FIRST AMENDMENT—FACIAL CHALLENGE DOCTRINE—FACIAL ATTACK PERMITTED AGAINST A DISCRETIONARY AIRPORT LICENSING REGULATION AIMED AT SPEECH RELATED TO COMMERCIAL ACTIVITY—*Gannett Satellite Information Network v. Berger*, 894 F.2d 61 (3d Cir. 1990).

Frank Walser

I. INTRODUCTION

A party must be able to assert standing in order to challenge the constitutionality of legislation.[1] Generally, standing exists only when the application of a statute jeopardizes a party's personal constitutional rights.[2] The United States Supreme Court altered this requirement in cases where overbroad laws threatened a claimant's first amendment rights.[3] In such cases, it is possible to challenge the legislation's constitutionality "on its face," regardless of its application.[4] This exception to the traditional standing requirement is known as the "facial

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[1] Flast v. Cohen, 392 U.S. 83, 95 (1968). Standing stems from the requirement of justiciability under the constitution, which provides in pertinent part, "[t]he judicial Power shall extend to all Cases in Law and Equity, arising under this Constitution . . . ." U.S. CONST. art III, § 2, cl. 1.

Within the federal courts, standing serves to focus the issues before the court by "assur[ing] that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends." *Flast*, 392 U.S. at 99 (citing Baker v. Carr, 369 U.S. 186, 204 (1962)).

[2] Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 502 (1985). The Supreme Court held that "one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional." *Id.* (quoting United States v. Raines, 362 U.S. 17, 21 (1960)).

[3] *See, e.g.*, City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750 (1988) (allowing a challenge to a municipal ordinance requiring prior permission to install newspaper vending machines in public where the claimant never applied for permit); Freedman v. Maryland, 380 U.S. 51 (1965) (A constitutional application of a pertinent state film censorship provision did not foreclose the claimant's ability to challenge the statute "as a whole."); Saia v. New York, 334 U.S. 558 (1948) (The failure of a minister to reapply for a permit under a municipal ordinance licensing public use of loudspeakers was not fatal to a claim of unconstitutionality.).

[4] Shuttlesworth v. Birmingham, 394 U.S. 147, 151 (1969); *Freedman*, 380 U.S. at 56; Thornhill v. Alabama, 310 U.S. 736, 741 (1940).

challenge" doctrine.[5]

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[5] For a discussion of the facial challenge doctrine, see *infra* notes 37-183 and accompanying text.

A great deal of confusion results from the interplay of the various doctrines employed by the Supreme Court to interpret legislation threatening a party's first amendment rights. Specifically, those with which this note is most concerned are the facial challenge doctrine, the overbreadth doctrine, and the void-for-vagueness doctrine. While the following is intended as a skeletal outline of the relationship between these three concepts, it is easiest to understand if one keeps in mind that the facial challenge doctrine provides a method for approaching the issue of standing to challenge a statute, while "overbreadth" and "vagueness" generally refer to concepts addressing the substantive nature of a particular piece of legislation. Sedler, *The Assertion of Constitutional Jus Tertii: A Substantive Approach*, 70 CALIF. L. REV. 1308, 1377 (1982) [hereinafter *Jus Tertii II*]; Sedler, *Standing to Assert Constitutional Jus Tertii in The Supreme Court*, 71 YALE L.J. 599, 612-13 (1962) [hereinafter *Jus Tertii I*]; Note, *The Void-For-Vagueness Doctrine in The Supreme Court*, 109 U. PA. L. REV. 67, 96 (1960) [hereinafter Note, *Void-For-Vagueness*].

Generally, cases holding a statute invalid on its face fall into one of two categories: (1) where every possible application of the statute would be unconstitutional, or (2) in situations where, although the litigant's own speech is unprotected, the statute under which he was convicted covers a broad spectrum of protected speech. Arenson, *Prior Restraint: A Rational Doctrine or An Elusive Compendium of Hackneyed Cliches?*, 36 DRAKE L. REV. 265, 289 (1986-87). The Supreme Court generally treats statutes falling into the latter category under the overbreadth doctrine. *Id.*

However, the overbreadth doctrine, which holds that all or part of a statute may be deemed unconstitutional if it is so broadly drafted that the possibility arises as to its application in violation of the first amendment, is not limited to facial challenges. Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970) [hereinafter Note, *Overbreadth*]. Rather, the more traditional and conservative approach allows the Court to consider the constitutionality of a statute by virtue of the result under the circumstances of a particular case. *Id.* This, in essence, is the "as applied" method of review. *See id.* On the other hand, the contemporary and more tenacious approach to the doctrine involves finding a statute unconstitutional "on its face" by virtue of its sweeping application. *Id.* Consequently, while the overbreadth doctrine may be used to initiate a facial attack upon statutes impinging upon first amendment rights, it is not strictly limited to the confines of the facial challenge doctrine. *See id.*

Further confusion arises given the close, and often indistinguishable, relationship between the overbreadth doctrine—which seeks to invalidate laws which are overinclusively drafted—and the void-for-vagueness doctrine—which holds that laws whose meanings are not readily apparent to men of common intelligence are constitutionally void. *See* Note, *Overbreadth*, *supra*, at 845 n.5. In fact, when first amendment rights are at issue, the Court has, in effect, merged the vagueness and overbreadth doctrines because in almost any overbroad statute there exists some degree of latent vagueness. *Id.* at 873. Consequently, it should be no surprise that the Supreme Court has employed vagueness analysis, as well as overbreadth, in evaluating potential facial challenges. *See, e.g.*, Smith v. Cahoon, 283 U.S. 553 (1931) (A statute requiring certificate of public convenience for public carriers held facially void for vagueness because it failed to effectively distinguish "public" from "private" carriers.); People v.

The Third Circuit Court of Appeals recently embraced the facial challenge doctrine in *Gannett Satellite Information Network v. Berger*.[6] The *Gannett* court held that an airport regulation requiring prior permission to distribute printed or written material concerning commercial activity, although constitutionally applied to prohibit the installation of newspaper vending machines in public areas of Newark International Airport,[7] nevertheless was unconstitutional on its face because it placed overly broad discretion in the hands of those government officials licensing distribution.[8] The appellate court also found that a similar regulation granting officials discretion to regulate the airport's commercial activity was not subject to a facial challenge.[9] This note will examine the legal history supporting these holdings so as to elucidate the requirements of the facial challenge doctrine, and to determine whether the discretionary regulation of commercial activity is constitutionally valid where the government is free to define "commercial activity" as in *Gannett*.

Gannett arose after an attempt by a state-run transportation authority to regulate the amount of commercial activity occurring within one of the nation's busiest airports.[10] Among its many responsibilities, the Port Authority of New York and New Jersey ("Port Authority")[11] is responsible for allocating space in the three main terminals of Newark International Airport ("Newark Airport") to airlines, concessionaires, and

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Winters, 294 N.Y. 545, 63 N.E.2d 98 (1945) (A state statute prohibiting collections of literature portraying violence in such a way as to create a potential to incite violence was found invalid on its face for vagueness.). *See generally* Note, *Void-For-Vagueness*, *supra*, at 96-104.

The perceived result of this facial attack-overbreadth-vagueness intermixing is an overall extension of the Supreme Court's power of review. *Id.* at 100-01 & 104-05. The Court, then, is freer to interpret state law depending upon its own apprehension of the lack of clarity in statutory drafting and interpretation. *Id.* at 104.

[6] 894 F.2d 61 (3d Cir. 1990).

[7] The very fact that, on appeal, no constitutional concerns were raised by the application of the statute to Gannett is what gave rise to the facial challenge concerns. *See id.* at 64-65. This type of situation exemplifies precisely the utility of the facial challenge doctrine. *See supra* notes 1-5 and accompanying text.

[8] *Gannett*, 894 F.2d at 70.

[9] *Id.* at 69.

[10] *Id.* at 63.

[11] The Port Authority of New York and New Jersey is a dual-state agency responsible for the operation of Newark Airport, as well as a variety of other transportation stations and depots in both states. *Id.*

other privately owned businesses.[12] In October of 1987, the Port Authority, pursuant to its rules and regulations then in effect, denied a request by Gannett Satellite Information Network ("Gannett") to install *USA Today* newspaper vending machines throughout the airport.[13] One month later, Gannett's principal concessionaire informed the publisher that it was considering discontinuing the sale of *USA Today*.[14] In response to the resulting potential loss of its Newark Airport market, Gannett filed suit against the concessionaire, the Port Authority, and several Port Authority officials.[15] Four months later, the Port Authority amended its rules and regulations as applied to commercial activity in the airport.[16] Among the changes, Rule 2 provided that no one could conduct any commercial activity in the airport without the Port Authority's prior consent; Rule 3 stated that vending machines were prohibited in all non-leased areas; and Rule 10 required written permission of the Authority prior to the distribution of "any printed or written matter concerning or referring to commercial activity."[17]

At trial, Gannett argued that the amended provisions, together with

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[12] *Id.*

[13] *Id.*

[14] *Id.* at 64. The concessionaire, W & J Lassiter, Inc., appeared to be retaliating against Gannett's daily habit of providing more copies of *USA Today* than the concessionaire could sell. *Id.*

[15] *Id.* Gannett later dropped its claims against the concessionaire because he ceased doing business in Newark Airport, and voluntarily withdrew its claim against the Port Authority on the basis of state agency immunity under the eleventh amendment. *Id.* at 64 n.2.

[16] *Id.* at 64.

[17] Specifically, the amended rules provided:

> [Rule 2] No person shall carry on any commercial activity at any air terminal without the consent of the Port Authority.
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> [Rule 3] No vending machines for the sale of goods shall be permitted in the public areas of . . . Newark International . . . which are not occupied by a lessee, licensee or permittee. This provision shall not apply to vending machines in restrooms selling personal hygiene items. . . .
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> [Rule 10] No person shall post, distribute or display at an air terminal a sign, advertisement, circular, or any printed or written matter concerning or referring to commercial activity, except pursuant to a written agreement with the Port Authority specifying the time, place and manner of, and fee or rental for, such activity.

Id.

the concessionaire leasing arrangements, created a facially invalid "scheme" because the combined result allowed government officials to monitor and censor written expression at their discretion.[18] Additionally, Gannett contended that the Port Authority's refusal to allow the installation of vending machines created an unconstitutional prior restraint.[19] The United States District Court for the District of New Jersey refused to find for Gannett on either ground.[20]

The district court concluded that, because the regulations focused solely upon commercial activity, first amendment concerns were not implicated and, therefore, the facial challenge doctrine was inapplicable.[21] The court maintained that the provisions did not, "per se, create a threat of censorship or the impact of a suppression of expressive activity," because they were not narrowly and specifically directed at expressive activity.[22] Furthermore, the district court determined that the Port Authority's refusal to allow Gannett to install vending machines was a valid time, place, and manner restriction.[23]

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[18] *Id.* The facial challenge doctrine enables a contesting litigant to argue that the sum total effect of a group of regulations or statutory provisions is to create an unconstitutional prior licensing system, even though the provisions, when individually considered and applied, are not in and of themselves unconstitutional. *See* Freedman v. Maryland, 380 U.S. 51, 56-57 (1965).

[19] *Gannett*, 894 F.2d at 64.

[20] *Id.*

[21] *Id.* Currently, in order to raise a facial challenge against a discretionary licensing statute one must demonstrate that the legislation seeks to regulate conduct which is closely related to expression. City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 759 (1988).

[22] *Gannett*, 894 F.2d at 64. *See Plain Dealer Publishing*, 486 U.S. at 759.

[23] *Gannett*, 894 F.2d at 64. Time, place, and manner restrictions are permissible provided they are content neutral, narrowly tailored to serve significant government interests, and permit access to alternative sources of communication. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989); Perry Education Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983); United States Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 132 (1981); Consolidated Edison Co. v. Public Service Comm'n, 447 U.S. 530, 535-36 (1980); Grayned v. City of Rockford, 408 U.S. 104, 115 (1972). *See also* Note, *Constitutional Law—Freedom of Speech—Since Advertising Display Areas in Federally-Owned Airports Are Public Forums, The Government's Prohibition of Political Advertisements Violates The First Amendment*, 29 VILL. L. REV. 535, 540-52 (1983-84). *See generally* Lee, *Lonely Pamphleteers, Little People, and The Supreme Court: The Doctrine of Time, Place, and Manner Regulations of Expression*, 54 GEO. WASH. L. REV. 757 (1986).

Such restrictions are based on the notion that various methods of expression, no matter what their content, hold the potential to interfere with permissible and desirable governmental goals. *Consolidated Edison*, 447 U.S. at 536. Consequently, "a restriction

Characterizing the airport as a public forum mandating first amendment protection,[24] the court nonetheless postulated that the prohibition of vending machines was content neutral, served significant government interests, and was narrowly tailored to serve those interests.[25] Finally,

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that regulates only the time, place, or manner of speech may be imposed so long as it is reasonable." *Id.* Furthermore, such regulations are valid under all circumstances so long as they are applied "to all speech irrespective of content." Erznoznik v. City of Jacksonville, 422 U.S. 205, 209 (1975).

Reliance upon the standard of reasonableness apparently derives from the universally accepted view that first amendment rights "cannot legitimately claim an absolute right to priority in resource use." Baker, *Unreasoned Reasonableness: Mandatory Parade Permits and Time, Place, and Manner Regulations*, 78 NW. U.L. REV. 937, 949 (1983). After all, two parties cannot hold "two parades on the same corner at the same time." *Id.*

[24] Essentially, there are three kinds of public forums. *See Perry*, 460 U.S. at 45-46; Note, *School Board's Exclusive Access Policy to Teachers' Mailboxes Does Not Violate Rights of Minority Union:* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 67 MARQ. L. REV. 772, 777-79 (1984). First, there are those areas which are traditionally set aside for public assembly and debate. *Perry*, 460 U.S. at 45. Second, there are those locations which the government has set aside specifically for use by the public for expressive activity. *Id.* at 45-46. Finally, there are those locations which, although public in nature, are not commonly set aside for expressive activity, nor have they been specifically set aside for that purpose. *Id.* at 46. Presumably, Newark International Airport would fall into either the second or third category. *See Gannett*, 894 F.2d at 63.

The district court's conclusion is bolstered by the fact that the vast majority of federal courts examining precisely this question have come to the same conclusion, namely, that airports constitute some type of public forum. Carlson, *First Amendment Protection of Free Speech in Public Airports*, 55 J. AIR L. & COM. 1075, 1080 (1990). A composite of decisions shows that courts generally consider the following factors in rendering their determinations: (1) that the public areas of airports resemble city streets, (2) that airport terminals are open for access to the general public, and (3) that there exist statutes and regulations specifically recognizing the rights of airport demonstrators. *Id.* at 1081-82.

[25] *Gannett*, 894 F.2d at 64. For an overview of the law regarding time, place, and manner restrictions, see *supra* note 23 and accompanying text.

With regard to first amendment rights in a public forum, the Supreme Court has held:

> The rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place at any time. The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy.

Cox v. Louisiana, 379 U.S. 536, 554 (1965). *See also Greenburgh Civic Ass'ns*, 453 U.S. at 132; *Consolidated Edison*, 447 U.S. at 536; Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976); *Grayned*, 408 U.S. at 115;

the court indicated that other newsstands in the airport provided Gannett with a variety of communication outlet options.[26] Consequently, Gannett was not completely denied the opportunity to distribute its newspaper in the airport.

Gannett appealed only the district court's finding that the regulations were facially valid.[27] It did not, however, dispute the district court's conclusion that the regulations were valid "as-applied."[28] As a result, the United States Court of Appeals for the Third Circuit, in an opinion authored by Chief Judge Gibbons,[29] assumed the correctness of the district court's findings that the airport was a public forum,[30] and that the Port Authority's prohibition of vending machines was a permissible time, place, and manner restriction of protected speech.[31] The appellate court then concluded that Gannett suffered no actual first amendment injury.[32]

The appellate court, on the other hand, did not agree with the district court's blanket prohibition of a facial attack.[33] Although it affirmed the district court's denial of Gannett's facial challenges to Rules 2 and 3 regulating commercial activity and prohibiting vending machines, the appellate court reversed the district court's holding regarding Rule 10's prohibition of printed or written matter.[34] Instead, Chief Judge Gibbons concluded that Rule 10 was facially invalid.[35] The court found that the wide discretion the regulation vested in government officials violated the first amendment under the overbreadth doctrine.[36]

Linmark Assoc. v. Willingboro, 431 U.S. 85, 93 (1972).

[26] *Gannett*, 894 F.2d at 64; *see supra* note 23.

[27] *Gannett*, 894 F.2d at 64.

[28] *Id.*

[29] Chief Judge Gibbons wrote for a three-judge panel including Circuit Judge Scirica and District Judge Waldman. *Id.* at 63.

[30] *Id.* at 65. All points not raised on appeal are considered to be abandoned by the appellant. Nissho-Iwai Co. v. Occidental Crude Sales, 729 F.2d 1530, 1539 n.14 (5th Cir. 1984); Martin v. Atlantic Coastline Railroad, 289 F.2d 414, 417 n.4 (5th Cir. 1961).

[31] *Gannett*, 894 F.2d at 65.

[32] *Id.*

[33] *See id.* at 69-70.

[34] *Id.* at 70.

[35] *Id.*

[36] *Id.* For a discussion of the interrelationship between the facial challenge and overbreadth doctrines, see *supra* note 5, and *infra* notes 37-48 and accompanying text.

Several federal and state courts have constitutionally invalidated state and municipal ordinances granting the government unfettered discretion to regulate the placement of

II. VARYING THE REQUIREMENTS FOR STANDING UNDER THE FIRST AMENDMENT

A. EVOLUTION OF THE FACIAL CHALLENGE DOCTRINE

At first glance, the facial challenge doctrine resembles a kind of constitutional *jus tertii*,[37] permitting those to whom a statute may be constitutionally applied to oppose the validity of that statute on the theory that it may be unconstitutionally applied to others.[38] This is accomplished by asserting that the statute is either overbroad, in that it sweeps within its ambit both constitutionally protected and unprotected activity,[39] or that the statute is so vague that when exercised, any resulting penalty is a denial of due process.[40] While it appears that

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newsracks. *See, e.g.*, Miami Herald Publishing Co. v. City of Hallandale, 734 F.2d 666 (11th Cir. 1984); Chicago Tribune Co. v. City of Chicago, 705 F. Supp. 1345 (N.D. Ill. 1989); Chicago Newspaper Publishers Ass'n. v. City of Wheaton, 697 F. Supp. 1464 (N.D. Ill. 1988); Providence Journal Co. v. City of Newport, 665 F. Supp. 107 (D. R.I. 1987); Gannett Satellite Information Network, Inc. v. Town of Norwood, 579 F. Supp. 108 (D. Mass. 1984); Philadelphia Newspapers, Inc. v. Borough of Swathmore, 381 F. Supp. 228 (E.D. Pa. 1974); Kash Enters, Inc. v. City of Los Angeles, 19 Cal. 3d 394, 562 P.2d 1302, 138 Cal. Rptr. 53 (1977); Minnesota Newspaper Ass'n. v. Minneapolis, 9 Media L. Rep. (BNA) 2116 (Dist. Ct. Minn. 1983); News Printing Co. v. Borough of Totowa, 211 N.J. Super. 121, 511 A.2d 139 (Law Div. 1986); Passaic Daily News v. City of Clifton, 200 N.J. Super. 468, 491 A.2d 808 (Law Div. 1985); 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); Gannett Co. v. City of Rochester, 69 Misc. 2d 619, 330 N.Y.S.2d 648 (Sup. Ct. 1972). *But c.f.* Gannett Satellite Information Network v. Metropolitan Transportation Authority, 745 F.2d 767 (2d Cir. 1984) (Guidelines to direct the exercise of discretion of government officials in granting licenses to place newsracks are not necessary to maintain the constitutionality of a provision granting discretionary power.).

[37] *Jus tertii* here refers to "standing to assert the constitutional rights of third parties." *Jus Tertii I, supra* note 5, at 600.

[38] *Id.*; Monaghan, *Third Party Standing*, 84 COLUM. L. REV. 273, 282 (1984) ("[T]he first amendment was thought to free litigants from the general limitations of as-applied challenges in permitting them to challenge the 'facial' validity of a statute by raising the 'rights' of 'hypothetical' third parties.").

[39] Note, *Overbreadth, supra* note 5, at 847. According to the Court, a cause of action based upon a claim of overbreadth is possible because a chilling effect on potential speech results from the "threat . . . inherent in a penal statute . . . which does not aim specifically at evils within the allowable area of State control but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press." Thornhill v. Alabama, 310 U.S. 736, 742 (1940); *Jus Tertii I, supra* note 5, at 615.

[40] Champlin Ref. Co. v. Corporation Comm'n, 286 U.S. 210, 243 (1932).

either approach[41] provides for a third-party exception to the traditional notion of standing,[42] in actuality the claimant is asserting his or her own right—the right to be free from subjugation under overbroad or vague statutes.[43] The consequence is that both assertions demonstrate the facial challenge doctrine's dependency upon either the overbreadth doctrine or the void-for-vagueness doctrine in order to maintain constitutional standing.[44]

This doctrinal interdependency[45] is clearly expressed in cases involving legislation requiring government permission prior to engaging in expressive activities.[46] In this context, the issue of overbreadth usually arises by virtue of the discretionary nature often inherent in such licensing schemes.[47] The facial challenge doctrine sprang from the Court's attempt to answer the question of how much governmental discretion is too much.[48]

One of the earliest cases invalidating a statute on its face was *Lovell*

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[41] The approaches are not only not mutually exclusive, *see, e.g.*, People v. Winters, 294 N.Y. 545, 63 N.E.2d 98 (1945) (New York literature censorship law found to be both unconstitutionally overbroad and vague), but are considered nearly identical in their application to the first amendment. Note, *Overbreadth*, *supra* note 5, at 873.

[42] To assert standing, the Court traditionally required that "in the absence of a statute expressly conferring standing, federal plaintiffs must allege some threatened or actual injury . . . before a federal court may assume jurisdiction." Linda R.S. v. Richard D., 410 U.S. 614, 617 (1973).

[43] Note, *Void-For-Vagueness*, *supra* note 5, at 97; *Jus Tertii II*, *supra* note 5, at 1327. Apparently, considerable confusion has arisen by virtue of the Court's failure to expressly treat the concepts of overbreadth and *jus tertii* separately. Note, *Standing To Assert Constitutional Jus Tertii*, 88 HARV. L. REV. 423, 442 (1974). In fact, the Court has even gone so far as to treat the application of the overbreadth doctrine with language used to describe *jus tertii*. *See* Board of Trustees of S.U.N.Y. v. Fox, 492 U.S. 469, 483 (1989) ("The principal advantage of the overbreadth doctrine for a litigant is that it enables him to benefit from the statute's unlawful application to *someone else*." (emphasis in original)).

[44] *See* Note, *Void-For-Vagueness*, *supra* note 5, at 97.

[45] The relationship between these three concepts has led the Court to refer to the overbreadth doctrine as "a departure from traditional rules of standing," *Fox*, 492 U.S. at 484 (citing Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973)), rather than treating the overbreadth and vagueness doctrines as applying to substantive issues and the facial challenge doctrine to the issue of standing. *See id.* *See also* discussion of the interrelated use of the three doctrines, *supra* note 5.

[46] Note, *Overbreadth*, *supra* note 5, at 871-72.

[47] *Id.* *See also infra* notes 49-66 and accompanying text.

[48] For a history of the evolution of the facial challenge doctrine, see *infra* notes 49-77 and accompanying text.

v. City of Griffin.[49] In *Lovell*, the State of Georgia convicted a Jehovah Witness under a municipal licensing ordinance requiring official permission prior to distributing pamphlets within city limits.[50] Absent constitutional guidelines for its administration, the Supreme Court determined that the ordinance effectively empowered city officials to restrict the public dissemination of any and all types of literature.[51] Finding the ordinance invalid on its face, the Court noted that, as such, "it was not necessary for appellant to seek a permit under it" to acquire standing.[52]

Two years later, the Court permitted a facial challenge to an Alabama loitering and picketing law used to prevent striking labor union members from picketing outside their places of work.[53] Adding clarity and depth to the growing facial challenge doctrine, Justice Murphy, writing for the majority in *Thornhill v. Alabama*,[54] stated that the actual application of such a law was not necessary to allow a constitutional challenge.[55] Rather, Justice Murphy emphasized that "[p]roof of an abuse of power in the particular case has never been deemed a requisite for attack on the constitutionality of a statute purporting to license the dissemination of ideas."[56] This was so, the Justice argued, because licensing schemes are inherently evil in that they constantly threaten the

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[49] 303 U.S. 444 (1938).

[50] *Id.* at 447-48. The ordinance provided in pertinent part:

> Section 1. That the practice of distributing, either by hand or otherwise, circulars, handbooks, advertising, or literature of any kind, whether said articles are being delivered free, or whether same are being sold, within the limits of the City of Griffin, without first obtaining written permission from the City Manager of the City of Griffin, such practice shall be deemed a nuisance, and punishable as an offense against the City of Griffin.
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> Section 2. The Chief of Police of the City of Griffin and the police force of the City of Griffin are hereby required and directed to suppress the same and to abate any nuisance as is described in the first section of this ordinance.

Id.

[51] *Id.* at 451.

[52] *Id.* at 452.

[53] Thornhill v. Alabama, 310 U.S. 88 (1940).

[54] 310 U.S. 88 (1940).

[55] *Id.* at 96-97.

[56] *Id.* at 97.

dissemination of information of public concern.[57] Analagous to a licensing law, the penal statute in *Thornhill* allowed for discriminatory enforcement against those engaged in protected expression.[58] Hence, the Court found it invalid on its face.[59]

The Court employed similar reasoning in subsequent cases involving a variety of media sources.[60] In *Saia v. New York*,[61] the Court facially invalidated a statute prohibiting the use of loudspeakers to broadcast news and other public information without police permission.[62] Saia,

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[57] *Id.* at 97-98. The Court here adopted the argument that discretionary prior licensing laws may act to effect a prior restraint. *See* Arenson, *supra* note 5, at 266. A prior restraint results because the vast discretion often provided for in such laws creates a "chilling effect" upon the mind of the would-be speaker, intimidating that person from making any attempt at public expression. *See* Note, *Overbreadth*, *supra* note 5, at 853-55.

[58] *Thornhill*, 310 U.S. at 97-98. The code section read as follows:

> Any person or persons, who, without a just cause or legal excuse therefor, go near to or loiter about the premises or place of business of any other person, firm, corporation, or association of people engaged in a lawful business, for the purpose, or with the intent of influencing, or inducing other persons not to trade with, buy from, sell to, have business dealings with, or be employed by such persons . . . , or who picket the works or place of business of such other persons . . . , for the purpose of hindering, delaying, or interfering with or injuring any lawful business or enterprise of another, shall be guilty of a misdemeanor.

ALA. CODE § 3448 (1923)

[59] *Thornhill*, 310 U.S. at 101.

[60] *See, e.g.*, City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750 (1988) (newsracks); Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969) (peaceful demonstrations); Freedman v. Maryland, 380 U.S. 51 (1965) (motion pictures); Saia v. New York, 334 U.S. 558 (1948) (loudspeakers).

[61] 334 U.S. 558 (1948).

[62] *Id.* at 559-60. The penal ordinance in *Saia* stated:

> Section 2. Radio devices, etc. It shall be unlawful for any person to maintain and operate in any building, or on any premises or on any automobile, motor truck or other motor vehicle, any radio device, mechanical device, or loud speaker or any device of any kind whereby the sound therefrom is cast directly upon the streets and public places and where such device is maintained for advertising purposes or for the purpose of attracting the attention of the passing public, or which is so placed and operated that the sounds coming therefrom can be heard to the annoyance or inconvenience of travelers upon any street or public places or of persons in neighboring premises.
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> Section 3. Exception. Public dissemination, through radio loudspeakers, of items of news and matters of public concern and athletic activities shall not be

a Jehovah Witness like the plaintiff in *Lovell*, was convicted for continuing to broadcast his ministries in a public park after his permit expired.[63] Striking down the ordinance, Justice Douglas focused upon its lack of standards regulating the exercise of discretion, stating that "[w]hen a city allows an official to ban [loudspeakers] in his uncontrolled discretion, it sanctions a device for suppression of free communication of ideas . . . . Annoyance at ideas can be cloaked in annoyance at sound."[64] Justice Douglas acknowledged that free speech should be balanced against community interests, but declared that the courts should "keep the freedoms of the First Amendment in a preferred position."[65] The Court further noted that "condemnation on the grounds of previous restraint" was not removed simply because judicial review of police discretion was available.[66]

The facial challenge doctrine was again expanded in 1965 when a theater owner attacked a state motion picture censorship law in *Freedman v. Maryland*.[67] In *Freedman*, the state convicted the appellant for showing a film he failed to first submit to the State Board of Censors for approval.[68] The state conceded that the film would have received a license had the appellant complied with the law.[69] The appellant contended that, although a prior restraint was not per se

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deemed a violation of this section provided that the same be done under permission obtained from the Chief of Police.

Saia, 334 U.S. at 558 n.1. *But cf.* Kovacs v. Cooper, 336 U.S. 77, 82-83 (1949) (The Supreme Court upheld a similar statute which did not provide for the use of prior discretionary permission of the police.).

[63] *Saia*, 334 U.S. at 559.

[64] *Id.* at 562.

[65] *Id.*

[66] *Id.* at 560 (citing Cantwell v. Connecticut, 310 U.S. 296 (1940)).

[67] 380 U.S. 51 (1965). The statute provided in pertinent part:

It shall be unlawful to sell, lease, lend, exhibit or use any motion picture film or view in the State of Maryland unless the said film or view has been submitted by the exchange, owner or lessee of the film or view and duly approved and licensed by the Maryland State Board of Censors . . . .

MD. ANN. CODE art. 66A, § 2 (1957).

[68] *Freedman*, 380 U.S. at 52.

[69] *Id.* at 52-53.

unconstitutional,[70] the section under which he was convicted, in combination with other statutory provisions,[71] effected an invalid prior restraint allowing him to raise a facial challenge against the statute as a whole.[72] Consequently, the appellant argued that he was not restricted, as the appellate court believed,[73] solely to an attack upon the section forming the basis of the conviction, under which he lacked standing.[74]

Finding in favor of the appellant, Justice Brennan, writing for the Court, congealed the requirements of the facial challenge doctrine, stating:

> In the area of freedom of expression it is well established that one has standing to challenge a statute on the ground that it delegates overly broad licensing discretion to an administrative office, whether or not his conduct could be proscribed by a properly drawn statute, and whether or not he applied for a license.[75]

Having established the appellant's right to challenge the statute as a whole, the Court went on to find it constitutionally invalid because it failed to require that the censorship board's actions be held to judicially prescribed constitutional limits.[76]

In general, then, the facial challenge doctrine permits those desirous of engaging in protected expression to attack the constitutionality of a

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[70] The appellant acknowledged that the state movie censorship statute could be constitutionally applied to prevent the showing of obscenity pursuant to Times Film Corp. v. City of Chicago, 365 U.S. 43 (1961). *Freedman*, 380 U.S. at 54.

[71] Currently, the facial challenge doctrine may be invoked to invalidate as overbroad the entirety of a prior licensing statute. *See* Board of Trustees of S.U.N.Y. v. Fox, 492 U.S. 469, 483 (1989) ("Where an overbreadth attack is successful, the statute is obviously invalid in all its applications, since every person to whom it is applied can defend on the basis of the same overbreadth."); *see also supra* note 18.

[72] *Freedman*, 380 U.S. at 54-55. For a discussion of the prior restraint nature of licensing laws, see *supra* note 57 and accompanying text.

[73] The appellate court maintained that Freedman's actions constituted solely a violation of section 2. *Freedman*, 380 U.S. at 55-56. Consequently, "he [had] restricted himself to an attack on that section alone, and lack[ed] standing to challenge any of the other provisions . . . of the statute." *Id.*

[74] *Id.* at 56.

[75] *Id.*

[76] *Id.* at 57. While the Supreme Court did elucidate the facial challenge issues, it found that the problems of prior restraint arose from the statute's inadequate provisions for judicial review of the decisions rendered by the Maryland Board of Censors. *Id.*

relevant licensing statute, regardless of its actual application, on the grounds that it provides government officials with overly broad discretion to grant or deny a license.[77] Therefore, in situations where discretion is totally unfettered, as was the case in *Gannett*,[78] the Court need only determine whether the specific form of expression at issue is constitutionally protected.[79] This analysis, however, does not immediately provide for a facial challenge to all discretionary licensing laws regulating expression. Whenever a statute seeks to license public expression, the Court will also assess the governmental interests involved.[80]

B. PROTECTED EXPRESSION IN PUBLIC FORUMS

1. Prior Licensing of Public Expression

The government maintains the right to limit expression, regardless of its nature, whenever it is conducted in a public forum.[81] This is accomplished by enacting time, place, and manner restrictions.[82] Such restrictions are constitutional provided they are content neutral, narrowly tailored to serve significant government interests, and allow for alternative channels of communication.[83] Furthermore, time, place, and manner restrictions may be invoked in the form of prior discretionary

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[77] *Id.* at 56.

[78] Only Rules 2 and 10 provided for standardless discretion to be exercised by Port Authority officials; Rule 3 merely provided for a blanket prohibition on all vending machines in non-leased areas of Newark Airport. *See supra* note 17.

[79] *See* Note, *The First Amendment Protection of Free Press and Expression—State Licensing Laws for Newspaper Vending Machines*, 58 U. CIN. L. REV. 285, 289 (1989) ("In spite of the clarity of the test, however, some ambiguity exists as to the proper application of the doctrine because caselaw has never made exactly clear what those protected [forms of expression] are.").

[80] *See, e.g.*, Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45-46 (1983); United States Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 132 (1981); Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 535-36 (1980).

[81] *Perry*, 460 U.S. at 45.

[82] *Id.* For a discussion of time, place, and manner restrictions, see *supra* note 23 and accompanying text.

[83] *Rock Against Racism*, 491 U.S. at 791.

licensing laws.[84] Nonetheless, even where the government enacts licensing statutes to protect such crucial public interests as public peace, safety, and order, such laws are rarely upheld when they vest unbridled discretion in those charged with their enforcement.[85]

For example, in *Kunz v. New York*[86] the Court struck down a city ordinance requiring a permit to hold public religious services because it gave administrative officials unlimited discretionary power to regulate a protected activity.[87] The ordinance, aimed at public order, prohibited anyone from directly denouncing or ridiculing any religion during public services.[88] Kunz was convicted for his scathing criticisms of Catholicism and Judaism in public sermons.[89] The Court recognized the right of municipalities to regulate activities interfering with the normal use of

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[84] Niemotko v. Maryland, 340 U.S. 268, 280 (1951) ("[T]he United States Constitution does not deny localities the power to devise a licensing system if the exercise of discretion by the licensing officials is appropriately defined."). *See, e.g.*, Cox. v. New Hampshire, 312 U.S. 569 (1941) (A statute requiring prior license to conduct parades upheld as a valid time, place, and manner restriction.).

[85] *See, e.g.*, Shuttlesworth v. Birmingham, 394 U.S. 147 (1969) (An ordinance providing plenary discretion to grant or deny parade licenses held invalid on its face.); Cox v. Louisiana, 379 U.S. 536 (1965) (Discretionary enforcement of a state breach of the peace law prohibiting all parades and demonstrations gave local authorities unchecked power identical to that of a discretionary licensing scheme, rendering the law void on its face.); Staub v. City of Baxley, 355 U.S. 313 (1958) (The Court invalidated a city ordinance granting officials the power to review, based on the applicant's character, license applications of organizations desirous of soliciting membership fees within the city limits.); *Niemotko*, 340 U.S. 268 (Lack of standards in practice of local authorities in issuing licenses for religious meetings in a public park rendered the practice constitutionally invalid.).

[86] 340 U.S. 290 (1951).

[87] *Id.* at 295.

[88] The ordinance in question provided, in pertinent part:

> a. Public worship—It shall be unlawful for any person to be concerned or instrumental in collecting or promoting any assemblage of persons for public worship or exhortation, or to ridicule or denounce any form of religious belief, service or reverence, or to preach or expound atheism or agnosticism, or under any pretense therefore, in any street.

Id. at 291 n.1 (citing Section 435-7.0 of chapter 18 of the Administrative Code of the City of New York).

[89] *Id.* at 291. Kunz regularly lambasted the policies and beliefs of the Catholic Church with statements such as, "the Catholic Church makes merchandise out of souls," Catholicism is "a religion of the devil," and the Pope is "the anti-Christ." *Id.* at 296 (Jackson, J., dissenting). Kunz also regarded Jews as "Christ-killers" and said it was "a shame" that they were not all "burnt in the incinerators." *Id.*

streets,[90] but indicated that "'[w]herever 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.'"[91] Subsequently, the Court determined that the public speech concerns outweighed the government's purported need to discretionarily regulate speech under the circumstances, and found the ordinance facially unconstitutional.[92] *Kunz* demonstrates that whenever a statute provides officials with discretion to regulate protected expression in public forums, the Court will first consider the extent of the discretion in light of the governmental interest at stake.[93] The Court then balances these considerations against the first amendment freedoms of would-be speakers.[94]

Cases involving civil rights marches also exemplify the Court's use of a balancing test to ascertain the appropriate scope of the government's ability to regulate expression in public forums.[95] In the 1965 case of *Cox v. Louisiana*,[96] the Court focused on the legitimate nature of the governmental interest in parade and assembly scenarios.[97] The *Cox* Court found a state breach of the peace law unconstitutional by virtue of the local officials' practice of applying it in a discriminatory fashion.[98]

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[90] *Id.* at 293-94.

[91] *Id.* at 293 (quoting Hague v. C.I.O., 307 U.S. 496, 515 (1939)).

[92] *Id.* at 294.

[93] *See id.* at 293-94.

[94] *See id. See also* Baker, *supra* note 23, at 937.

[95] *See* Arenson, *supra* note 5, at 285-86; Baker, *supra* note 23, at 937.

[96] 379 U.S. 536 (1965).

[97] The Court dealt with both a state breach of the peace law and a law prohibiting obstructions of public passages. *See id.* at 544, 553. *Cox* involved a demonstration of some 2,000 black students in front of the Baton Rouge, Louisiana, courthouse protesting segregation and the arrest and imprisonment of fellow black students. *Id.* at 539-40. The protest was conducted peacefully and was permitted to continue until lunchtime when the group's leader, the Reverend Mr. B. Elton Cox, suggested that the demonstrators conduct sit-ins at twelve local stores refusing to serve blacks. *Id.* at 542. The local authorities considered the remarks "inflammatory" and proceeded to forcibly disperse the crowd. *Id.* at 543-44. Cox was arrested the following day and charged with criminal conspiracy, disturbing the peace, obstructing public passages, and picketing before a courthouse. *Id.* at 544.

[98] *Id.* at 558. The statute provided, in pertinent part:

> Whoever with intent to provoke a breach of the peace, or under circumstances such that a breach of the peace may be occasioned thereby . . .

Refining its balancing requirements, the Court noted that where a statute does not allow for abuse by discriminatory application, it will not be invalidated merely because it was enforced against those exercising civil rights.[99] The Court then distinguished between the protection afforded patrolling, marching, and picketing, and that given to "pure speech,"[100] and refused to recognize the same protection for both.[101] While the Court did not address the constitutionality of a blanket prohibition of public parades and demonstrations,[102] the majority stated that the absence of guidelines for the statute's application led to its discriminatory enforcement.[103] Characterizing the statute as a limitless discretionary licensing law,[104] the Court found it unconstitutional on its face.[105]

Four years later the Court, in *Shuttlesworth v. Birmingham*,[106] refined the determinative requirements as to the constitutional protection afforded public expression, and reaffirmed the facial challenge

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> crowds or congregates with others . . . in or upon . . . a public street or public highway, or upon a public sidewalk, or any other public place or building . . . and who fails or refuses to disperse and move on . . . when ordered so to do by any law enforcement officer of any municipality, or parish, in which such act or acts are committed, or by any other authorized person . . . shall be guilty of disturbing the peace.

LA. REV. STAT. ANN. § 14:103.1 (West 1962).

[99] *Cox*, 379 U.S. at 554. *Cox* later gave rise to the original concept of "public forum" via Harry Kelvin's article, *The Concept of The Public Forum:* Cox v. Louisiana, 1965 SUP. CT. REV. 1. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1718 (1987).

[100] As used by Justice Goldberg in this case, "pure speech" refers to conduct "initiated, evidenced, or carried out by means of language, either spoken or written, or printed." *Cox*, 379 U.S. at 555 (citing Giboney v. Empire Storage & Ice Co. 336 U.S. 490, 502 (1949)).

[101] *Id.* The foundation for the distinction is that "[g]overnmental authorities have the duty and responsibility to keep their streets open and available for movement." *Id.* at 554-55.

[102] *Id.* The Court did indicate, however, that it believed that such a blanket prohibition would be unconstitutional to the extent that some public area must be made available for outdoor assemblies. *Id.* at 555 n.13.

[103] *Id.* at 556-57.

[104] *Id.* at 557.

[105] *Id.* at 558.

[106] 394 U.S. 147 (1969).

doctrine standards.[107] In *Shuttlesworth*, local authorities convicted a black minister under a municipal ordinance for conducting a peace march without a permit.[108] Assessing the thirty years of prior case law,[109] Justice Stewart concluded that "a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional."[110] The Court held that the Birmingham ordinance constituted an unconstitutional prior restraint on its face,[111] because it gave police officials complete discretion to issue parade and demonstration permits.[112] Furthermore, the Court emphatically stressed that those guilty under a discretionary licensing statute "may ignore it and engage with impunity in the exercise of the right of free

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[107] *See* Note, *supra* note 79, at 288.

[108] *Shuttlesworth*, 394 U.S. at 149-50. The ordinance provided as follows:

> It shall be unlawful to organize or hold, or to assist in organizing of holding, or to take part or participate in, any parade or procession or other public demonstration on the streets or other public ways of the city, unless a permit therefore has been secured from the commission.
>
> To secure such permit, written application shall be made to the commission, setting forth the probable number of persons, vehicles and animals which will be engaged in such parade, procession or other public demonstration, the purpose for which it is to be held or had, and the streets or other public ways over, along or in which it is desired to have or hold such parade, procession or other public demonstration. The commission shall grant a written permit for such parade, procession or other public demonstration, prescribing the streets or other public ways which may be used therefore, unless in its judgement the public welfare, peace, safety, health, decency, good order, morals or convenience require that it be refused. It shall be unlawful to use for such purposes any other streets or public ways than those set out in said permit.
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> The two preceding paragraphs, however, shall not apply to funeral processions.

Id. (citing § 1159 of the General Code of Birmingham).

[109] *Id.* Justice Stewart cited 17 cases to support his position. *Id.* at 151 n.2.

[110] *Id.* at 150-51.

[111] For a discussion of how discretionary licensing laws create a prior restraint, see *supra* note 57 and accompanying text.

[112] *Shuttlesworth*, 394 U.S. at 151. The Court also noted that a narrowing construction of the ordinance supplied by the Alabama Supreme Court did not render it constitutional because the words and actions of local officials gave no indication that the restrictive interpretation would be followed. Note, *Free Expression and Parade Permit Ordinances*, 34 S.C.L. REV. 51, 56 (1982).

expression for which the law purports to require a license."[113] Therefore, as was the case in *Freedman*,[114] the Court found that under the facial challenge doctrine, an individual's choice to ignore a licensing law does not foreclose his standing to challenge it.[115]

While standing is therefore established for those who wish to engage in religious meetings and civil rights demonstrations[116]—activities which call forth public safety and peace concerns under specific time, place and manner restrictions—separate issues are raised when, as in *Gannett*, governmental authorities seek to license activities which are essentially commercial in nature.[117]

2. The Peculiar Problems of Commercial Speech

Unlike political or religious expression, or protected forms of "pure speech,"[118] the Supreme Court has only apprehensively extended protected status to commercial speech.[119] In fact, prior to 1975,[120] the Court denied that commercial speech was entitled to any first amendment protection.[121] While commercial speech is qualifiedly protected today,[122] its inclusion under the facial challenge doctrine is

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[113] *Shuttlesworth*, 394 U.S. at 151.

[114] *See supra* notes 67-76 and accompanying text.

[115] *See Shuttlesworth*, 394 U.S. at 151.

[116] *See, e.g., Shuttlesworth*, 394 U.S. 147; Cox v. Louisiana, 379 U.S. 536 (1965); Kunz v. New York, 340 U.S. 290 (1951); Niemotko v. Maryland, 340 U.S. 268 (1951); Saia v. New York, 334 U.S. 558 (1948); Cox v. New Hampshire, 312 U.S. 569 (1941).

[117] *See, e.g.*, Board of Trustees of S.U.N.Y. v. Fox, 492 U.S. 469 (1989); Posadas de Puerto Rico Assoc. v. Tourism, Co., 478 U.S. 328 (1986); Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978); Virginia Pharmacy Bd. v. Virginia Consumer Council, 425 U.S. 748 (1976).

[118] In this context, the definition of "pure speech" is intended to mirror that used by Justice Goldberg in Cox v. Louisiana, 379 U.S. 536 (1965). *See supra* note 100.

[119] *See Metromedia*, 453 U.S. at 505.

[120] In 1975, the Supreme Court explicitly stated that speech appearing in the form of an advertisement did not foreclose first amendment concerns. Bigelow v. Virginia, 421 U.S. 809, 818 (1975).

[121] *Metromedia*, 453 U.S. at 505 (citing Valentine v. Chrestensen, 316 U.S. 52 (1942)).

[122] *See* Ohralik v. Ohio State Bar Ass'n., 436 U.S. 447, 456 (1978) ("Rather than subject the First Amendment to . . . a devitalization, we instead have afforded commercial speech a limited measure of protection, commensurate with its subordination in the scale of First Amendment values.").

still problematic.[123]

Commercial speech is defined by the Court as that which is intended to "propose a commercial transaction."[124] So long as such a transaction is offered, the communication remains commercial in nature and does so "notwithstanding the fact that [it] contain[s] discussion of important public issues."[125] Furthermore, "advertising which 'links a product to a current public debate' is not thereby entitled to the constitutional protection afforded noncommercial speech."[126] The test to determine the degree of protection afforded commercial speech was established by the Supreme Court in *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of New York.*[127] There, the Court stated:

> At the outset we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest [in regulating a particular form of commercial speech] is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.[128]

Since 1980, the Court has employed the *Central Hudson* test to determine both the facial validity of statutes regulating commercial speech and the constitutionality of such statutes as applied.[129] For example, in *Posadas de Puerto Rico Assoc. v. Tourism Co.*,[130] the Court held that a Puerto Rican statute regulating the advertisement of gambling and casinos was facially valid because, under a narrowed

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[123] The confusion surrounding the protection of commercial speech is not surprising since it is a relatively new area, and it involves a vast variety of types of speech—from the political message to the pure sales pitch. Stone, *Theorizing Commercial Speech*, 11:2 GEO. MASON L. REV. 95, 101, 110 (1988).

[124] Board of Trustees of S.U.N.Y. v. Fox, 492 U.S. 469 (1989) (citing Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 762 (1976)).

[125] Bolger v. Youngs Drug Products, Corp., 463 U.S. 60, 67-68 (1983).

[126] *Fox*, 492 U.S. at 475 (quoting Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 562 n.5 (1980)).

[127] 447 U.S. 557 (1980).

[128] *Id.* at 566.

[129] *See infra* notes 130-44 and accompanying text.

[130] 478 U.S. 328 (1986).

interpretation rendered by the Puerto Rico Superior Court,[131] the statute satisfied the four-part commercial speech test.[132] Justice Rehnquist, writing for the majority, noted that the legislature's power to restrict commercial speech relating to casinos stemmed directly from its power to prohibit gambling altogether.[133] Additionally, the majority held that the appellant's contention that the statute was unconstitutionally vague was overcome by the lower court's interpretive narrowing of the statute's scope.[134] Thus, while the Court did not limit itself solely to the *Central Hudson* analysis, it did employ the test as a tool to evaluate the legitimacy of facial challenges to statutes regulating commercial speech.[135]

In contrast, the Court recently retooled the *Central Hudson* test so as to permit its application in the context of an "as applied" analysis.[136] In *Board of Trustees of S.U.N.Y. v. Fox*,[137] the sole issue before the Court was whether the fourth prong of the *Central Hudson* test, requiring that a regulation restricting commercial speech be "not more extensive than is necessary to serve" a substantial government interest,[138] was equivalent to a requirement that the government use only the least restrictive measures possible.[139]

Rejecting the least restrictive means standard, Justice Scalia found that the constitutionality of a commercial speech regulation depended upon the reasonableness of the measure in light of the legislature's particular goal.[140] Justice Scalia wrote:

> What our decisions require is a "'fit' between the legislature's

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[131] The Supreme Court is obligated to abide by the narrowing constructions placed upon otherwise vague or overbroad statutes by state courts which have already had the opportunity to review the legislation. New York v. Ferber, 458 U.S. 747, 769 n.24 (1982).

Justice Rehnquist posited that the same was true for lower court determinations made under Puerto Rican jurisdiction. *See Posadas*, 478 U.S. at 339.

[132] *See Posadas*, 478 U.S. at 340-47.

[133] *Id.* at 345-46.

[134] *Id.* at 347.

[135] *See id.* at 330.

[136] Board of Trustees of S.U.N.Y. v. Fox, 492 U.S. 469 (1989).

[137] *Id.*

[138] Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 566 (1980).

[139] *Fox*, 492 U.S. at 476.

[140] *See id.* at 480.

> ends and the means chosen to accomplish those ends"—a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is "in proportion to the interest served;" that employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective.[141]

The Justice then explained that this refinement of the commercial speech test was limited to an "as applied" analysis.[142] Justice Scalia noted that by utilizing the test in this manner, the Court was automatically precluded from employing it to assess statutory overbreadth.[143] This was so, Justice Scalia explained, because a specific finding that a statute was "narrowly tailored" under the four-part *Central Hudson* test necessarily prevented the contrary finding that it was drafted in an overly broad fashion.[144] Notwithstanding its analysis, however, the *Fox* Court held that both the "as applied" and facial challenge issues were not yet ripe for resolution.[145]

Justice Scalia postulated, nonetheless, on the plaintiff's ability to raise a claim of statutory overbreadth in the face of a commercial speech regulation.[146] Justice Scalia noted that the overbreadth doctrine generally is not available to challenge statutes regulating commercial speech.[147] Therefore, the Justice concluded, a facial challenge would apply only when such regulations reached protected non-commercial speech.[148] The Justice then indicated that the definition of commercial speech, as provided in a stipulation to the university's regulations in *Fox*,[149] could easily encompass protected speech.[150] Should such a potential application be found upon remand to the lower court, Justice Scalia explained, the overbreadth analysis would invalidate the

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[141] *Id.* (citations omitted).

[142] *Id.* at 482-83.

[143] *See id* at 482.

[144] *Id.*

[145] *Id.* at 485.

[146] *See generally id.* at 481-85.

[147] *Id.* at 481.

[148] *Id.*

[149] The university stipulation defined commercial speech as any invited speech "where the end result is the intent to make a profit by the invitee." *Id.* at 482.

[150] *Id.*

commercial speech regulation in all its applications.[151] The Court thus intimated that commercial speech regulations may run the risk of impermissibly trampling protected speech whenever the government reserves for itself the discretion to define commercial speech.[152] The result of such a finding would permit those subject to commercial speech regulations to avail themselves of the overbreadth doctrine by way of a facial challenge.[153]

The consequence of Justice Scalia's dicta regarding facial challenges to commercial speech regulations based upon allegations of overbreadth is that it appears to contradict the use of the *Central Hudson* test to determine facial validity.[154] While the Court in *Posadas de Puerto Rice v. Tourism Co.*[155] never definitively stated whether *Central Hudson* is indeed the appropriate test in light of a facial challenge to a commercial speech regulation,[156] Justice Scalia's specific reference in *Fox* to *Central Hudson* as an "as applied" analysis,[157] together with his conclusion that the *Central Hudson* test and the overbreadth doctrine are mutually exclusive,[158] will probably restrict future overbreadth analyses of

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[151] *Id.* at 483.

[152] *See id.* Identical concerns were raised in Metromedia, Inc. v. San Diego, 453 U.S. 490 (1981). *Metromedia* involved the constitutionality of a city ordinance regulating the use of billboards for commercial speech, and providing for a general ban on any signs carrying noncommercial messages. *See id.* at 493-96. The Supreme Court, by a plurality, held that the commercial speech regulations were permissible. *Id.* at 512. The Court also held that the general ban on noncommercial advertising was invalid. *Id.* at 521. In a concurring opinion, Justice Brennan criticized the Court's belief, raised in Justice White's opinion, that an ordinance totally banning commercial billboards would be constitutional. *See id.* at 536 (Brennan, J., concurring). Justice Brennan argued that such an ordinance ran the risk of "curtailing noncommercial speech in the guise of regulating commercial speech" because it would permit local government authorities to define "commercial" and "noncommercial" advertising. *Id.* at 536-37 (Brennan, J., concurring). The Justice concluded that the Court invalidated that type of discretionary power in such cases as Shuttlesworth v. Birmingham 394 U.S. 147 (1969); Kunz v. New York, 340 U.S. 290 (1951); Saia v. New York, 334 U.S. 558 (1948); and Lovell v. Griffin, 303 U.S. 444 (1938). *Fox*, 492 U.S. at 537-38 (Brennan, J., concurring).

[153] *Fox*, 492 U.S. at 484.

[154] This is especially true in light of Justice Scalia's explanation that an "as applied" utilization of the *Central Hudson* test necessarily precludes its employment to determine the necessary overbreadth to raise a facial challenge. *Id.* at 482; *see also supra* notes 142-44 and accompanying text.

[155] 478 U.S. 328 (1986).

[156] *See generally* Posadas de Puerto Rico Assoc. v. Tourism, Co., 478 U.S. 328 (1986).

[157] *Fox*, 492 U.S. at 482.

[158] *Id.*

commercial speech regulations to an examination of the potential application of those regulations to protected non-commercial speech.[159]

Moreover, this limited approach to facial challenges in the context of commercial speech is not the only restraint placed by the Court upon claimants seeking to assert standing. In addition to the requirement that a regulation have the potential to threaten protected noncommercial speech, the Court has further restricted first amendment facial challenges, in both commercial and noncommercial settings, to statutes directed at, or related to, expression.[160] Accordingly, this narrowing should limit the availability of the facial challenge doctrine for those claimants contesting discretionary licensing laws, including those aimed at commercial speech behavior.[161]

3. Discretionary Licensing of Newsracks

The Supreme Court recently limited the facial challenge doctrine by restricting its use to licensing schemes impinging solely upon traditional forms of expression.[162] In *City of Lakewood v. Plain Dealer Publishing Co.*,[163] the Court held that a discretionary licensing law is subject to a facial challenge only where the law bears "a close enough nexus to expression, or to conduct commonly associated with expression, to pose a real and substantial threat" of censorship.[164] *Plain Dealer Publishing*, similar to the facts in *Gannett*, involved the availability of the facial challenge doctrine to contest the constitutionality of a municipal ordinance requiring a permit to place newspaper vending machines

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[159] *See id.* at 482-83. *See also supra* notes 146-53 and accompanying text.

[160] City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 759 (1988).

[161] *See id.* at 761. For example, the Court believed that no facial challenges could be made to a law giving the local government discretion to license the placement of soda machines—a commercial activity. *Id.* The Court acknowledged that such a statute created the unlikely possibility that it might result in a chilling effect by allowing the government to deny a soda machine vending license to anyone outspokenly critical of the government. *Id.* at 788-89 (White, J., dissenting). Nonetheless, the minimal impact of possible censorship under the circumstances meant that a facial challenge was not necessary. *Id.* at 761. Rather, any resulting restrictions upon first amendment rights could be dealt with as they arose via an "as applied" analysis. *Id.*

[162] *Plain Dealer Publishing*, 486 U.S. 750.

[163] *Id.*

[164] *Id.* at 759.

throughout the city of Lakewood, Ohio.[165] Dissatisfied with the licensing requirement, a local newspaper brought suit against the city without first applying for a permit.[166] Although the failure to apply foreclosed any challenge to the statute's unconstitutional application, the Court nonetheless permitted the newspaper to facially attack the ordinance.[167]

Justice Brennan, writing for a four member majority,[168] determined that a facial challenge was permissible where a licensing law "allegedly vests unbridled discretion in a government official over whether to permit or deny expressive activity."[169] Referring to the "time tested

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[165] *Id.* at 753. The Lakewood ordinance provided in pertinent part:

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

Id.

[166] *Id.* at 754.

[167] *Id.* at 755-56. *See generally* Note, *Diminishing The First Amendment Rights of Newsracks:* City of Lakewood v. Plain Dealer Publishing Co., 37 WASH. U. J. URB. & CONTEMP. L. 243 (1990).

[168] Only seven Justices participated in the decision, with three dissenters. *Plain Dealer Publishing*, 486 U.S. at 752. Commentators have suggested that the dearth of Justices participating in *Plain Dealer Publishing* may render it vulnerable to political and ideological attack in the near future. *See* Note, *supra* note 79, at 299.

[169] *Plain Dealer Publishing*, 486 U.S. at 755. Excessive discretion under a newsrack licensing law stems from the failure of such a regulation to provide for a variety of procedural safeguards. *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. PROB. 183, 202 (1985). A valid ordinance should specify: first, a brief period of time within which the licensor should be required to act; second, that the

knowledge" of the "long line of precedent" addressing licensing laws,[170] Justice Brennan isolated two major reasons for permitting a facial challenge under the circumstances.[171] First, the Court observed that "the mere existence of the licensor's unfettered discretion, coupled with the power of prior restraint, intimidates parties into censoring their own speech, even if the discretion and power are never actually abused."[172] Second, the Court noted that the absence of specific standards regulating the application of a licensing statute "makes it difficult to distinguish, 'as applied,' between a licensor's legitimate denial of a permit and its illegitimate abuse of censorial power."[173] Justice Brennan concluded it was necessary to permit a facial challenge "whenever a licensing law gives a government . . . agency substantial power to discriminate based on the content . . . of speech by suppressing disfavored speech or disliked speakers," citing the unique intimidating and interpretive effects of statutes regulating expression.[174] The Court, however, distinguished between all discretionary laws, and those attempting to license expression, by restricting facial challenges to the latter category.[175] Thus, while the Court permitted the publisher to facially attack the licensing ordinance in *Plain Dealer Publishing*, a similar claim under a statute not typically aimed at expression—a local law requiring a building permit, for example—would have to be applied before it could be contested.[176]

In the end, *Plain Dealer Publishing* adds very little to the first amendment facial challenge doctrine.[177] Nothing in the *Plain Dealer Publishing* opinion changes the earlier rulings of the Court in *Lovell*, *Freedman*, or *Shuttlesworth*.[178] Moreover, the unspecific nature of

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licensor either issue a license or restrain unlicensed acts by court action; and third, that prompt judicial review is available pending denial of a permit. *Id.*

[170] *Plain Dealer Publishing*, 486 U.S. at 757.

[171] *See id.* at 757-58.

[172] *Id.*

[173] *Id.* at 758.

[174] *Id.* at 759

[175] *Id.*

[176] *Id.* at 761.

[177] *See* Note, *supra* note 79, at 298.

[178] *Id. See also* Note, *Facial Challenges to Standardless Licensing Statutes*, 102 HARV. L. REV. 257, 263 (1989) ("*Plain Dealer Publishing* has reaffirmed key tenets of first amendment theory, including the principles that regulation of the instruments of speech can infringe the first amendment, and that the greater power to ban an activity altogether does not include the lesser power to regulate the activity in a manner that

Justice Brennan's "close enough nexus to expression"[179] rule has led some commentators to speculate that the continued application of the facial challenge doctrine to newsracks may become increasingly troublesome.[180] Indeed, while the Third Circuit Court of Appeals was able to draw liberally from *Plain Dealer Publishing*,[181] the *Gannett* court's use of the "close enough nexus to expression"[182] rule to uphold Newark Airport's commercial activity regulation demonstrates a unique manifestation of the predicted difficulty.[183]

III. FACIAL CHALLENGES IN THE CONTEXT OF COMMERCIAL ACTIVITY AND EXPRESSION IN AIRPORTS

Chief Judge Gibbons began his analysis of *Gannett* by establishing that ordinary rules of severability[184] do not apply when the court reviews allegedly overbroad statutes impinging upon the first amendment.[185] The Chief Judge argued that the kind of piece-meal litigation available under severability was inadequate to guard against the likelihood that at some point, a government official vested with

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chills speech.").

[179] *Plain Dealer Publishing*, 486 U.S. at 759.

[180] *See id.* at 788 (White, J., dissenting) ("[T]he Court's new 'nexus to expression, or to conduct commonly associated with expression' test is peculiarly troublesome, because it is of uncertain scope and vague expanse."). *See also* Note, *supra* note 79, at 299 ("The vagueness of the 'close enough nexus' rule will invite conflicting decisions below as judges are forced to decide which licensing statutes have the nexus and which do not.").

[181] The Third Circuit Court of Appeals employed the *Plain Dealer Publishing* "close enough nexus to expression" test to forbid a facial challenge to Rule 2 of the Port Authority's amended Rules and Regulations, Gannett Satellite Information Network v. Berger, 894 F.2d 61, 68-69 (3d Cir. 1990), and the same test to allow a facial challenge to Rule 10. *Id.* at 69-70.

[182] *Plain Dealer Publishing*, 486 U.S. at 759.

[183] For a discussion of the problems associated with applying the *Plain Dealer Publishing* test to commercial activity, see *infra* notes 221-30 and accompanying text.

[184] A law which is found severable is "one that may be constitutionally applied to at least some persons, even if it is unconstitutional as to others." *Jus Tertii II*, *supra* note 5, at 1311.

[185] *Gannett*, 894 F.2d at 65. In contrast, where a challenged law does not restrict expression, the Supreme Court will permit an attack based upon its violation of third parties' rights only where the law is shown to be nonseverable. *Jus Tertii II*, *supra* note 5, at 1323.

unbridled discretion would abuse his censorship power.[186] Therefore, the court determined that those against whom a prior licensing statute regulating speech is validly applied may challenge the statute on behalf of those who may fall victim to its potentially unconstitutional administration.[187]

Chief Judge Gibbons then went on to outline the facial challenge doctrine as conceived in *Plain Dealer Publishing*.[188] Breaking down the Supreme Court's analysis into its component parts, Chief Judge Gibbons stated that "a statute granting discretion to government[] officials can be said to violate the first amendment only if it specifically relates to expression and only if it gives rise to a 'real and substantial' risk of unconstitutional censorship."[189]

Applying the *Plain Dealer Publishing* test to the *Gannett* facts, Chief Judge Gibbons initially dismissed the publisher's argument that the Port Authority's recent rule amendments, combined with the Port Authority's lease agreements with airport concessionaires, promulgated a "scheme" of discretionary regulations which, taken as a whole, were facially invalid.[190] Rather, Chief Judge Gibbons found that Gannett's attempt to combine the issues only obscured the first amendment argument.[191] Consequently, the court exposed each component of the "scheme" to an independent constitutional evaluation.[192]

The court first considered Gannett's contention that the scarcity of guidelines to instruct concessionaires in their selection of marketable media allowed them, by virtue of their lease agreements, to operate as

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[186] *Gannett*, 894 F.2d at 66. *See also* Cameron v. Johnson, 262 F. Supp. 873, 897 (S.D. Miss. 1966) (Rives, Cir. J., dissenting), *aff'd*, 390 U.S. 611 (1968) ("The danger to freedom of speech [from] a broad and vague delegation of power . . . is too great to expose it to the long road of case-by-case litigation in the hope that someday the statute's reach will be narrowed to constitutionally permissible limits."); Note, *Overbreadth*, *supra* note 5, at 868 ("Review under an ad hoc test not only fails to cure the overbroad law's chilling effect; it also leaves the actor unsure whether even his own particular constitutional claims will be reliably adjudicated.").

[187] *Gannett*, 894 F.2d at 66.

[188] *See id.* For a discussion of the *Plain Dealer Publishing* decision, see *supra* notes 162-80 and accompanying text.

[189] *Gannett*, 894 F.2d at 66.

[190] *Id.*

[191] *Id.* The court stated, "This claim however, conflates four distinct regulatory elements into an amorphous whole and thereby needlessly obscures the first amendment issues raised in this case." *Id.*

[192] *Id.*

"First Amendment gatekeepers" on behalf of the Port Authority.[193] Chief Judge Gibbons determined that the Constitution could not be applied to regulate their behavior because concessionaires are private, not public, entities.[194] Furthermore, the Chief Judge found that, in the absence of a "symbiotic relationship" between the concessionaires and the Port Authority, the lease agreements did not trigger state action.[195] This was so, Chief Judge Gibbons argued, because a licensing relationship which fails to bestow a dual benefit to both the government and a private licensee does not make the government responsible for the actions of the licensee.[196]

Finally, Chief Judge Gibbons pointed out that forcing private concessionaires to abide by government guidelines regulating the dissemination of information would create additional first amendment problems.[197] Consequently, the court rejected Gannett's challenge to the airport concessionaires.[198]

The court then turned its attention to Rules 2 and 3 of the Port Authority Rules and Regulations requiring the Authority's consent to conduct commercial activity within the airport, and prohibiting the installation of vending machines in the airport's public areas.[199] Chief Judge Gibbons held that Rule 3's prohibition of vending machines was not subject to Gannett's facial attack because it did not involve the use of government discretion.[200] Since such a prohibition prevents officials from carving out case-by-case exceptions pursuant to their fancies, the Chief Judge believed that the precautionary aspects of a facial challenge would not be served.[201]

The *Gannett* court also determined that no facial attack could be made upon the unrestricted discretion of Port Authority officials to

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[193] *Id.* at 67.

[194] *Id.*

[195] *Id.* Chief Judge Gibbons noted that "In such circumstances, state action will be recognized only when there is a 'symbiotic' relationship between the private and governmental entities, such that the public might reasonably conclude from that relationship that the government has lent support to the private entity's actions." *Id.*

[196] *Id.*

[197] *Id.* at 68.

[198] *Id.*

[199] *See supra* note 17.

[200] *Gannett*, 894 F.2d at 68.

[201] *Id.*

license commercial activity under Rule 2.[202] Chief Judge Gibbons initially followed a traditional facial challenge analysis,[203] noting that Rule 2 provided government officials with vast discretion, while it simultaneously excluded standards regulating the exercise of that discretion.[204] Nonetheless, employing the "close enough nexus to expression"[205] rule outlined in *Plain Dealer Publishing*, the court held that no facial challenge could be made against the regulation because its application was to commercial activity in general, and thus it was not "narrowly and specifically" directed at expression.[206] Analogizing Rule 2 to Justice Brennan's example in *Plain Dealer Publishing* of a discretionary licensing ordinance requiring prior government approval for a building permit,[207] Chief Judge Gibbons stated that the commercial activity regulation "provide[d] too blunt a censorship instrument to warrant judicial intervention prior to an allegation of actual misuse."[208]

The same test, however, yielded different results when the appellate court applied it to Rule 10, requiring the written permission of the Port Authority to "post, distribute or display . . . any printed or written matter concerning or referring to commercial activity."[209] Holding that a facial challenge was appropriate,[210] Chief Judge Gibbons first observed that the wording of the regulation could be applied to constitutionally protected speech such as newspapers or magazines.[211] Moreover, the court found that the absence of guidelines directing the Authority in its

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[202] *Id.* at 69.

[203] Normally, a facial challenge will lie where regulation provides government officials with some form of standardless discretion. *See, e.g.*, Hynes v. Mayor of Oradell, 425 U.S. 610, 617 (1976); Young v. American Mini Theaters, Inc., 427 U.S. 50, 93 (1976); Police Dept. of Chicago v. Mosley, 408 U.S. 92, 97 (1972); Shuttlesworth v. Birmingham, 394 U.S. 147, 150-53 (1969); Staub v. City of Baxley, 355 U.S. 313, 321-25 (1958); Kunz v. New York, 340 U.S. 558, 560-62 (1948); Cantwell v. Connecticut, 310 U.S. 296, 307 (1940); Schneider v. State, 308 U.S. 147, 163-64 (1939).

[204] *Gannett*, 894 F.2d at 68.

[205] City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 759 (1988). For a discussion of the "close enough nexus to expression" rule enunciated by Justice Brennan in *Plain Dealer Publishing*, see *supra* notes 162-76 and accompanying text.

[206] *Gannett*, 894 F.2d at 69.

[207] *Plain Dealer Publishing*, 486 U.S. at 761; *see also supra* notes 175-76 and accompanying text.

[208] *Gannett*, 894 F.2d at 69 (citing *Plain Dealer Publishing*, 486 U.S. at 761).

[209] *See supra* note 17 (Rule 10).

[210] *Gannett*, 894 F.2d at 70.

[211] *Id.* at 69.

exercise of discretion might result in the Authority's unconstitutional use of the regulation against protected speech.[212] Finally, Chief Judge Gibbons stated that the rule's "printed or written matter" clause satisfied the *Plain Dealer Publishing* "close enough nexus to expression" test.[213] The court subsequently concluded that there existed an intolerable possibility Rule 10 might be used by the Port Authority in contravention of the first amendment.[214] Hence, the court found Rule 10 unconstitutional on its face.[215]

IV. CONCLUSION: AN UNCERTAIN FUTURE FOR FACIAL CHALLENGES TO COMMERCIAL SPEECH REGULATIONS

The *Gannett* decision is consistent with the long line of case law permitting a facial challenge to discretionary licensing laws aimed at traditional areas of protected expression.[216] Like the Supreme Court decision in *Plain Dealer Publishing*, *Gannett* represents a straightforward application of the facial challenge doctrine.[217] Furthermore, Chief Judge Gibbons demonstrated the value of the *Plain Dealer Publishing* "close enough nexus to expression"[218] test when applied to discretionary regulations threatening protected noncommercial expression.[219] This serves several important societal interests.

Primarily, *Gannett* holds open the use of public forums for politically charged expression in all situations where the government fails to carefully establish content neutral time, place, and manner restrictions.[220] Given the onus upon the government in such instances, the appellate court decision also provides an impetus for the careful drafting of all regulations aimed at or involving traditionally protected speech. In addition, Chief Judge Gibbons' protected speech analysis of the Port Authority provisions provides precedential background for further evaluation of future licensing laws which appear on their face to

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[212] *Id.*

[213] *Id.*

[214] *Id.* at 69-70.

[215] *Id.* at 70.

[216] *See supra* note 203.

[217] *See* Note, *supra* note 79, at 298.

[218] City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 759 (1988).

[219] *See supra* notes 168-76 and accompanying text.

[220] Thus, *Gannett* is consonant with the case law holding narrowly tailored time, place, and manner restrictions to be constitutional. *See supra* note 23.

address only unprotected types of expression. Nonetheless, while *Gannett* achieves these benefits as a result of its noncommercial speech analysis, the court's application of the "close enough nexus to expression" test to Rule 2's commercial activity regulation appears to operate contrary to the above noncommercial speech benefits.

The appellate court's exclusion of Rule 2 from a facial challenge, although it seemingly follows from *Plain Dealer Publishing*, raises three problems. First, Chief Judge Gibbons' brief analysis of the provision fails to consider the potential noncommercial applications of such a broad discretionary regulation. In *Board of Trustees of S.U.N.Y. v. Fox*,[221] Justice Scalia, in dicta, raised the possibility that a facial challenge may lie against discretionary licensing statutes aimed at commercial speech where a government body defines commercial speech according to its own standardless discretion, and that definition jeopardizes constitutionally protected noncommercial speech.[222] Such a possibility is greatest where, as in *Gannett*, no definition of commercial activity exists to tell a court whether it will be applied to include only constitutionally unprotected commercial expression.[223] Absent a specific definition of commercial activity consonant with the requirements of the first amendment, Rule 2 could easily be applied to protected noncommercial expression.[224]

Second, because the appellate court was able to summarily dismiss a facial challenge to the Port Authority's commercial activity provision without accounting for Justice Scalia's warning in *Fox*, *Gannett* represents the kind of difficulty inherent in the nonspecific nature of Justice Brennan's "close enough nexus to expression" test articulated in *Plain Dealer Publishing*.[225] Without more specific guidelines to direct the application of the test, it may be used to foreclose facial challenges in circumstances where, as in *Gannett*, the government's ability to define commercial activity with standardless discretion threatens to restrain

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[221] 492 U.S. 469 (1989).

[222] *See id.* at 484. *See also supra* notes 146-53 and accompanying text.

[223] The threat is therefore the same as that raised by the discretionary licensing of protected noncommercial expression. *See* City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 758-59 (1988). In *Plain Dealer Publishing*, Justice Brennan noted, "without standards to fetter the licensor's discretion, the difficulties of proof and the case-by-case nature of 'as applied' challenges render the licensor's actions in large measure effectively unreviewable." *Id.*

[224] *See, e.g.*, *Fox*, 492 U.S. at 484 (Justice Scalia implied that a university definition of "commercial speech" not consistent with the constitutional definition could lead to its application against protected noncommercial expression.).

[225] *See* Note, *supra* note 79, at 299.

protected noncommercial expression under the yolk of a license for commercial activity.[226]

Finally, the court's determination that a sweeping discretionary commercial activity regulation is "too blunt an instrument to warrant judicial intervention" until the regulation is actually applied seems counter-intuitive to the concerns which form the foundation of the facial challenge doctrine.[227] In essence, the appellate court's decision would allow a facial challenge where licensing statutes are specifically directed at expression, but would not permit such a challenge where an even greater discretionary net is cast upon nonspecific commercial activity.[228] In contrast, facial challenges to potentially overbroad statutes are permitted precisely because it is their nondescript nature which the Supreme Court perceives as a threat to the open discussion of matters of public concern.[229] To permit the government to escape facial scrutiny by providing for itself even greater discretion couched in the nebulous category of "commercial activity" would only exacerbate the problems the facial challenge doctrine exists to control.[230] In short, the Third Circuit's failure to find that the absence of a regulatory definition for commercial activity could lead to an unconstitutional prior restraint of protected noncommercial speech provides the government with a dangerous "commercial activity" exception for licensing laws. At the same time, the court leaves unresolved the issue of how to apply the facial challenge doctrine to discretionary statutes regulating commercial speech.

In the end, *Gannett* should prove to be a valuable asset in applying the facial challenge doctrine to administrative provisions purporting to regulate newspaper vending machines pursuant to licensing laws threatening identifiable forms of protected expression. Unfortunately, it may prove to be a troublesome precedent if applied in the future to prohibit facial attacks upon commercial speech regulations.

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[226] *See supra* note 17 (Rule 2).

[227] *See Plain Dealer Publishing*, 486 U.S. at 761.

[228] *See* Gannett Satellite Information Network v. Berger, 894 F.2d 61, 68-70 (3d Cir. 1990).

[229] *See* Thornhill v. Alabama, 310 U.S. 736, 742 (1940) ("It is not merely the sporadic use of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion.").

[230] Classically, the facial challenge doctrine is aimed at correcting both the risk of self-censorship by speakers avoiding denial of a license to speak and the absence of standards providing for effective judicial review. *Plain Dealer Publishing*, 486 U.S. at 757-58.