

by Lawrence R. Levin

First Amendment protection denied to newsstands



For nearly 70 years, a newsstand has stood in front of the old Chicago Public Library. The U.S. Court of Appeals for the 7th Circuit has just held that newsstands “have no [constitutional] protection from the city’s bulldozer.” The *en banc* decision that newsstands have no First Amendment protection was startling.

Recognizing that public forums provide a place “where people have a right to express their views,” the court held that this did not encompass the maintenance of a newsstand “on a public sidewalk.” Thus, cities may prohibit newsstands without facing the usual First Amendment protections.

Perhaps the most interesting part of the court’s decision was that it went to great length to distinguish news boxes or “news racks,” which it said are protected by the First Amendment, from newsstands.

Recognizing that circulation of newspapers through news boxes was “conduct commonly associated with expression,” the court held that “building and operating a newsstand is conduct, not speech, which the city can lawfully proscribe.”

The distinction between news boxes and newsstands that the court found was that newsstands “are much larger, more permanent structures that occupy a significant portion of limited sidewalk space.”

The court also focused on the concept that news boxes are associated with a single newspaper such as the *Chicago Sun-Times* or *Chicago Tribune*, while newsstands present many editorial viewpoints by carrying multiple publications.

According to the court, this makes it

easier for the city to censor newspapers when dealing with news boxes than with newsstands.

To the court, this meant that the “same threat of prior restraint does not exist for newsstands” that is posed with respect to news boxes. Closing newsstands “would still” leave other “methods of dissemination — newsboys, news racks, in-building newsstands, etc. — to sell papers.”

Having said that newsstands are not entitled to constitutional protection, the court went on to test the city’s actions by many of the same First Amendment standards that applied to news boxes. This created a dangerous precedent.

The court found no problem with regulations or prohibitions based solely on aesthetics, saying, “Certainly a city can regulate newsstands to reduce clutter on its streets.” If this decision is limited to its fundamental premise that regulating newsstands is merely the normal zoning-type functions of “planning, regulation and zoning of property . . . on which newsstands could be located,” then the damage that this opinion could do to a free press may be limited. From the standpoint of the media, however, this decision has several very disturbing long-term aspects.

Most disturbing is that this opinion continues a trend in which courts fail to recognize that because the First Amendment protects both freedom of speech and freedom of the press, newspapers are entitled to protections that go beyond free speech.

In discussing the freedom of speech concepts of previous news box cases, the 7th Circuit focused on whether the ordinance was “content-neutral.”

The court noted that the Supreme Court has left open the issue of whether a city may prohibit news box-

es entirely in a content-neutral ban. This single-minded focus on censorship, whether self-imposed or direct, fails to recognize the meaning or purpose of a free press as contained in the First Amendment.

A primary purpose of guaranteeing freedom of the press in the Constitution is to permit the press to inform the public about issues of public concern so there can be reasoned public debate.

Such debate by an informed public is, as the courts have held, vital to the oversight of the government in a democratic society. This requires more than freedom of speech.

As courts have acknowledged, for the press to perform its function requires a constitutional right to investigate, prepare, print and distribute the news.

Even the 7th Circuit made clear that “newspapers are in a privileged position and are not and will not become the victims of discrimination.”

If the First Amendment is going to protect newspapers, courts must, however, recognize that freedom of the press encompasses more than free speech. A court could uphold a ban on all news boxes from city streets as content-neutral if only censorship were at issue.

Once freedom of the press goes beyond speech, i.e. “censorship,” to include distribution, the issues with respect to news boxes become quite different.

(“Since World War II, news boxes have become increasingly important to single-copy sales As the nation’s population shifted to urban centers, the availability of home-delivery carriers and corner newsstands steadily declined.” (*E&P*, Sept. 21, 1991, pp. 28 & 53.))

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Limiting news boxes would affect distribution of newspapers dramatically.

A decision to prohibit or limit news boxes for aesthetic or safety reasons may carry "no threat or risk of censorship" in the narrow sense used by the 7th Circuit, but it could affect the public's access to newspapers dramatically.

In Chicago, the public associates certain colors or shapes of news boxes with certain papers.

If all newspapers were required to be in generic, bland news boxes, that clearly would affect the ability of papers such as *USA Today* to distribute their publication.

People tend to associate certain types of information with certain newspapers.

Thus, simple limits on news boxes may involve far more complex issues.

Having news boxes near bus stops is important to the public, which finds this convenient.

Yet, without any proof, cities often claim that this poses a safety problem.

A court only looking at content-neutral censorship tests clearly will miss the free press constitutional issues involved in such aesthetic or safety regulations.

The press needs to guard against decisions such as the recent newsstand case, which in the long run could make newspapers available only at the Smithsonian Institution.