publisher individually when problems arise, the city deals directly with City Solutions.

So far, the system is in place in Delray Beach, Florida, and is part of a city-wide pilot program in San Francisco, California.¹⁶⁷

163. The regulations were drafted by City Solution's legal counsel, O'Melveny & Myers, and can be modified or adopted to accommodate local concerns and requirements. *See id.*

164. A typical Information Center might hold as many as fourteen publications and is eight feet long, two feet deep, and just over four feet high. *See CITY SOLUTIONS, CITY SOLUTIONS CITY HANDBOOK* 19 (Sept. 1, 1997) [hereinafter *CITY SOLUTIONS HANDBOOK*]. It replaces fourteen individual newsracks, which, when placed side by side, may be as long as thirty feet. *See id.*

165. For example, in Florida, publishers pay \$8, \$10, or \$12 per month based on their location within the center. *See Trento Interview, supra* note 161. Publishers are, however, responsible for keeping their product stocked and, if they are paid publications, for collecting their own change from the coin mechanisms. *See id.*

166. *See id.* One advertising space is approximately three feet by four feet. While the "additional" advertising may seem offensive to some, City Solutions argues that the Information Center actually reduces the total amount of advertising in the public right-of-way because it replaces all of the advertising that was originally on each of the individual newsracks which the Information Center replaced. *See CITY SOLUTIONS HANDBOOK, supra* note 175, at 25.

167. *See John King, S.F. Testing 4 News Racks in Effort to End Street Clutter 6-Month Test of Displays Will Gauge Public Reaction*, S.F. CHRON., June 14, 1997,

As this type of program is so new, it is uncertain what legal implications may arise. Nevertheless, it is a particularly attractive alternative for mid-size cities which lack the resources or wealthy business districts like those in New York City.

IV. CONCLUSION

In conclusion, this comment suggests that present Supreme Court case law affecting the placement of newspaper vending machines on public property is uncertain and fails to provide adequate guidance for cities and publishers wrestling with the issue. From *City of Lakewood* and *Discovery Network*, it is clear that cities must be particularly careful that their newspaper vending machine regulations do not violate the content-based standard under the public forum doctrine or unnecessarily discriminate between commercial and non-commercial publications. However, because the Supreme Court has yet to determine whether publishers have a constitutionally protected right to distribute via newspaper vending machines on public property or has yet to review a content-neutral newspaper box regulatory scheme, it is not clear to what extent cities may control newspaper box aesthetics or the location of newspaper box placement.

Recent lower court case law, particularly the *Gold Coast* and *Beacon Hill* cases, indicates that cities may be able to devise content-neutral newspaper box regulations that will withstand constitutional scrutiny under the public forum doctrine. Arguably, these cases provide cities currently facing a newspaper box crisis with an effective framework for drafting future ordinances. In addition to the potential for regulatory solutions which follow those discussed in *Beacon Hill* and *Gold Coast*, several cities have implemented innovative newspaper box programs which rely on private sector involvement to make public regulation viable. Although these programs have yet to be tested by the courts, they appear to satisfy the content-neutral standard. In addition, they provide a safe and aesthetically pleasing solution, yet still allow publishers to distribute their publications on public rights-of-way.

at A17. City Solutions is one of four companies participating in a six-month San Francisco test "to find the best multi paper news rack for San Francisco." *Id.* To decide which multiple-unit system it likes best, San Francisco will rate several factors including appearance and ease of use. *Id.* "After the test, the city will hold a formal bidding process to choose an operator." *Id.*

Consequently, this comment concludes that the problem is best solved by these novel programs because they rely on both the private and the public sectors to protect and promote the legitimate rights of all parties involved.

