

Newsracks

A Business and Legal Guide for the Distribution of
Printed Material by Vending Machine



Newspaper Association of America

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An NAA Publication

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Forward

This work updates a similar manual published by NAA in 1996 as a general guide for publishers, circulation managers, and lawyers on legal rights relating to the use of newsracks to distribute newspapers.

Alice Neff Lucan, Esq., first undertook the writing of this manual with NAA more than ten years ago, and worked with us again on this second edition. Although we have now updated the manual to include many more references to case law and to practical problems arising for newspaper publishers in the 21st century, this discussion is not legal advice or business advice. As always, it is advisable to consult your own newspaper attorney, familiar with your particular facts and circumstances.

Chapter I briefly reviews the history and purpose of street distribution of newspapers, from early hawkers through the present day. Chapters II and III review general legal principles governing this distribution, including the doctrine of the “public forum” as it has developed in the United States Supreme Court and lower courts.

Chapter IV discusses the distribution of newspapers by newsracks in a variety of particular places, such as city sidewalks, post offices, airports, commuter stations, and shopping centers. Chapter V reviews related distribution and business issues, such as delivery of free newspapers, newspaper theft, and newsrack maintenance. As the manual concludes in Chapter VI, it is important to remember that the history and purpose of newsracks are vital parts of the legal analysis.

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About Alice Neff Lucan, Esq.

Alice Neff Lucan is a solo practitioner in Washington, D.C., focused on representation of newspapers, their websites, and their press associations. Much of her time is spent advising newspapers on practical solutions to the legal and business issues involved in distribution. She was assistant general counsel at Gannett Company, Inc., and of counsel at Davis Graham & Stubbs in Washington, D.C., prior to setting up her solo practice in 1991. Before entering law school, Lucan was a broadcast reporter. She graduated from Randolph-Macon Woman's College and was awarded her Juris Doctor by the Cleveland-Marshall College of Law at Cleveland State University.

About NAA

Newspaper Association of America is a nonprofit organization representing the interests of more than 2,000 newspapers in the United States and Canada. Its members account for nearly 90 percent of the daily newspaper circulation in the United States and a wide range of non-daily newspapers. One of the key objectives of NAA is to advance newspapers' First Amendment interests, including the ability to gather and report the news.

*Special thanks to Alice Neff Lucan, Esq.,
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Introduction:

History and Hawkers

Even with the Internet's challenge to newsprint, newsracks today remain an important means of distributing the newspaper in cities and towns nationwide. "Single copy" sales are still about 17 percent of daily circulation and more than 24 percent on Sundays. Thirty percent of these daily single copy sales are from coin-operated newsracks. These numbers remain fairly consistent and, generally, the larger the community, the larger the share of circulation in single copy sales.

In cities like Chicago, Detroit, Washington, and Baltimore, tabloids allow easy reading on a commuter's daily trip. Sunday mornings still mean stopping by the corner newsrack outside the neighborhood diner. Saturday night we check the paper for local movie and club listings. Few things are more relaxing than sitting back and reading a newspaper. Despite the increasing focus on digital platforms, newsracks will play an important part in the distribution of newspapers for some time to come.

Whatever the format, newspapers are essential to democracy. As noted by U.S. Supreme Court Justice Lewis Powell, newspapers have "a special and constitutionally recognized role...in informing and educating the public, offering criticism, and providing a forum for discussion and debate."¹

According to historian Daniel Boorstin, newspapers took root in this country early and flourished rapidly. While the more literate mother country was enjoying the new luxury of plenty of books to read, Americans were reading newspapers. "By 1730 seven newspapers were being published regularly in four colonies; by 1800 there were over 180 . . ."² Boorstin cites Benjamin

Franklin's remark that Americans were so occupied by the "little periodical Pamphlets," few had time to read a book.³ As Boorstin suggests, the English may have been more literate, but the Americans were busy settling a new country and forming new governments. Americans had a much more immediate need to know of events.

Circulation of newspapers in colonial America depended on the fledgling postal service, and on street distribution, first by the printer's apprentice⁴ and later by enterprising young men who purchased the newspaper at a discount and hawked it for a profit.⁵ The "penny press" became popular in the mid-1800's when these cheap sheets challenged established newspapers by relying entirely on street sales.⁶ Street sales remained important into the nineteenth century, when newsboys shouted headlines along main thoroughfares⁷ and cities supported many different newspapers. The number of newspapers diminished somewhat in the same era. As competing dailies shut down, many hometown papers found themselves with little competition. The late twentieth century saw a return to newspaper diversity, with many modern readers picking up a second and third newspaper. At the turn of the twenty-first century, competition from the Internet began to cut into this circulation.

Today, newsracks deliver the practical function of providing a newspaper when stores are not open, home delivery is not economical, or Internet access is unavailable; outside diners, commuter stations and public places; to those who do not subscribe

¹ *First National Bank v. Bellotti*, 435 U.S. 765, 781 (1978).

² D. BOORSTIN, *THE AMERICANS: THE COLONIAL EXPERIENCE*, 327-328 (rev. ed. 1958).

³ *3 Id.* at 328.

⁴ J. LEE, *HISTORY OF AMERICAN JOURNALISM*, 159 (rev. ed. 1923).

⁵ F. MOTT, *AMERICAN JOURNALISM: A HISTORY 1690-1960*, 106 (3d ed. 1967).

⁶ M. SCHUDSON, *DISCOVERING THE NEWS: A SOCIAL HISTORY OF AMERICAN NEWSPAPERS*, 22 (1981).

⁷ D. NASAW, *CHILDREN OF THE CITY*, 78 (1985).

and for those who find the paper more comfortable to read. Issues of distribution remain critical for publishers.

This history and purpose are the very foundation for the legal arguments supporting and protecting newsracks as a means of distributing newspapers in American cities.

Newsracks are *sui generis*. They are best explained by Justice Holmes' remark that "a page of history is worth a volume of logic." Since the replacement of newsboys, who had free reign to peddle newspapers in public places, the courts and public authorities have spent decades working out the law concerning the placement of newsracks in public places.⁸

This book addresses the legal issues that concern the publisher's right to distribute newspapers in a variety of places. It is always important to remember that history and purpose are vital parts of the legal analysis.

⁸ *International Caucus of Labor Committees v. City of Montgomery*, 87 F.3d 1275, 1278 (11th Cir. 1996) (citations omitted).

II

The Evolution of the Public Forum:

“Tangible reinforcement to the Idea that we are a free people”

Supreme Court Justice Anthony Kennedy wrote eloquently about the connection between our legal traditions and the function of open and public places.

At the heart of our jurisprudence lies the principle that in a free nation citizens must have the right to gather and speak with other persons in public places. The recognition that certain government-owned property is a public forum provides open notice to citizens that their freedoms may be exercised there without fear of a censorial government, adding tangible reinforcement to the idea that we are a free people.⁹

The public forum is a place where, when you have something to say, you have the right to speak. This is the birthplace of the American soapbox, the pamphleteer, street theater and newspaper hawkers. It is the place where government is permitted to impose the fewest and least imposing restraints on people with something to say, whether by oratory, music, performance — or by the distribution of a newspaper.

A. The Public Forum

The “public forum doctrine” does not appear in any statute, nor explicitly in the Constitution of the United States. It has been developed by judges as a common law response to the deeply embedded American tradition that permits speech freely in public places. The public forum doctrine is a legal formula designed to ensure that places “suitable for discourse” remain open to lawful speech activities, yet are not given over to lawlessness or legally “nuisance” behavior. Correctly applied, the public forum doctrine considers the nature of the location and, in so doing, gives voice to the principle that

certain places, though regulated, are always open to speech.

The doctrine was first coined as “the public forum” in a 1965 law review article,¹⁰ but the principle of free speech in public places was continuously recognized in cases as early as the 1930s. According to the 1939 *Hague v. Committee for Industrial Organization* decision, “use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.”¹¹

The government does have the power to regulate the distribution of speech in the public forum, but its power generally is limited to reasonable time, place and manner regulations that are content neutral to ensure the public safety and welfare. Where these conditions are present, a court will impose a standard of review known as “intermediate scrutiny” to ensure that the regulation is narrowly tailored to advance a significant government interest unrelated to the content of the speech. Where the content of the speech is the basis for the regulation, however, then a court will apply “strict scrutiny.” As the Supreme Court recently stated, “Reasonable time, place, and manner restrictions are allowed...but any restriction based on the content of the speech must satisfy strict scrutiny, that is, the restriction must be narrowly tailored to serve a compelling government interest ... and restrictions based on viewpoint are prohibited.”¹²

¹⁰ *Harry Kalvin, Jr., The Concept of the Public Forum: Cox v. Louisiana*, 1965 Sup. Ct. Rev. 1, 11-12.

¹¹ *Hague v. Committee for Industrial Organization*, 307 U.S. 496, 515 (1939); see also *Lovell v. Griffin*, 303 U.S. 444 (1938); *Schneider v. State*, 308 U.S. 147 (1939); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943); *Martin v. Struthers*, 319 U.S. 141 (1943). “City streets are recognized as a normal place for the exchange of ideas by speech or paper.” *Kovacs v. Cooper*, 336 U.S. 77, 86-87 (1949).

¹² *Pleasant Grove City v. Summum* 129 S. Ct. 1125, 1132 (U.S. 2009) (citations omitted).

⁹ *International Society for Krishna Consciousness v. Lee*, 505 U.S. 672, 696 (1992) (Kennedy, J., concurring).

The Court “repeatedly has sanctioned the use of reasonable, content-neutral time, place, and manner regulations in public forums if the regulations are narrowly tailored to serve a ‘significant’ government interest and if they leave open ample alternative channels of communication.”¹³

Significant government interests are a critical consideration. The only power given to the government is to preserve the public safety, public welfare, and public use of the public forum. The right of speakers to use the forum for communicative purposes is balanced against the power given to the government to regulate in the public forum. For example, publishers may distribute newspapers on the sidewalk, but not in a way that interferes with the fire department’s access to a fire hydrant.

B. The Nonpublic Forum

Not every government-owned place is open to the public in this fashion. For example, on the far end of the spectrum from a public park, is the jailhouse. In *Adderly v. Florida*, the Supreme Court ruled that the sheriff could legitimately keep student demonstrators out of a county jail and off its premises. “Nothing in the Constitution of the United States prevents Florida from even-handed enforcement of its general trespass statute against those refusing to obey the sheriff’s order to remove themselves from what amounted to the curtilage of the jailhouse.”¹⁴

Accordingly, the Court created a “nonpublic forum,” a place where the government could permit speech appropriate or necessary in the forum, but could exclude speech that would interfere with the government’s purpose for the place. In a pair of cases after *Adderly*, the Court reinforced the idea

¹³ *U.S. Southwest Africa/Namibia Trade & Cultural Council v. United States*, 708 F.2d 760, 768 (D.C. Cir. 1983). See also *Perry Education Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37 (1983) (“State may also enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication”).

¹⁴ *Adderly v. Florida*, 385 U.S. 39 (1966).

that free speech rights were not welcome in every government setting. So, for example, in *Perry Education Ass’n v. Perry Local Educators’ Ass’n*, the Court ruled that the non-elected union did not have the same right of access as the elected union to public school teachers’ mail boxes.¹⁵

In the non-public forum, the government may determine the types of speech that are compatible with the forum, and may apply reasonable restraints that are viewpoint-neutral. Where a united charity campaign aimed at federal employees excluded legal defense and political advocacy organizations, for example, the First Amendment did “not forbid a viewpoint-neutral exclusion of speakers who would disrupt a nonpublic forum and hinder its effectiveness for its intended purpose.”¹⁶

C. The Limited Purpose (or Designated) Public Forum

Courts also began to develop a “limited purpose public forum,” also called a “designated public forum,” to account for places like auditoriums, stadiums, and state university campuses. Often these are government-owned places that the government has opened to *some* types of speech. If a university campus, for example, has been traditionally open to speech activities, including distribution of the student newspaper, that space is at least a limited purpose public forum, if not a public forum. This status may depend on several factors, including physical configuration.

In the case of Southwest Texas State University, which tried to prevent distribution of a free newspaper to prevent litter and to protect students from any deceptive material in the publication, the U.S. Court of Appeals for the Fifth Circuit paid particular attention to the nature of the forum in holding that the restriction would prohibit permissible speech.

¹⁵ *Perry Education Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37 (1983).

¹⁶ *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, 473 U.S. 788, 800 (1985).

Roughly 5,000 students live and work on the campus, making the campus, in the words of the University's own promotional booklet, a "town" of which the resident student will be a "contributing citizen" and "voting member." The campus's function as the site of a community of full-time residents makes it "a place where people may enjoy the open air or the company of friends and neighbors in a relaxed environment," ...and suggests an intended role more akin to a public street or park than a non-public forum.¹⁷

Once a place is a designated or limited purpose public forum for some types of speech, all First Amendment standards apply to the permitted speech. The government may select the types of speech permitted in the limited purpose public forum, but once that is done, all First Amendment principles apply to that type of speech. The U.S. Supreme Court recently observed in *Pleasant Grove City v. Summum* that, with the concept of the traditional public forum as a starting point, the Court has recognized that members of the public have free speech rights in other types of government property and programs that share essential attributes of a traditional public forum:

We have held that a government entity may create "a designated public forum" if government property that has not traditionally been regarded as a public forum is intentionally opened up for that purpose...Government restrictions on speech in a designated public forum are subject to the same strict scrutiny as restrictions in a traditional public forum.¹⁸

Indeed, the chief difference between the public forum and a limited purpose public forum is that the government retains the authority to change the status of the designated public forum back to a non-public forum. As stated by the Supreme Court, "Although a State is not required to indefinitely retain the open character of the facility, as long as it does so it is bound by the same standards as apply

in a traditional public forum. Reasonable time, place, and manner regulations are permissible, and a content-based prohibition must be narrowly drawn to effectuate a compelling state interest."¹⁹

It is important to note that legal analysis does not always fall perfectly within one of these neat categories. *Pleasant Grove City v. Summum* considered the right of a religious organization to install a permanent monument in a city park because other permanent religious monuments were there. The Court began with the assumption that the city park was a classic public forum. However, the Court to some extent sidestepped a "public forum" analysis, by holding that the permanently installed monuments were "government speech" and thus in a different category from citizen speech. The Court held that a "public forum" analysis was not applicable to the facts of *Pleasant Grove City* and there was no First Amendment right to install another religious monument:

Speakers, no matter how long-winded, eventually come to the end of their remarks; persons distributing leaflets and carrying signs at some point tire and go home; monuments, however, endure. They monopolize the use of the land on which they stand and interfere permanently with other uses of public space. A public park, over the years, can provide a soapbox for a very large number of orators — often, for all who want to speak — but it is hard to imagine how a public park could be opened up for the installation of permanent monuments by every person or group wishing to engage in that form of expression.²⁰

Because the permanency of monuments was such a significant factor in the Court's ruling, it is difficult to assess the ruling's impact, if any, on the public forum doctrine.

As in *Pleasant Grove*, the potential physical impact upon the park of the particular form of

¹⁷ *Hays County Guardian v. Supple*, 969 F.2d 111, 117 (5th Cir.1992).
¹⁸ *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1132 (U.S. Feb. 25, 2009).

¹⁹ *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (U.S. 1983).
²⁰ *Id.* at 1137.

expression at issue has weighed on the Court’s public forum analysis before. An organization devoted to the cause of homelessness in Washington, D.C., applied for a permit to set up two tents for an overnight camping “demonstration” in Lafayette Park, the National Park that sits across Pennsylvania Avenue from the White House. Citing potential damage to this park, the Supreme Court overturned the U.S. Court of Appeals for the District of Columbia to hold that a prohibition against camping is “a reasonable time, place, or manner regulation that withstands constitutional scrutiny.” In dissenting opinions, Justices Thurgood Marshall and William Brennan cautioned that the Court had not scrutinized possible political reasons for the Park Service regulation.

The point of these observations is not to impugn the integrity of the National Park Service [but] to illustrate concretely that government agencies by their very nature are driven to over-regulate public forums to the detriment of First Amendment rights, that facial viewpoint-neutrality is no shield against unnecessary restrictions on unpopular ideas or modes of expression, and that in this case in particular there was evidence readily available that should have impelled the Court to subject the Government’s restrictive policy to something more than minimal scrutiny.²¹

Unlike “demonstration camping” and permanent monuments, newspaper distribution is compatible with the history and purpose of city parks, where park users may read a newspaper on a park bench or, as tourists, find local sights and events. Newsracks do appear in commercial areas inside National Parks. However, there are some prohibitions against such distribution in some places in Washington, D.C. and New York City, to name just two. Both *Pleasant Grove City* and *Clark* may suggest the prudence of distributing newspapers within a park in a manner that protects against damage or detriment to the parks’ natural spaces.

To summarize each type of forum:

- ❖ In the public forum, the government may impose only reasonable time, place and manner restrictions on the distribution of speech, and the regulations must be content-neutral and narrowly tailored, leave open ample alternative means of distribution, and directly advance a significant government interest.²² The government does not possess the power to remove the place from the public forum.
- ❖ If the place is a limited or designated public forum, full First Amendment principles limit any regulations, but the government may change the status of the place at will, or nearly so.
- ❖ In a non-public forum, if government agencies are to carry on their functions, the exercise of free speech rights must be limited to activity that is compatible with the primary purpose of the non-public forum and restraints need only be reasonable for the context and viewpoint-neutral.

²¹ *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 315-316 (1984) (Marshall, J., dissenting).

²² *Perry Education Association*, *supra* 460 U.S. at 45

III

Newsracks in Court:

The Supreme Court of the United States

The first time the Supreme Court of the United States had a question concerning newsracks before it, the publisher won.²³ The second time the Supreme Court of the United States had a question concerning newsracks before it, the publisher won again.²⁴ Nonetheless, separate opinions written by the Justices in these initial cases revealed some fundamental disagreement on whether a government has power to ban newsracks entirely from any city street. This portion of the discussion is intended to clarify the question so that publishers considering litigation will not stumble into a bad case.

In 1983, the *Plain Dealer* in Cleveland, Ohio, challenged the newsrack ordinance of an adjacent suburb, the City of Lakewood. The Lakewood fight began because the City Council prohibited the placement of any private “structure” on public property, and denied permission for the *Plain Dealer* to place newsracks on city sidewalks. The federal district court ruled the ordinance was unconstitutional, but permitted the City time to amend it. The amended ordinance allowed the Mayor of Lakewood to require permits prior to the placement of newsracks, and to issue permits based on conditions that he “deemed necessary and reasonable.” The litigation over that grant of discretion eventually took the case to the Supreme Court.

In 1988, three Justices joined Justice William Brennan to rule that the ordinance could not give the Mayor “unguided discretion,” and that power alone rendered the ordinance unconstitutional. Three Justices dissented, and two declined to vote. Thus, with only four of nine votes on the bench, the Supreme Court ruled that an ordinance is unconstitutional if it allows any government official

the unguided discretion to grant or deny a license for the use of newsracks in the public forum.²⁵ The ruling relied on the assumption that the distribution of newspapers by means of newsracks was a fully protected First Amendment right.²⁶

The dissent, written by Justice Byron White, would have held that the use of the newsrack itself was not a protected First Amendment activity, no matter how closely tied to newspaper distribution. Thus the municipality would be able to exercise discretion in lawful exercise of the state’s police power to protect the public safety, to keep the public forum open for use of all, and to preserve the municipality’s interest in aesthetics. The dissent compared use of the newsrack to the building of any structure on public property, to any other vending machine, or to a telegraph pole. “Just as there is no First Amendment right to operate a bookstore or locate a movie theater however or wherever one chooses . . . the First Amendment does not create a right of newspaper publishers to take city streets to erect structures to sell their papers.”²⁷ The dissent relied on the reasoning in *Adderly v. Florida*, the 1966 case in which the Supreme Court held that a sheriff could legitimately keep student demonstrators off the premises of the county jail.

The use of newsracks on city sidewalks came to the Court again in 1992, when the City of Cincinnati passed an ordinance that permitted the placement of newsracks by newspapers, but that banned *commercial* speakers or *advertising* publications. The Court noted that it accepted the case for review in part because of the “dramatic growth in the use of newsracks throughout the country.”²⁸

²³ *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988).

²⁴ *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1992).

²⁵ *City of Lakewood*, 486 U.S. at 781 (1988).

²⁶ *Id.* at 761.

²⁷ *Id.* at 780.

²⁸ *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 416 n.10 (1992).

The seven-vote majority ruled in favor of the commercial speaker, overturning the ban on its newsracks. The Court held that the purported content-based distinction between a general newspaper and a commercial or advertising publication required the City to show that a *compelling* (as opposed to significant) government interest was served. A compelling interest is far more difficult for a municipality to prove than is a significant government interest.²⁹ The Court in *Cincinnati v. Discovery Network* noted that the ordinance would remove only the handful of newsracks devoted to commercial speech, while permitting hundreds of general newsracks to remain, undercutting any argument that the City had a compelling government interest at stake. Without a compelling interest, the content-specific ordinance failed.

That was the good news. Somewhat troubling again was the dissenting opinion where three Justices, including the late Chief Justice William Rehnquist, agreed that the commercial speech distinction was valid since “every newsrack that is removed from the city’s sidewalks marginally enhances the safety of its streets and aesthetics of its cityscape.”³⁰ Again, members of the Court expressed sympathy with the municipality’s efforts to ban at least some newsracks in the face of “unabated” proliferation.³¹

The constitutional status of newsracks remains somewhat unclear in Supreme Court cases. Is it an instrument so bound with distribution that its use is protected by the First Amendment, or a mere convenience for the publisher that is vulnerable to a ban? Lower courts, however, have held it well settled that “the right to distribute newspapers through newsracks is protected under the First Amendment.”³²

²⁹ Generally speaking, a “compelling” governmental interest usually is related to the government’s obligation to protect citizen rights, while a “significant” government interest typically is related to public safety. See *Pittsburgh Press v. Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1973) (upholding a prohibition against publishing gender-biased employment advertising).

³⁰ *Id.* at 445 (Rehnquist, J., dissenting).

³¹ See *id.*

³² *Miami Herald Publishing Co. v. City of Hallandale*, 734 F.2d 666,

A significant Supreme Court decision did come along in 1989. Because it concerned a law that limited the noise level of rock bands performing in New York’s Central Park, its relevance to newsrack ordinances is not immediately apparent. But the case reaffirmed that regulation limiting speech in the public forum may not “burden substantially more speech than is necessary to further the government’s legitimate interests.”³³ In upholding the noise ordinance, the Court rejected lower circuit case law requiring regulation of First Amendment activity to be the “least restrictive means” of advancing the significant government interest in question. But the Court confirmed that such regulations must be “narrowly tailored.”

Lest any confusion on the point remain, we reaffirm today that a regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government’s legitimate, content-neutral interests but that it need not be the least restrictive or least intrusive means of doing so.³⁴

After *Ward v. Rock against Racism*, it is hard to imagine that a ban on newsracks would be sustainable. The Supreme Court traditionally dislikes speech bans. The Court recently struck down a city ordinance forbidding a homeowner

673-74 (11th Cir. 1984); see also *Sentinel Communications Co. v. Watts*, 936 F.2d 1189, 1196 (11th Cir.1991) (“...our circuit has joined an increasingly lengthy body of Supreme Court and federal precedent emphasizing that there is ‘no doubt’ that the right to distribute and circulate newspapers through the use of newsracks is protected by the first amendment.”).

See also generally *Gannett Satellite Info. Network v. Metropolitan Transportation Auth.*, 745 F.2d 767, 772 (2d Cir.1984); *Jacobsen v. Petersen*, 728 F.Supp. 1415, 1419 (D.S.D.1990); *Gannett 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 (3rd Cir.1990); *Gannett Satellite Information Network, Inc. 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 v. City of Wheaton*, 697 F.Supp. 1464, 1466 (N.D.Ill.1988); *Gannett v. White*, 14 Med.L.Rptr. 2037, 2040 (N.D.N.Y.1987); *Gannett Satellite Info. Network Inc. v. Town of Norwood*, 579 F.Supp. 108, 114 (D.Mass.1984); *Providence Journal Co. v. City of Newport*, 665 F.Supp. 107, 110 (D.R.I.1987); *Miller Newspapers, Inc. v. City of Keene*, 546 F.Supp. 831, 833 (D.N.H.1982); *Southern New Jersey Newspapers, Inc. v. New Jersey Dep’t of Transp.*, 542 F.Supp. 173, 183 (D.N.J.1982); *Philadelphia Newspapers, Inc. v. Borough Council*, 381 F.Supp. 228, 241 (E.D.Pa.1974), cited in *Sentinel Communications*, 936 F.2d at 1196.

³³ *Ward v. Rock against Racism*, 491 U.S. 781 (U.S. 1989).

³⁴ *Id.* at 798.

from posting political signs on residential property because the ordinance would have forbidden all types of signs in a residential area, even signs that people commonly post on their lawns.

Although prohibitions for closing entire media may be completely free of content or viewpoint discrimination, the danger they pose to the freedom of speech is readily apparent — by eliminating a common means of speaking, such measures can suppress too much.³⁵

In the meantime, lawyers and their publisher clients who are in heated battles with municipal lawyers must consider whether their case would provide the opportunity for the municipality to assert the reasonableness of a ban on newsracks. In any litigation challenging a restriction on First Amendment rights, before pursuing a claim the publisher must consider the impact of any adverse decision on the entire publishing industry.

³⁵ *City of Ladue v. Gilleo*, 512 U.S. 43, 55 (1994).

IV

Access as a Practical Matter

A. All Sorts of Sidewalks

One federal appeals court has observed that newsracks “are ubiquitous in American cities.”³⁶ Myriad decisions from the lower courts reflect this fact. These courts say or assume, with near unanimity, that the First Amendment protects the right of the publisher to use newsracks for distribution on public sidewalks. “It is beyond dispute that the First Amendment protects the right to distribute newspapers in Newsracks.”³⁷ While the Supreme Court has the final say on the application of constitutional law, it usually does not ignore concepts embraced for years by the lower courts.

1. Municipal Sidewalks

The lower courts began making decisions in favor of the publisher’s right to distribute on municipal sidewalks at least a decade before Justice Brennan’s 1988 defense of newsracks appeared in the *Lakewood* decision.³⁸ One of the earliest cases was in Rochester, New York, where the City tried to require a permit for the placement of newsracks on city sidewalks. The court held that the “right to communicate thoughts and discuss questions on the public street may not be denied or even abridged by ordinance and certainly not in advance by requiring a permit upon the theory that its exercise may obstruct traffic.”³⁹ One year before Justice Brennan’s decision in *Lakewood*, a federal district court judge in Rhode Island joined “the long line of precedents holding that coin-operated newspaper vending machines constitute a means of

distributing newspapers that is entitled to full First Amendment protection.”⁴⁰ There are many state and federal court decisions consistent with these rulings, several deciding the simple point that a ban is not supportable under constitutional law.⁴¹

However, two federal appeals courts have held that a government may ban newsracks on municipal sidewalks in particular zones. As noted above, it happened first in 1986 in the *Lakewood* case that eventually went to the Supreme Court. The U.S. Court of Appeals for the Sixth Circuit said *Lakewood* had the power to ban newsracks in residential areas of the city, primarily because of evidence showing that “all residences in the City are within one quarter of a mile from an existing newsrack” and also because there were eleven “all-night” privately owned businesses that chose at the time to sell the *Plain Dealer*.⁴²

In appealing to the Supreme Court, as discussed above, the publishers of the *Plain Dealer* focused on the main issue of the case — the official’s unguided discretion to issue or deny a permit for the use of a newsrack in the public forum — and decided not to appeal this ancillary rule regarding residential newsracks, which remains good law only in the Sixth Circuit. Thus, while the rule holds, at least ostensibly, in the Sixth Circuit states of Ohio, Michigan, Kentucky and Tennessee, at least one federal district court elsewhere has since disregarded the Sixth Circuit holding.⁴³

³⁶ *Chicago Observer, Inc. v. City of Chicago*, 929 F.2d 325, 325 (7th Cir. 1991).

³⁷ *Chicago Newspaper Publishers Association v. Wheaton*, 697 F. Supp. 1464, 1466 (N.D. Ill. 1988).

³⁸ *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988).

³⁹ *Gannett v. City of Rochester*, 69 Misc.2d 619, 330 N.Y.S.2d 648, 656 (S.Ct. Monroe County, 1972).

⁴⁰ *Providence Journal Company v. City of Newport*, 665 F. Supp. 107, 110 (D.R.I. 1987).

⁴¹ See, e.g., *Chicago Newspaper Publishers v. City of Wheaton*, 697 F. Supp. 1464, 1470-1471 (N.D. Ill. 1988); *Philadelphia Newspapers v. Borough of Swarthmore*, 381 F. Supp. 228 (E.D. Pa. 1974); *Southern New Jersey Newspapers v. NJ DOT*, 542 F. Supp. 173 (D. NJ 1982); *California Newspaper Publishers v. City of Burbank*, 51 Cal. App. 3d 50, 123 Cal. Rptr. 880 (1975); *Remer v. City of El Cajon*, 52 Cal. App. 3d 441, 125 Cal. Rptr. 116 (1975).

⁴² *Plain Dealer Publishing Co. v. City of Lakewood*, 794 F.2d 1139, 1147 (6th Cir. 1986).

⁴³ *Chicago Newspaper Publishers Ass’n v. Wheaton*, 697 F. Supp. 1464,

The Sixth Circuit ruling was further marginalized in 1988 by the U.S. Supreme Court when it held in *Frisby v. Schultz* that a municipal government is not permitted to limit First Amendment rights based on residential zoning.⁴⁴ In an opinion joined by four of her colleagues and a concurring Justice Byron White, Justice Sandra O'Connor rejected a municipality's contention that residential streets were not a public forum when picketers wanted to demonstrate there.

No particularized inquiry into the precise nature of a specific street is necessary; all public streets are held in the public trust and are properly considered traditional public fora. . . . The residential character of those streets may well inform the application of the relevant test, but it does not lead to a different test; the anti-picketing ordinance must be judged against the stringent standards we have established for restriction on speech in traditional public fora...⁴⁵

The anti-picketing ordinance had been enforced as a complete ban on residential picketing, but the Supreme Court majority interpreted the ordinance to mean that picketers could not target one particular home. Thus the ordinance was upheld as a valid protection of the state's interest in protecting the tranquility of the private home, while allowing picketers to demonstrate on residential streets. The *Frisby* decision is among several that have overturned ordinances that would prohibit using sidewalks in the public space as public fora, regardless of ownership, zoning, and the like.⁴⁶

1471 (N.D. Ill. 1988) ("Wheaton cannot condition the exercise of First Amendment freedoms on events and conditions outside of Wheaton any more than it can rely on private sellers to guarantee the expression which Wheaton has abridged.")

⁴⁴ *Frisby v. Schultz*, 487 U.S. 474, 480 (1988). See also *U.S. v. Grace*, 461 U.S. 171, 180 (1983) ("... here is no separation, no fence, and no indication whatever to persons stepping from the street to the curb and sidewalks that serve as the perimeter of the Court grounds that they have entered some special type of enclave.")

⁴⁵ *Frisby*, 487 U.S. at 481.

⁴⁶ See e.g., *U.S. v. Grace*, 461 U.S. 171 (1983) (on sidewalks surrounding the Supreme Court of the United States); *Bock v. Westminster Mall Company*, 819 P.2d 55 (Co. 1991) (based on the state constitution, common space inside a privately-owned large shopping mall); *Southern New Jersey Newspapers, Inc. v. State of New Jersey*, 542 F. Supp. 173 (D.N.J.1982) (along commercial roadsides within right-of-way of state highways); *Providence Journal v. Newport*, 665 F. Supp. 107 (1987) (along streets curbs and sidewalks).

However, a second newsrack ban case appeared in the First Circuit in 1996, concerning a ban in an historic district. *Boston Globe v. Beacon Hill Architectural District Commission* is discussed more thoroughly below.

Prudent publishers will focus their energies on where the best distribution opportunities lie. The use of newsracks on genuinely residential streets may be somewhat limited. Yet readers do like to pick up newspapers at bus stops that serve residential zones, and at other public service sites, like libraries and post offices, that are likely to be in or near residential zones.

2. Improved Business Districts or Historic Zones

If rows of newsracks are not maintained, they can become hazardous to pedestrians and detrimental to publishers' business. Take a look at where you are distributing newspapers. If newsracks are unkempt and poorly maintained, explore what can be done to improve their condition because, otherwise, the municipality may take steps to impose order in the form of homogeneity, or even to attempt a ban.

a. Homogeneity

Municipalities may regulate for aesthetics, but this power is limited by First Amendment considerations.

Municipal planners often begin by trying to make everyone look alike. They may require all publishers to use the same newsrack style (typically a standard metal rack by one of the major manufacturers) and color (usually white, beige, brown, black or green). An ordinance before the City Council in Annapolis, Maryland, in 2009 would allow a selection of certain muted or neutral colors, but would exclude newsracks that are red, yellow or orange. In Houston, Texas, pursuant to an ordinance that went into effect in 2008, the city is picking up newsracks that are not the required "forest green." The city has reported having collected some 4,052 non-conforming newsracks.⁴⁷

⁴⁷ See khou.com/home/Painted-the-wrong-shade-non-green-

Another frequent choice is to purchase modular newsracks, also called condo-racks, and to require all publishers to use the modular units instead of their own trademark newsracks. Before such restrictions can be enforced, the First Amendment requires that an ordinance actually achieve the government's legitimate goals. Efforts at homogeneity do not address the root problem, which is poor maintenance. Sooner or later, if poorly maintained, new look-alike newsracks can look just like old ones.

Two cases in California support this concept. In 1977, the California Supreme Court approved of a Los Angeles newsrack ordinance that has provided a model for thousands of ordinances that followed.⁴⁸ In particular, the ordinance required that "Each newsrack shall be maintained in a clean, neat and **attractive** condition and in good repair at all times."⁴⁹ Recognizing, however, that a requirement to maintain newsracks in an "attractive condition" was properly subject to legal challenge because it could lead to subjective judgments based on personal taste, the court interpreted this phrase to mean "clean and neat":

. . . Insofar as this requirement may be interpreted to impose an aesthetic standard distinct from the commonly accepted meaning of the terms "clean" and "neat," it exposes a newsrack owner to criminal sanction on the basis of a totally subjective aesthetic judgment, a judgment which will invariably vary with the personal taste of individual police officers, municipal inspectors or the ultimate triers of fact in any criminal proceeding. Because such a reading of the term "attractive" would pose obvious constitutional problems in light of its vagueness and potential for arbitrary application..., we conclude, in conformance with the general principle that legislation should be construed, if reasonably possible,

newsracks-pile-up-in-Houston-storage-lot-69798007.html.

⁴⁸ *Kash Enterprises, Inc. v. City of Los Angeles*, 19 Cal.3d 294, 562 P.2d 1302, 1307-09 (Cal. 1977). This ordinance set forth places where newsracks should not be placed, such as certain distances from a fire hydrant, and, as a result, does not impose municipal decisions about where newspapers ought to be distributed. The California Supreme Court held such space limitations did not "unduly hamper the distribution of newspapers. . . ." *Id.* at 1308.

⁴⁹ Los Angeles Municipal Code, Section 42.00 (f) (H) (emphasis added).

to preserve its constitutionality...that the term "attractive" must be interpreted in this context simply as a synonym for "neat" and "clean" and not as an independent aesthetic requirement. As so interpreted we conclude that this provision is not unconstitutional on its face.⁵⁰

In 1987, the California Court of Appeal remarked that it was obvious that "the aesthetic quality of the environment could be improved by standardizing the size, shape, and maintenance of the newsracks."⁵¹ But the ordinance in question there required only that all newsracks be no higher than four feet. The decision does not refer to uniform racks in any sense but height. Further, the uniform height requirement had a safety purpose, not simply an aesthetic one, because taller newsracks would block views of and for pedestrians. The same conclusion was reached in the Seventh Circuit when Chicago effectively outlawed a "tall" newsrack intended to serve as a billboard for third party ads.⁵²

But in 1994, the Eleventh Circuit went further. In *Gold Coast Publications v. Corrigan*,⁵³ that Court upheld a uniform rack ordinance in Coral Gables, Florida. The ordinance required tan newsracks on all city streets and limited the lettering size on newsrack exteriors. The court claimed to rule under the standard set forth by the U.S. Supreme Court in 1989 in *Ward*, the case involving rock bands in Central Park.⁵⁴ While Coral Gables' requirement for one color was not the least restrictive means to improve appearance, the Eleventh Circuit held that the requirement was narrowly fashioned to address aesthetics.⁵⁵

The Court recognized that this neutral presentation might not distribute newspapers as effectively as the publisher's purple racks. After

⁵⁰ *Kash*, 19 Cal.3d at 305.

⁵¹ *Duffy v. City of Arcadia*, 195 Cal. App. 3d 308, 312 (Cal. App. 2d Dist. 1987).

⁵² *Chicago Observer, Inc. v. City of Chicago*, 929 F.2d 325, 328 (7th Cir. 1991).

⁵³ *Gold Coast Publications v. Corrigan*, 42 F.3d 1336 (11th Cir. 1994) cert. denied 516 U.S. 931 (1995).

⁵⁴ *Ward v. Rock against Racism*, 491 U.S. 781 (1989).

⁵⁵ *Gold Coast Publications v. Corrigan*, 42 F.3d 1336 (11th Cir. 1994) cert. denied 516 U.S. 931 (1995).

all, the newsrack, with its color, shape, logo and headlines, took the place of “news boys” who shouted headlines to attract readers:

...the beige and brown colors specified in the Ordinance are not as eye catching as the deep purple newsracks previously used to display !Exit!, but “that reduction in visibility is the valid aesthetic interest to be served.”⁵⁶

However, the Eleventh Circuit found that the outcome turned “not on whether the specified interests are significant, but rather on whether the regulation is narrowly tailored to serve those interests.”⁵⁷

This rule in the Eleventh Circuit suggests that, when a municipality seeks to impose uniformity on newsracks, the publisher may consider taking the following steps:

- ❖ Demonstrate to the city council that there are other approaches to improving the neat appearance of newsracks, such as the use of post-and-rail “corrals;”
- ❖ Investigate the municipality’s treatment of other trademarks in the zone in question, such as whether the city council has tried to impose physical uniformity in its sign ordinance or with store fronts;
- ❖ Determine whether the department of public works has tried to enforce an existing ordinance on maintenance issues;
- ❖ Discover the city council’s basis for the demand for homogeneity, including whether the city has commissioned any studies supporting it;
- ❖ Identify what other efforts have been made to “improve” aesthetics. Is this just an effort to clean up newsracks or is there a comprehensive plan?

The U.S. Supreme Court has found that municipalities may regulate for aesthetics,

⁵⁶ *Id.*

⁵⁷ *Gold Coast Publications, Inc. v. Corrigan*, 42 F.3d at 1345.

but this power is limited by First Amendment considerations. In 1981, the Court held that the City of San Diego could ban billboards only if it could demonstrate a comprehensive approach to aesthetics, and that its approach had failed “to address other obvious contributors to an unattractive environment.” Even the late Justice William Brennan, a strong proponent of First Amendment rights, said in *Metromedia, Inc. v. City of San Diego* that “a historical community such as Williamsburg, Va., should be able to prove that its interests in aesthetics and historical authenticity are sufficiently important that the First Amendment value attached to billboards must yield.”⁵⁸ However, in San Diego, because the ordinance banned only billboards, the city’s commitment to improving its physical environment was placed in doubt:

By showing a comprehensive commitment to making its physical environment in commercial and industrial areas more attractive, and by allowing only narrowly tailored exceptions, if any, San Diego could demonstrate that its interest in creating an aesthetically pleasing environment is genuine and substantial. This is a requirement where, as here, there is an infringement of important constitutional consequence.⁵⁹

In contrast, in the Coral Gables case, *Gold Coast*, the Eleventh Circuit held that the City *had* done a comprehensive review of the aesthetics issues and had come to its decision through a legitimate process.

“... the City has taken several steps to enhance the aesthetics of the business district, including convening a task force to study beautification methods, researching how other cities have dealt with similar issues, developing a proposed Ordinance to correct some of the problems associated with newsracks, and revising that Ordinance based on input from affected parties.”⁶⁰

⁵⁸ *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 533-34 (U.S. 1981) (Brennan, J., concurring).

⁵⁹ *Id.* at 531-533.

⁶⁰ *Gold Coast*, 42 F.3d at 1346.

Since *Metromedia*, the City of San Diego too has taken a different and more comprehensive approach, with respect to newsracks in its historic Gaslamp Quarter District. San Diego first adopted a newsrack ordinance in 1974 and amended it in 1996. In 2007, the City Council amended the ordinance again to require distributors citywide to obtain a newsrack permit and to insure and to maintain racks for public health, safety and welfare. Inside the historic Gaslamp Quarter, publishers and the City agreed on 10 corral locations to accommodate up to eight racks. The corrals provide a neat demarcation around the newsracks, but still allow publishers to attract readers to their own trademarks. Corrals also can be manufactured to be consistent with other specially designed street furniture in a historic area. Perhaps the first municipality to address aesthetic issues by allowing use of newsrack corrals within the historic district was the City of Philadelphia, inside its historic Center City District.

Any municipality that requires uniform newsracks should be required to demonstrate that its decisions will or are likely to achieve legitimate government ends. Without this, there is a danger of hidden content-based regulation of some or all of the newspapers distributed.⁶¹

Aside from requiring the municipal government to show its studied basis supporting uniformity, courts should consider the negative effects of uniformity. In the context of free speech, homogeneity is not a quality to be sought. Cloaking all publishers in the same color reduces their means to identify their unique voices to the public. If a municipality has the power to require one color, then it may change the requirement to another color. Another municipal government may decide that maroon is best, or perhaps tan or green. Publishers cannot afford to purchase and keep an

inventory of colors among their newsracks. This type of ordinance may create a cost barrier to street distribution, especially for small or new publishers. It is unfair to allow restaurants and retail stores to maintain store fronts and signs in a myriad of colors and styles, while requiring publishers to display their offer in only one, municipally selected, color.

b. Bans

The first case to discuss municipal efforts to ban newsracks from city streets was *Providence Journal v. City of Newport*.⁶² The City of Newport sought to ban newsracks from public streets, arguing that they were often banged up or in poor repair and that the streetscape was diminished aesthetically by their presence. The Court did not agree. The racks were on city streets and appropriate to their context: “although some individuals might view newsracks as eyesores, the question for the court is whether their elimination from the streets of Newport ‘would have more than a negligible impact on aesthetics.’... Courts have long recognized that aesthetics is not so much a matter of absolute standards as it is a function of context.”⁶³

Two years later, a federal district court judge in New Jersey was sympathetic to efforts of the Town of Pennsauken to improve its business district and to distinguish itself visually from an adjacent and less attractive town, where the town required only that newsracks be moved thirty feet off the main thoroughfare to an intersecting street. As the court said, the ordinance was not a ban on newsracks, and the court recognized the importance of allowing the newsracks to be visible and noticeable to passersby.⁶⁴

In 1996, however, Boston’s Beacon Hill Architectural Commission succeeded in persuading two judges of the First Circuit Court of Appeals that newsracks should be banned

⁶¹ See *Abilene Retail # 30, Inc. v. Bd. of Comm’rs*, 492 F.3d 1164, 1175-1176 (10th Cir. Kan. 2007) (court review is deferential, but evidentiary basis for regulatory ordinance must be related to similar locale). But see *City of Los Angeles v. Alameda Books*, 535 U.S. 425 (2002) (municipality may rely on old study to conclude that presence of adult businesses may lead to higher crime in area).

⁶² *Providence Journal v. City of Newport*, 665 F. Supp. 107 (D.R.I. 1987).

⁶³ *Id.* at 114 (citing *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 530-31 (1981) (Brennan, J., concurring)).

⁶⁴ *Gannett Satellite Information Network v. Township of Pennsauken*, 709 F. Supp. 530, 540 (D.N.J. 1989).

entirely from the historic district of Beacon Hill, with its narrow sidewalks and period architectural exteriors.⁶⁵ The ban officially applied throughout Beacon Hill, but, because publishers did not seek to place newsracks in its residential areas, practically speaking the ban affected North Charles Street, a highly commercial street.

In spite of the Architectural Commission's efforts to maintain a colonial look-and-feel, Charles Street is studded with modern accoutrements such as gas stations and cable television boxes. Because the commission did not try to accommodate newsracks as it had done with other modern street furniture, the dissenting judge found the ban not narrowly tailored. The dissent acknowledged that the historical basis for the ban was incontestable: newsracks did not exist in colonial Boston. Nevertheless, Beacon Hill today is also a contemporary residential and commercial community:

Various other anachronous utilities abound as well including paved roads and sidewalks, automobiles, traffic signals, streetlights, trash receptacles, mail boxes, and fire hydrants not only along Charles Street but throughout the District. Even though many of these nonconforming modernities are regulated by the Commission often robustly rather than banned outright, the Commission concedes that newsracks are the only "street furniture" it subjects to an outright ban.⁶⁶

The dissent concluded that the Commission had not met its burden of demonstrating that it carefully considered alternative regulatory means, or that it narrowly tailored the regulation to achieve its end. "Otherwise, there would be virtually no role left to be served by the requirement that governmental entities 'carefully calculate' the burdens their regulatory actions impose on protected expressive activity... since an outright ban will almost invariably prove most efficient in rooting out unbecoming appurtenances."⁶⁷

⁶⁵ *Globe Newspaper Company v. Beacon Hill Architectural Commission*, 100 F.3d 175 (1st Cir., 1996).

⁶⁶ *Id.* at 196 (Cyr, J., dissenting).

⁶⁷ *Id.*

Globe Newspapers has since been followed in a newsracks case by only one federal district court judge, in the First Circuit.⁶⁸ The federal district court judge there said an ordinance in Boston's Back Bay was identical to Beacon Hill's. For that reason, he was obliged to follow *Globe*. The judge placed weight on the fact that readers could find the plaintiff's newspaper outside of Back Bay. The U.S. Supreme Court, however, has stressed the importance of providing access "within the forum in question."⁶⁹ As the Court stated in *Reno v. ACLU*, "One is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."⁷⁰

3. Post Office Ingress-Egress Sidewalks

The history of the U.S. Postal Service and the American newspaper are closely tied. In a broad sense, they perform similar information distribution functions and, as noted in Chapter I, the fledgling postal service was critical to the distribution of newspapers. The post office became a natural place to purchase the newspaper. One historian said the post office "gave birth to the first newspaper."⁷¹

The great distances, which sharpened the appetite for news, made the post office in each town a gathering place for men of affairs. Since all letters passed first through the postmaster's hands, he had the quickest and most confidential access to news. When townspeople came to get their mail, he could gather news items of local interest and at the same time sell books, magazines, cough medicine, sealing wax, chocolate, lemons, writing paper, pens and fiddle strings.⁷²

⁶⁸ *Hop Publications v. City of Boston*, 334 F. Supp. 2d 35 (D. Mass. 2004). The *Globe Newspaper* case has been mentioned more than 60 times by other courts, but followed only to support bans on signs, parade sites and the like, not newsracks.

⁶⁹ See *Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 655 (1981).

⁷⁰ *Reno v. ACLU*, 521 U.S. 844, 880 (1997) (quoting *Schneider v. New Jersey*, 308 U.S. 147 (1939)).

⁷¹ H.M. KONWISER, COLONIAL AND REVOLUTIONARY POSTS: A HISTORY OF THE AMERICAN POSTAL SYSTEM 22 (1931).

⁷² BOORSTIN, *supra* note 2, at 337.

In spite of this history, newsrack access to postal premises remains an unresolved issue to this day. The modern U.S. Postal Service has a somewhat less welcoming approach toward newsracks. The historical connection remains relevant for courts examining whether there is a constitutional right of access to this particular government forum.

There are three categories of places where newsracks might be placed on postal property: outside, on sidewalks adjacent to municipal sidewalks; outside, but within the “postal campus” on ingress-egress sidewalks; or inside the post office public area. At times, the Postal Service, and some individual postmasters, have attempted to ban newspaper distribution from all three.

The first category, postal sidewalks adjacent to city sidewalks, are public fora, as the D.C. Circuit Court of Appeals made clear in 2005:

Given that the “public sidewalks forming the perimeter of the Supreme Court grounds” are public forums...there can be no doubt that similar sidewalks abutting post offices qualify as well. “The mere fact that a sidewalk abuts property dedicated to purposes other than free speech is not enough to strip it of public forum status.” [Citations omitted.] It is uncontested that some postal properties contain what we will hereinafter refer to as *Grace* sidewalks.⁷³

The second category concerns the outdoor ingress-egress sidewalks of a post office. When the U.S. Supreme Court decided *U.S. v. Kokinda*, a plurality held that active solicitors may be prohibited from seeking donations or selling subscriptions on post office ingress-egress sidewalks.⁷⁴ However, in *Kokinda*, the Court distinguished active solicitation from the passive offer of literature. In the concurring opinion that established the majority outcome, Justice Anthony Kennedy wrote that these particular sidewalks

were “more than a nonpublic forum.”⁷⁵ He agreed that the regulation restricting solicitation was reasonable under the circumstances, so long as the regulation “expressly permits the respondents and all others to engage in political speech on topics of their choice and to distribute literature soliciting support, including money contributions, provided there is no in-person solicitation for payments on the premises.”⁷⁶

Based on the *Kokinda* majority, it would appear that the passive distribution of literature should be permitted in post office ingress-egress sidewalks. More recently, in *Initiative & Referendum Institute v. U.S. Postal Service*, the U.S. Court of Appeals for the District of Columbia found it acceptable for solicitors to ask people to sign petitions on those post office ingress-egress sidewalks.

None of the government interests previously identified — against disturbing postal patrons, impeding their access, or invading their privacy — reasonably justifies an across-the-board prohibition of pure solicitation on postal sidewalks. Although simply asking for a signature might in some circumstances create one or another of those problems, it is doubtful that it would do so in many.⁷⁷

If the solicitation of petition signatures is permissible, the passive offer of a newspaper should be permissible. There are earlier circuit court decisions holding that active solicitation for funds cannot take place on post office ingress-egress sidewalks;⁷⁸ and another circuit court case concerning newsracks on post office ingress-egress sidewalks, litigated *pro se* by a non-lawyer, resulted in a finding that newsracks could be excluded because the location was a non-public forum.⁷⁹ It is doubtful, however, that that decision, *Jacobson v. U.S. Postal Service*, remains authoritative after the 2005 *Initiative & Referendum Institute* decision in the D.C. Court of Appeals.

⁷⁵ *Id.* at 738.

⁷⁶ *Id.* at 738-739.

⁷⁷ *Initiative & Referendum Institute v. U.S. Postal Service*, 417 F.3d 1299, 1315 (D.C. Cir. 2005).

⁷⁸ *U.S. v. Belsky*, 799 F.2d 1485 (11th Cir. 1980); *U.S. v. Bjerke*, 796 F.2d 643 (3d Cir. 1986).

⁷⁹ *Jacobson v. U.S. Postal Service*, 993 F.2d 649 (9th Cir. 1992) (as amended in 1993).

⁷³ *Initiative and Reference Institute v. U.S. Postal Service*, 417 F.3d 1299, 1314 (D.C. Cir. 2005). The reference is to *United States v. Grace*, 461 U.S. 171 (1983) (“The public sidewalks forming the perimeter of the Supreme Court grounds...are public forums and should be treated as such for First Amendment purposes”).

⁷⁴ *U.S. v. Kokinda*, 497 U.S. 720 (1990)

The third and final category concerns the interior of the post office. Inside of post offices, federal regulations and internal policies prohibit “commercial soliciting and vending, except for “[c]ommercial activities performed under contract with the Postal Services or pursuant to the provisions of the Randolph-Sheppard Act.”⁸⁰ Under the federal Randolph-Sheppard Act, operators of vending machines on federal property are required to pay a commission to state-sponsored organizations dedicated to providing income to the visually impaired.

Assuming that litigation is not a viable choice when it comes to placement of newsracks in and around the post office, the options often turn out to be negotiation with the local postmaster, appeal to district and regional postal managers, and further appeal to the district congressional representative.

4. Airport Sidewalks

Sidewalks outside airports are owned by municipal governments or regional authorities. They are either part of the public forum, or in a class of nonpublic fora where newspaper distribution is compatible with their primary purpose. As a practical matter, airport managers do not frequently object to newsrack placement on sidewalks outside of airports. Access to the exterior sidewalks is a separate legal issue from access to the airports themselves. The usual problem of access to airports concerns placement of newsracks inside the terminal and concourse buildings.

5. Shopping Centers

If a shopping center is privately owned, one might assume there is no First Amendment right of access to the place. There is some truth to this assumption, but in some states, courts have ruled that the private property owner’s rights may be

limited by others’ free speech rights, depending on the specific facts and on the state constitution.

A handful of state supreme courts have held that the constitutions in their respective states provide an even stronger free speech and distribution right than the First Amendment to the U.S. Constitution. In these states, free speech and distribution rights may limit the private property owner’s use of its property, depending on whether certain common sense factors are present. These factors amount to common sense tests of whether the property is used as though it were public property.

For example, in 1991, the Colorado Supreme Court approved access to a large mall in the suburbs of Denver for people soliciting signatures on a petition for referendum.⁸¹ The shopping center had the following characteristics:

- ❖ The mall was one of two such operations in the metropolitan Denver area and provided a large percentage of retail sales in the City of Westminster.
- ❖ The City of Westminster provided financing through the sale of municipal bonds, improved adjacent streets and sewers, and operated a police substation within the mall.
- ❖ Other government agencies, such as the armed forces recruiters and the county’s voter registration office, maintained an active presence in the mall.
- ❖ Because of the attraction of its businesses and its function as a great open public area, the mall was “the equivalent of a downtown business district.”
- ❖ The mall owners could not show that peaceful political solicitation would adversely affect the mall’s normal operations.

The Colorado court said operation of the large mall was so imbued with public functions that it would violate the state constitution to prohibit solicitation of referendum signatures there.

⁸⁰ 39 C.F.R. § 232.1(h); USPS Operations Manual § 221.654., 20 U.S.C.S. §107, VENDING FACILITIES FOR BLIND IN FEDERAL BUILDINGS. Under the federal Randolph-Sheppard Act, operators of vending machines on federal property are required to pay a commission to state-sponsored organizations dedicated to providing income to the visually impaired.

⁸¹ *Bock v. Westminster Mall*, 819 P.2d 55 (Colo. 1991).

Where governmental entities or public monies are shown by the facts to subsidize, approve of, or encourage private interests and such private interests happen also to restrict the liberty to speak and to dissent, this court may find that such private restrictions run afoul of the protective scope [of the Colorado Constitution's free speech clause].⁸²

The state court did not rely on the First Amendment to the U.S. Constitution. Based entirely on state constitutional rights, the court held it possible that “a private project may develop and operate in a manner such that it performs a virtual public function.”⁸³

Once facts of this nature and of such a public-private nexus are established, state courts have also looked to the type of speech activity and its likely interference with the other intended uses of the property. The state cases generally require a balancing test among three principal factors: the primary use of the property, the extent of the public's invitation to use the property, and the purpose of the speech rights in relation to the use of the property.⁸⁴

In the federal cases, results are mixed. In an older, landmark case, where the property was a company-owned town, the Supreme Court found that the company-employed police could not enforce a rule against distributing religious pamphlets.⁸⁵ More recently, the Supreme Court decided in *Hudgens v. NLRB* that union pickets did not have a First Amendment right of access to privately leased space surrounding the grocery store that was the target of their picket, even when the grocery store was in a large shopping center.⁸⁶ However, the pickets in *Hudgens* were deemed to impinge directly on the property owner's or

tenant's rights to use the property as it wished to do, because they interfered with shoppers' access to the store. In contrast, a religious pamphleteer such as in *Marsh* or a political activist seeking signature on a referendum ballot presents relatively little interference with the use of a privately owned public street or large shopping mall. By analogy, the passive offer of a newspaper from a vending machine should receive favorable treatment.

Most recently, the Ninth Circuit would not allow the City of Las Vegas, Nevada, to take a street out of the public forum, in spite of efforts to make the street function like an entertainment and shopping center. The court's discussion highlights First Amendment concerns that are inherent in the municipal trend toward privatization. Sidewalks in “The Fremont Street Experience” area of Las Vegas remained a public forum despite elaborate changes in appearance and activities.⁸⁷ Spending \$70 million to convert Fremont Street, the City of Las Vegas sought “to emulate economic revival measures taken in towns throughout the United States by creating a pedestrian-friendly zone,” the appeals court said.⁸⁸ Nonetheless, the street remained a pedestrian thoroughfare crossed by two city streets. Despite the City's argument that Fremont Street's primary function was now to stimulate economic growth, the Ninth Circuit would not overlook the fundamental public thoroughfare purpose or permit the make-over to snatch the sidewalks from the public forum.

6. Government Office Building Sidewalks

As previously discussed, not every government-owned place can provide full First Amendment access to anyone who wants to exercise speech rights. The public's right of access to a jail is tightly regulated, so a typical prison could be thought of as the most “non-public” forum. Similarly,

⁸² *Id.* at 60.

⁸³ *Id.*

⁸⁴ See *Stranahan v. Fred Meyer, Inc.*, 153 Ore. App. 442, 451 (Or. Ct. App. 1997); *Robins v. PruneYard Shopping Ctr.*, 23 Cal.3d 899, 592 P.2d 341, 347 (1979), *aff'd* 447 U.S. 74, 100 (1980); *Batchelder v. Allied Stores Int'l*, 388 Mass. 83, 445 N.E.2d 590, 595 (1983); *Lloyd Corp. v. Whiffen* 315 Or. 500, 849 P.2d 446, 453-54 (1993) (*Whiffen II*).

⁸⁵ *Marsh v. Alabama*, 326 U.S. 501 (1946).

⁸⁶ *Hudgens v. NLRB*, 424 U.S. 507 (1976).

⁸⁷ *ACLU v. City of Las Vegas*, 333 F.3d 1092 (9th Cir. 2003); see also *Frisby v. Shultz*, 487 U.S. 474 (1988) (“Our prior holdings make clear that a public street does not lose its status as a traditional public forum simply because it runs through a residential neighborhood.”)

⁸⁸ 333 F.3d at 1094-95.

a municipal plaza or town square could be considered the most “public” forum. Somewhere along this continuum are government facilities where speech is frequently permitted, such as an auditorium or municipal stadium; or the entrances to, or campuses of, government-owned or leased office buildings. As discussed above, these are called “limited purpose” or “designated” public fora.

In 1992, the federal district court in Washington, D.C., ruled that grounds surrounding the Social Security Administration (SSA) headquarters in Woodlawn, Maryland, were a designated public forum.⁸⁹ As a result, the federal government was directed to allow leafleting on SSA grounds around the building by a union campaigning to dislodge the American Federal of Government Employees (AFGE) as the exclusive bargaining agent for SSA employees.

In deeming the place a designated public forum, the court considered four factors: (1) the size and open character of the place, including the absence of fences or guards, and the presence of a public transportation bus service; (2) the SSA’s practice of giving permits to charitable organizations to distribute literature; (3) the loci’s comparison to non-public fora, such as secured grounds of a military base; and (4) the existence of a federal regulation creating a permit procedure for occasional use of the public areas for cultural, educational and recreational activities. It was also important that the leaflet distributors could not reach their intended audience by passing out leaflets from the municipal sidewalks, because employees drove past the sidewalk into the headquarters parking lots. This eliminated any effective alternative means of distribution. In a later proceeding, the SSA changed its Unfair Labor Practice claim so that the argument over distribution of leaflets became moot.⁹⁰ For that reason, the trial court decision on the First

Amendment issue stands. In large areas around government buildings, bans on leaflet distribution are not likely to be constitutional.

The limit on the government’s ability to regulate speech in a limited purpose public forum was highlighted when a private business wanted to protect its competitive advantage at the premises of a municipal stadium, “the Stadium District” in Denver. The Colorado Rockies Baseball Club, Ltd., had banned the sale or distribution of any materials on these sidewalks other than those sold by their vendor. The plaintiffs, selling their “alternative” baseball score cards and programs, were arrested and charged with trespass. The Colorado Supreme Court first held these sidewalks were public fora.⁹¹ The court agreed the Rockies’ ban was content-neutral, since it banned everything without reference to content. The court also agreed that the Rockies had articulated significant government interests in relation to safety, crowd congestion and the like. But the court could not agree that the Rockies’ economic interests were more important than the plaintiffs’ or that those interests would be significantly harmed by some competition from the plaintiffs. The court also held that alternative venues for circulation cited by the Rockies were not sufficient.

We do not agree with the Rockies that persons attending baseball games can necessarily be reached by distributing the materials in bars, restaurants, or by mail. The alternative channels articulated by the Rockies are not functionally equivalent to on-site distribution and are not very likely to reach the intended audience. Therefore, we agree with the district court that the Rockies’ policies effectively prevent the Publishers from reaching twenty percent of the ballpark’s patrons and that these patrons are not realistically accessible to the Publishers by other means.⁹²

This oft-made assertion, that there are “ample alternative means of distribution,” is a factor

⁸⁹ *National Treasury Employees Union v. King*, 798 F. Supp. 780 (D.D.C. 1992).

⁹⁰ See *National Treasury Employees Union v. King*, 961 F.2d 240 (D.C. Cir. 1992).

⁹¹ *Lewis v. Colorado Rockies Baseball Club*, 941 P.2d 266 (Colo. 1997).

⁹² *Id.* at 278.

in many cases relevant to the distribution of newspapers via newsracks. It is vital that strong factual arguments be presented when discussing hypothetical alternatives presented by defendants who are attempting to ban newsracks from their premises. The rule is that alternatives should be available within the original context.⁹³

B. Apartment Buildings and Complexes

Access to *privately owned* apartment buildings and complexes is likely to depend on permission of the apartment owner, as represented by the apartment manager. As a residence, such a building is not open for public use or access.

The Third Circuit Court of Appeals has ruled that an apartment complex is not a public forum.⁹⁴ That case held that a cable TV company does not have a right of access to apartment dwellers after the apartment owners disconnected the cable, because the apartment building is not analogous to a “company town” and its owners’ actions are not state action. The building management was not “a substitute for a municipal government in any meaningful way”:

There is no allegation that the two [apartment] complexes in this case are anything more than apartment buildings with some associated shopping facilities and office space. We agree with the district court that Cable Investments has failed to allege the requisite state action to support its First Amendment claim.⁹⁵

In another case, the Supreme Court ruled that mail boxes set up to receive U.S. mail, such as those found in apartment complexes, may not be used by a civic association to deliver messages to residents. The mail boxes are not public fora and the Post

⁹³ See *Heffron v. Int'l Soc. for Krishna Consciousness*, 452 U.S. 640 (1981) (upholding rule that did not exclude religious group from fairgrounds or deny organization’s right to conduct speech activity at some point within the forum); *City of Ladue v. Gilleo*, 512 U.S. 43, 55 (1994) (municipality could not close the forum of residential signs and leave only alternatives among other types of speech).

⁹⁴ *Cable Invest., Inc. v. Woolley*, 867 F.2d 151 (3d Cir. 1989).
⁹⁵ *Id.* at 162 (3d Cir. 1989).

Office rule against such use serves a legitimate government purpose.⁹⁶

In a case involving a *public* housing complex, or more precisely public housing that had been privatized, a man arrested for trespass while trying to visit family members living there raised a First Amendment challenge to the ordinance that gave the housing manager discretion to ban his presence, arguing that the Virginia law gave the public housing manager too much discretion as to who may speak. The Virginia Supreme Court initially allowed the alleged trespasser to challenge the policy under the overbreadth doctrine, because “even if the government may constitutionally impose content-neutral prohibitions on a particular manner of speech, it may not condition that speech on obtaining a license or permit from a government official in that official’s boundless discretion.”⁹⁷ However, the U.S. Supreme Court later reviewed the case and found that the Virginia Supreme Court should not have used the “strong medicine” of overbreadth to invalidate the entire trespass policy.⁹⁸ Had this been a true speech case involving newspaper distribution, the outcome may have been different; under the reasoning of *Marsh v. Alabama*, private or public, the streets outside the apartment buildings are part of the public forum.⁹⁹

When dealing with apartment managers concerning access to buildings, circulation directors will find tact and negotiating skills useful. There may be allies among subscribers or readers inside the building. At least some building residents may be willing to say they would like access to or delivery of a newspaper inside the building and to help the circulation director

⁹⁶ *U.S.P.S. v. Council of Greenburgh Civic Association*, 453 U.S. 114 (1981).

⁹⁷ See *Commonwealth v. Hicks*, 264 Va. 48, 55 (Va. 2002). The trespass conviction was later upheld. *Commonwealth v. Hicks*, 267 Va. 573 (Va. 2004).

⁹⁸ *Virginia v. Hicks*, 539 U.S. 113 (2003) (“Rarely, if ever, will an overbreadth challenge succeed against a law or regulation that is not specifically addressed to speech or to conduct necessarily associated with speech (such as picketing or demonstrating).”).

⁹⁹ *Marsh v. Alabama*, 326 U.S. 501 (1945) (state could not enforce trespass law against Jehovah’s Witness who continued to proselytize after being warned to stop in “company-owned” town).

“lobby” the building manager or management committee.

C. Inside Airports (Terminals & Concourses)

At one time, most federal circuits treated airports as public fora, and newspaper publishers’ distribution rights were clear.¹⁰⁰ In more recent precedent, the physical and commercial characteristics of the airports have sometimes been as influential on the outcome of controversies as any public forum analysis.

In 1987, in a case that concerned the mammoth airport at Los Angeles, the U.S. Supreme Court chose to sidestep the public vs. non-public forum question. The Commissioners managing the Los Angeles International Airport had tried to impose a zone where nothing but “airport-related” speech activities could take place. The Commissioners allowed the reading of newspapers, but attempted to stop leafletters and solicitors. Without deciding the “forum” nature of the airport, the Supreme Court said there were no circumstances that would justify such a ban in any airport.¹⁰¹

In 1992, the Supreme Court again issued a set of rulings that were indecisive on the nature of the forum. Even so, the right to distribute literature in airports was preserved. It happened this way.

The case began when a religious group known popularly as the “Hari Krishnas” went before the Supreme Court of the United States seeking to allow their members to distribute literature and to solicit donations inside the airports managed by the New York Port Authority, which are Kennedy, LaGuardia and Newark. It is fair to say that the case turned on the fact that the Hari Krishna wanted to approach passengers and proselytize while asking for donations. The Court clearly regarded active solicitation and proselytizing as

disruptive but protected First Amendment activity. The distribution of literature, on the other hand, has been regarded as passive and non-disruptive.

The outcome was another plurality vote. The Justices wrote several different opinions, splitting evenly on the issue of whether the modern airport was a public forum or not. In the end, Justice Sandra Day O’Conner broke the tie in a concurring opinion which characterized the airport as a “multi-purpose forum.” “In my view, the Port Authority is operating a shopping mall as well as an airport.”¹⁰² The bottom line was that the Hari Krishnas could not solicit for donations, but they could distribute literature in the airports.¹⁰³ Thus the Court, while reluctant to characterize the airport forum as public or non-public, made a critical distinction between the disruptive act of solicitation and the passive offer of literature.

Today, at least 37 international airports, including Atlanta, Boston, New Orleans, Dallas, St. Louis and Orlando, allow newsracks to operate on the concourse after passengers’ clear security, the point at which people are most likely to pick up a newspaper. But some airport managers persist in restricting distribution of newspapers. Again, the Supreme Court has been clear about the public and commercial nature of airport concourses and held that the distribution of literature must be permitted, thereby allowing the inference that the presence of newsracks is reasonable. In spite of this, some airports continue to ban newsracks. Two airports, in North and South Carolina, were challenged; one following a very clear decision from the Fourth Circuit Court of Appeals that newsracks could not be banned.

In 1993, the Fourth Circuit ruled in *Multimedia Publishing Co. v. Greenville-Spartanburg Airport District* that newspaper distribution through newsracks must be permitted at the Greenville-Spartanburg Airport. The court expressly acknowledged the holding in the *Hari Krishna* case.

¹⁰⁰ See *Jamison v. St. Louis*, 828 F.2d 1280, 1283-1284 (8th Cir. Mo. 1987) (“...every court that has decided the issue has held that an airport is a public forum...”).

¹⁰¹ *Board of Airport Comm’rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 574-575 (1987).

¹⁰² *Lee v. International Soc’y for Krishna Consciousness, Inc.* 505 U.S. 693 (1992) (O’Connor, J., concurring).

¹⁰³ *Id.* at 831.

Though during pendency of this appeal it was established in *International Soc’y Soc’y for Krishna Consciousness, Inc. v. Lee*, (citations omitted) that airline terminals of the sort here in issue are not public forums, we conclude that the total ban here challenged is nevertheless unconstitutional and we therefore affirm the district court’s decision to that effect.¹⁰⁴

The *Multimedia* decision was based in part on the fact that, without newsracks, “newspapers would be hard to come by” in the airport.¹⁰⁵ In holding the regulation unconstitutional, the Court also found the airport’s arguments to be pre-textual and founded at heart on the airport management’s dislike of publishers distributing without airport control.

Following that holding, the federal district court for the Middle District of North Carolina applied the same rule to the Raleigh-Durham Airport.¹⁰⁶

In the summer of 1996, litigation arose over newspaper distribution at Hartsfield-Jackson Atlanta International Airport. The matter began during the 1996 Olympic Games, when the City of Atlanta told publishers they would be required to use (and pay fees for) new white newsracks draped with advertising for Coca-Cola. The publishers refused, and obtained an injunction against the City’s enforcement of the plan. Following that initial altercation, the issues expanded.

The litigation ended in 2003 with a decision from the U.S. Court of Appeals for the Eleventh Circuit that provides principles of newspaper distribution in airports. Though there is some confusion in the court’s language, the holding is nonetheless clear that restrictions on newspaper distribution in an airport must at least be reasonable and viewpoint neutral. In part because neither the airport nor the newspaper litigants sought to characterize the airport as a designated public forum, the

court applied the more deferential standard for regulation of expressive activity in a nonpublic forum.¹⁰⁷ Applying that standard, the court said the regulations “are constitutionally valid if they are reasonable and viewpoint neutral.” Here, the court found “no question that the regulations are viewpoint neutral, and, therefore, we focus on their reasonableness.” By the time the case reached the Eleventh Circuit, moreover, the Atlanta Department of Aviation had rewritten the regulations to be essentially reasonable in their approach, and the court held as much.

However, the court was mindful of how the dispute had begun, and reminded airport authorities not to allow subjective considerations to be injected into the administrative process. When an airport is operated as a business by a government entity, it may charge profit-conscious fees on newspaper distribution, so long as the fees are commercially reasonable and set in a manner that avoids exercise of unguided discretion. The City’s administrative decisions to accept or reject a publisher’s request to distribute at the airport must be made according to clear procedural safeguards, to ensure that no personal preference or unguided discretion taints the decision to deny or accept the permit application.¹⁰⁸ As noted by the Eleventh Circuit:

... the City, even acting as a proprietor, retains its power to censor. Such power must be cabined by some standard of First Amendment reasonableness over and above the invisible hand of the marketplace. Structural and procedural safeguards can reduce the possibility that an official will use her power to corrupt the protections of the First Amendment. The official charged with administering the Plan should have clear standards by which to accept or reject a publisher’s request to use the newsracks at the Airport.¹⁰⁹

An airport does not have the power to force publishers into uniform newsracks for the purpose

¹⁰⁴ *Multimedia Publishing Co. v. Greenville-Spartanburg Airport Dist.*, 991 F.2d 154, 156 (4th Cir. 1993).

¹⁰⁵ *Id.* at 160.

¹⁰⁶ *News & Observer Publ. Co. v. Raleigh-Durham Airport Auth.*, 588 F. Supp. 2d 653 (E.D.N.C. 2008).

¹⁰⁷ *Atlanta Journal & Constitution v. City of Atlanta Dep’t of Aviation*, 322 F.3d 1298, 1307 (11th Cir. 2003).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 1311.

of advertising another airport vendor.¹¹⁰ The publishers prevailed so decisively on this and other arguments that the Eleventh Circuit upheld an award of eighty percent attorney's fees for a combined award of well over one million dollars.¹¹¹

There is a final note. In South Dakota, the federal district court held that a municipality had the power to confine newspaper sales to its only gift shop in the small airport serving Rapid City, South Dakota.

Until [the plaintiff] comes forward with concrete evidence that the City's facially reasonable policy regarding distribution of newspapers at the Rapid City Airport either is intended to discriminate or unreasonably fails to provide a viable means of airport distribution, he is not entitled to injunctive relief interfering with the City's proprietary revenue interest in operating the Airport for the benefit of air travelers.¹¹²

Note that the publisher handled his own litigation *pro se*, and, as implied by the court's statement above, the outcome turned, at least in part, on the absence of certain critical evidence and a fully developed record.

D. Highway Rest Areas

When the United States began building its interstate highway system, one of the objectives stated in the authorizing legislation was a military objective to heighten American troop mobility. At least one enterprising state attorney general has since suggested that this created a countervailing interest in security to be balanced against First Amendment access to highway rest areas. Despite this assertion, access to highways is generally unlimited.

The federal laws regarding the federal highway system list "safety rest areas" in a section authorizing state governments *to permit*

information to be made available to the public.¹¹³ The Code of Federal Regulations says that the purpose of these roadside facilities is to provide the motorist with those services deemed necessary for "his rest, relaxation, comfort and information needs."¹¹⁴ Clearly, the term "safety" is meant to include motorists' need for respite from the pressure of highway driving.

One federal appeals court has decided that highway rest areas are non-public fora, but that the distribution of newspapers is compatible with the purpose of the highway rest area.¹¹⁵ Another federal district court found that the right of distribution extends to rest stops, regardless of their status.¹¹⁶

Newspapers contribute to the purpose of creating a place that provides "rest, relaxation, comfort and information needs" by giving readers current news information about the weather and the places through which and to which they are driving. Reading the newspaper contributes to the break and the driver's rest and recreation. Emphatically then, the distribution of daily newspapers is compatible with the function of the highway rest areas, just as with airports and commuter stations.

It is important enough to reiterate: First Amendment protection extends even to public property that is not a traditional public forum, so long as the expression of the speech is appropriate to and compatible with the primary purpose of the place. The government may not infringe First Amendment rights on generalized and unsupported assertions that speech would clash with other governmental interests; real and substantial conflict must be demonstrated before constitutional rights may be abridged.¹¹⁷

¹¹⁰ *Atlanta Journal & Constitution v. City of Atlanta Dep't of Aviation*, 1996 U.S. Dist. LEXIS 22591 (N.D. Ga. 1996).

¹¹¹ *Atlanta Journal and Constitution v. City of Atlanta Department of Aviation*, 442 F.3d 1283 (11th Cir. 2006).

¹¹² *Jacobsen v. City of Rapid City*, 128 F.3d 660, 665 (8th Cir. 1997).

¹¹³ 23 U.S.C.A. § 101(b)

¹¹⁴ 22 C.F.R. § 752.3 (a). See also 23 C.F.R. §§ 752.5 and 752.7.

¹¹⁵ *Sentinel Communications v. Watts*, 936 F.2d 1189, 1207 (11th Cir. 1991).

¹¹⁶ *Gannett v. White*, No. 87-CV-1222, slip op. (N.D. N.Y. Oct. 18, 1987).

¹¹⁷ *Eastern Conn. Citizens Action Group v. Powers*, 723 F.2d 1050, 1055 (2^d Cir. 1983).

E. Subways and Commuter Trains

Commuter stations collect large numbers of potential readers who are waiting or riding in the perfect environment to read the newspaper. To the authorities that operate the stations, hawkers or newsracks may appear to use up space, to distract from the business of travel, or even to diminish safety. But judges have understood that commuters customarily read newspapers and have generally ruled that newspaper distribution is appropriate in commuter stations. The same courts have sometimes been willing to allow the transportation authorities to impose a variety of restrictions on newspaper distribution.

The latter discussion seems to have begun in the City of Shaker Heights, Ohio. While this decision concerned political advertising inside trolley cars, it has become a touchstone for courts considering speech activities inside transportation facilities.

The City sold advertising space to retail merchants and other businesses inside its trolley cars, but did not want to place political ads in the same spaces. The U.S. Supreme Court upheld that rule. In an unusual content-based distinction, the decision supported the exclusion of political advertising, which is usually protected as “core speech.” The ruling demonstrated the extent of the Supreme Court’s willingness to allow the government owner of transportation facilities to curtail speech activities on the theory of interference with the primary use of the forum. Even Justice William Brennan concurred in this decision, finding that “the managerial decision to limit car card space to innocuous and less controversial commercial and service oriented advertising does not rise to the dignity of a First Amendment violation.”

No First Amendment forum is here to be found. The city consciously has limited access to its transit system advertising space in order to minimize chances of abuse, the appearance of favoritism, and the risk of imposing upon a captive audience. These are reasonable legislative objectives advanced by the city in a proprietary

capacity. In these circumstances, there is no First or Fourteenth Amendment violation.¹¹⁸

However, twenty-four years later, in 1998, the Third Circuit would not allow the Southeastern Pennsylvania Transportation Authority to refuse to display an apparently misleading advertisement placed by anti-abortion advocates. This court held that the advertising was no different from other speech already allowed in the forum, and therefore could not be excluded without strict scrutiny for a compelling government interest.¹¹⁹

Thus the government “may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities...”¹²⁰

Besides advertisements and billboards, similar issues have arisen with respect to hawkers in commuter stations. In 1989, the *Washington Post* sued the Director of the Washington Metropolitan Area Transit Authority (WMATA) for hawkers’ access to the commuter platforms in the Washington Metro subway system. The U.S. District Court for the District of Columbia agreed that WMATA had clearly “opened its properties for use by the public as a place for expressive activity” and that the stations were public fora.¹²¹ But the Authority argued that

¹¹⁸ *Lehman v. City of Shaker Heights*, 418 U.S. 298, 304 (1974) (Brennan, J., concurring).

¹¹⁹ When the government regulates speakers based on the content of their speech, it must show a *compelling* government interest, which the courts are obliged to subject to their *strict scrutiny*.

¹²⁰ *Christ’s Bride Ministries v. SEPTA*, 148 F.3d 242, 255 (3d Cir. Pa. 1998). There is precedent for the *SEPTA* decision wherein courts recognize the public forum nature of spaces where people travel and commute. In 1983, the D.C. Circuit Court of Appeals would not uphold a ban on political advertising at National Airport (where commercial advertising was allowed). At this time, airports were more uniformly categorized as public fora. “The first amendment is not an abstract proposition; our society’s commitment to free speech must exist in fact as well as in principle. In fact, the open, public areas of National and Dulles Airports have become contemporary crossroads in which millions of people each year engage in a considerable amount of commercial, social, and political interchange.” See also *U.S. Southwest Africa/Namibia Trade & Cultural Council v. United States*, 708 F.2d 760, 774 (D.C. Cir. 1983); *Lebron v. WMATA*, 749 F.2d 893 (D.C. Cir. 1984).

¹²¹ *The Washington Post Company v. Turner*, 708 F. Supp. 405, 410 (D.D.C. 1989).

the hawkers' stacks of newspapers presented fire and tripping hazards and that their shouts could interfere with passengers' ability to discern loud-speaker safety announcements. In contrast, leafletters, who were permitted by WMATA, did not shout and carried their literature with them. The newspaper argued that the regulation was not narrowly tailored. However, the court agreed with the transit authority and held that the safety factor outweighed publishers' free speech rights. The ruling included a finding that publishers had ample access to the stations by means of vending machines placed before the fare gates and outside the platforms where people are doing their stand and wait for trains.

The ultimate outcome is that free speech activities are allowed "above ground" at WMATA stations, on the Supreme Court's *Grace* sidewalks, where they would be permitted anyway.¹²² Inconsistently with *Grace*, hawkers are permitted only where WMATA designates. As for newspaper vending machines, they are permitted underground if they are machines that the fire marshal has designated as fire proof, which tend to be large and expensive.¹²³

Newspapers have fared better in the Second Circuit Court of Appeals. In 1976, the appeals court remanded a newspaper distribution case because the lower court had not required the New York City Transit Authority to demonstrate that nothing other than a total ban on newspaper distribution would work.¹²⁴ The remand order required the parties to reach agreement on regulations that would allow the distribution of newspapers in the subway stations. In 1984, the Second Circuit ruled that the distribution of

newspapers naturally belongs in the Metropolitan Transportation Authority (MTA) stations serving New York City.

The public areas of MTA stations are appropriate forums for the sale of newspapers through newsracks. The thousands of commuters who pass through the stations each day provide a ready market for the morning newspapers. The presence of newsracks is not incompatible with the operation of MTA stations; since at least 1965 several publishers have maintained newsracks in the stations.¹²⁵

In the same ruling, however, the Second Circuit upheld MTA's power to impose fees that would produce revenue to the nearly bankrupt commuter authority.

The First Circuit has also been more liberal than the D.C. Circuit in allowing free speech activities inside a commuter rail station. The Massachusetts Bay Transportation Authority (MBTA) sought to ban leafleting, solicitation of signatures, and public speeches (or "noncommercial expressive activity") within the paid areas of its 80 subway stations in the name of passenger safety and convenience. The First Circuit Court of Appeals rejected this policy and held that all such activities could take place in the subway stations because the MBTA could exclude speakers and distributors from safety zones within the stations.¹²⁶ The Court concluded the burden was on the government to prove a credible reason why its regulations would advance the forum's purpose. When the transit authority could not do that, it lost the case. Any commuter system would similarly have a hard time proving that the distribution of newspapers is not compatible with its primary purpose. The U.S. Supreme Court has repeatedly held absolute bans on pamphleteering and canvassing invalid, whether

¹²² See *United States v. Grace*, 461 U.S. 171 (1983) ("The public sidewalks forming the perimeter of the Supreme Court grounds...are public forums and should be treated as such for First Amendment purposes."). *Grace* sidewalks have come to refer more broadly to sidewalks that surround a public agency, are not part of the municipal sidewalk, but are not otherwise barricaded against entry or access.

¹²³ WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY, REGULATION CONCERNING THE USE BY OTHERS OF WMATA PROPERTY AND RELATED BOARD RESOLUTIONS (Sept. 2007), available at wmata.com/about_metro/docs/UseRegulations.pdf.

¹²⁴ *Wright v. Chief of Transit Police*, 558 F.2d 67 (2d Cir. 1977).

¹²⁵ *Gannett Satellite Information Network, Inc. v. MTA*, 745 F.2d 767, 773 (2d Cir. 1984). See also *Wolin v. Port of New York Authority*, 392 F.2d 83, 90 (2d Cir. 1968) (The Terminal building is an appropriate place for expressing one's views precisely because the primary activity for which it is designed is attended with noisy crowds and vehicles, some unrest and less than perfect order.).

¹²⁶ *Jews for Jesus v. Massachusetts Bay Transportation Authority*, 984 F.2d 1319 (1st Cir. 1993).

applied to nonpublic governmental forums¹²⁷ or to private property,¹²⁸ because of their substantial overbreadth.

Publishers facing challenges distributing newspapers in commuter train stations should explore the physical layout of the train platforms and station interior, and ask the transportation authority for narrowly tailored rules. Many stations and outdoor platforms have space where solicitation, leafleting, hawking and placement of newsracks could take place. For example, in Gannett's case against the MTA in New York City, the court looked at the station's physical lay-out and found room for speech activities:

[T]he proposed First Amendment activity is the entirely innocuous distribution by machine of a commercial newspaper in a forum that...is not unduly confined, and contains waiting rooms, concourses, passageways, and platforms that are in many ways analogous to the street corners and meeting halls which are the traditional public forums.¹²⁹

The burden is on the government transportation authority to prove that its concerns are legitimate and that its proposed rules will address the problem narrowly and actually solve the problem. ". . . [T]he requirement of narrow tailoring is satisfied 'so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.'"¹³⁰

¹²⁷ See *Lee v. International Soc'y for Krishna Consciousness, Inc.*, 505 U.S. 830 (1992) (holding unconstitutional a ban on leafleting in airport terminals); *Airport Comm'rs v. Jews For Jesus, Inc.*, 482 U.S. 569, 575-76 (1987) (holding unconstitutional a ban that effectively prohibited, within an airport terminal, the "talking" or "the wearing of campaign buttons or symbolic clothing" that was not "airport related," noting that "no conceivable governmental interest would justify such an absolute prohibition of speech").

¹²⁸ See *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Village of Stratton*, 536 U.S. 150, 160, 153 L. Ed. 2d 205, 122 S. Ct. 2080 (2002) (noting that "for over 50 years, the Court has invalidated restrictions on door-to-door canvassing and pamphleteering"); *Initiative & Referendum Inst. v. United States Postal Serv.*, 368 U.S. App. D.C. 50, 66 (D.C. Cir. 2005) ("The Supreme Court has repeatedly held absolute bans on pamphleteering and canvassing invalid, whether applied to nonpublic governmental forums or to private property, because of their substantial overbreadth").

¹²⁹ *Initiative & Referendum Inst. v. United States Postal Serv.*, 368 U.S. App. D.C. at 96.

¹³⁰ *Jews for Jesus v. Massachusetts Bay Transportation Authority*, 984 F.2d 1319, 1328 (1st Cir. 1993) (citation omitted).

F. Military Bases

A military base should be a prime audience for newspaper distribution. Anecdotal experience suggests that newspapers are distributed there routinely. If the base or part of the base has been open to unrestricted civilian access, the U.S. Supreme Court has held that the commander must allow a peaceful leafleter to distribute there.¹³¹

The commander of the base has greater control over more of its areas than in any other government-owned facilities (except a jail), but First Amendment rights continue to exist or thrive, even inside a military post.

During the era of protests against the Vietnam War, the Supreme Court gave military base commanding officers the power to close their bases to people who would disrupt and threaten the security of the base.¹³² Even so, when the Supreme Court in *Greer* upheld a literature distribution ban, it did so because it applied *only if* the base commander found "clear danger to loyalty, discipline or morale" and not simply because he did not like the content or simply because the literature was critical of government policies or officials.

The Fourth Circuit has said the military command is entitled to give favorable treatment to its designated Civilian Enterprise Newspaper over other military newspapers, but the favoritism should occur only inside barracks and officers' clubs where newspapers normally would not be distributed without a private contract.¹³³ If a military base is a non-public forum, in itself that does not prevent newspaper distribution. When newspaper distribution is compatible, expected, appropriate and complementary to the function of the non-public forum, courts recognize the First Amendment right to distribute, as we have seen in previous discussions of non-public forum places. It is the policy of the Department of Defense

¹³¹ *Flower v. U.S.*, 407 U.S. 197 (1972).

¹³² *Greer v. Spock*, 424 U.S. 828 (1976).

¹³³ *Shopco Distribution v. Commanding General*, 885 F.2d 167 (4th Circuit 1989).

that “a free flow of news and information shall be provided to all military personnel without censorship or news management.”¹³⁴ Distribution of newspapers in newsracks is compatible with the command’s purposes and not disruptive. When the government owns non-public forum property, “[t]he reasonableness of the Government’s restriction of access to a nonpublic forum must be assessed in the light of the purpose of the forum and all the surrounding circumstances.”¹³⁵

¹³⁴ 32 C.F.R. § 272.4.

¹³⁵ *Cornelius v. NAACP Legal Defense and Education Fund, Inc.*, 473 U.S. 788, 809 (1985).

Related Distribution and Business Issues

The focus of this manual is on newsracks, because they have been a critical means of newspaper distribution in the past and remain important as the newspaper business evolves. The fundamental principles of newspaper distribution apply equally, however, to newsracks, hawkers, subscriptions, or free delivery. These methods of distribution also raise related logistical issues, such as the theft of free newspapers from newsracks.

In addition, publishers distributing via newsracks often face issues in which the business and legal questions are closely related. This section of the manual addresses some related distribution and business issues.

A. Related Distribution Issues

1. Delivery of Free Newspapers

Home delivery of free newspapers is not a new phenomenon. The “Total Market Coverage” or “TMC” product was developed in the 1980’s and was given its name because the point was to deliver the project to every household, not just to subscribers. Now some publishers are delivering their primary publication product free to households.

Typically, the carrier tosses the newspaper on to or in front of the residential property without approaching the front door or stepping on to the property. There is no trespass. Sometimes, residents or neighborhoods have mounted objections to the delivery of free newspapers. Sometimes it is claimed that an accumulation of free newspapers could signal would-be burglars that a house is empty. When the Borough of Doylestown, Pennsylvania, tried to use that argument to support a law against delivery of free advertising publications, the Third Circuit in *Ad World, Inc. v. Doylestown* did not credit the argument.

The Township wishes to stop the door to door delivery of plaintiff’s Piggy Back because the paper is left visible to passers-by and because possible accumulation may tip off burglars that a given home is unoccupied. It has provided no evidence of a strong connection between accumulation of papers and the incidence of burglary.¹³⁶

The *Ad World* decision relied on a long line of cases that concerned the delivery of speech to the front door of the home. In 1943, the U.S. Supreme Court held in *Martin v. Struthers* that an ordinance forbidding all delivery of literature to any home was too broad.

The ordinance does not control anything but the distribution of literature, and in that respect it substitutes the judgment of the community for the judgment of the individual householder. It submits the distributor to criminal punishment for annoying the person on whom he calls, even though the recipient of the literature distributed is in fact glad to receive it.¹³⁷

Sometimes neighborhoods have tried using anti-littering ordinances to prevent delivery of free newspapers. In *Schneider v. State*, the U.S. Supreme Court said preventing litter could not outweigh the First Amendment right to distribute handbills. “[T]he purpose to keep the streets clean and of good appearance is insufficient to justify an ordinance which prohibits a person rightfully on a public street from handing literature to one willing to receive it.”¹³⁸ As these and other cases were applied by the Third Circuit in *Ad World*, the conclusion was that an accumulation of papers could be handled by the resident, rather than

¹³⁶ *Ad World, Inc. v. Doylestown*, 672 F.2d 1136, 1140-1141 (3d Cir. Pa. 1982).

¹³⁷ *Martin v. Struthers*, 319 U.S. 141, 143-144 (U.S. 1943).

¹³⁸ *Schneider v. State*, 308 U.S. 147, 162 (U.S. 1939).

forbidding unwanted delivery altogether. “The Supreme Court has tenaciously protected the right of a speaker to reach a potential listener and get the listener’s attention,” the appeals court said. “It does not seem onerous to impose on the potential listener some of the costs of this important freedom.”¹³⁹ A resident has the option of reading the free newspaper, tossing an unwanted delivery in the trash can, posting signs to request no delivery of free newspapers, and asking a publisher to prevail upon the carrier to stop delivery.

When legislators attempt to stop such deliveries by ordinance, they frequently discover that First Amendment principles impede their goal. The Georgia Supreme Court struck down a law in the City of Sylvania barring delivery of a free weekly newspaper because, although aimed at curtailing litter from weekly Penny-Savers, it banned even political and religious literature.

“After careful review, we conclude that the Sylvania ordinance’s restrictions on the distribution of printed materials at homes are not narrowly tailored to serve the city’s desire to protect its aesthetic beauty and prevent litter.”¹⁴⁰

Another approach has been for a municipal government to create a “do not deliver” list, and then to require the publisher to purchase the list from city hall. According to the *Los Angeles Times*, the City of Pasadena passed such a law in 1998 making it a misdemeanor to deliver to anyone who placed their name on a “refusal” list. In 2009, the Pasadena City Council suggested that a handbill refusal registry might not withstand legal challenge, and announced plans to craft a new ordinance. In the City of Alexandria, Virginia, the City Council in 2009 passed an ordinance that would penalize an independent contractor distributor if unwanted deliveries were to continue after complaints from a resident. Although most newspaper deliveries are handled by independent contractor and not by the publisher, if unreasonable deadlines are enforced, the ordinance would likely fail a court test because

the deadlines would impose an undue burden on the distribution right.

2. Door-to-Door Solicitation Ordinances

While today door-to-door solicitation occurs less frequently, eclipsed by telemarketing and direct mail, solicitors still knock at the front door of residences, seeking donations, selling goods, soliciting votes for political candidates and, to a lesser extent, selling newspaper subscriptions. As long as this has occurred, municipal governments have been trying to enact ordinances known as “Green River Ordinances,” named after the Wyoming town where the first such ordinance reportedly appeared. These ordinances originally sought to prohibit solicitors from knocking on residential front doors to sell their wares.

After initial success in *Breard v. City of Alexandria*,¹⁴¹ these ordinances often fail where they threaten to impinge upon a First Amendment right. Municipal governments relying on *Breard* will likely discover that it is no longer considered a valid decision. “Since the decision in *Breard* ... the Court has never denied protection on the ground that the speech in issue was “commercial speech,” said the Supreme Court in 1976.¹⁴² The opinion went on to say that most of the Justices believed *Breard* to be of doubtful validity. The decision, in which that commentary appeared, *Virginia State Board of Pharmacy*, gave First Amendment protection to commercial speech, finally recognizing its value in daily life:

So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.¹⁴³

¹³⁹ *Ad World, Inc. v. Doylestown*, 672 F.2d 1136, 1141 (3d Cir. 1982).
¹⁴⁰ *Statesboro Publ’g Co. v. City of Sylvania*, 271 Ga. 92, 94 (Ga. 1999).

¹⁴¹ *Breard v. Alexandria*, 341 U.S. 622 (1951).

¹⁴² *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 759 (U.S. 1976).

¹⁴³ *Id.* at 765.

In 2002, the U.S. Supreme Court reaffirmed in *Watchtower Bible & Tract Soc’y of N.Y., Inc. v. Village of Stratton*, that “for over 50 years, the Court has invalidated restrictions on door-to-door canvassing and pamphleteering.”¹⁴⁴

3. Newspaper Theft

Newspapers are sometimes stolen in bulk from newsracks. Theft of newspapers may be motivated by an effort to suppress the message or reporting contained in the editorial content, or, in the case of free newspapers, by a pecuniary interest in recycling the newsprint for a cash refund.

In 1998, a group of sheriff’s deputies in Southern Maryland decided to deprive the public of the next day’s edition of *St. Mary’s TODAY*. The weekly newspaper had let it be known that the next edition would be highly critical of a candidate for State’s Attorney, a candidate with political ties to the Sheriff. Encouraged by the Sheriff and the candidate, the deputies purchased all *St. Mary’s TODAY* newspapers they could find, both in newsracks and retail stores. They believed, apparently, the Fourth Circuit would later suggest, that by leaving behind the purchase money, they would escape prosecution by St. Mary’s County law enforcement or charges under Maryland’s Newspaper Theft Law.¹⁴⁵ Their defense, however, failed as the result of a First Amendment analysis and not because of any effort by Maryland officials to enforce the Newspaper Theft Law. A First Amendment law firm took the case as a civil rights action against the Sheriff, candidate and deputies. As the Fourth Circuit later would hold, the purchase of the newspapers was not at issue. Instead, this case centered on the publisher’s right to send a message and the reader’s right to receive it. The appeals court quoted black letter law on the right to circulate newspapers:

Liberty of circulation is as important to freedom of the press “as liberty of publishing; indeed, without the circulation, the publication would be of little value.” *Lovell v. City of Griffin*, 303 U.S. 444, 452, (1938) (quoting *Ex parte Jackson*, 96 U.S. 727, 733, (1877)).¹⁴⁶

The first task of the plaintiff’s team, however, was to prove that this was a state action, even though most or all of the participating deputies were off-duty. The link between personal or political motive and public policy was so strong; the Fourth Circuit identified several factors present for a finding of state action. The deputies’ asserted private actions were linked directly to their government jobs. Their desire to retaliate arose from the publisher’s criticism of the Sheriff’s Department and of their candidate for State’s Attorney. They were recognized as deputies when they bought the retail stores’ newspapers, making it clear, as one clerk testified, that “they could make my life here a living hell.”¹⁴⁷ The Fourth Circuit also noted that the deputies presumably could believe they could rely on the Sheriff and the candidate, one who gave them \$500 for the project, the other who was said to have given them advice, not to follow up with prosecution under the state theft law.¹⁴⁸

Ultimately, the Fourth Circuit said, this was not an action that could be tolerated in this country. “The incident in this case may have taken place in America, but it belongs to a society much different and more oppressive than our own. And we would leave particularly vulnerable this kind of paper in this kind of community. Alternative weeklies such as *St. Mary’s Today* may stir deep ire in the objects of their irreverence, but we can hardly say on that account that they play no useful part in the political dialogue.”¹⁴⁹ If the defendants believed the newspaper’s articles or editorials to be scurrilous, their remedy “was either to undertake their own response or to initiate a defamation action,” said the Court of Appeals.¹⁵⁰

¹⁴⁴ *Watchtower Bible & Tract Soc’y of N.Y., Inc. v. Village of Stratton*, 536 U.S. 150, 160 (2002). See also *Initiative & Referendum Inst. v. United States Postal Serv.*, 368 U.S. App. D.C. 50, 66 (D.C. Cir. 2005).

¹⁴⁵ Md. Code, Criminal Law § 7-106(b) (2002).

¹⁴⁶ *Rossignol v. Voorhaar*, 316 F.3d 516, 522 (4th Cir. 2003).

¹⁴⁷ *Id.* at 50.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 528.

¹⁵⁰ *Id.*

It was not for law enforcement to summon the organized force of the sheriff's office to the cause of censorship and dispatch deputies on the errands of suppression in the dead of night. If we were to sanction this conduct, we would point the way for other state officials to stifle public criticism of their policies and their performance.¹⁵¹

But similar events have happened elsewhere. In 2008, the City of Yonkers confiscated actual newsracks belonging to a free newspaper that had criticized the Mayor.¹⁵² The police chief of San Francisco ordered his officers to pick up copies of a gay newspaper that pictured him in an unflattering light.¹⁵³ A candidate for Mayor in the City of Berkeley, California, took about 1,000 copies of the *Daily Californian* just before election day in 2002 because the free student newspaper favored his opponent. He won election, but eventually was charged with an infraction and fined.¹⁵⁴ *LareDos* was removed from newsstands at the Laredo, Texas, City Hall and at the airport after it published an unattractive cartoon about Mayor Raul Salinas.¹⁵⁵

In 2004, a law review article reported that newspaper thefts were on the rise: “. . . the theft of newspapers - particularly free newspapers at colleges and universities - has grown rapidly since the early 1990s. In the first five months of 2004 alone, there were at least half-a-dozen separate incidents of newspaper theft reported across the country.”¹⁵⁶

¹⁵¹ *Id.* at 527-528.

¹⁵² *Guardian News, Inc. v. Amicone*, 2008 U.S. Dist. LEXIS 16965 (S.D.N.Y. Mar. 3, 2008).

¹⁵³ *Coming Up v. City & County of San Francisco*, 857 F. Supp. 711, 715 (N.D. Calif. 1994) (citations omitted).

¹⁵⁴ According to the Nashville, Tenn.-based First Amendment Center Online, the official was charged with an infraction for trashing the newspaper copies, pled guilty to petty theft, was fined \$100 in January 2003, and promised to propose an ordinance prohibiting theft of free newspapers. The Berkeley City Council unanimously approved the ordinance in October 2003. <http://www.firstamendmentcenter.org/news>.

¹⁵⁵ The newspaper did initiate a claim against the Mayor, but there is no citation to a court order resolving the matter.

¹⁵⁶ Clay Calvert, *All The News That's Fit To Steal: The First Amendment, A "Free" Press & A Lagging Legislative Response*, 25 Loy. L.A. Ent. L. Rev. 117 (2004-05).

Only California, Colorado, and Maryland have adopted laws against stealing newspapers, whether the newspaper is paid or free. Colorado adopted its law in 2004.¹⁵⁷ Maryland enacted its law in 1957.¹⁵⁸ In both laws, the criminal act is the intent to prevent others from reading the stolen edition of the newspaper. California enacted a newspaper theft law in 2006, making it an infraction to take more than 25 newspapers either to sell them for recycling or to prevent others from reading them.¹⁵⁹ The First Amendment Center reported that the entire run of one free newspaper was stolen for sale to Mexican recyclers.

When publishers in such cases have sought a remedy outside state law, they have had to rely on federal civil rights laws.¹⁶⁰ As in *Rossignol*,¹⁶¹ these laws can be invoked when state action threatens someone's civil rights. The prevailing party in such a case is entitled to attorney's fees. But to pursue this remedy requires a substantial initial outlay of cash and fees are not always awarded in the full amount expended.

157 Colorado Revised Statutes Section 18-4-419.

Newspaper theft

(1) A person commits the offense of newspaper theft when that person obtains or exerts unauthorized control over more than five copies of an edition of a newspaper from a newspaper distribution container owned or leased by the newspaper publisher with the intent to prevent other individuals from reading that edition of the newspaper. Control is unauthorized if there is a notice on the newspaper or on the newspaper distribution container that possession of more than five copies with intent to prevent other individuals from reading that edition of the newspaper is illegal.

158 Maryland Criminal Code Section 7-106

Newspaper theft

(a) “Newspaper” defined. — In this section, “newspaper” means a periodical that is distributed on a complimentary or compensatory basis.

(b) Prohibited. — A person may not knowingly or willfully obtain or exert control that is unauthorized over newspapers with the intent to prevent another from reading the newspapers.

(c) Penalty. — A person who violates this section is guilty of a misdemeanor and on conviction is subject to imprisonment not exceeding 60 days or a fine not exceeding \$ 500 or both.

159 California Penal Code § 490.7

(a) The Legislature finds that free newspapers provide a key source of information to the public, in many cases providing an important alternative to the news and ideas expressed in other local media sources. The Legislature further finds that the unauthorized taking of multiple copies of free newspapers, whether done to sell them to recycling centers, to injure a business competitor, to deprive others of the opportunity to read them, or for any other reason, injures the rights of readers, writers, publishers, and advertisers, and impoverishes the marketplace of ideas in California.

¹⁶⁰ See 42 U.S.C. 1982 *et seq.*

¹⁶¹ *Rossignol v. Voorhaar*, 316 F.3d 516 (4th Cir. 2003).

Finally, newsracks are sometimes the target of old fashioned vandalism. There are remedies in most states' criminal statutes, from plain criminal theft to nuisance infractions. In one instance having nothing to do with the content of the publication, one defendant stole an entire USA TODAY vending machine in Crescent City, California, to get the money inside the coin mechanism. He was initially charged with grand theft and ultimately ordered to pay to repair the machine and to refund the stolen coins.¹⁶²

B. Related Business Issues

1. Voluntary Agreements

In many cities, voluntary agreements between publishers and municipalities are in place and working. Probably the first of these was in Philadelphia, also the first major city to use post-and-rail corrals to collect newsracks into neat rows, under an ordinance that allows the Center City Business Improvement District (or any approved entity) to enter into a voluntary agreement with publishers. The relevant code provision states:

a) Publishers box corrals may be placed and maintained on the public sidewalks by any City agency or by any authority designated by the Department at locations acceptable to the Department.¹⁶³

In Washington, D.C., a publishers coalition reached a similar voluntary agreement with the city's Golden Triangle Business Improvement District ("GTBID"), long before the D.C. City Council became involved. As of this writing, the D.C. Department of Consumer and Regulatory Affairs is considering a regulation based largely on the publishers' voluntary agreement with the GTBID.

In both Washington and Philadelphia, questions inevitably arise as to how to assign the scarce corral locations. Some consideration may be given to

frequency of publication, such that dailies are given preference over weeklies and so forth. In reality, however, publications *already in place* are given top priority. As noted in the Washington, D.C., agreement:

After the above principle is followed, higher frequency of publication will take precedence over lower frequency. This reflects the short demand for the most frequent publications of only a few hours, while less frequent publications remain useful to the readers for several days and sometimes for several weeks. Giving precedence to the more frequent publisher recognizes that the reader has less time, and in the case of a daily newspaper, very little time to find the current edition.¹⁶⁴

The Washington agreement also allowed for use on a trial basis of "modular" or "condo" rack units. Unlike the post-and-rail corrals used in Philadelphia and parts of D.C., the modular or condo units may prevent publishers from fully displaying their trademarks.

In Minneapolis, publishers created a voluntary organization to oversee regular newsrack maintenance and clean-up efforts, to fend off an effort by the City Council to impose a maintenance fee of \$42.34 per newsrack. An ordinance controlling the placement, size and appearance of newsracks passed in December of 2008, and was amended in 2009 to allow the publishers' voluntary agreement time to work.¹⁶⁵ "Appearance" means "neat and clean" and "free of graffiti," which is reminiscent of language in the first newsrack case in 1977 in Los Angeles.¹⁶⁶ The Minneapolis

¹⁶⁴ VOLUNTARY AGREEMENT FOR THE DISTRIBUTION OF NEWSPAPERS ON SIDEWALKS AND OTHER PUBLIC PLACES IN THE GOLDEN TRIANGLE BUSINESS IMPROVEMENT DISTRICT, WASHINGTON, D.C. Section 3 Definitions, (b) Priorities (ii). See also *Bolinske v. North Dakota State Fair*, 522 N.W.2d 426, 433-34 (N.D. 1994) ("Although persons leasing booths have first opportunity to renew their rentals for another year, all spaces rented to new applications are on a first-come, first-serve basis.")

¹⁶⁵ See MINNEAPOLIS CODE OF ORDINANCES, Title 17, Chapter 464 Newsracks.

¹⁶⁶ *Kash Enterprises, Inc. v. City of Los Angeles*, 19 Cal.3d 294, 305 562 P.2d 1302, 1309 (Cal. 1977) ("... the term "attractive" must be interpreted in this context simply as a synonym for "neat" and "clean" and not as an independent aesthetic requirement. As so interpreted we conclude that this provision is not unconstitutional on its face.")

¹⁶² *People v. Swift*, 2006 Cal. App. Unpub. LEXIS 8801 (Cal. App. 1st Dist. 2006).

¹⁶³ Philadelphia City Code §9-211(6).

ordinance also allows for the use of corrals, approved and paid for by the City.

2. Sales taxes and newsrack license fees

There are only two basic rules regarding taxes and newspapers. Taxes that are generally applicable to businesses, such as sales and property taxes, may be imposed on newspaper publishers. When a fee is aimed at publishers in particular, however, there are a number of limitations.

Generally speaking, such a fee may be used only to generate enough funds to pay for administrative costs, not to raise revenue. A state or municipality generally may charge no more than the amount needed to cover administrative costs.¹⁶⁷ The government may not profit by imposing licensing or permit fees on the exercise of first amendment rights.¹⁶⁸ The government may not artificially inflate the fee by making the application process more costly.¹⁶⁹ Nor can a government charge a fee for improper purposes.¹⁷⁰ While publishers as a class may be (and often are) made exempt from sales taxes by state law, exemptions themselves must be applied without an unconstitutional purpose.¹⁷¹ A fee or tax should not single out one publisher or a group of publishers.¹⁷² When fees have been challenged

in court, they often have been vulnerable to showings that the fee amount is too high, overreaching, or unfounded.¹⁷³

Despite the general rule that a government may not profit by licensing the exercise of First Amendment rights, some courts have held that a government-run business may impose revenue-raising fees on newsracks. The federal district court in New York upheld a \$75.00 per newsrack fee for newsracks placed inside subway stations, at a time when the MTA was in a financial crisis.¹⁷⁴ The Eleventh Circuit allowed the City of Atlanta to charge a revenue-producing fee on newsracks so long as the fee remained “commercially reasonable” and “viewpoint neutral.”¹⁷⁵

3. Avoiding Municipal Ordinances through Good Newsrack Maintenance

Publishers who believe that newsrack single copy sales must be part of their circulation base should pay attention to their newspaper presence on the street. Any short list of practical advice for newspaper circulation executives might include the following points:

- ❖ Use well-built, easy-to-clean, weighted or bolted street-worthy equipment of a standard-height.
- ❖ Require circulation management, including vice presidents, directors and managers to visit newsrack sites frequently, checking for safety, cleanliness, maintenance, and newspaper recovery.

¹⁶⁷ See *Cox v. News Hampshire*, 312 U.S. 569 (1941).

¹⁶⁸ See *Murdock v. Pennsylvania*, 319 U.S. 105, 113-114 (1943).

¹⁶⁹ *Chicago Newspapers Publishers Assn. v. City of Wheaton*, 697 F. Supp. 1464, 1472 (N.D. Ill. 1988) (“... Wheaton is not free to enact and administer unconstitutional restrictions on speech and then charge those whose speech is restricted to pay for the time it took.”); *Eastern Conn. Citizens Action Group v. Powers*, 723 F.2d 1050, 1056 (2d Cir. 1983) (“Licensing fees used to defray administrative expenses are permissible, but only to the extent necessary for that purpose.”).

¹⁷⁰ *Central Florida Nuclear Freeze Campaign v. Walsh*, 774 F.2d 1515, 1523 (11th Cir. Fla. 1985) (“These limitations do not permit the imposition of unlimited charges for the costs of additional police protection based on the content of the speaker’s views.”)

¹⁷¹ See *Arkansas Writers’ Project, Inc. v. Ragland*, 481 U.S. 221, 230 (U.S. 1987) (“...official scrutiny of the content of publications as the basis for imposing a tax is entirely incompatible with the First Amendment’s guarantee of freedom of the press.”)

¹⁷² *Minneapolis Star & Tribune Co. v. Minn. Comm’r of Revenue*, 460 U.S. 575, 585 (U.S. 1983) (“Differential taxation of the press, then, places such a burden on the interests protected by the First Amendment that we cannot countenance such treatment unless the State asserts a counterbalancing interest of compelling importance that it cannot achieve without differential taxation.”).

¹⁷³ See, e.g., *New Times v. Arizona Board of Regents*, 519 P.2d 169 (Ariz. 1984) (\$2.00 permit fee overturned because university failed to meet burden to establish fee was reasonable or related to actual costs incurred); *Gall v. Lawler*, 322 F. Supp. 1223 (E.D. Wis. 1971) (“peddler” fee of \$100 a day invalid when applied to “underground” newspapers); *NAACP v. Chester*, 253 F.Supp. 707 (E.D. Pa. 1966) (\$25 fee for sound truck permit invalid for lack of proof of the reasonableness of fee amount).

¹⁷⁴ *Gannett Satellite Information Network, Inc. v. Metropolitan Transit Authority*, 579 F. Supp. 90 (S.D.N.Y. 1984).

¹⁷⁵ *Atlanta Journal & Constitution v. City of Atlanta Dep’t of Aviation*, 322 F.3d 1298, 1312 (11th Cir. Ga. 2003) (holding that when government acts in proprietary capacity functionally indistinguishable from private business, then commercially reasonable, profit-conscious contracts may be negotiated for distribution space in non-public forum for First Amendment activities, subject to structural protections that reduce or eliminate possibility of viewpoint discrimination).

- ❖ Repair damaged equipment as soon as feasible, removing broken equipment off the street.
- ❖ Ask your independent carrier to be aware of and attend to street trash around the newsracks.
- ❖ Remove low performance racks.
- ❖ Keep newsrack chains off of utility poles, parking meters, street signs, and other city property, by securing with weights, bolt or chains to other racks where possible.
- ❖ Cluster newsracks in small groups instead of allowing lines of newsracks to develop into barricades along the curb.
- ❖ Be sure that district sales managers work with other publishers to keep newsracks neat and in good order. A dose of good citizenship will go a long way.

VI

Conclusion

From the earliest printers and hawkers in colonial America, to the technologically sophisticated websites of today, the newspaper is essential to democracy. Newsracks remain an important means of distributing the newspaper in cities and towns nationwide. This history and purpose are the very foundation for the legal arguments and analyses that support and protect newsracks as a means to distribute the newspaper in American cities.

At the same time, the law under the First Amendment concerning newspaper distribution creates a balance between the rights of the press and the power of the government. Newspapers have significant and liberal access to “the public forum,” subject to regulation that prevents the distribution from becoming a nuisance, impedance or danger. Just as the publisher’s news room is involved with the community it covers, the circulation department also should be aware of the community it is a part of, so that the distribution process does not undercut the publisher’s ability to deliver the newspaper to its readers.



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