

DIMINISHING THE FIRST AMENDMENT RIGHTS
OF NEWSRACKS: *CITY OF LAKEWOOD V.*
PLAIN DEALER PUBLISHING CO.,
108 S. CT. 2138 (1988)

The first amendment¹ protects the distribution of newspapers² through newsracks.³ Municipalities, however, have attempted to impose arbitrary controls and bans on the placement of newsracks.⁴ Though municipalities have used governmental interests to justify the control of newsracks,⁵ in analogous situations implicating the first

1. U.S. CONST. amend. I states, in pertinent part: "Congress shall make no law . . . abridging the freedom of speech, or of the press." It has been noted that "[a]djustment of the inevitable conflict between free speech and other interests is a problem as persistent as it is perplexing." *Niemotko v. Maryland*, 340 U.S. 268, 275 (1951) (Frankfurter, J., concurring in result). For an analysis of these tensions in the years before the adoption of the Constitution, see P. Kurland, *The Original Understanding of the Freedom of the Press Provision of the First Amendment*, 55 *MISS. L.J.* 225 (1985).

2. "Liberty of circulating is as essential to [freedom of expression] as liberty of publishing; indeed, without the circulation, the publication would be of little value." *Ex Parte Jackson*, 96 U.S. 727, 733 (1878).

3. The semi-automatic newsrack, also known as a newspaper vending machine or newsbox, was invented in 1957. It consists of a coin mechanism and a pull-down door, which when opened exposes a stack of newspapers. The newsrack replaced the so-called "honor rack," which only required voluntary payment, and thus left the newspapers bare to easy theft. *It's the 30th Birthday of Coin Operated Newsracks*, *PRESSTIME*, Feb. 1987, at 32.

4. See *Boe v. Colello*, 438 F. Supp. 145 (S.D. N.Y. 1977) (the town clerk's unbridled licensing discretion over the right to sell newspapers is an infringement of first amendment rights). For an overview of newsrack cases before 1985, see P. 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). See *infra* notes 74-89 and accompanying text for a discussion of newsrack cases.

5. For example, in regulating newspapers: *Rubin v. City of Berwyn*, 553 F. Supp. 476 (N.D. Ill. 1982) (sidewalk obstruction); *Passaic Daily News v. Clifton*, 200 N.J. Super. 468, 491 A.2d 808 (N.J. Super. Ct. Law Div. 1985) (regulation of roadside signs); *City of Fredonia v. Chanute Tribune*, 7 Kan. App. 2d 65, 638 P.2d 347 (1981) (littering); *H & L Messengers, Inc. v. City of Brentwood*, 577 S.W.2d 444 (Tenn. 1979) (preventing the indication of vacant property); *Carl v. City of Los Angeles*, 61 Cal. App. 3d 265, 132 Cal. Rptr. 365 (1976) (obscenity). For a discussion on how traffic regulations can be used, see Note, *Traffic Regulations Cannot Unduly Curtail the Free Speech Right to Circulate Publications*, 13 *TEX. TECH L. REV.* 1512 (1982). For an

amendment the Supreme Court has allowed reasonable time, place and manner restrictions⁶ on expression if such limitations are content-neutral.⁷ In *City of Lakewood v. Plain Dealer Publishing Co.*⁸ the Supreme Court held a city ordinance⁹ facially unconstitutional¹⁰ because the ordinance granted a government official discretion over a licensing scheme with a nexus to a first amendment right.¹¹ The Court decided such a scheme cannot be content-neutral¹² but allowed a lower court ruling to stand which permitted not only a restriction, but a total

argument that the Supreme Court has carried the governmental interests test too far, see H. Quadres, *Content-Neutral Public Forum Regulations: The Rise of the Aesthetic State Interest, the Fall of Judicial Scrutiny*, 37 HASTINGS L.J. 439 (1986).

6. See, e.g., *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640 (1980) (state's interest in maintaining orderly movement of a crowd allowed restriction); *Cox v. New Hampshire*, 312 U.S. 569 (1941) (street parades forbidden without a license). For an overview, see J. NOWAK, R. ROTUNDA, & J. YOUNG, *CONSTITUTIONAL LAW* § 16.47 (3d ed. 1986).

7. See, e.g., *Arkansas Writer's Project, Inc. v. Ragland*, 481 U.S. 221 (1987) (state sales tax imposed on general interest magazines, but exempting religious, professional, trade and sports magazines held content-based and therefore unconstitutional); *Minneapolis Star v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983) (Minnesota ink and paper tax with \$100,000 exemption targets a small group of newspapers and is therefore unconstitutional).

8. 108 S.Ct. 2138 (1988).

9. In this case, City of Lakewood ordinance 901.181, which read in part:

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 through the city.

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

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

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

10. A facial attack is one made before an actual harm occurs:

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 [one's] conduct could be proscribed by a properly drawn statute, and whether or not [one] applied for a license.

Freedman v. Maryland, 380 U.S. 51, 56 (1965). See *Board of Airport Commissioners v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987) (facial attack allowed because statute may cause party to refrain from expression rather than risk prosecution). See generally H. Monaghan, *Overbreadth*, 1981 SUP. CT. REV. 1.

11. 108 S.Ct. at 2152. For a description of the "nexus" test, see *infra* notes 92-95 and accompanying text.

12. 108 S.Ct. at 2143.

ban.¹³

The City of Lakewood¹⁴ forbade the erection of any structure on city-owned property.¹⁵ As a result, the city denied the Plain Dealer Publishing Company¹⁶ permission to place the publisher's newsracks on city-owned sidewalks.¹⁷ Plain Dealer brought suit in the District Court for the Northern District of Ohio.¹⁸ The court held the prohibition unconstitutional, but delayed entering a permanent injunction in order to give Lakewood time to amend its ordinances.¹⁹ The city responded by adopting an elaborate licensing scheme²⁰ which gave the Mayor discretion to grant or deny annual newsrack permit applications.²¹ Choosing not to seek a permit, Plain Dealer amended the complaint in the district court and challenged the new law on its face.²² The district court upheld the new ordinance.²³ On appeal, the Sixth Circuit affirmed in part and reversed in part.²⁴ The appellate court found a number of sections of the ordinance unconstitutional,²⁵ includ-

13. 108 S.Ct. at 2152.

14. Lakewood is an older residential community, west of Cleveland, with an area of 5.5 square miles and a population in 1980 of just over 60,000. Plain Dealer Publishing Co. v. City of Lakewood, 794 F.2d 1139, 1141 (6th Cir. 1986).

15. Section 901.18 of the City of Lakewood ordinances stated: "No person shall erect or place, or cause to be erected or placed, or permit to remain, any building or structure of any nature upon any street, lane, alley or public ground within the City."

16. The Plain Dealer daily newspaper is distributed as a publication of general circulation throughout the Cleveland Metropolitan area and Ohio. Generally, Plain Dealer daily newspaper sales are 77 percent by home delivery through carriers and 80 percent on Sundays by home delivery. The balance of the sales are by single copy through retail outlets and coin-operated newsboxes, the latter constituting 4.6 to 5.27 percent of total sales. 794 F.2d at 1141.

17. 108 S.Ct. at 2141.

18. Both this and the subsequent district court opinions are unreported.

19. 108 S.Ct. at 2141.

20. See *supra* note 9 for a description of the licensing scheme.

21. 108 S.Ct. at 2142.

22. *Id.* "There was evidence at trial that although Plain Dealer made no application for a permit, it had intended to place newsracks at eighteen locations in Lakewood, eight of which were located in residential districts." 794 F.2d at 1143. On facial attacks, see *supra* note 10.

23. 108 S.Ct. at 2142.

24. 794 F.2d at 1148.

25. 794 F.2d at 1143-6. The court found a review by an Architectural Board and insurance indemnification requirements were unconstitutional, but these were not considered in the Supreme Court opinion.

ing the Mayor's arbitrary authority.²⁶ The court noted, however, that a total ban on newsracks would be constitutional and severable from the original ordinance.²⁷ The Supreme Court affirmed, holding the Mayor's arbitrary authority unconstitutional, and remanded the matter to determine whether the offending section was severable from the remainder of the ordinance.²⁸

For more than a century, the Supreme Court has recognized the right to freely distribute printed material as a corollary to the first amendment right to free expression.²⁹ The Court in *Hague v. Congress of Industrial Organizations*³⁰ first extended this distribution right to the "public forum."³¹ In dictum, Justice Roberts stated that streets and parks were a public trust, and access to them for free expression could not be abridged or denied.³² Subsequent Supreme Court cases reinforced Justice Roberts' assertion,³³ until the Court firmly established

26. See *supra* note 9 for a description of the Mayor's authority.

27. 794 F.2d at 1147-8. See *infra* note 78 for a criticism of this holding.

28. 108 S.Ct. at 2152. Of course, the court of appeals had already determined this issue. See *supra* note 27 and accompanying text.

29. Ex parte Jackson, 96 U.S. 727 (1878).

30. 307 U.S. 496 (1939).

31. Professor Kalven coined this phrase. See H. Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1. The Supreme Court had considered the public forum issue earlier than *Hague*, but had rejected it as a concept, holding a public forum does *not* exist. *Davis v. Massachusetts*, 167 U.S. 43 (1897).

32. 307 U.S. at 515-16. Justice Roberts stated:

Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.

Id. It has been noted that instead of the solid endorsement for free access, as a first glance at this passage would indicate, only those particular areas that have been used "time out of mind" are accessible. All other publicly-owned property may still be restricted. G. Stone, *Fora Americana: Speech in Public Places*, 1974 SUP. CT. REV. 233, 238-9. See also *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984) (utility poles are not an historically protected public forum).

33. A trio of cases decided shortly after *Hague* established the dictum as precedent: *Schneider v. State*, 308 U.S. 147 (1939) (establishing a balancing approach between the first amendment and a community's interest, and rejecting the contention that alterna-

this right of access in *Shuttlesworth v. City of Birmingham*.³⁴ In *Shuttlesworth*, police arrested a minister for violating a city ordinance when he led an orderly civil rights march through the public streets.³⁵ The ordinance arbitrarily allowed the City Commission to grant or deny a parade permit.³⁶ The Court cited *Hague*³⁷ to support the proposition that access to the streets for picketing may not be wholly denied.³⁸

*Perry Education Association v. Perry Local Educators' Association*³⁹ recently reinforced the importance of open access to streets and parks.⁴⁰ Justice White established three different public forum categories,⁴¹ the preeminent category being streets and parks.⁴² This forum requires that a content-based exclusion serve a compelling state interest and be narrowly drawn.⁴³ All other restrictions must be time, place and manner limitations⁴⁴ that are content-neutral,⁴⁵ leave open ample alternative channels of communication⁴⁶ and are narrowly tailored to

tive available forums justify a ban); *Cox v. New Hampshire*, 312 U.S. 569 (1941) (time, place and manner restrictions are the appropriate means to regulate); *Jamison v. Texas*, 318 U.S. 413 (1943) (naked assertion of title by the state does not justify a ban on speech on public lands). *But cf.* *Cox v. Louisiana*, 379 U.S. 536 (1965) (Court in dictum suggested that an absolute ban on patrolling, marching and picketing in streets and parks would be permissible).

34. 394 U.S. 147 (1969).

35. *Id.* at 149.

36. *Id.*

37. *See supra* note 32 and accompanying text for the *Hague* passage.

38. 394 U.S. at 152. For a discussion of *Shuttlesworth* as it relates to administrative discretion, *see infra* notes 67-71 and accompanying text.

39. 460 U.S. 37 (1983).

40. This includes sidewalks, *United States v. Grace*, 461 U.S. 171 (1983), but not, for example, utility poles, *Vincent, supra* note 32, and state fairs, *Heffron, supra* note 6.

41. 460 U.S. at 45-6.

42. *Id.* at 45. The other two are those which the state has opened for expressive activity, and those which "not by tradition or designation" are a forum for expressive activity. *Id.* at 45-6.

43. *Id.* at 45.

44. *See supra* note 6 and accompanying text for examples of permissible time, place and manner limitations.

45. Though the opinion in *Plain Dealer* does not address the issue, Lakewood's ordinance states that permits may be granted only to "newspapers having general circulation throughout the city." *Supra* note 9. This is content-based discrimination and thus unconstitutional. *See supra* note 7.

46. However, the availability of alternative fora of communication may not justify a regulation. *Spence v. Washington*, 418 U.S. 405, 411 n.4 (1974). *But cf. Heffron, supra* note 6 (regulation upheld in part because alternative fora were available). *Heffron*, how-

serve a significant governmental interest.⁴⁷

In a line of authority paralleling this development of free admission to public fora,⁴⁸ the Supreme Court has also imposed a limitation on the government's arbitrary power to license access to streets and parks. Though the Court had already articulated the general concept of prior restraint,⁴⁹ *Lovell v. City of Griffin*⁵⁰ first linked prior restraint with arbitrary authority to grant or deny licenses for expression.⁵¹ The Court emphasized that a discretionary licensing scheme without time, place or manner restrictions would establish an unacceptable system of censorship.⁵²

The Supreme Court restricted this holding in *Cox v. New Hampshire*,⁵³ where it addressed a municipal ordinance requiring licenses for parades.⁵⁴ The New Hampshire Supreme Court had interpreted a vague city ordinance as implicitly establishing a standard of comfort and convenience in the use of city streets.⁵⁵ Unlike in *Lovell*,⁵⁶ the Court weakened its stance by holding that the ordinance was a permissible time, place and manner restriction because the ordinance, as cre-

ever, involved expression in *Perry's* "second category" forum, one that had been opened for expressive activity.

47. 460 U.S. at 45. It is important to note that these are conjunctive requirements, not alternative ones. See *Providence Journal Co. v. City of Newport*, 665 F. Supp. 107, 117 (D. R.I. 1987).

48. See *supra* notes 31-47 and accompanying text for a discussion of free admission to public fora.

49. *Near v. Minnesota*, 283 U.S. 697 (1931). For a history of prior restraint, see D. Bogen, *The Origins of Freedom of Speech and Press*, 42 MD. L. REV. 429, 439-44 (1983); T. Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROBS. 648, 650-2 (1955).

50. 303 U.S. 444 (1938). In *Lovell*, the appellant was convicted of violating a city ordinance which forbade the distribution of circulars without written permission from the City Manager. No standards were set to grant or deny permission.

51. Writing for the Court, Chief Justice Hughes, in speaking of the power of the licensor, said: "While this freedom from previous restraint upon publication cannot be regarded as exhausting the guaranty of liberty, the prevention of that restraint was a leading purpose in the adoption of the constitutional provision." 303 U.S. at 451-2.

52. 303 U.S. at 452.

53. 312 U.S. 569 (1941).

54. In *Cox*, the appellants were Jehovah's Witnesses who had occupied the street in a loose procession. "The marchers interfered with the normal sidewalk travel, but no technical breach of the peace occurred." They were convicted of not acquiring a parade permit. 312 U.S. at 572-3.

55. *Id.*

56. See *supra* notes 50-2 and accompanying text for a discussion of *Lovell*.

ated, set a standard—albeit one given it by the state supreme court.⁵⁷

A comparison of *Saia v. New York*⁵⁸ and *Kovacs v. Cooper*,⁵⁹ decided in successive terms, illustrates the Court's renewed hostility to arbitrary licensing schemes. Both involved similar ordinances regulating sound amplification devices.⁶⁰ The ordinance in *Saia* required a license, arbitrarily granted or denied by a city official, for the use of a sound amplifier.⁶¹ The *Kovacs* ordinance placed a total ban on the use of sound amplifiers.⁶² The Court⁶³ characterized the difference as a prior restraint in *Saia*'s discretionary licensing, versus the legitimate exercise of the state's authority to prevent disturbing noises in *Kovacs*'s prohibition.⁶⁴ The Court struck down the *Saia* ordinance,⁶⁵ but upheld the *Kovacs* ordinance.⁶⁶

In *Shuttlesworth v. City of Birmingham*,⁶⁷ the Court faced another discretionary licensing scheme that the state supreme court, as in *Cox*,⁶⁸ had given a narrow construction.⁶⁹ The Court recognized that without this limiting construction the ordinance would be facially unconstitutional.⁷⁰ Significantly, the Court ruled that despite the limitation, Birmingham had arbitrarily administered the ordinance, making

57. "[T]he state court considered and defined the duty of the licensing authority and the rights of the appellants to a license for their parade, with regard only to considerations of time, place and manner so as to conserve the public convenience." 312 U.S. at 575-6. Even though the original ordinance was similar to the one in *Lovell*, the *Cox* court felt the construction given by the state court was sufficient. *Id.* at 577.

58. 334 U.S. 558 (1948).

59. 336 U.S. 77 (1949).

60. 334 U.S. at 558; 336 U.S. at 78. The only difference between the devices was that in *Kovacs* the amplification device had to be mounted on a vehicle.

61. 334 U.S. at 558. The appellant in *Saia*, a Jehovah's Witness, had been granted a permit, but upon reapplication was refused due to public complaints.

62. 336 U.S. at 78. The system in this case was used to comment on a labor dispute.

63. Though *Kovacs* was a plurality opinion, it is generally considered authoritative. See *Plain Dealer*, *supra* note 8, at 2148 n.9.

64. 336 U.S. at 82-3.

65. 334 U.S. at 562.

66. 336 U.S. at 89.

67. 394 U.S. 147 (1969).

68. See *supra* notes 53-7 and accompanying text for a discussion of *Cox*.

69. 394 U.S. at 153-4. The Alabama Supreme Court stated that applications "for permits to parade must be granted if, after an investigation it is found that the convenience of the public in the use of the streets or sidewalks would not thereby be unduly disturbed." 281 Ala. 542, 546, 206 So. 2d 348, 352 (1967).

70. 394 U.S. at 150-3.

the licensing system unconstitutional.⁷¹

Although a total prohibition of first amendment-protected activities must conform to Court-imposed restrictions,⁷² controversy continues over whether an arbitrary licensing scheme is a fundamentally greater denial of first amendment freedoms than a content-blind ban.⁷³

The merger of these two principles, public forum availability⁷⁴ and the denial of arbitrary municipal authority over the public forum,⁷⁵ has led, since 1972,⁷⁶ to almost thirty reported decisions on challenges to newsrack ordinances.⁷⁷ With one exception, no court has upheld a to-

71. *Id.* at 155-9. It is interesting to note that while there is obviously no evidence Lakewood's ordinance has been applied in a discriminatory manner—it was challenged as soon as it was implemented—other newsrack ordinances have been unfairly used. *See* *Rubin v. City of Berwyn*, 553 F. Supp. 476 (N.D. Ill. 1982).

72. Of course, a ban cannot be overbroad. *See supra* notes 41-47 and accompanying text. *See also* *Airport Commissioners of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987) (resolution banning "all first amendment activities" in airport terminal overbroad and therefore unconstitutional). *Grayned v. City of Rockford*, 408 U.S. 104 (1972), presents a useful distinction in what the Court finds overbroad. In *Grayned*, the Court held overbroad an ordinance that forbade picketing within 150 feet of a school building (excepting school labor disputes), but allowed an ordinance forbidding noises while adjacent to a school building that disturbs the "peace or good order" of school sessions, because the noise ordinance "punishes only conduct which disrupts or is about to disrupt normal school activities."

73. *Compare* *Secretary of State of Maryland v. J.H. Munson Co.*, 467 U.S. 947 (1984) (discretionary waiver provision of statute limiting charitable fundraising expenses is unconstitutional) *and* *Staub v. City of Baxley*, 355 U.S. 313 (1958) (authority to refuse or deny permit for solicitation of members, being discretionary with the Mayor and City Council, is unconstitutional) *with* *Heffron, supra* note 6 (banning activities at state fair except at specific places is a reasonable time, place and manner restriction and therefore constitutional) *and* *Vincent, supra* note 32 (prohibiting the posting of signs on utility poles advances a legitimate governmental interest and is therefore constitutional).

74. *See supra* notes 30-47 and accompanying text for a discussion of public forum availability.

75. *See supra* notes 49-73 and accompanying text for a discussion of arbitrary municipal control.

76. *Gannett v. City of Rochester*, 69 Misc. 2d 619, 330 N.Y.S.2d 648 (N.Y. Sup. Ct. 1972).

77. Cases published before the Court's decision in *Plain Dealer* are: *Jacobsen v. U.S. Postal Service*, 812 F.2d 1151 (9th Cir. 1987); *Gannett v. White*, 14 Med. L. Rptr. 2037 (N.D. N.Y. 1987); *Providence Journal Co. v. Newport*, 665 F. Supp. 107 (D. R.I. 1987); *City of Burlington v. N.Y. Times*, 198 Vt. 275, 532 A.2d 562 (1987), *aff'g* 12 Med. L. Rptr. 1454 (Dist. Ct. of Vt. 1985); *Duffy v. City of Arcadia*, 195 Cal. App. 3d 308, 243 Cal. Rptr. 87 (1987); *Plain Dealer Publishing Co. v. City of Lakewood*, 794 F.2d 1139 (6th Cir. 1986); *News Printing Co. v. Totowa*, 211 N.J. Super. 121, 511 A.2d 139 (N.J. Super. Ct. Law Div. 1986); *New York City v. American School Publications*, 119 A.D.2d 13, 505 N.Y.S.2d 599 (1986); *Passaic Daily News v. Clifton*, 200 N.J.

tal ban on newsracks as constitutional,⁷⁸ and most courts have struck down attempts to regulate newsracks as being too broad to serve a compelling government interest.⁷⁹ The imaginative powers of municipalities in creating a wide variety of ordinances to regulate newsracks, combined with few higher court opinions, complicates analysis.⁸⁰ The only two state supreme court decisions discussing newsrack ordinances indicate the narrow drafting that courts have required if an ordinance is to pass constitutional mandates.

In *City of Burlington v. New York Times Co.*⁸¹ the Vermont Supreme Court evaluated an ordinance regulating temporary obstructions on sidewalks.⁸² The ordinance gave the superintendent of streets free

Super. 468, 491 A.2d 808 (N.J. Super. Ct. Law Div. 1985). For a list of cases before 1985, see Ball, *supra* note 4, at 185 n.14.

78. See, e.g., *Providence Journal Co. v. Newport*, 665 F. Supp. 107 (D. R.I. 1987); *Redd v. Davison*, 7 Med. L. Rptr. 1142 (E.D. N.Y. 1981); *Philadelphia Newspapers, Inc. v. Borough of Swarthmore*, 381 F. Supp. 228 (E.D. Pa. 1974). The one exception is the Sixth Circuit's opinion in *Plain Dealer*. However, its discussion of the needs Lakewood must show in order to uphold the ban, see *supra* notes 41-47, occupied less than a column in the official reporter. 794 F.2d at 1147. First, the opinion never showed a ban advanced the asserted government interest. See *Providence Journal*, 665 F. Supp. at 113-6. Second, the opinion merely asserted the ban was narrowly tailored. See *Chicago Newspaper Publishers Ass'n v. City of Wheaton*, 697 F. Supp. 1464, 1471 (N.D. Ill. 1988) (ban is not narrowly tailored). Finally, the opinion held the availability of private outlets provides an alternative forum, a contention specifically rejected by the Supreme Court. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 556 (1975) (the availability of a private theater would not justify a city's refusal to allow the performance of the musical play "Hair" in its municipal theater). Of the four needs *Perry* outlined to justify a total ban, see *supra* notes 44-47 and accompanying text, the Sixth Circuit satisfied only one.

It has been suggested that the reasoning of *Vincent*, *supra* note 32, might justify a total ban. See Ball, *supra* note 4, at 192 n.58. *Vincent*, however, distinguished streets and parks from its holding. 466 U.S. at 813.

79. See, e.g., *Miami Herald Publishing Co. v. City of Hallandale*, 734 F.2d 666 (11th Cir. 1984); *City of Burlington*, *supra* note 77. *But cf.* *Kash Enterprises v. City of Los Angeles*, 19 Cal. 3d 294, 562 P.2d 1302, 138 Cal. Rptr. 53 (1977) (newsrack ordinance sufficiently narrow, but struck down on other grounds).

80. Ball, *supra* note 4, at 186. There have only been three circuit court opinions, and two state supreme court opinions. See *id.*, and *supra* note 77 (listing these decisions).

81. 148 Vt. 275, 532 A.2d 562 (1987).

82. Section 27-31 of the Burlington Code of Ordinances reads:

(a) It shall be unlawful for any person, firm or corporation to temporarily obstruct a street or sidewalk without first obtaining a written permit therefor from the superintendent of streets, except as hereinafter provided. . .

(b) "Obstruction" as used in this section includes, but is not limited to, temporary obstacles and/or barriers which hinder the free and safe passage of pedestrians and

choice in determining whether to grant a license for any structure that hindered movement on the sidewalk.⁸³ The Vermont Supreme Court held that arbitrary power vested in a government official cannot be a valid time, place and manner regulation.⁸⁴ Such discretion may suppress particular points of view by discriminating against licensees based on what the licensee intends to say.⁸⁵

In *Kash Enterprises, Inc. v. City of Los Angeles*,⁸⁶ however, the California Supreme Court examined an ordinance that definitely and narrowly regulated the placement of newsracks on city sidewalks.⁸⁷ The court characterized one provision of the ordinance, for example, as simply requiring that newsracks be positioned to minimize interference with the city's sidewalk cleaning machinery.⁸⁸ Consequently, the court upheld the ordinance as a reasonable time, place and manner restriction.⁸⁹

*City of Lakewood v. Plain Dealer Publishing Co.*⁹⁰ provided the Supreme Court its first opportunity to discuss newsrack regulations.⁹¹ Writing for a slim majority,⁹² Justice Brennan analyzed whether the

vehicles, or which may receive injury or damage, if run over or into by pedestrian or vehicle traffic.

83. *Id.*

84. 148 Vt. at 280-81, 532 A.2d at 564.

85. *Id.* at 281, 532 P.2d at 564-65 citing *Heffron, supra* note 6.

86. 19 Cal. 3d 294, 562 P.2d 1302, 138 Cal. Rptr. 53 (1977).

87. Section 42.00, subdivision (f), for example, provided in part:

(3) Any news rack which in whole or in part rests upon, in or over any sidewalk or parkway, shall comply with the following standards: . . .

(F) No news rack shall be placed, installed, used or maintained:

- 1) Within three feet of any marked crosswalk.
- 2) Within fifteen feet of the curb return of any unmarked crosswalk.
- 3) Within three feet of any fire hydrant, fire call box, . . .
- 6) Within three feet of any bus bench. . .

and so on. This brief excerpt gives a flavor of the detailed descriptions contained in the ordinance.

88. 19 Cal. 3d at 304, 562 P.2d at 1308, 138 Cal. Rptr. at 59.

89. The ordinance was ultimately held unconstitutional, however, because one section authorized the unlawful seizure of newsracks. *Id.* at 313, 562 P.2d at 1314, 138 Cal. Rptr. at 65.

90. 108 S.Ct. 2138 (1988).

91. See *supra* notes 74-79 and accompanying text for a discussion of previous newsrack cases.

92. The Court divided 4-3. Justice Brennan was joined by Justices Marshall, Blackmun and Scalia. Justice White filed a dissenting opinion, which was joined by Justices

ordinance permitted a facial attack,⁹³ and confirmed that unbridled discretion vested in a government official can result in prior restraint.⁹⁴ As a result, the Court created a test to evaluate the permissibility of a facial attack on a statute and, by implication, a determination whether the statute is presumptively unconstitutional. The Court held that if a licensing law with a “nexus to expression” gives discretionary power to a government official, the Court will allow the challenge.⁹⁵

Justice Brennan argued that the crucial issue was the discretionary licensing scheme, not whether the city had the power to ban newsracks.⁹⁶ Comparing *Saia* and *Kovacs*,⁹⁷ Justice Brennan stressed that the arbitrary licensing ordinance by itself was unconstitutional on its face, even if the city could ban newsracks.⁹⁸ The Court, therefore, chose not to decide whether a ban of newsracks would be constitutional.⁹⁹ Concluding that unrestricted discretion to deny a permit was unconstitutional, the Court remanded the case for a determination of whether this part of the ordinance was severable.¹⁰⁰

The dissent first established that the Court could strike down discretionary licensing only if newsracks were entitled to first amendment protection.¹⁰¹ The dissent further argued that newsracks, by occupying a piece of sidewalk, amount to a taking of public property.¹⁰² The

Stevens and O'Connor. Chief Justice Rehnquist and Justice Kennedy did not participate.

93. See *supra* note 10 for a discussion of facial attacks.

94. 108 S.Ct. at 2143.

95. *Id.* at 2145. The Court characterized the nexus test as follows:

In contrast to the type of law at issue in this case, laws of general application that are not aimed at conduct commonly associated with expression and do not permit licensing determinations to be made on the basis of ongoing expression or the words about to be spoken, carry with them little danger of censorship. For example, a law requiring building permits is rarely effective as a means of censorship.

Id. at 2146.

96. 108 S.Ct. at 2147.

97. See *supra* notes 58-66 and accompanying text for a discussion of *Saia* and *Kovacs*.

98. 108 S.Ct. at 2149.

99. *Id.* at 2147 n.7.

100. *Id.* at 2142.

101. *Id.* at 2155 (White, J., dissenting). The dissent characterized this as the “*Lovell-Freedman* doctrine.” For a discussion of *Lovell*, see *supra* notes 50-2 and accompanying text. *Freedman* is discussed briefly in *supra* note 10.

102. 108 S.Ct. at 2155-57. The dissent charged that by allowing this taking, the state was “subsidizing” the newspaper’s first amendment rights.

first amendment does not obligate the state to allow such a taking; therefore, no restraint of freedom and no first amendment sanction exists.¹⁰³ In justifying the regulation the dissent identified a variety of governmental interests that the state intended the ordinance to protect.¹⁰⁴

Plain Dealer, in its analysis of arbitrary discretion,¹⁰⁵ correctly applied precedent¹⁰⁶ to invalidate a part of Lakewood's newsrack ordinance.¹⁰⁷ Since *Lovell*,¹⁰⁸ the Court has justifiably struck down unchecked licensing power over expressive activities.¹⁰⁹ Lower courts have consistently applied this standard to newsrack schemes.¹¹⁰

The Court's remand in *Plain Dealer*,¹¹¹ however, is potentially more ominous. The lower appellate court already had found a total ban on newsracks in Lakewood was both constitutional and severable from the stricken section,¹¹² and the *Plain Dealer* remand allows this judgement to stand unchallenged.¹¹³ Permitting the ban is contrary to every other court judgement¹¹⁴ and inconsistent with prior constitutional principles on the public forum.¹¹⁵

By refusing to address the issue directly,¹¹⁶ the Supreme Court pro-

103. *Id.* The Court has rejected the right to a subsidy for first amendment activities in the past. *Regan v. Taxation with Representation of Washington*, 461 U.S. 540 (1983) (Congress is not required by the first amendment to subsidize lobbying through the tax code).

104. 108 S.Ct. at 2157-8. The interests the dissent identifies are free access for the public, safety and aesthetics.

105. *See supra* notes 90-100 and accompanying text for a description of the Court's analysis.

106. *See supra* notes 49-73 and accompanying text for a discussion of the Court's prior treatment of arbitrary discretion.

107. *See supra* note 9 for Lakewood's ordinance.

108. *See supra* notes 50-2 and accompanying text for a discussion of *Lovell*.

109. *See supra* notes 58-73 and accompanying text.

110. *See supra* notes 81-89 and accompanying text describing the prior treatment of newsracks.

111. *See supra* note 28.

112. *See supra* note 27.

113. The Supreme Court specifically did not rule on the constitutionality of a total ban. *See supra* text accompanying note 99.

114. *See supra* note 78 for a sampling of these court judgments.

115. *See supra* notes 30-47 and accompanying text for a description of public forum principles.

116. Federal courts, of course, have a duty to avoid constitutional issues that need not be resolved in order to determine the rights of the parties in the case under consider-

vided little guidance and allowed a newsrack ban to stand, ratifying the placement of newsracks in a first amendment purgatory.¹¹⁷ At its first opportunity, the Court should clearly protect newsracks from legislative prohibitions.

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ation. *County Court of Ulster County v. Allen*, 442 U.S. 140, 154 (1979). Strictly speaking, this is what the Court has done in *Plain Dealer*. However, the impact of the decision in real terms obviously extends to the foregone results of the remand. See *Chicago Newspaper Publishers Ass'n v. City of Wheaton*, 697 F. Supp. 1464, 1472 (N.D. Ill. 1988) (to preserve judicial resources and guide municipality in revising ordinance, court went beyond what was necessary to rule ordinance unconstitutional).

117. Lakewood amended its ordinance after the remand. Permits may now only be denied for cause and after notice and hearing. City of Lakewood Ordinance No. 91-88 (1989). The mayor may still deny permits, though, "at any location where the Mayor determines that such placement would cause an undue safety or health hazard or unduly interfere with the right of the public to the proper use of the streets and throughfares [sic] . . ." *Id.*

The review by the Architectural Board of Review, the indemnification requirements, and the limitation to "newspapers having general circulation throughout the city" are still mandated by the ordinance. *Id.*

* J.D. 1990, Washington University.

