City of Lakewood v. Plain Dealer Publishing Co.: Saia Revisited, Can Kovacs Be Far Behind

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CITY OF LAKEWOOD v. PLAIN DEALER PUBLISHING CO.: SAIA REVISITED; CAN KOVACS BE FAR BEHIND?

I. INTRODUCTION

Forty years ago the United States Supreme Court decided two cases that explored the constitutional limits of the power of municipalities to regulate a new technology used to disseminate ideas and information to the public. The cities argued that the new technology was offensive and intrusive, and that the regulations in question were necessary to protect the public interest. They further argued that they were regulating only the instrument of communication, not the content, and that the protections of the first amendment were therefore inapplicable.

The issue in the first case, Saia v. New York, was whether a public official could be given complete discretion to grant or deny permits to use the new technology in public places. The second case, Kovacs v. Cooper, decided whether the new devices could be excluded entirely under certain circumstances. The Court held that the granting of unfettered discretion to the public official in Saia was unconstitutional, but upheld a very substantial restriction on the use of the same devices in Kovacs.

2. Kovacs, 336 U.S. at 81. In Kovacs, Justice Reed, writing for the plurality, described the situation as follows:
   The use of sound trucks and other peripatetic or stationary broadcasting devices for advertising, for religious exercises and for discussion of issues or controversies has brought forth numerous municipal ordinances. The avowed and obvious purpose of these ordinances is to prohibit or minimize such sounds on or near the streets since some citizens find the noise objectionable and to some degree an interference with the business or social activities in which they are engaged or the quiet that they would like to enjoy.
   Id.
3. Id. at 96 (Frankfurter, J., concurring). This position was supported by some members of the Saia Court. Justice Jackson, for example, said that [the majority] treats the issue only as one of free speech. To my mind this is not a free speech issue. Lockport has in no way denied or restricted the free use, even in its park, of all of the facilities for speech with which nature has endowed the appellant. It has not even interfered with his inviting an assemblage in a park space not set aside for that purpose.
   Saia, 334 U.S. at 568-69 (Jackson, J., dissenting) (footnotes omitted).
6. 334 U.S. at 561.
7. 336 U.S. at 88. The plurality held that the city could prohibit the use of "loud and raucous" sound trucks. Id. at 87. Three Justices, however, contended...
In 1948 the suspect technology was the "sound truck"—sound amplification equipment mounted on an automobile and used to broadcast messages to the public. In a 1988 case, City of Lakewood v. Plain Dealer Publishing Co., the Court decided the constitutionality of a licensing scheme for another new means of disseminating information. The device in question this time was the newsrack—a coin operated vending machine used to distribute newspapers on public streets and sidewalks.

The ordinance in question gave the mayor of Lakewood, Ohio, complete discretion to grant or deny permits for placing newsracks on public property. In a four-to-three opinion authored by Justice Brennan, the Court held that the clause granting unfettered discretion to the mayor was unconstitutional on its face. Justice White, writing for the dissent, disagreed with the majority's characterization of newsracks as being protected by the first amendment and would have allowed the ordinance to stand. Justice White argued that the discretion given to the

that the Court's interpretation of the ordinance in question was consistent with a holding that all sound trucks could be banned. Id. at 99. Kovacs is sometimes cited as upholding a total ban. For example, in City of Lakewood v. Plain Dealer Publishing Co., both the majority and the dissent stated that Kovacs involved a ban on all sound trucks. 108 S. Ct. 2138, 2148, 2158 (1988).

Commentators writing at the time of the decisions also concluded that the effect of the holding was to approve a total ban. For example, in City of Lakewood v. Plain Dealer Publishing Co., both the majority and the dissent stated that Kovacs involved a ban on all sound trucks. 108 S. Ct. 2138, 2148, 2158 (1988).

The less restrictive interpretation, following the language of the Kovacs plurality, has also survived. See, e.g., Note, Constitutionality of the Municipal Regulation of Sound Amplifying Equipment, 3 Rutgers L. Rev. 250, 265 (1949) ("While it is obvious that seven of the justices would look with disfavor upon an ordinance which openly amounted to a complete ban upon the use of all sound-amplifying equipment, the result of the Kovacs decision is to sustain just that kind of a regulation through a curious construction of the ordinance."); Comment, The First Amendment and the Sound Truck: a Problem in Municipal Regulation, 22 S. Cal. L. Rev. 416, 423 (1949) ("The Kovacs case, by allowing a complete abolition of sound devices, failed to follow the [Saia] holding to its logical conclusion.").

For additional discussion of the confusing Kovacs opinion, see infra notes 134-37 and accompanying text.

8. See Kovacs, 336 U.S. at 78; Saia, 334 U.S. at 567.
10. Newsracks, also called newsboxes or honor-boxes, are metal boxes "four feet tall, less than 1\(1/2\) feet square and weighing about 100 pounds." Brief for Appellee at 10, City of Lakewood v. Plain Dealer Publishing Co., 108 S. Ct. 2138 (1988) (No. 86-1042).
11. City of Lakewood, 108 S. Ct. at 2142. For the text of the ordinance, see infra note 61.
12. City of Lakewood, 108 S. Ct. at 2152. Chief Justice Rehnquist and Justice Kennedy did not participate. Id. For a complete discussion of the majority opinion, see infra notes 67-80 and accompanying text.
13. City of Lakewood, 108 S. Ct. at 2153. Justices O'Connor and Stevens joined in the dissent. Id. at 2152. For a complete discussion of the dissent, see infra notes 67-80 and accompanying text.
mayor did not present a constitutional problem because there is no first amendment right to place newsracks on public property. Based on the assumption that newsracks could legitimately be prohibited altogether, Justice White would have denied the facial challenge of this regulation, which was less sweeping than a complete ban.

The case was a narrow victory for newspapers. But what will happen next? Given the proliferation of newsrack-related cases, it appears that the question of a complete ban or other substantial restriction could come before the Court in the near future. If it does, proponents of such restrictions may find encouragement in the precedent purportedly set by Kovacs and the hostility toward newsracks displayed by the minority in City of Lakewood.

This Note will examine what the City of Lakewood decision will mean.

15. Id. at 2152-55 (White, J., dissenting).
16. This is not the first case of this type to be brought into court, nor is it likely to be the last. Newsrack cases have been proliferating over the past 15 years in both state and federal courts. For a complete discussion of newsrack cases through 1984, see Ball, Extra! Extra! Read All About It: First Amendment Problems in the Regulation of Coin-Operated Newspaper Vending Machines, 19 COLUM. J.L. & SOC. PROBS. 183 (1985) (cited in City of Lakewood, 108 S. Ct. at 2157 n.7); see also Providence Journal Co. v. City of Newport, 665 F. Supp. 107 (D.R.I. 1987) (newspapers challenged ordinance which banned newsracks on public right-of-way); News Printing Co. v. Totowa, 211 N.J. Super. 121, 511 A.2d 139 (1986) (newspaper publisher challenged constitutionality of city ordinance regulating newsracks on city sidewalks); City of New York v. American School Publications, 69 N.Y.2d 576, 509 N.E.2d 311, 516 N.Y.S.2d 616 (1987) (city brought action seeking removal from city sidewalks of bins for distribution of free publication); Burlington v. New York Times, 148 Vt. 275, 532 A.2d 562 (1987) (city brought action to collect five dollar per-week fee for placement of newsracks on city sidewalks).


Amicus briefs filed by law enforcement and public administration associations in support of the Lakewood ordinance indicate that the regulation of newspaper vending boxes is a subject of great interest among city managers. See Brief of the National Institute of Municipal Law Officers as Amicus Curiae, City of Lakewood v. Plain Dealer Publishing Co., 108 S. Ct. 2138 (1988) (No. 86-1042); Brief of the National League of Cities, the Council of State Governments, the United States Conference of Mayors, the International City Management Association and the National Association of Counties as Amici Curiae, City of Lakewood v. Plain Dealer Publishing Co., 108 S. Ct. 2138 (1988) (No. 86-1042).

17. As previously noted, Kovacs is cited as holding that a complete ban on a means of disseminating information may be constitutional. For a discussion of whether this was the holding intended by the Kovacs Court, see supra note 7 and infra notes 134-37 and accompanying text.
to newspapers and to cities seeking to regulate the placement of newsracks. The development of the *Saia-Kovacs-City of Lakewood* line of cases will be traced in anticipation of a newsrack case considering the constitutionality of a total ban on newsracks. 18 This Note will illustrate that a total ban on newsracks would be unconstitutional and unwise, but that newspaper publishers can expect to encounter a wide range of constitutional regulations that are almost as troublesome as a complete ban. 19

II. BACKGROUND

A. Freedom of the Press

Historically, newspapers have enjoyed broad protection from governmental interference under the first amendment, which prohibits abridgement of the freedom of the press. 20 Moreover, it is well settled first amendment doctrine that freedom of the press also encompasses the publication and circulation of newspapers. 21 The publication of newspapers may not be subjected to potentially discriminatory regulation. For example, the government may not levy taxes that impose a special burden upon newspapers. 22 At the same time, public streets and

18. For a discussion of *Saia* and *Kovacs*, see supra notes 2-8 and infra notes 134-37 and accompanying text. For a discussion of the *City of Lakewood* opinions, see infra notes 67-119 and accompanying text.

19. For a discussion of the constitutionality of newsrack ordinances, see infra notes 67-119 and accompanying text describing the *City of Lakewood* opinions.

20. U.S. CONST. amend. I. The first amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." *Id.*

21. *See*, e.g., *Lovell v. City of Griffin*, 303 U.S. 444 (1938). In *Lovell* the Court stated that an "ordinance cannot be saved because it relates to distribution and not to publication. 'Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value.'" *Id.* at 452 (quoting *Ex parte Jackson*, 96 U.S. 727, 733 (1878)).

*Lovell* was one of a group of "leafletting" cases decided in the late 1930's. *See*, e.g., *Schneider v. State*, 308 U.S. 147 (1939) (ordinances prohibiting distribution of literature on public streets and sidewalks held unconstitutional). *Lovell* involved the criminal conviction of a Jehovah's Witness who was arrested for distributing literature without a permit from the city manager as required by a municipal ordinance. *Lovell*, 303 U.S. at 447. The ordinance, which completely prohibited the distribution of any kind of literature without a permit, was struck down by the Court. *Id.* at 451. The Court speculated that the ordinance could have been used to prohibit the distribution of newspapers. *Id.* at 450.

22. *See*, e.g., *Grosjean v. American Press Co.*, 297 U.S. 233 (1936). In *Grosjean*, the Court invalidated a tax on advertising receipts that applied only to advertisements appearing in newspapers with a weekly circulation of greater than 20,000 copies. *Id.* at 251. *Grosjean* focused on censorship, since 12 of the 13 newspapers affected by the statute were also the only 12 newspapers (out of 163 in the state) that had published articles in opposition to the political party then in control of the state government. *Id.* at 238.

In *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460
sidewalks, where newspaper distribution has traditionally taken place, have been regarded as the epitome of the public forum within which the free exchange of ideas and information receives the greatest protection under the free speech clause of the first amendment.\(^\text{23}\)

\textbf{B. The Public Forum}

The roots of the conflict in \textit{Saia, Kovacs} and \textit{City of Lakewood}\(^\text{24}\) can be traced back to the 1897 case of \textit{Davis v. Massachusetts},\(^\text{25}\) in which the Supreme Court expressed agreement with the lower court that “[f]or the legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house.”\(^\text{26}\)

U.S. 575 (1983), the Court struck down a tax levied upon the cost of ink and paper in excess of $100,000 worth used per year. There was no evidence of censorship, but the tax was held invalid because it singled out the press for special treatment. \textit{Id.} at 581.

23. \textit{See}, e.g., \textit{Hague v. Committee for Indus. Org.}, 307 U.S. 496 (1939). In \textit{Hague}, the Court invalidated a city ordinance which required a permit from the Director of Safety of Jersey City, New Jersey, before holding a public assembly in the streets and parks of the city. \textit{Id.} at 501-02. The ordinance gave the official the power to deny a permit for an assembly, but only for the purpose of preventing riots or disturbances. \textit{Id.} at 502 n.1. Another ordinance, also invalidated, made it an offense to “distribute or cause to be distributed or strewn about any street or public place any newspapers, paper, periodical, book, magazine, circular, card or pamphlet.” \textit{Id.} at 501. The suit was brought after the C.I.O. and other labor organizers were frustrated in their attempts to inform the Jersey City workers of their rights under the federal labor laws through informational meetings and pamphlets. \textit{Id.} at 501-02. The Court held that the ordinances, although ostensibly enacted to avoid rioting and littering, unconstitutionally suppressed the rights of assemblage and free speech. \textit{Id.} at 517-18.

24. For the facts and holding of \textit{City of Lakewood}, see infra notes 57-80 and accompanying text.

25. 167 U.S. 43 (1897).

26. \textit{Id.} at 47 (citations omitted) (affirming and quoting \textit{Commonwealth v. Davis}, 162 Mass. 510, 511, 39 N.E. 113, 113 (1895)). The Massachusetts Supreme Judicial Court, in an opinion written by Justice (then Judge) Holmes, upheld the criminal conviction of an individual arrested for preaching on Boston Common without a permit from the mayor. \textit{Davis}, 162 Mass. at 510-12, 39 N.E. at 113. The ordinance in question required a permit before any person could make a public address. \textit{Id.} at 510, 39 N.E. at 113. The court rejected Davis’ constitutional challenge saying that his argument “assume[d] that the ordinance [was] directed against free speech generally, . . . whereas in fact it [was] directed toward the modes in which Boston Common may be used.” \textit{Id.} at 511, 39 N.E. at 113 (citation omitted). The Supreme Court affirmed. \textit{Davis}, 167 U.S. at 48.

It appears, from our modern viewpoint as colored by subsequent decisions, that both the Massachusetts and United States Supreme Courts may have missed the point of Mr. Davis’ constitutional argument. The courts began with the assumption that the common was “absolutely under the control of the [state] legislature, which, in the exercise of its discretion, could limit the use to the extent deemed by it advisable.” \textit{Davis}, 167 U.S. at 46. As the Massachusetts court stated in its opinion: “There is no evidence before us to show that the power of the Legislature over the Common is less than its power over any other park
The Court modified its position forty-four years later in *Hague v. Committee for Industrial Organization*, when Justice Roberts stated:

Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.

These two approaches to the control of public property have been the foundation of the debate that continues today. On one side are those who believe that the government, as the representative of the public, has the right to exercise dominion over public property in the same manner that individuals may control their own private property. On the other side are those who believe that the public has the right to use public property in the manner that they choose, to the extent only which the law permits.

Dedicated to the use of the public, or over public streets the legal title to which is in a city or town." 162 Mass. at 511, 39 N.E. at 113. The only question considered by both courts was whether the Boston municipal ordinance was a valid delegation of this presumed power of the legislature. Id. at 511-12, 39 N.E. at 113, 167 U.S. at 46-48. The courts never seriously considered the possibility that Mr. Davis had a right to preach in the park. The Supreme Court flatly rejected Davis' argument that the ordinance was "void because it is arbitrary and unreasonable in that it vests in the mayor the power to determine when he will grant a permit." 167 U.S. at 48. The Court stated that "[t]he right to absolutely exclude all right to use, necessarily includes the authority to determine under what circumstances such use may be availed of, as the greater power contains the lesser." Id.

Davis had argued that "Boston Common is the property of the inhabitants of the city of Boston, and dedicated to the use of the people of that city and the public in many ways ..." Id. at 46. However, the Court insisted that Davis did not have "any particular right to use the common apart from the general enjoyment which he was entitled, as a citizen, to avail of along with others and to the extent only which the law permitted." Id. (emphasis added).


28. Id. at 515-16. The *Hague* Court distinguished *Davis* on the ground that the *Davis* ordinance regulated other activities in addition to speech. Id. at 515. A dissent in *Hague* disagreed, saying that "the challenged ordinance is not void on its face; ... in principle it does not differ from the Boston ordinance ..." Id. at 533 (Butler, J., dissenting).


30. For example, the traditional rights of an owner of private property include the right of ejectment. See generally R. CUNNINGHAM, W. STOEBUCK & D. WHITMAN, THE LAW OF PROPERTY § 7.1, at 411 (1984) (right to exclude others is the most nearly absolute of property rights).

It has been asserted that this right also pertains to the government as the owner of public property. For example, in *Adderley v. Florida*, 385 U.S. 39
the other side are those who regard the government’s powers to regulate the use of public places as subordinate to the citizens’ right to make use of them. This later viewpoint has its roots in *Hague* but was greatly expanded in the leafletting cases of the 1930’s and again in the civil rights cases of the 1960’s.

The analytical approach to resolving this conflict was restructured by the Court in *Perry Education Association v. Perry Local Educators’ Association*. Justice White, writing for the majority in *Perry*, examined the question of a right of access and formulated an approach to public forum cases that depends upon the nature of the property in question.

(1966) (cited in *City of Lakewood*, 108 S. Ct. at 2156 (White, J., dissenting)), the Court stated that “the State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.” *Adderley*, 385 U.S. at 47. In *Adderley*, the Court considered the appeal of civil rights demonstrators arrested for trespassing when they conducted a protest on the grounds of a racially segregated county jail. *Id.* at 40. The dissent acknowledged:

There may be some public places which are so clearly committed to other purposes that their use for the airing of grievances is anomalous. . . . But this is quite different from saying that all public places are off limits to people with grievances. . . . And it is farther yet from saying that the ‘custodian’ of the public property in his discretion can decide when public places shall be used for . . . communication. . . . For to place such discretion in any public official. . . . is to place those who assert their First Amendment rights at his mercy.

*Id.* at 54 (Douglas, J., dissenting) (citations omitted).

An interesting variation on the subject of private versus public property arises where the title to the property is in private hands but the property is nonetheless a public forum. See, e.g., PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980) (shopping center owner must allow individuals to engage in free speech); see also L. Tribe, AMERICAN CONSTITUTIONAL LAW § 12-25 (2d ed. 1988) (some privately owned property is public forum by the very design of owner).

31. For a discussion of *Hague*, see supra note 23.


34. 460 U.S. 37 (1983). In *Perry*, the Court considered whether a board of education could allow one teachers’ union access to the school’s internal mail system while denying such access to another rival union. *Id.* at 39. The aggrieved union contended that the policy was a violation of the first and fourteenth amendments. *Id.* The Court disagreed and upheld the school board’s policy. *Id.* at 55.

35. *Id.* at 44. “The existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differ depending on the character of the property at issue.” *Id.* The dissent disagreed with this approach, arguing instead that the case does not involve an ‘absolute access’ claim. It involves an ‘equal access’ claim. As such it does not turn on whether the internal school mail system is a ‘public forum.’ In focusing on the public forum issue, the Court disregards the first amendment’s central proscription against censorship, in the form of viewpoint discrimination, in any forum, public or nonpublic.

*Id.* at 57 (Brennan, J., dissenting).
The result of *Perry* is that subsequent cases have turned on the characterization of the particular forum according to the three *Perry* categories of: 1) "traditional public forums;" 2) "property which the State has opened for use by the public as a place for expressive activity;" and 3) "property which is not by tradition or designation a forum for public communication."

This new analytical framework was intended to provide a context in which to more effectively balance competing interests. Consideration is given to the intended uses of the property, the needs of persons seeking access to the property for expressive activity and the needs of other users of the property.

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37. *Perry*, 460 U.S. at 45. Within such forums the "rights of the State to limit expressive activity are sharply circumscribed. . . . In these quintessential public forums, the government may not prohibit all communicative activity." *Id.* Content-based exclusions must be justified by showing a compelling state interest and that the regulation is narrowly drawn to serve that interest. *Id.* In addition, "[t]he State may . . . enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *Id.* (citations omitted).

38. *Id.* Within such forums, the same standards apply as in a traditional public forum, but only so long as the state chooses to maintain the public character of the forum. *Id.* at 46.

39. *Id.* In such nonpublic forums, "[i]n addition to time, place, and manner regulations, the State may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Id.*

40. In recent years, however, critics have argued that the *Perry* labels have been used in place of the requisite balancing of interests rather than as a contextual framework. For a persuasive presentation of this argument, see *Dienes, The Trashing of the Public Forum: Problems in First Amendment Analysis*, 55 GEO. WASH. L. REV. 109, 118-21 (1986).

41. As Justice Blackmun has explained: [T]he fact that the Government 'owns' the property to which a citizen seeks access for expressive activity does not dispose of the First Amendment claim; it requires that we balance the First Amendment interests of those who seek access for expressive activity against the interests of the other users of the property and the interests served by reserving the property for its intended uses. *Cornelius v. NAACP Legal Defense & Educ. Fund*, Inc., 473 U.S. 788, 822 (1985) (Blackmun, J., dissenting).
C. Balancing the Interests

The protection afforded to communicative activities on public streets and sidewalks is not without limits. Throughout the twentieth century, particularly during times of social turmoil, the Court has been called upon to resolve questions of how much control the government may exercise over speech in the public forum. The method developed by the Court to analyze and resolve such conflicts is essentially a balancing test that measures the rights of citizens to engage in free speech against the rights of the government to maintain order and safety in public places.

A fundamental principle of this balancing is that the government may "enforce regulations of the time, place and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." Any governmental interference based upon the content of the speech is subjected to a higher standard of review and will be upheld only if the activity is within certain categories that have been excluded from first amendment protection.

At the same time, if the regulation is overbroad and interferes more than necessary with the free exercise of first amendment rights, it may be unconstitutional on its face and thus unenforceable. Courts are


44. Id. at 45.


46. See Board of Airport Commissioners v. Jews for Jesus, Inc., 107 S. Ct. 2568 (1987). A resolution directed the Los Angeles City Attorney to institute legal action against any individual who "engages in First Amendment activities" in the Los Angeles International Airport terminal. Id. at 2570. An individual who was distributing religious literature within the terminal was warned by a security officer that the city would take action against him if he did not leave. Id. Although no action was taken by the city, the individual and the religious organization filed a facial challenge to the ordinance. Id. The Court held that the resolution was substantially overbroad and invalid on its face. Id. at 2573.

Facial challenges arise more often when an individual has been prosecuted under the authority of an unconstitutional statute. See, e.g., Shuttlesworth v. City
particularly wary of statutes that result in prior restraint\(^47\) of protected activities, especially when that restraint is exerted by a public official exercising discretion granted to him by statute.\(^48\)

**D. The Problem of Discretion**

The question of how much discretion can constitutionally be vested in a governmental official who applies ordinances regulating speech-re-

of Birmingham, 394 U.S. 147 (1969). “[O]ur decisions have made clear that a person faced with such an unconstitutional licensing law may ignore it and engage with impunity in the exercise of the right of free expression for which the law purports to require a license.” \(\text{Id. at 151}\). Shuttlesworth overturned the criminal conviction of a civil rights protester who was sentenced to 90 days imprisonment at hard labor and an additional 48 days at hard labor in default of payment of a $75 fine and $24 costs for having failed to obtain a permit before participating in a peaceful protest march. \(\text{Id. at 150}\). The protestors were stopped by the Birmingham police after having walked only four blocks and were charged with violating a municipal ordinance that prohibited parades, processions (other than funeral processions) or any other public demonstrations without a permit from the city commission. \(\text{Id. at 149-50}\). The commission was empowered to deny the permit only if the public health, safety or welfare so required. \(\text{Id.}\). The Court found that the ordinance “clearly gave the City Commission extensive authority to issue or refuse to issue parade permits on the basis of broad criteria entirely unrelated to legitimate municipal regulation of the public streets and sidewalks,” and was, therefore, unconstitutional. \(\text{Id. at 153}\).

\(47\). Prior restraint may consist of inhibitory conduct that occurs either before publication or before a determination that the expression is or is not protected by the first amendment. See L. Tribe, supra note 30, § 12-34. Professor Tribe has stated:

In some cases the primary concern is that any restraint before dissemination, however temporary, allows the government to destroy the immediacy of the intended speech, overriding the individual’s choice of a persuasive moment or an editor’s decision of what is newsworthy; dissemination delayed may prove tantamount to dissemination denied. In other cases the primary concern is that any system of censorship insufficiently constrained by the safeguards of the judicial process is apt to overreach; censors uncontrolled by courts tend to deny publication to material protected by the first amendment. \(\text{Id. at 1042}\).

For an example of a prior restraint case, see Near v. Minnesota, 283 U.S. 697 (1931). In Near, the Court struck down a state statute that authorized the state to bring action against anyone who produced an “obscene, lewd and lascivious,” or “malicious, scandalous and defamatory” publication. \(\text{Id. at 702}\). For a lively description of the events leading to the passage of the statute and of the ensuing court battle, including the pertinent extra-judicial gossip and bloodshed, see F. Friendly, Minnesota Rag: The Dramatic Story of the Landmark Supreme Court Case that Gave New Meaning to Freedom of the Press (1981).

\(48\). See, e.g., Freedman v. Maryland, 380 U.S. 51 (1965). Although it is within the power of the state to restrict obscenity, the Court in Freedman found that a statute requiring a movie theater owner to submit all films to a board of censors before showing them constituted an improper prior restraint. \(\text{Id. at 57}\). The statute was especially problematic because the ruling of the board of censors could not be quickly and effectively appealed. \(\text{Id. at 55}\).
lated activities arises often in first amendment cases. The fear is that officials can inject their own potentially discriminatory values into a regulatory scheme that does not include adequate administrative guidelines for its implementation. This gives the official the opportunity to engage in censorship in an indirect but effective manner. By simply denying a permit to engage in a protected activity, or by exercising the power to prosecute alleged violations of an ordinance, the official can suppress speech with which he or she does not agree.

Some statutes are more obviously prone to discriminatory abuse than others. Nevertheless, the Court has been consistent in demanding that statutes be written in a way that minimizes such abuse, particularly where a permit must be obtained before engaging in a protected activity or where the ordinance contains no explicit standards for judi-

49. For a general discussion of this topic, see L. Tribe, supra note 30, § 12-38.

50. Professor Tribe has stated:

Statutes which open-endedly delegate to administering officials the power to decide how and when sanctions are applied or licenses issued are overbroad because they grant such officials the power to discriminate—to achieve indirectly through selective enforcement a censorship of communicative content that is clearly unconstitutional when achieved directly.

Id. at 1056.

51. A particularly compelling example of such abuse is found in Niemotko v. Maryland, 340 U.S. 268 (1951). In Niemotko, the Court reversed a disturbance of the peace conviction of a Jehovah's Witness who had conducted a religious meeting in a public park without a permit. Id. at 269. There was no ordinance requiring a permit, but it had been the custom for organizations to seek permits from the park commissioner. Id. When the appellants approached the city council, the council interrogated them concerning their religious beliefs. Id. "The only questions asked of the Witnesses at the hearing pertained to their alleged refusal to salute the flag, their views on the Bible, and other issues irrelevant to unencumbered use of the public parks," and the permit was refused. Id. at 272. The Court explained that "[t]he right to equal protection of the laws, in the exercise of those freedoms of speech and religion protected by the First and Fourteenth Amendments, has a firmer foundation than the whims or personal opinions of a local governing body." Id.

In another example, Largent v. Texas, 318 U.S. 418 (1943), the Court considered the validity of an ordinance that required a permit before any person could solicit, sell, or canvass door-to-door. The permit application required the applicant to list the nature of the solicitation, sale or door-to-door canvass. Id. at 419 n.1. The permit would be granted "if after investigation the Mayor deemed it proper and advisable." Id.

Likewise, in Cantwell v. Connecticut, 310 U.S. 296 (1940), a statute required a permit in order to solicit for any religious or charitable cause. Id. at 301-02. The permit would be granted only after the official made a determination that such cause either was religious or was a valid charitable or philanthropic cause which conformed to standards of efficiency and integrity. Id. at 302; see also Staub v. City of Baxley, 355 U.S. 313, 315 n.1 (1958) (ordinance unconstitutional that required permit to engage in union organizing activities where mayor could deny permit based upon character of the applicant or organization).
cial review of the administration of the ordinance. A valuable weapon against these kinds of statutes has been the facial challenge. The Court has, in first amendment cases, allowed parties to challenge licensing schemes whether or not they have attempted to obtain a permit. Consequently, parties need not risk prosecution under an unconstitutional statute in order to challenge it.

E. City of Lakewood

City of Lakewood provides an updated illustration of the competing analyses of questions of speech in the public forum. The majority's analysis focused on the constitutional limitations of the discretion granted to public officials and the threat of content-based discrimination.

The dissent, in contrast, approached the issue by first determining that newspaper publishers have no constitutional right to place newsracks on city property and that the placement of newsracks is therefore entirely without first amendment protection. Following this approach, the question of the mayor's discretion was avoided and the city's safety and traffic concerns easily outweighed the newspaper's concerns, which the dissent characterized as purely pecuniary.

This case is important because it applies the law of facial challenges, particularly concerning official discretion and the threat of prior restraint, to a relatively new technology used for the dissemination of information. The consideration of public forum concepts and permissible bounds of governmental regulation as applied to this technology lays important groundwork for future cases involving newsracks and other means of distributing newspapers.

52. For a discussion of prior restraint, see supra notes 47-48 and accompanying text.


55. Id. at 2153 (White, J., dissenting).

56. Id. at 2156-57 (White, J., dissenting). Justice White contended:

To . . . create a First Amendment right of publishers to take city property to erect newsboxes, would ignore the significant governmental interests of cities . . . that are threatened by newsrack placements. Id. (White, J., dissenting). The dissent stated that newsracks present safety and aesthetic hazards because they are discordant with urban centers and commercial districts and because they contribute to accidents and injuries. Id. at 2157-58.
III. DISCUSSION

A. The Facts

City of Lakewood arose when the Cleveland Plain Dealer sought to deploy newsracks in both commercial and residential areas of a suburb of Cleveland, Ohio, on public property.\(^{57}\) The city refused to allow the newspaper to set up the boxes, based on a city ordinance prohibiting private structures on public property.\(^{58}\) The newspaper sought a declaratory judgment and injunctive relief in the federal district court.\(^{59}\) The court declared the statute unconstitutional but delayed the issuance of a permanent injunction to allow the city to amend the ordinance.\(^{60}\) The city responded by enacting two new ordinances, only one of which is within the scope of this Note.\(^{61}\) The newspaper objected to the new-

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57. Id. at 2141. The brief filed by the Plain Dealer described the parties as follows:

The Plain Dealer publishes a major metropolitan daily newspaper called The Plain Dealer, which has the largest circulation of any newspaper in Ohio. The Plain Dealer is published in Cleveland, Ohio and its primary circulation area includes the City of Lakewood. The City of Lakewood encompasses an urban industrial, commercial, and older residential area sharing part of the northwestern border of the City of Cleveland. Several of Cleveland's main western thoroughfares continue through Lakewood. About 60,000 people live within Lakewood’s 5 1/2 square miles, and thousands more travel through Lakewood each day on their way to and from downtown Cleveland. Stores, offices, and other commercial establishments line Detroit and Madison avenues, two of Lakewood’s main thoroughfares. Older homes and apartment buildings share other thoroughfares with municipal buildings, school buildings and even some small motels.


59. 108 S. Ct. at 2141.

60. Id.

61. The other ordinance regulated the design and placement of all structures other than newsracks. Id. at 2142 (citing Lakewood, Ohio, Codified Ordinances § 901.18 (1984)).

The full text of the newsrack ordinance is reproduced in the court of appeals opinion. See Plain Dealer Publishing Co. v. City of Lakewood, 794 F.2d 1139, 1141 n.1 (6th Cir. 1986), aff'd in part, 108 S. Ct. 2138 (1988). For the purposes of this discussion, the following portions of the ordinance are pertinent:

901.181 NEWSPAPER DISPENSING DEVICES; PERMIT AND APPLICATION

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

The Mayor shall either deny the application, stating the reasons for such denial or grant said permit subject to the following terms:
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The design of [newsracks] shall be subject to approval by the Architectural Board of Review.

(a) Newspaper dispensing devices shall not be placed in the residential use districts of the City . . . .

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

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

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

(c) A person aggrieved by a decision of the Mayor in refusing to grant or revoking a rental permit shall have the right to appeal to Council. . . .


62. 108 S. Ct. at 2142.

63. Id.

64. Id.

65. Plain Dealer Publishing, 794 F.2d at 1147-48. Consequently, when the city appealed the court of appeals decision, the total residential area ban section was no longer an issue and was not considered by the Supreme Court.

66. City of Lakewood, 108 S. Ct. at 2143. The case was argued on November 4, 1987 with only seven Justices participating, and decided on June 17, 1988. Id. at 2138.

67. Id. at 2143. For a discussion of facial challenges, see supra notes 46-53 and accompanying text.
The first task of the City of Lakewood Court was to assess whether the Lakewood ordinance was such a regulation. The majority found the facial challenge appropriate whereas the dissent would have denied it. The primary source of disagreement was the characterization of the activity in question. The majority asserted that the regulation of newsracks constitutes regulation of newspaper circulation—an activity traditionally protected by the first amendment and therefore within the scope of a facial challenge. The dissent vehemently disagreed, distinguishing the placement of newsracks on public property from the licensing of newspaper circulation.

Once the facial challenge was granted, the next step for the Court was to consider whether the ordinance did, in fact, pose the threats of censorship alleged by the newspaper—namely that the discretion granted to the mayor posed a risk of self-censorship and that the lack of explicit standards made the mayor's decision effectively unreviewable. The majority's consideration of the merits concluded that these threats of censorship were present in the Lakewood ordinance. The dissent, however, contended that cities could ban newsracks entirely since they deserve no first amendment protection and, therefore, any less restrictive regulation is facially constitutional. Consequently, the dissent considered only whether the Lakewood ordinance was unconstitutional as applied. Since the newspaper had not sought permits under the ordinance, the dissent found no evidence that the ordinance had been unconstitutionally applied, and also found that the city's interests in maintaining safe and attractive streets and sidewalks justified the inconvenience to the newspaper.

Having found the section granting the mayor's discretion to be unconstitutional, the majority had no need to consider the ordinance further and did not discuss the peripheral requirements of indemnity and the approval of the architectural review board. The dissent considered all of the provisions of the ordinance and found them all.

68. City of Lakewood, 108 S. Ct. at 2145.
69. If the facial challenge had been found to be inappropriate, the case would have been dismissed with no consideration of the merits. To challenge the ordinance, the newspaper would have had to wait until it had applied for and been denied a permit.
70. 108 S. Ct. at 2143.
71. Id. at 2153 (White, J., dissenting).
72. Id. at 2149.
73. Id. at 2153 (White, J., dissenting).
74. Id. at 2150.
75. Id. at 2150-52.
76. Id. at 2153 (White, J., dissenting).
77. Id. at 2161-63 (White, J., dissenting).
78. Id. at 2162 (White, J., dissenting).
79. Id. at 2152.
C. Facial Challenge

Since the newspaper had not yet applied for any permits under the ordinance and had not placed any newsracks in violation of the ordinance, the facial challenge was essential to the newspaper’s case. The majority held that the facial challenge was appropriate. The cases cited by the majority as precedent for this holding describe two rationales for the granting of facial challenges.

First, statutes that purport to license speech may be attacked facially because the threat of being denied a license or prosecuted for failing to procure one may cause the speaker to engage in self-censorship. Self-censorship amounts to prior restraint on expression—a result traditionally regarded as more evil than prosecution for speech already uttered. The second rationale involves licensing schemes that contain no neutral standards by which to evaluate the licensor’s actions. Such ordinances may be facially challenged because an “as-applied” challenge based on absent or ethereal standards would be doomed to failure. It is an essential component of both types of facial challenge that the regulation in question have “a close enough nexus to expression, or to conduct commonly associated with expression, to pose a real and substantial threat of the identified censorship risks.”

The majority in City of Lakewood found two indications that the ordi-

80. Id. at 2164-66 (White, J., dissenting).
81. Id. at 2143.
108 S. Ct. at 2143-44. For the facts and holding of Shuttlesworth, see supra note 46. For the facts and holding of Freedman, see supra note 48. For the facts and holding of Staub, see supra note 51. For the facts and holding of Niemotko, see supra note 51. For the facts and holding of Lovell, see supra note 21. For a discussion of Saia, see supra notes 3-6 and accompanying text.
83. 108 S. Ct. at 2143-46.
84. Id. at 2144. The Court gave the example of “a newspaper that relies to a substantial degree on single issue sales feeling significant pressure to endorse the incumbent Mayor in an upcoming election, or to refrain from criticizing him, in order to receive a favorable and speedy disposition on its permit application.”
85. Id. The Court stated:
Standards provide the guideposts that check the licensor and allow courts quickly and easily to determine whether the licensor is discriminating against disfavored speech. Without these guideposts, post hoc rationalizations by the licensing official and the use of shifting or illegitimate criteria are far too easy, making it difficult for courts to determine in any particular case whether the licensor is permitting favorable, and suppressing unfavorable expression.
86. Id. at 2145. This sentence was the focus of much criticism by the dis-
nance was subject to a facial challenge. First, the newsrack permits were specifically directed at a protected activity—the circulation of newspapers. Second, the requirement that permits be renewed annually provided the mayor with an opportunity to make content-based evaluations of each newsrack. This convinced the Court that a facial challenge of the ordinance was necessary to examine whether the ordinance contained neutral criteria by which to review the mayor’s administration of the regulation.

The dissent accused the majority of expanding the usual rules of facial challenges to encompass an activity not protected by the first amendment. Justice White would have denied the facial challenge because he saw the ordinance as affecting “the placement of newsracks on city property . . . (as opposed to the circulation of newspapers as a general matter).” Justice White also attacked the majority’s “nexus to expression.” For further discussion of the phrase “nexus to expression,” see infra notes 87-88 and 91-93 and accompanying text.

It is submitted that Justice Brennan had no doubt that the Lakewood ordinance was directed at the circulation of newspapers and that the phrase “nexus to expression,” which was criticized by the dissent as an expansion of prior doctrine, was not intended to describe anything less closely connected to expression. No expansion of the facial challenge doctrine was necessary for the majority’s holding and need not be inferred from the phrase “nexus to expression.” For further discussion of the dissent, see infra notes 91-93 and accompanying text.

87. 108 S. Ct. at 2145. Justice Brennan made it very clear that he regarded this ordinance as one directed at the circulation of newspapers saying: “[T]he licensing system at issue here is . . . directed narrowly and specifically at expression or conduct commonly associated with expression: the circulation of newspapers . . . [T]he actual ‘activity’ here is the circulation of newspapers, which is constitutionally protected.” Id. at 2145, 2149.

88. 108 S. Ct. at 2145. The Court explained that “when such a system is applied to speech, or to conduct commonly associated with speech, the licensor does not necessarily view the text of the words about to be spoken, but can measure their probable content or viewpoint by speech already uttered.” Id.

89. Id. As Justice Brennan explained:

Because of these features in the regulatory system at issue here, we think that a facial challenge is appropriate, and that standards controlling the Mayor’s discretion must be required. Of course, the City may require periodic licensing, and may even have special licensing procedures for conduct commonly associated with expression; but the Constitution requires that the City establish neutral criteria to ensure that the licensing decision is not based on the content or viewpoint of the speech being considered.

90. Id. at 2152-53 (White, J., dissenting).

91. Id. at 2153 (White, J., dissenting). Justice White vigorously resisted the majority’s characterization:

[T]he Court asserts that I do not understand the nature of the conduct at issue here. It is asserted that “[t]he actual ‘activity’ at issue here is the circulation of newspapers, which is constitutionally protected.” But of course, this is wrong. Lakewood does not, by its ordinance, seek to license the circulation of newspapers within the city. In fact, the Lakewood ordinance does not even require licenses of all newsracks within...
pression” description as “amorphous”92 and as a “newly crafted rule”93 since he could not accept the contention that newspaper circulation was affected by the ordinance. The majority was highly critical of Justice White’s viewpoint, warning that this analysis made it possible to “define away a host of activities commonly considered to be protected.”94

D. The Merits

The majority, in considering the merits of the case, reiterated its concern with the unbridled discretion vested in the mayor to grant or deny permits.95 Examining the ordinance, the majority observed that it contained “no explicit limits on the Mayor’s discretion.”96

The city had argued that the mayor could be expected to act in good faith and deny permits only for legitimate reasons related to the public health, safety and welfare,97 but the Court was unconvinced, saying that any limits on the mayor’s discretion had to be explicitly written into the ordinance in order to pass constitutional muster.98

the jurisdiction—the many newsracks located within Lakewood on private property are not included within the scope of the city’s ordinance. Thus, it is the majority . . . that is guilty of “recharacterizing” the activity that Lakewood licenses. The Lakewood ordinance must be considered for what it is: a license requirement for newsracks on city property.

Id. at 2159-60 (White, J., dissenting).

92. Id. at 2155 (White, J., dissenting).
93. Id. at 2161 (White, J., dissenting). For a discussion of Justice Brennan’s intention in coining the phrase “nexus to expression,” see supra note 87.
94. 108 S. Ct. at 2150. Justice Brennan gave the following examples: The right to demonstrate becomes the right to demonstrate at noise levels proscribed by law; the right to parade becomes the right to parade anywhere in the city 24 hours a day; and the right to circulate newspapers becomes the right to circulate newspapers by way of newsracks placed on public property.

Id.
95. Id.
96. Id. “Indeed, nothing in the law as written requires the Mayor to do more than make the statement ‘it is not in the public interest’ when denying a permit application.” Id.

97. Brief for Appellant, City of Lakewood v. Plain Dealer Publishing Co., 108 S. Ct. 2138 (1988) (No. 86-1042). “The Mayor may not deny an application for a rental permit without stating his reason and may only require additional conditions which are reasonable and necessary to further the purposes of the ordinance, including protecting the public health, safety, welfare and property.” Id. at 17.

98. 108 S. Ct. at 2151. The Court explained:
[T]his is the very presumption that the doctrine forbidding unbridled discretion disallows. The doctrine requires that the limits the City claims are implicit in its law be made explicit by textual incorporation, binding judicial or administrative construction, or well-established practice. This Court will not write nonbinding limits into a silent state statute.

Id. at 2150-51 (citations and footnote omitted).
Justice White, continuing his analysis based on the premise that newsracks are not constitutionally protected, asserted that the mayor's discretion did not pose a constitutional question because the city would be entirely within its rights to completely prohibit newsracks from public property.\(^9\)

The dissent echoed the idea articulated in *Davis v. Massachusetts*\(^{100}\) and reiterated in *Adderley v. Florida*\(^{101}\) in 1966 that a city has the same rights as any private property owner.\(^{102}\) While conceeding that the newspaper had "a right to distribute its newspapers on the City's streets, as others have a right to leaflet, solicit, speak, or proselytize in this same public forum area,"\(^{103}\) Justice White insisted that this right "does not encompass the right to take city property—a part of the public forum, . . . and appropriate it for its own exclusive use, on a semi-permanent basis, by means of the erection of a newsbox."\(^{104}\)

The dissent supported the argument that newsracks could be regulated or prohibited with impunity by citing four additional considerations.\(^{105}\) Justice White contended that extending first amendment protection to the placement of newsracks on city property would threaten the ability of cities to protect three significant governmental

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99. *Id.* at 2155 (White, J., dissenting). The dissent would allow the facial challenge only if the activity was one that was absolutely protected by the first amendment. *Id.* (White, J., dissenting). As Justice White stated:

For example, the *Lovell-Freedman* line of cases would be applicable here if the City of Lakewood sought to license the distribution of all newspapers in the City, or if it required licenses for all stores which sold newspapers. These are obviously newspaper circulation activities which a municipality cannot prohibit and therefore, any licensing scheme of this scope would have to pass muster under the *Lovell-Freedman* doctrine. But—and this is critical—Lakewood has not cast so wide a net. Instead, it has sought to license only the placement of newsracks (and other like devices) on City property. As I read our precedents, the *Lovell-Freedman* line of cases is applicable here only if the Plain Dealer has a constitutional right to distribute its papers by means of dispensing devices or newsboxes, affixed to the public sidewalks. I am not convinced that this is the case.

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


103. *Id.* at 2155 (White, J., dissenting). The dissent made no attempt to resolve the case by the application of Perry categories. It seems obvious that the sidewalks and streets are in the first Perry category of "traditional" public forums. Nonetheless, the Court has occasionally used the Perry categories to reach surprising results. For example, in *City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984), the Court found that a municipal ordinance banning the placement of campaign posters on lampposts and utility poles was valid because such objects, although a part of the urban landscape, are not "by tradition or designation a forum for public communication . . . ." *Id.* at 814-15.

104. 108 S. Ct. at 2155 (White, J., dissenting).

105. *Id.* at 2157-59 (White, J., dissenting).
interests: the interest in “keeping the streets and sidewalks free for the use of all members of the public, and not just the exclusive use of any one entity;” 106 the interest in “insuring the safety of persons using city streets and public forums;” 107 and “cities’ recognized aesthetic interests.” 108 The fourth factor submitted by the dissent in support of newsrack regulation was the contention that there were ample alternate outlets for newspapers available to the residents of Lakewood. 109 The majority criticized this reasoning as “legal sleight-of-hand” diverting the analysis away from the issue of prior restraint toward the issue of the constitutionality of a complete ban on the placement of newsracks. 110 The majority emphasized that the test to determine whether an activity may be banned is different from the test to determine whether it may be licensed subject to official discretion. 111

To illustrate this distinction the majority offered a comparison of Saia v. New York 112 and Kovacs v. Cooper. 113 These two cases considered the permissible scope of municipal regulation of sound trucks. 114 According to the majority in City of Lakewood, the Court in Saia struck down an ordinance granting the chief of police unbridled discretion in considering permits for sound trucks—a situation analogous to the holding of City of Lakewood. Even though sound trucks were afforded this measure of protection from censorship, the Court only seven months later in Kovacs upheld an ordinance that, according to Justice Brennan, entirely prohibited the use of sound trucks. 115

Justice White rejected this analysis of the sound truck cases, insisting instead that Kovacs was a thorough repudiation of Saia that served to demonstrate the constitutionality of the kinds of regulation common to

106. Id. at 2157 (White, J., dissenting).
107. Id. (White, J., dissenting). The dissent cited examples of the safety hazards purportedly caused by newsracks, “running the gamut from the obvious to the unimaginable.” Id. (White, J., dissenting).
108. Id. (White, J., dissenting).
109. Id. at 2158 (White, J., dissenting). The dissent explained that every resident of Lakewood lived within one-quarter mile of either an all-night convenience store or newsracks placed on private property and that home delivery was also available. Id. (White, J., dissenting). This argument, which overlooks the fact that not every newspaper in every community is distributed as widely as the Plain Dealer, would not be appropriate in a facial challenge, but, of course, the dissent was approaching this case “as-applied” to the facts at hand.
110. Id. at 2146-47.
111. Id. at 2147.
112. 334 U.S. 558 (1948). For a discussion of Saia, see supra notes 3-6 and accompanying text.
113. 336 U.S. 77 (1949). For a discussion of Kovacs, see supra notes 2-7 and infra notes 135-37 and accompanying text.
115. 108 S. Ct. at 2147-48. For a discussion of whether this is an accurate description of the Kovacs holding, see supra notes 2-7 and infra notes 135-37 and accompanying text.
Saia and City of Lakewood, Justice White summarized his position by saying that "my view is simply this: where an activity that could be forbidden altogether (without running afoul of the First Amendment) is subjected to a local license requirement, the mere presence of administrative discretion in the licensing scheme will not render it invalid per se." The determination that the mayor’s discretion alone rendered the ordinance unconstitutional terminated the majority’s analysis. The case was remanded to the court of appeals to determine whether the invalidated provisions were severable from other sections dealing with rental fees, insurance and aesthetic review.

IV. Analysis

The City of Lakewood majority correctly focused on the question of official discretion in first amendment-related ordinances. The important question presented to the Court was not whether newsracks could be regulated or even prohibited by a properly drawn statute, but rather whether the ordinance in question was constitutional considering the standardless discretion it granted to the mayor. The majority was in line with established precedent in concluding that an ordinance intended to control the placement of newsracks must contain neutral criteria and may not vest excessive discretion in a governmental official. Such discretion opens up the possibility of content-based discrimination. Even if such discrimination does not actually occur, the threat of it creates a risk of self-censorship on the part of newspapers which can lead to prior restraint.

The question of whether newsracks could be completely prohibited was not necessary to the holding of this case. Nonetheless, this issue was addressed in dicta. The dissent’s argument was based on the assertion that newsracks are entirely without first amendment protection and that they may be regulated or even prohibited with impunity. The majority did not directly dispute the dissent’s contention that an abso-

116. 108 S. Ct. at 2159 (White, J., dissenting).
117. Id. (White, J., dissenting).
118. Id. at 2152.
119. Id. (severability is question of state law and is best resolved by lower court). The other provisions of the ordinance were considered by the dissent, id. at 2163-66 (White, J., dissenting), but a discussion of those sections is beyond the scope of this Note.
120. For a discussion of the majority opinion, see supra notes 67-80 and accompanying text.
121. For the text of the ordinance, see supra note 61.
122. For a discussion of prior restraint, see supra notes 47-48 and accompanying text.
123. 108 S. Ct. at 2152 (White, J., dissenting).
nute prohibition would be constitutional. Indeed, the majority con-
ceded that a complete ban would at least be content neutral.

It is submitted that both the majority and the dissent misinterpreted
the constitutional status of newsracks. The majority contended that
the placement of newsracks is tantamount to the circulation of newspapers
but did not adequately counter the dissent's assertion that a complete
ban would be constitutional.

The primary purpose of newsracks is to distribute newspapers. It is
concrete first amendment doctrine that "[l]iberty of circulating is as
essential . . . as liberty of publishing; indeed, without the circulation,
the publication would be of little value." Since their introduction
approximately thirty-five years ago, newsracks have become an integral
component of newspaper circulation systems. It is estimated that
there are currently well over half a million newsracks in operation in the
United States. Furthermore, the importance of newsracks as a means
of distribution is expected to continue to grow. The role that news-
racks play in the distribution of newspapers must not be underesti-

124. Id. at 2147 n.7 ("Because we reject the dissent's overall logical frame-
work, we do not pass on its view that a city may constitutionally prohibit
the placement of newsracks on public property.").

125. Id. at 2147.

126. The city argued in its brief that newsracks are also used as billboards
to advertise the newspaper. Brief for Appellant at 9, City of Lakewood v. Plain
Dealer Publishing Co., 108 S. Ct. 2138 (1988) (No. 86-1042). While this is un-
deniable, the functions of newsracks as distribution mechanisms and as advertis-
ing devices are separable. Regulations aimed at advertising could be enforced
without disturbing the distribution functions of newsracks. The fact that new-
racks are sometimes used for advertising does not diminish their function as
distribution devices.

127. Ex parte Jackson, 96 U.S. 727, 733 (1878).

128. An ICMA Report: ICMA Survey Views Newsracks, 80 ICMA UPDATE,
November, 1983, at 12.

129. International Circulation Managers Association (September 1988)
(untitled, unpublished tabulation of newsracks).

pamphlet published jointly by the International Circulation Managers Associa-
tion and the American Newspaper Publishers Association has emphasized the
growing importance of newsracks saying:

Newsracks are an ever-growing part of newspapers' distribution
networks. They become more and more important in augmenting
home and office delivery as readership studies show that many people
simply could not be newspaper readers if they could not purchase their
newspaper from a newsrack . . . .

The newsrack makes the newspaper easily accessible. It permits
updated editions to be distributed quickly to a wide audience. It supplies
newspapers to locations where home delivery is not possible and
at times when stores selling newspapers may be closed or are otherwise
not readily available. For some readers, newsracks are a sole source
and for some newspapers, newsracks are the only affordable means of
distribution.

American Newspaper Publishers Ass'n & Inter'l Circulation Managers
Ass'n, Reaching the Reader Through Newsracks (1988).
mated by the courts. While cities may well express legitimate concerns about the physical obstructions and even the aesthetic hazards sometimes caused by newsracks, the issues must be kept in perspective. The range of reasonable regulations to avoid newsrack problems does not rationally extend to the complete elimination of such an important outlet for newspaper sales. In addition, the contention that newsracks placed on private property can adequately insure freedom of circulation is incorrect. If anything, newsracks on private property are more vulnerable to content-based discrimination and competitive pressures than those on public streets and sidewalks.

The majority's tacit acceptance of the constitutionality of a complete ban seems to be based on the assumption that Kovacs set a clear precedent for such a prohibition. As previously discussed, there is considerable disagreement as to the exact holding of Kovacs. However, regardless of the practical effect of the splintered and confused

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131. Newsracks are not the only form of distribution under regulatory attack. Some municipalities have also tried to ban “hawkers”—individuals that sell newspapers on street corners, intersections and median strips. Across U.S., Street Vendors are Under Regulatory Attack, 84 ICMA UPDATE October, 1987, at 1. Cities claim that the live sellers, often youths, create severe traffic hazards and are themselves in danger. Id. at 2. Newspapers have challenged such ordinances in Evansville, Indiana, El Paso, Texas and Durham, North Carolina. Id. The newspapers all reached amicable agreements with the city councils.

Another hawker case was recently decided by a federal district court. In News & Sun-Sentinel Co. v. Cox, No. 88-6271-Civ. (S.D. Fla. Dec. 19, 1988) (WESTLAW, DCT database), the court declared unconstitutional a Florida statute that prohibited “any commercial use of the right-of-way of any state-maintained road, including appendages thereto, and also including, but not limited to, rest areas, wayside parks, boat-launching ramps, weigh stations, and scenic easements.” Id. at 2-3. Four years after the statute was passed the City of Fort Lauderdale, in response to residents’ requests, enforced the statute against a hawker selling newspapers from the median strip of a state highway. Id. at 5. The court agreed with the newspaper that the application of the statute to the sale of newspapers raised a constitutional question, id. at 14, and held that the ordinance was not narrowly tailored to serve the city’s concerns with traffic safety. Id. at 19-20.

132. There are at least two newsrack disputes underway concerning private property. In Palm Springs, California, the Desert Weekly newspaper has filed suit against a supermarket chain for removing its newsracks from the stores while allowing four other newspapers’ racks to remain. Stein, California Weekly Sues Supermarket Chain Over Newsrack Removal, EDITOR & PUBLISHER, Aug. 13, 1988, at 24. In Coeur d’Alene, Idaho, the municipal newsrack regulations have been used by private property owners as justification for removing newsracks from their premises. Newspaper publishers in Spokane, Washington, contend that their newsracks are “being systematically frozen out of key locations downtown” while the local and national papers are allowed to remain. Some of the locations that have barred the Spokane papers, including two hotels and the chamber of commerce building, are owned by a businessman who also owns the Coeur d’Alene Press. Stein, Newsrack Battle: Newspaper Chain Battles City Council, Other Newspaper Over the Placement of Newsracks in Idaho City, EDITOR & PUBLISHER, Oct. 1, 1988, at 18.

133. City of Lakewood, 108 S. Ct. at 2148.

134. For a discussion of Kovacs, see supra notes 2-7 and accompanying text.
Kovacs opinion, one point was made perfectly clear by the Kovacs Court. Six of the nine Justices explicitly expressed disapproval of a complete ban on the operation of all sound trucks on public property.\textsuperscript{135} Only two Justices asserted that such a ban would be constitutional.\textsuperscript{136} Justice Murphy dissented without stating an opinion.\textsuperscript{137}

Therefore, it is submitted that it is inaccurate to say that Kovacs is precedent for the constitutionality of an absolute ban on newsracks. It is more accurate to say that Kovacs permits reasonable regulation of the placement of newsracks according to the usual rules regarding regulations pertaining to first amendment-protected activities. Such regulations might, for example, exclude newsracks that are excessively large or poorly maintained, but the standards for evaluating the newsracks would have to be objective and explicit to pass constitutional muster. A blanket prohibition on all newsracks on public property is clearly not such a regulation.\textsuperscript{138} For the City of Lakewood Court to suggest otherwise is a

\textsuperscript{135} Kovacs v. Cooper, 336 U.S. 77 (1949). The plurality opinion, announced by Justice Reed and joined by Chief Justice Vinson and Justice Burton, stated that an "[a]bsolute prohibition within municipal limits of all sound amplification, even though reasonably regulated in place, time and volume, is undesirable and probably unconstitutional as an unreasonable interference with normal activities." Id. at 81-82. Accepting the state court's interpretation of the municipal ordinance as prohibiting only "loud and raucous" sound trucks, id. at 85, the plurality held that "it is a permissible exercise of legislative discretion to bar sound trucks...amplified to a loud and raucous volume from the public ways of municipalities," id. at 87, but also stated that "sound trucks may be utilized in places such as parks or other open spaces off the streets." Id. at 85.

Three Justices, Black, Douglas and Rutledge, joined in dissent because they disagreed with the plurality's interpretation of the ordinance. Id. at 98-99. Justice Black, writing for the dissent, interpreted the case as presenting the question of a total ban (as opposed to a ban only on loud and raucous trucks) and regarded such a ban as unconstitutional, saying:

A city ordinance that reasonably restricts the volume of sound, or the hours during which an amplifier may be used, does not, in my mind, infringe the constitutionally protected area of free speech. It is because this ordinance does none of these things, but is instead an absolute prohibition of all uses of an amplifier on any of the streets of Trenton at any time that I must dissent.

\textit{Id.} at 104 (Black, J., dissenting). Commentators writing at the time of the decision also concluded that Kovacs validated the use of a total ban on soundtrucks. See, e.g., Note, supra note 4, at 265; Comment, supra note 4, at 423.

\textsuperscript{136} Kovacs, 336 U.S. at 89, 97 (Frankfurter and Jackson, J.J., concurring) (expressed approval of absolute ban on all sound trucks).

\textsuperscript{137} Id. at 89 (Murphy, J., dissenting).

\textsuperscript{138} Another flaw in this approach is that it overlooks the fact that a total ban on newsracks, although technically content neutral, would have a disparate impact upon various publishers. Justice White's opinion in City of Lakewood is clearly colored by the fact that the Plain Dealer is a successful business venture:

The Court mentions the risk of censorship, the ever-present danger of self-censorship, and the power of prior restraint to justify the result. Yet these fears and concerns have little to do with this case, which involves the efforts of Ohio's largest newspaper to place a handful of newsboxes in a few locations in a small suburban community. . . .
repudiation of established first amendment law, including *Kovacs*.

V. Conclusion

*City of Lakewood* resolves only one facet of the ongoing dispute between newspaper publishers and municipal governments. The invalidation of the discretionary clause of the Lakewood ordinance makes it clear that a municipality may not grant too much subjective discretion to a governing body charged with the responsibility of granting or denying permits for newsrack placement. This should encourage municipalities to be more explicit in setting standards for reviewing such permits.

The Court expressly did not rule on the validity of any portion of the Lakewood ordinance other than the clause allowing the mayor to require "such other terms and conditions deemed necessary and reasonable by the Mayor" before a permit could be granted. The case has been remanded to the United States Court of Appeals for the Sixth Circuit to determine whether this defective provision can be severed from the remainder of the ordinance. Severance would preserve most of the ordinance in its original form.

Despite the invalidation of the discretionary clause, municipalities will still find many opportunities to restrict newsrack placement. It is not difficult to imagine an ordinance that would include no unconstitution-

It is hard to see how the Court's concerns have any applicability here. And it is harder still to see how the Court's image of the unbridled local censor, seeking to control and direct the content of speech, fits this case. . . . The Court's David and Goliath imagery concerning the balance of power between the regulated and the regulator in this case is wholly inapt—except, possibly, in reverse.

Justice White also placed faith in the fact that the ordinance did not affect newsbox placement on private property and that there were many newsracks on private property. Id. at 2158 (White, J., dissenting). But, of course, the Plain Dealer was not the only newspaper affected by the ordinance. A smaller newspaper, that often publishes unconventional opinions, might have difficulty persuading private property owners to facilitate distribution of the paper and would also be unable to mount an expensive legal battle to defend itself if charged with violation of the ordinance or to challenge the ordinance. Newsracks could provide the only means for such a newspaper to survive. For an excellent discussion of the discriminatory effects of facially content-neutral regulations, see Lee, *supra*, note 29.

139. 108 S. Ct. at 2152. "We need not resolve the remaining questions presented for review, as our conclusion regarding mayoral discretion will alone sustain the Court of Appeals' judgment if these portions of the ordinance are not severable from the remainder." *Id.*

140. *Id.* The other portions of the ordinance that came before the Supreme Court included a requirement that the newspaper purchase liability insurance for the boxes as well as specific regulations about the placement of newsracks on sidewalks. *Id.* at 2142. For the text of the pertinent provisions of the Lakewood ordinance, see *supra* note 61. For the full text of the Lakewood ordinance, see Plain Dealer Publishing Co. v. City of Lakewood, 794 F.2d 1139 (6th Cir. 1986), aff'd in part, 108 S. Ct. 2138 (1988).
tional degree of discretion but would nonetheless severely hamper the distribution of newspapers. For example, under City of Lakewood, an ordinance could specify that there may be no more than one newsbox per city block. This could effectively abort the launch of a new newspaper in a city where the allotted locations were already taken.

Although the Court's holding was very specifically directed at only the discretionary clause, the dissenting opinion is likely to attract a great deal of attention as more newsrack cases inevitably come before federal courts. Up until City of Lakewood, the district and circuit courts, as well as many state courts, had consistently held that the placement of newsracks on public property is protected by the first amendment and that the state could not regulate the activity beyond the usual content-neutral, time, place and manner restrictions. Justice White's strong support for the constitutionality of a total prohibition on newsracks, casts uncertainty into this previously tranquil area. Consequently, municipalities that are unhappy with the inconvenience of specificity required by the majority opinion may be encouraged by Justice White's assurance that a total ban on newsracks would be upheld by the Court. Since the majority explicitly did not consider the constitutionality of a total ban, and even commented that a total ban would at least be content neutral, there is no language in the case that suggests that such a ban would be struck down.


142. 108 S. Ct. at 2152 (White, J., dissenting). Justice White asserted: [O]ur precedents suggest that an outright ban on newsracks on city sidewalks would be constitutional, particularly where (as is true here) ample alternate means of 24-hour distribution of newspapers exist. In any event, the Court's ruling today cannot be read as any indication to the contrary: cities remain free after today's decision to enact such bans.

Id. (White, J., dissenting).

143. As previously stated, the Court split four-to-three in City of Lakewood.

144. 108 S. Ct. at 2152. The dissent was careful to draw attention to this aspect of the majority's opinion.
Therefore, although the holding of City of Lakewood is technically a victory for newspapers, it is a bitter victory because it has set the stage for a successful challenge of the lower court rulings that had invalidated total bans on newsrack placement. Banishing newspaper vending boxes from public property would not only have adverse economic consequences for the press, but would also deprive the public of a highly convenient means of access to the news. In addition, smaller newspapers, particularly those concerned with unpopular topics, would be disproportionately burdened by such a ban or by less sweeping regulations dictating the number of newsboxes allowed within a particular area, specific placement rules, requirements for indemnity insurance or rental fees. In any given community, even the variety of well-established publications available would be diminished because out-of-town or national papers would be less able to distribute without vending boxes. To adequately insure the continuation of truly-free distribution, newspapers, following City of Lakewood v. Plain Dealer Publishing Co., will be wise to exercise caution when operating within potentially hostile municipalities that might prefer to eliminate newsracks altogether rather than surrender their power to exercise discretion. Until the Supreme Court resolves the question of the constitutionality of an absolute ban on newsracks on public property, the small but significant gain made by the Plain Dealer in Lakewood, Ohio will be overshadowed by the threat of regulations more onerous than those struck down in City of Lakewood.

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Moreover, the Court expressly rejects the view, heretofore adopted by some lower courts, that any local scheme that seeks to license the placement of newsracks on public property is per se unconstitutional. Cities "may require periodic licensing, and may even have special licensing procedures for conduct commonly associated with expression." It is only common sense that cities be allowed to exert some control over those who would permanently appropriate city property for the purpose of erecting a newspaper dispensing device.

Id. (White, J., dissenting) (quoting majority opinion).

145. For a discussion of the importance of newsracks, see supra notes 16-19 and accompanying text.

146. See generally Lee, supra note 29.