THE NEWSBOX AND THE FIRST AMENDMENT

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According to the American Newspaper Publishers Association, almost half of the single copy sales of newspapers in the United States takes place through newsboxes, or "newsracks".[1] In recent years a proliferation of newsboxes along public streets, sidewalks, and in other public areas has led to their increased government regulation. Responding to this regulation, newspaper publishers have filed numerous challenges under the First Amendment,[2] which states that "Congress shall make no law . . . abridging the freedom of speech, or of the press . .. ."[3]

Although newsboxes are not themselves speech, they are an important method for the press to distribute speech, and both the Supreme Court and lower courts have affirmed that the First Amendment protects speech distribution.[4] Further, the First

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1.Cincinnati v. Discovery Network, 507 U.S. 410, 416 n. 10 (1993) (citing brief for the American Newspaper Publishers Association).

[2]*See* e.g., City of Cincinnati v. Discovery Network, 507 U.S. 410 (1993); City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750 (1988); Globe Newspaper Co. v. Beacon Hill Architectural Comm'n, 100 F.3d 175 (1st Cir. 1996); Crawford v. Lungren, 96 F.3d 380 (9th Cir. 1996); Gold Coast Publications v. Corrigan, 42 F.3d 1336 (11th Cir. 1994); Graff v. City of Chicago, 9 F.3d 1309 (7th Cir. 1993); Jacobsen v. U.S. Postal Service, 993 F.2d 649 (9th Cir. 1992); Sentinel Communications Co. v. Watts, 936 F.2d 1189 (11th Cir. 1991); Chicago Observer v. City of Chicago, 929 F.2d 325 (7th Cir. 1991); Jacobsen v. Harris, 869 F.2d 1172 (8th Cir. 1989); Jacobsen v. Givaro, 851 F.2d 1067 (8th Cir. 1988); Miami Herald Publishing Co. v. City of Hallandale, 734 F.2d 666 (11th Cir. 1984); Gannett Satellite Information Network v. Township of Pennsauken, 709 F. Supp. 530 (D. N.J. 1989); Chicago Newspaper Publishers Ass'n v. City of Wheaton, 697 F. Supp. 1464 (N.D. 111. 1988); Providence Journal Co. v. City of Newport, 665 F. Supp. 107 (D. R.I. 1987); Jacobsen v. U.S. Postal Service, 624 F. Supp 520 (D. Ariz. 1987); Gannett Satellite Information Network v. Town of Randolf, 579 F. Supp. 108 (D. Mass. 1984); Miller Newspapers v. City of Keene, 546 F. Supp. 831 (D.C. N.H. 1982); Philadelphia Newspapers, Inc. v. Borough of Swarthmore, 381 F. Supp. 228 (E.D. Penn. 1974).

[3]U.S. CONST, amend. I.

[4]This protection has been long recognized. *See, e.g.,* City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 768 (1988); Lovell v. City of Griffin, 303 U.S. 444, 452 (1938) (distribution as well as publication of literature subject to First Amendment protection); Ex parte Jackson, 96 U.S. 727, 733 (1878) ("Liberty of circulating is as essential to [First Amendment freedom] as liberty of publishing; indeed, without the circulation in the publication would be of little value."). Protection of speech distribution by newsbox has also been specifically recognized. *See* Sentinel Communications v. Watts, 936 F.2d 1189, 1196 (11th Cir. 1991) ("[0]ur circuit has enjoined 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.").

Amendment extends free speech and press protection to speech distribution in public fora, and the Supreme Court has "repeatedly referred to public streets as the archetype of a traditional public forum."[5] There is also a "long tradition of sale of newspapers upon public streets,"[6] thus in sum making newsbox regulation constitutionally problematic.

On the other hand, First Amendment rights are not absolute, a fact the Supreme Court has often acknowledged.[7] Newspaper publishers possess no unfettered right to place newsboxes on public property. Newsboxes are subject to reasonable time, place, and manner restrictions imposed by the state.[8] Governments can and do regulate newsboxes by requiring permit fees and insurance for them and by regulating their size, shape, color, number, and location.[9]

As newsbox regulations are applied in specific situations, however, they present the opportunity for newspaper publishers to challenge them constitutionally. What constitutes "reasonable" time, place, and manner restrictions on newsboxes is ambiguous and requires case-by-case adjudication. The following analysis explores the constitutional contours of appropriate governmental restrictions on newsboxes. It concludes that although important public interests in safety and aesthetics support considerable regulation of newsboxes, governments must carefully tailor restrictions to conform to First Amendment case law.

I. NEWSBOX REGULATION: THE GENERAL ANALYSIS

In evaluating the constitutionality of a newsbox regulation, the courts have followed the Supreme Court's analysis for content-neutral and content-based speech regulation. If newsbox regulation is content-neutral, it can restrict the time, place, and manner of protected speech provided that it is "narrowly tailored to serve a significant governmental interest"[10] and "leaves open ample alternative channels for communication."[11] Content-based speech regulation is strictly scrutinized to determine whether the statute serves "a compelling state interest and is narrowly drawn to achieve

[5]Frisby v. Schultz, 487 U.S. 474, 480 (1988).

6.International Caucus of Labor Comms. v. City of Montgomery, 87 F.3d 1275, 1278 (11th Cir. 1996).

7.See, e.g., Cornelius v. NAACP Legal Defense & Ed. Fund, 473 U.S. 788, 799 (1985) ("Even protected speech is not equally permissible in all places at all times."); Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 640, 647 (1981) ("[T]he First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired."); Gitlow v. New York, 268 U.S. 652, 666 (1925) ("It is a fundamental principle, long established, that the freedom of speech and of the press . . . does not confer an absolute right to speak or publish.").

8.See infra notes 28-66 and accompanying text.

9.See cases cited *supra* note 2.

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

11.See also Ward v. Rock Against Racism, 491 U.S. 781 (1989); Clark v. Community for Creative Nonviolence, 468 U.S. 288, 293 (1984).

that end."[12]

Supreme Court cases teach that "the principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys."[13] This disagreement can be not only with a viewpoint, such as speech hostile to people based on their race or gender, but also with the general subject matter of speech, such as distinctions made between commercial and other speech.

Illustrating the latter is the regulation of newsboxes found in *City of Cincinnati* v. *Discovery Network}*[4] In that case the Supreme Court determined that Cincinnati's ban on the distribution, via newsboxes, of commercial handbills, but not newspapers, showed unconstitutional content bias. It quoted *Simon & Schuster* v. *Members of New York State Crime Victims Board*[15] to establish that it had rejected the argument that content-based regulation "is suspect under the First Amendment only when the legislature intends to suppress certain ideas."[16] The Court concluded that "[U]nder the city's newsrack policy, whether any particular newsrack falls within the ban is determined by the content of the publication resting inside the newsrack. Thus, by any commonsense understanding of the term, the ban in this case is 'content-based.'"[17]

For governmental regulation of newsboxes to be content-based invites strict scrutiny and requires a compelling state interest and a narrowly-drawn limitation in order to escape unconstitutionality. It is difficult for government to overcome the strong presumption of unconstitutionality regarding content-based regulations against newsbox distributions. However, the recent case of *Crawford* v. *Lungren*[8] suggests that governments can regulate certain matter with harmful content that might be distributed through newsboxes.

Crawford involved a California statute that banned coin-operated vending machines (including newsboxes) from distributing "harmful matter" in a public place unless supervised by an adult. *Harmful matter* constituted

> matter, taken as a whole, which to the average person, applying contemporary statewide standards, appeals to the prurient interest, and is matter which, taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.[19]

The Court of Appeals for the Ninth Circuit acknowledged that content-based

[12]Simon & Schuster, Inc. v. New York Crime Victims Bd., 502 U.S. 105, 118 (1991).

[13]Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

[14]507 U.S. 410(1993).

[15]502 U.S. 105(1991).

16.id.

[17]City of Cincinnati v. Discovery Network, 507 U.S. 410, 429 (1993).

[18]96 F.3d 380 (9th Cir. 1996).

[19]*Id.* at 383 (citing California Penal Code § 313 (a)).

regulations are presumptively unconstitutional, but asserted, quoting *Sable Communications, Inc.* v. *FCC* ,[20] that the "Government may . . . regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest."

Recognizing that protecting the physical and psychological well-being of children is a compelling state interest,[2"] the Ninth Circuit then assumed that protection of children from the "harmful" matter as defined protected this well-being.[21] It determined further that the California statute met the narrow tailoring of the "least restrictive" requirement.[24] The court stated that the legislature had gone "to great lengths to spell out ways that will keep children out of the materials in question, while still allowing access to adults."[25]

The *Crawford* case suggests that narrowly-drawn regulations can ensure that unattended newsboxes not be used to distribute adult-oriented sexual materials to children. In all likelihood, since the First Amendment does not protect obscene materials at all, regulation can also be used to keep obscenity out of public fora altogether. At issue always, however, is whether materials, although sexually graphic, constitute obscenity under contemporary community standards.[26]

Another compelling state interest that permits banning the distribution of speech through newsboxes (or otherwise) is the administration of justice. Consequently, materials aimed at influencing actual or potential jurors can be banned from sidewalks near a courthouse.[27] In spite of the few instances of content-based newsbox regulation, however, most government restrictions on newsbox regulation are content neutral. It is to the specific elements justifying content neutral regulation of newsboxes that we now turn.

[20] 492 U.S. 115(1989).

21.id. al 126. Notice that in *Sable* the Supreme Court described its test as requiring the "least restrictive means" to advance the government's compelling interest, whereas in Simon & Schuster, Inc. v. New York Crime Victims Board., the Court required only that the means advancing that interest be "narrowly drawn." 502 U.S. 105, 118 (1991).

[22] 96 F.3d 380, 387 (9th Cir. 19%).

[23] *ld.*

24.Id.

25.ld.

[26] The Supreme Court's tests for obscenity are found in Miller v. California, 413 U S 15 (1973)- Memoirs v, Massachusetts, 383 U.S. 413 (1966); and Roth v. United States, 354 U.S. 476 (1957)

[27] The Ninth Circuit upheld a district court's denial of preliminary injunctive relief concerning a regulation prohibiting distribution of written materials within fifty yards of a courthouse entrance determining that the state had a compelling interest in protecting the integrity of the jury system Fully Informed Jury Ass'n v. County of San Diego, No. 95-55121, 1996 U.S. App LEXIS 4254 at *2 (9th Cir Feb. 23. 1996).

II. Newsbox Regulation: The Significant Governmental Interest

Since the First Amendment is not absolute in its protection, many strands of precedent uphold reasonable time, place, and manner restrictions on speech and press.[28] As applied to newsboxes, most of the restrictions concern place and manner.[29] Primarily, municipal governments have justified these restrictions on the basis of safety and aesthetics.[30] Safety and aesthetics furnish the significant governmental interest necessary to make constitutionally reasonable place and manner restrictions.

A. Safety

In *Metromedia, Inc.* v. *City of San Diego"* the Supreme Court described safety as a "substantial" governmental goal.[32] In *Metromedia* the safety concern was visual distraction of motorists by billboards. Other Supreme Court cases recognizing significant safety interests have concerned adequate protection within the national park system[13] and the need to maintain orderly movement within a large crowd at a fairground.[34] That safety of the citizenry can take priority over speech and press interests is reflected in the Court's statement: "The authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use of public highways has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend."[35]

Many newsbox regulations cite safety concerns as a significant governmental interest.[36] Newsboxes present several potential safety problems. They can impede automobile traffic flow as motorists stop for newspapers on busy streets. Collisions may follow. Likewise, newsboxes can block pedestrian flow on sidewalks, creating obstructions to safe and rapid walking. They may especially impede the disabled who

28.See Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989); Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984); Perry Educ. Ass'n v. Perry Local Educators Ass'n, 460 U.S. 37 (1983); Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981); Consolidated Edison Co. v. Public Service Comm'n, 447 U.S. 530, 535 (1980); Grayned v. City of Rockford, 408 U.S. 104, 115 (1972); Police Dept, of Chicago v. Mosley, 408 U.S. 92, 95-96 (1972); Kovacs v. Cooper, 336 U.S. 77 (1949).

[29]*See* cases cited *supra* note 2.

[30].*Id.*

[31]453 U.S. 490(1981).

[32].*Id.* at 507-508 (1981). The terms substantial and significant should be taken as being synonymous.

[33]Clark v. Community for Creative Non-Violence, 486 U.S. 288, 297 (1984).

[34].Heffron v. ISKCON, 452 U.S. 640, 649-650 (1981).

[35]Cox v. New Hampshire, 312 U.S. 569, 574 (1941).

[36]Safety concerns are indicated in most of the cases cited *supra* note 2.

[37]

use wheelchairs. In *Fully Informed Jury Association* v. *County of San Diego,'* the court even identified the securing of an area around a courthouse as a safety interest warranting a ban on distributing written materials.

Size, number, and location of newsboxes are possible elements of safety regulation targeted at newsboxes.[18] Even a ban on the boxes in a certain area can be warranted.[39] Government can also require insurance from newsbox owners to cover losses occasioned by newsbox safety hazards.[40]

What proof, if any, must government adduce that newsbox regulation directly advances articulated safety concerns? The newsbox cases have not dealt extensively with this issue, but a recent case out of Seattle involving billboard regulation is suggestive.[41] In that case the court indicated that the legislative judgments about billboards as a traffic hazard supported the billboard regulation at issue, and in the absence of some ground for believing that the legislature's safety judgments were content based, there was nothing to suggest that these judgments were "unreasonable."[42]

Although the billboard regulation applied to all manner of speech, the court treated the case as regulating commercial speech. The third prong of the Supreme Court's commercial speech test in *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n of New York*[41] requires direct advancement of the government's interest in commercial speech. Although in most newsbox cases courts do not employ the *Central Hudson* test, they still require that the government's means of speech regulation advance the government's asserted significant interest.[44] However, in lieu of suspicion by courts that government is attempting to regulate speech content under a neutral guise, courts are unlikely to challenge legislative judgments about safety and aesthetics.

[3/] NO. 95-5501, 1996 U.S. App. LEXIS 4254 (9th Cir. Feb. 23, 1996).

38.See, e.g.. Gold Coast Publications, Inc. v. Corrigan. 42 F.3d 1336, 1340 (11th Cir. 1994); Jacobsen v. Harris, 860 F.2d 1172 (8th Cir. 1989).

39.See, e.g.. Globe Newspaper Co. v. Beacon Hill Architectural Comm'n, 100 F.3d 175, 178 (1st Cir. 1996); Gannett Satellite Information Network. Inc. v. Township of Pennsauken 709 F Supp 530 531-532 (D. NJ. 1989).

40. See, e.g.. Gold Coast Publications, Inc. v. Corrigan, 42 F.3d 1336, 1340 (11th Cir 1994)- Sentinel Communications Co. v. Watts, 936 F.2d 1189, 1192 (11th Cir. 1991); Jacobsen v Harris 869 F 2d 1172 (8th Cir. 1989).

[41] Ackerley Communications v. Dept, of Construction & Land Use No 95-3621 1997 US ADD LEXIS 4018 (9th Cir. Mar. 7, 1997).

42.Id. at *9.

[43]447 U.S. 557(1980).

44.The ' direct advancement'' requirement of *Central Hudson* is subsumed in most newsbox cases as part of the ''narrow tailonng" requirement. *See. e.g.*. Globe Newspaper Co. v. Beacon Hill Architectural Comm'n, 100F.3d 175, 188 (1st Cir. 19%).

B. Aesthetics

In *City Council of Los Angeles* v. *Taxpayers for Vincent*,[45] which involved a challenge to a city-wide ban on the posting of political signs on public property, the Supreme Court stated that "municipalities have a weighty, essentially aesthetic interest in proscribing intrusive and unpleasant formats for expression."[46] The Court observed, upholding the sign regulation: "It is well settled that the state may legitimately exercise its police powers to advance aesthetic values."[47] Virtually all newsbox regulation presently cites both aesthetic reasons and *Taxpayers for Vincent* to justify limiting newsbox distribution.

How comprehensively the government must pursue its aesthetic reasons justifying newsbox regulation is open to some question. In his concurrence in *Metromedia, Inc.* v. *City of San Diego*,[48] Justice Brennan observed of the aesthetic justifications of a city-wide ban on billboards:

> Of course, it is not for a court to impose its own notion of beauty on San Diego. But before deferring to a city's judgment, a court must be convinced that the city is seriously and comprehensively addressing aesthetic concerns with respect to its environment. Here, San Diego has failed to demonstrate a comprehensive coordinated effort in its commercial and industrial areas to address other obvious contributors to an unattractive environment.[49]

Justice Brennan's concurrence suggests that a city's aesthetic regulation must "seriously and comprehensively" address aesthetic concerns as part of a "comprehensive coordinated effort."[50] Why Brennan advances this interpretation is not clear. Perhaps, he wishes to ensure that a particular viewpoint is not silenced under the content-neutral guise of superficial aesthetic regulation. Perhaps, he merely requires a comprehensive addressing of aesthetics as the threshhold test for a "significant government interest" in a time, place, or manner restriction on speech. In any event, several district court cases have applied Brennan's words in the form of a test measuring the substantiality of government interest in aesthetics.

Other cases, however, reject the Brennan approach. In *Metromedia*, seven

[45] 466 U.S. 789 (1983).

[46] M. at 806.

[47] *Id.*

[48] 453 U.S. 490(1981).

[49] id. at 531.

50. Id.

[51] See, *e.g.*, Chicago Newspaper Publishers v. City of Wheaton, 697 F. Supp. 1464, 1470 (N.D. 111. 1988); Providence Journal Co. v. City of Newport, 665 F. Supp. 107, 115 (D. R.I. 1987); Southern New Jersey Newspapers, Inc. v. New Jersey Dept, of Transportation, 542 F. Supp. 173, 186 n.25 (D. N.J. 1982).

justices concluded that even without a comprehensive aesthetics plan, San Diego's interest in preventing aesthetic clutter was adequate to justify a billboard prohibition. ' And in *Taxpayers for Vincent,* a majority of the Court expressly rejected the Brennan approach.[5'] That Brennan dissented in *Taxpayers for Vincent,* reiterated his approach requiring a comprehensive aesthetics plan, and specifically criticized the majority for its "lenient approach towards the restriction of speech for reasons of aesthetics"[55] underscores the lack of support for this approach.

In spite of the rejection of Brennan's approach, newspublishers continue to argue that a government's aesthetic regulation of newsboxes must be comprehensive. The argument takes the form of claiming that aesthetic regulation cannot specifically target newsboxes. For instance, the Beacon Hill Architectural Commission, established by Massachusetts to preserve the historic quality of Boston's Beacon Hill district, enacted a regulation that stated: "Publication distribution boxes (any boxes placed on the sidewalks to distribute publications, whether for charge or not) visible from a public way are not allowed within the District."[56] When newspublishers brought suit, the federal district court ruled that the regulation violated the First Amendment.[57] Significantly, the court observed that the aesthetic regulation "applies to no form of visual clutter other than publication distribution."[58] After the bench ruling but before judgment was entered, the Beacon Hill Commission revised its regulation to ban all "street furniture," not just newsboxes, from Beacon Hill. Street furniture was defined "as any structure erected or placed in the public or private ways on a temporary or permanent basis." The Commission asked for the district court to reconsider the regulation, but again the court ruled that the regulation violated the First Amendment.[60]

On appeal the United States Court of Appeals for the First Circuit reversed the district court. The First Circuit stated that the publishers' argument, accepted by the district court, concerning the targeting of newsboxes was "implicitly based on the notion that newsracks within the District may only be regulated as part of a comprehensive beautification or, better yet, 'visual clutter reduction' plan . . . ,"[61] The First Circuit asserted that this notion was rejected "foursquare" by the Court in *Taxpayers for Vincent and Metromedia.*[62]

Other cases have also chosen not to accept newspublishers' assertions that

[5'] Metromedia, Inc. v. City of San Diego. 453 U.S. 490, 511-512 (1981).

53. City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 807 n.5 (1983).

54. Id. at 821, 828-831 (Brennan, J., dissenting).

55. Id. at 818.

56. Globe Newspaper Co. v. Beacon Hill Architectural Comm'n, 100 F.3d 175, 180 (1st Cir. 1996).

[57] Id. at 180-181.

[58] *Id.* at 181 (quoting bench trial transcript).

59. Id.

60. Globe Newspaper Co. v. Beacon Hill Architectural Comm'n, 847 F. Supp. 178, 195 (D. Mass.

[61] Globe Newspaper Co. v. Beacon Hill Architectural Comm'n, 100 F.3d 175, 191 (1st Cir 1996)

62. Id.

some sort of comprehensive aesthetics scheme is required constitutionally to justify newsbox regulation on aesthetic grounds. In *Gold Coast Publications v. Corrigan,*[63] in reversing the federal district court, the United States Court of Appeals for the Eleventh Circuit addressed Gold Coast's argument that newsbox coloring and lettering restrictions were invalid for failing to apply to other fixtures, such as awnings and trash receptacles, in the business district. Rejecting the argument the Eleventh Circuit stated: "The Supreme Court has allowed cities to enact partial solutions to further their aesthetic interests and has explicitly rejected a requirement that such solutions be part of a 'comprehensive plan' to improve aesthetics."[64] Likewise, in *Chicago Observer, Inc.* v. *City of Chicago*[65] and *Gannett Satellite Information* v. *Pennsauken*[66] federal courts also upheld newsbox aesthetic restrictions in the absence of an overall regulatory scheme.

Along with safety concerns, aesthetic purposes provide the necessary significant governmental interests to support time, place, and manner restrictions on speech and the press. However, as the Eleventh Circuit observed in *Gold Coast Publications v. Corrigan*,[67] the outcome of most challenges to content-neutral newsbox regulation "turns not on whether the specified interests are significant, but rather on whether the regulation is narrowly tailored to serve those interests."[68] The next section examines the important First Amendment requirement of narrow tailoring.

III. NEWSBOX REGULATION: THE REQUIREMENT OF NARROW TAILORING

As the Supreme Court stated of free speech restrictions in *NAACP* v. *Button:* "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms."[69] Overbreadth of free speech and press regulation is constitutionally fatal to a statute or ordinance even when the First Amendment permits government control of the underlying activity.[70] The narrow tailoring requirement of time, place, and manner speech or press regulation is a variation of the overbreadth principle. It applies in evaluating whether the regulation of newsboxes overly inhibits the protected activity of newspaper distribution just as the overbreadth principle applies in testing whether governmental restriction prohibits protected, as well as unprotected, speech.

63.42 F.3d 1336 (I Ith Cir. 1994).

64. *Id.* at 1347 (citations omitted).

65.929 F.2d 325, 328-329 (7th Cir. 1991).

66.709 F. Supp. 530, 537 (D. N.J. 1989).

67.42 F.3d 1336 (11th Cir. 1994).

68.*Id.* at 1345.

69.371 U.S. 415,438 (1963).

70.MFI yn 1 F B. NIMMER, NIMMER ON FREEDOM OF SPEECH: A TREATIES ON THE THEORY OF THE FIRST AMENDMENT § 4.11 [A] (1984).

The narrow tailoring requirement forces courts — and governments enacting newsbox regulation — to consider alternatives to particular regulations. If regulations are content based, the narrow tailoring requirement of First Amendment law mandates that they be the "least restrictive means" to achieve the compelling state interest served.[7] In upholding the California statute that protected children from newsbox distribution of harmful adult materials, the Ninth Circuit stated in *Crawford v. Lungren'.* "The statute is effective in limiting children's exposure and has a narrow focus, which still allows adults to purchase the materials from alternative sources or in alternative ways. It tightly fits the State's compelling interest."[72]

When time, place, or manner newsbox regulations are content neutral, and most of them are, the consideration of alternatives to specific regulation is less strict. They are evaluated under the test set forth in *Ward v. Rock Against Racism.*[1]* That test does not require that government determine "the most appropriate method for promoting significant government interests."[74] Rather, the interest must be promoted in a way "that would be achieved less effectively absent the regulation."[75]

A showing that newsbox regulation is an effective way of achieving aesthetic or safety interests is certainly less burdensome on government than having to establish specific regulation as being "least restrictive." However, it can still be used by a court to strike down newsbox regulation. At the district court level in *Globe Newspaper Co.* v. *Beacon Hill Architectural Commission*,[76] the Beacon Hill newsbox regulation did not pass constitutional muster due to the fact that it banned newsboxes while permitting store-front racks. The district court stated: "[T]he preference given to . . . store-front stands ... is evidence that the [regulation] ... is ... not narrowly tailored and burdens substantially more speech than is necessary to serve the Commission's interest in preserving the character of the District."[77] The court concluded that the government "has shown no reason why its interest in preserving the architectural and historic character of the District cannot be met by, for example, subjecting newsracks and other street furniture to the same review process as store-front merchandise racks."[78] The First Circuit, however, reversed the district court asserting that

> [W]hile the district court correctly considered the fact that less- burdensome alternatives exist, it gives too much weight to that fact alone. In so doing, it essentially discounts from the equation *Ward's* injury into whether the Street Furniture Guideline "promotes [the

[71]Crawford v. Lungren, 96 F.3d 380, 386 (9th Cir. 1996) (citations omitted). *But see* Sable Communications, Inc. v. FCC, 492 U.S. 115, 126 (describing test as requiring least restrictive means).

[72]Crawford v. Lungren, 96 F.3d 380, 387 (9th Cir. 1996).

73.491 U.S. 781 (1989).

[74]M. at 800.

[75]M. at 799.

[76]847 F. Supp. 178 (D. Mass. 1994).

[77]Id. at 194-95.

[78]Id.

> Commission's interests such] that [they] would be achieved less effectively absent the [Street Furniture Guideline]."[79]

The First Circuit reminded the district court that *Ward* had explicitly rejected the least restrictive means test and warned that the language in *Ward* should not "be reduced to a meaningless phrase."[80]

Municipal and other governments should note the disagreement between the district court and the court of appeals and should build a record in the adoption of newsbox regulation that evidences consideration of various alternatives and provides justification for the alternative selected. For example, in advancing aesthetic or safety interests, a municipal government might record that it rejected a city-wide restriction on newsboxes for a more limited prohibition on newsboxes along certain streets. Rather than a complete ban on newsboxes for aesthetic reasons, a municipality might instead consider size, shape, and color restrictions. Also, in some areas a limitation on the number of boxes might be more appropriate than a ban on them. Building a record of considering alternatives evidences the government's good faith attempt narrowly to tailor newsbox regulation and may forestall successful constitutional challenge.

A. The Total Ban of Newsboxes

Perhaps no single issue of newsbox regulation has caused more controversy than the total ban of newsboxes in municipal areas, nor has any issue led more to the invalidation of newsbox regulation based on failure to meet the narrow tailoring requirement. Both courts[81] and scholars[82] have argued that a total ban on newsboxes and other forms of distribution in public places is unconstitutional.

At the extreme, a total ban on newsboxes might require the government to demonstrate a compelling state interest, much as in the *Crawford* case, and trigger the least restrictive alternative requirement. In *Wright v. Chief of Transit Police*,[83] the Second Circuit stated that once publishers "have shown a protected interest in free speech under the First Amendment it is incumbent upon the governmental authority to prove that there is a compelling state interest in its total ban. This puts the burden on the governmental authority to establish that nothing less than a total ban would serve

[79] Globe Newspaper Co. v. Beacon Hill Architectural Comm'n, 100F.3d 175, 189(lstCir. 1996).

[80] Id at 190.

[81] See, *e.g.*, Lakewood v. Plain Dealer Pub. Co., 486 U.S. 750, 777 (1987) ("Streets, sidewalks and parks are traditional public fora; leafletting, phampletting, and speaking in such places may be regulated; but they may not be entirely forbidden''); Multimedia Pub. Co. v. Greenville-Spartanburg Airport, 991 F.2d 154, 156 (4th Cir. 1993) (prohibiting total newsbox ban); Sentinel Communications Co. v. Watts, 996 F.2d 1189, 1196-1197 (11th Cir. 1991) (citing several cases prohibiting a total newsbox ban).

[82] *See* Michael A. Pavlik, Note, *No News (Rack) Is Good News? The Constitutionality of a Newsrack Ban*, 40 CASE W. RES. L. REV. 451 (1990) (discussing scholars' arguments).

[83] 558 F.2d 67 (2d Cir. 1977).

»»84

this compelling state interest.

Likewise, in *Multimedia Publishing Co.* v. *Greenville-Spartanburg Airport,* the Fourth Circuit scrutinized a regulation banning placement of newsboxes at the airport. Although airports are not jiublic fora, the court cited a "bureaucratic unwillingness to explore alternatives" and held the total ban unconstitutional. The Fourth Circuit quoted the district court that "[b]ased on considerations of traffic flow and space available, there are numerous locations in the Airport where newsracks could be placed."[87]

To the contrary, numerous Supreme Court non-newsbox cases have supported total bans on First Amendment activities as part of reasonable time, place, and manner regulation/[8] In newsbox cases, the First Circuit supported a total ban in *Globe Newspaper Company* without requiring a compelling state interest.[89] Reconciliation between decisions rejecting and permitting total bans takes place if the requirement of a compelling state interest/least restrictive alternative is dropped from the analysis of the so-called "total ban" of newsboxes. The dropping of this requirement is indicated since the appropriate level of First Amendment protected activity is the distribution of newspapers, " not the distribution of newspapers through newsboxes. Likewise, the protected activity is not the distribution of newspapers through newsboxes of a particular size, shape, color, and placement deemed advantageous by publishers, without consideration of other significant government interests.

Seen in this light the "total ban" of newsboxes is not a total ban at all on the primary protected activity of newspaper distribution. It is, rather, the regulation of a specific harm caused by one aspect of newspaper distribution. As applied to newsbox regulation, the use of the phrase *total ban* is thus misleading. A total ban on newspaper distribution would require a compelling state interest. The better view holds that the banning of newsboxes requires only a significant government interest and a narrowly tailored regulation. Still, the narrow tailoring requirement forces government to consider various alternatives in shaping regulation under its significant interest.

B. Overbroad Discretion

Related to but different from the prior concerns of narrow tailoring is another issue of overbreadth, specifically, the issue of overbroad discretion on the part of

84.Id. at 68 n. 1 (citations omitted).

85.991 F.2d 154 (4th Cir. 1993).

[86]*Id.* at 163.

[87]*Id.* at 162.

88.See, e.g.. Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984) (upholding a ban or sleeping in a park to protest homelessness symbolically); U.S. Postal Service v. Council of Gieenburgh Civic Ass'ns, 453 U.S. 114 (1981) (upholding ban on unstamped materials in mailboxes).

[89]*See* Globe Newspaper Co. v. Beacon Hill Architectural Comm'n, 100 F.3d 175 (1st Cir. 1996).

90.This argument is advanced in Pavlik, *supra* note 82.

government officials to restrict newsboxes. The important concern here is the potential for content-and viewpoint-based regulation. Overbroad discretion allows the possibility of prior restraint of speech by public officials.

The most significant newsbox case to address overbroad discretion is *City of Lakewood* v. *Plain Dealer Publishing Company.*[9'] In this case the Supreme Court struck down a municipal ordinance requiring newspapers to obtain annual permits from the town's mayor in order to place newsracks on public property. The mayor's discretion was subject only to the requirement that he or she provide reasons for any rejections, and the ordinance allowed the mayor to condition permit approval on any "other terms and conditions deemed necessary and reasonable by the Mayor." The Court observed" "[N]othing in the law . . . requires the mayor to do more than make the statement 'it is not in the public interest' when denying a permit application."[93]

In striking down the Lakewood ordinance, the Court observed that broad official discretion in licensing speech permits content- and viewpoint-based discrimination against speech. Such discretion "makes it difficult to distinguish, 'as applied,' between a licensor's legitimate denial of a permit and its illegitimate abuse of censorial power."[94] The Court made reference to "the time-tested knowledge that in the area of free expression a licensing statute placing unbridled discretion in the hands of a government official or agency" constitutes "a prior restraint and may result in censorship."[95] The Court also rejected the dissent's assertion that because Lakewood could have greatly restricted or even banned newsboxes, it could also place the discretion at issue with its mayor. The Court contended that "in a host of other First Amendment cases we have expressly or implicitly rejected that logic."

Lower court cases also express concern for excessive official discretion in newsbox regulation. In *Gannett* v. *Berger*[97] the Third Circuit declared unconstitutional a regulation that empowered the Port Authority to grant or deny publishers permission to distribute their newspapers at Newark Airport, including newsbox distribution, but failed to set standards concerning how that power could be wielded. In *Gannett Satellite Information Network* v. *Town of Norwood,* a federal district court struck down an as applied regulation of newsboxes by two Massachusetts towns that regulated newsboxes through general by-laws requiring everyone advertising or selling merchandise to obtain a license from the boards of selection.

The prior cases concern the substantive discretion of officials, but the cases also suggest that overbroad procedural discretion in newsbox regulation is

[91]486 U.S. 750(1988).

92.*Id.* at 753-754.

[93]M. at 769.

94.Id. at 758.

[95]*Id.* at 757.

96.Id. at 766.

[97]894 F.2d 61 (3d Cir. 1991).

[98]*Id.* at 69.

99.559 F. Supp. 108 (D.C. Mass.

constitutionally suspect. In *Graff* v. *City of Chicago,*[100] the Seventh Circuit summarized permissible limits on the procedure for licensing a newsstand:

> A city may only license a business associated with First Amendment freedoms if, first, the licensor is obligated to grant or deny the permit within a specified and reasonable time during which the status quo is maintained and, second, if there is the possibility of prompt judicial review in the event the license is erroneously denied.

Although the *Graff* case involved the licensing of a newsstand business rather than the licensing of newsboxes, there is little constitutional reason why overbroad procedural discretion should not also create constitutional infirmity in the licensing of newsboxes.

IV. NEWSBOX REGULATION: ALTERNATIVE CHANNELS OF DISTRIBUTION

The final element of the time, place, and manner test requires that regulation leave open "ample alternative channels for communication."[102] However, the Supreme Court has "never clearly defined the alternative means test . . ,"[103] Nor have the lower courts provided much elucidation in applying this test to newsboxes. The cases mentioning alternative channels requirement have rather perfunctorily concluded that an otherwise acceptable newsbox regulation allowed for alternative channels of distribution.[104]

One possible reason for this lack of focus on the alternative channel issue in newsbox cases is that there are a great many ways of distributing newspapers, including home delivery, store sales, newsstand sales, and even Internet distribution. Usually, the alternative channels of distribution are both adequate and obvious to the courts. A second reason for the lack of focus is that the presence or absence of adequate alternative distribution channels is a part of the narrow-tailoring requirement.[1] If there are no adequate alternative channels of distribution, newsbox regulation is much more likely to fall as failing narrow tailoring. Conversely, once a regulation has passed narrow-tailoring scrutiny, there are likely open ample alternative distribution channels.

A final reason the alternative channels requirement has not attracted more

100.986 F.2d 1055 (7th Cir. 1993).

[101]M. at 1064.

[102]See, *e.g.*. Perry Educ. Ass'n v. Perry Local Educ. Ass'n, 460 U.S. 37, 45 (1983).

[103]Pavlik, *supra* note 82, at 483.

[104]The most thorough discussion of alternative channels of distribution in a newsbox case is found in Globe Newspaper Co. v. Beacon Hill Architectural Comm'n, 100 F.3d 175, 192-194 (1st Cir. 1996).

[105]*Id.* at 189.

judicial attention is that if there were not already alternative channels of newspaper distribution other than newsboxes, a significant limitation on newsboxes would approach a total ban on newspaper distribution. Such a ban would drastically interfere with a free press and would be unconstitutional absent a compelling state interest. But as ample alternative channels do exist, the focus of First Amendment analysis becomes whether newsbox restrictions are narrowly tailored rather than whether alternative channels of distribution are present.

V. CONCLUSION

Newsbox regulation is constitutionally permissible under reasonable time, place, and manner regulation. Freedom of speech and press does not permit publishers unfettered access to public fora in the face of significant government interests in public safety and aesthetics. On the other hand, courts will strike down regulations that fail the overbreadth test contained in the narrow tailoring requirement. By careful consideration of the various ways of achieving its significant interest, government can significantly reduce the likelihood that newsbox regulation will violate the First Amendment.