SUPREME COURT OF THE UNITED STATES

No. 91–1200

CITY OF CINCINNATI, PETITIONER *v.* DISCOVERY NETWORK, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[March 24, 1993]

JUSTICE STEVENS delivered the opinion of the Court.

Motivated by its interest in the safety and attractive appearance of its streets and sidewalks, the city of Cincinnati has refused to allow respondents to distribute their commercial publications through freestanding newsracks located on public property. The question presented is whether this refusal is consistent with the First Amendment.[1] In agreement with the District Court and the Court of Appeals, we hold that it is not.

Respondent, Discovery Network, Inc., is engaged in the business of providing adult educational, recreational, and social programs to individuals in the Cincinnati area. It advertises those programs in a free magazine that it publishes nine times a year. Although these magazines consist primarily of promotional material pertaining to

[1]The First Amendment provides, in part: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." The Due Process Clause of the Fourteenth Amendment has been construed to make this prohibition applicable to state action. See, *e.g.*, *Stromberg* v. *California*, 283 U. S. 359 (1931); *Lovell* v. *Griffin*, 303 U. S. 444 (1938).

Discovery's courses, they also include some information about current events of general interest. Approximately one third of these magazines are distributed through the 38 newsracks that the city authorized Discovery to place on public property in 1989.

Respondent, Harmon Publishing Company, Inc., publishes and distributes a free magazine that advertises real estate for sale at various locations throughout the United States. The magazine contains listings and photographs of available residential properties in the greater Cincinnati area, and also includes some information about interest rates, market trends, and other real estate matters. In 1989 Harmon received the city's permission to install 24 newsracks at approved locations. About 15% of its distribution in the Cincinnati area is through those devices.

In March 1990, the city's Director of Public Works notified each of the respondents that its permit to use dispensing devices on public property was revoked, and ordered the newsracks removed within 30 days. Each notice explained that respondent's publication was a "commercial handbill" within the meaning of §714–1–C of the Municipal Code[2] and therefore §714–

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[2]That section provides:

"`Commercial Handbill' shall mean any printed or written matter, dodger, circular, leaflet, pamphlet, paper, booklet or any other printed or otherwise reproduced original or copies of any matter of literature:

"(a) Which advertises for sale any merchandise, product, commodity or thing; or

"(b) Which directs attention to any business or mercantile or commercial establishment, or other activity, for the purpose of directly promoting the interest thereof by sales; or

"(c) Which directs attention to or advertises any

23 of the Code[3] prohibited its distribution on public property. Respondents were granted administrative hearings and review by the Sidewalk Appeals Committee. Although the Committee did not modify the city's position, it agreed to allow the dispensing devices to remain in place pending a judicial determination of the constitutionality of its prohibition. Respondents then commenced this litigation in the United States District Court for the Southern District of Ohio.

After an evidentiary hearing the District Court concluded that "the regulatory scheme advanced by the City of Cincinnati completely prohibiting the distribution of commercial handbills on the public right of way violates the First Amendment."[4] The court found that both publications were "commercial speech" entitled to First Amendment protection because they concerned lawful activity and were not misleading. While it recognized that a city "may regulate publication dispensing devices pursuant to its substantial interest in promoting safety and

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meeting, theatrical performance, exhibition or event of any kind for which an admission fee is charged for the purpose of private gain or profit." Cincinnati Municipal Code §714–1–C (1992).

[3]That section provides:

"No person shall throw or deposit any commercial or non-commercial handbill in or upon any sidewalk, street or other public place within the city. Nor shall any person hand out or distribute or sell any commercial handbill in any public place. Provided, however, that it shall not be unlawful on any sidewalk, street or other public place within the city for any person to hand out or distribute, without charge to the receiver thereof, any non-commercial handbill to any person willing to accept it, except within or around the city hall building." §714.23.

[4]App. to Pet. for Cert. 25a.

esthetics on or about the public right of way,"[5] the District Court held, relying on *Board of Trustees of State Univ. of New York* v. *Fox*, 492 U. S. 469 (1989), that the city had the burden of establishing "a reasonable `fit' between the legislature's ends and the means chosen to accomplish those ends." App. to Pet. for Cert. 23a. (quoting *Fox*, 492 U. S., at 480). It explained that the "fit" in this case was unreasonable because the number of newsracks dispensing commercial handbills was "minute" compared with the total number (1,500–2,000) on the public right of way, and because they affected public safety in only a minimal way. Moreover, the practices in other communities indicated that the City's safety and esthetic interests could be adequately protected "by regulating the size, shape, number or placement of such devices." App. to Pet. for Cert. 24a.[6]

On appeal, the city argued that since a number of courts had held that a complete ban on the use of newsracks dispensing traditional newspapers would be unconstitutional,[7] and that the "Constitution . . . accords a lesser protection to commercial speech than to other constitutionally guaranteed expression," *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n of New York*, 447 U. S. 557, 563 (1980), its preferential treatment of newspapers over commercial publications was a permissible method of serving its legitimate interest in ensuring safe streets

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[5]App. to Pet. for Cert. 23a.

[6]"Such regulation," the District Court noted, "allows [a] city to control the visual effect of the devices and to keep them from interfering with public safety without completely prohibiting the speech in question." App. to Pet. for Cert. 24a.

[7]See *Sentinel Communications Co.* v. *Watts*, 936 F. 2d 1189, 1196–1197 (CA11 1991), and cases cited therein.

and regulating visual blight.[8] The Court of Appeals disagreed, holding that the lesser status of commercial speech is relevant only when its regulation was designed either to prevent false or misleading advertising, or to alleviate distinctive adverse effects of the specific speech at issue. Because Cincinnati sought to regulate only the "manner" in which respondents' publications were distributed, as opposed to their content or any harm caused by their content, the court reasoned that respondents' publications had "high value" for purposes of the *Fox* "reasonable fit" test. 946 F. 2d, at 471 (italics omitted). Applying that test, the Court of Appeals agreed with the District Court that the burden placed on speech "cannot be justified by the paltry gains in safety and beauty achieved by the ordinance." *Ibid*.[9] The importance of the Court of Appeals decision, together with the dramatic growth in the use of newsracks throughout the country,[10] prompted our grant of certiorari. 503 U. S.

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[8]In the words of the Court of Appeals:
"This `lesser protection' afforded commercial speech is crucial to Cincinnati's argument on appeal. Cincinnati argues that placing the entire burden of achieving its goal of safer streets and a more harmonious landscape on commercial speech is justified by this lesser protection." 946 F. 2d 464, 469 (CA6 1991). See also *id*. at 471 ("The [city's] defense of that ordinance rests solely on the low value allegedly accorded to commercial speech in general").

[9]The Court of Appeals also noted that the general ban on the distribution of handbills had been on the books long before the newsrack problem arose. *Id.*, at 473.

[10]We are advised that almost half of the single copy sales of newspapers are now distributed through newsracks. See Brief for the American Newspaper Publishers Association et al. as *Amici Curiae* 2.

___ (1992).

There is no claim in this case that there is anything unlawful or misleading about the contents of respondents' publications. Moreover, respondents do not challenge their characterization as "commercial speech." Nor do respondents question the substantiality of the city's interest in safety and esthetics. It was, therefore, proper for the District Court and the Court of Appeals to judge the validity of the city's prohibition under the standard we set forth in *Central Hudson* and *Fox*.[11] It was the city's burden to establish a "reasonable fit" between its legitimate interests in safety and esthetics and its choice of a limited and selective prohibition of newsracks as the means chosen to serve those interests.[12]

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[11]While the Court of Appeals ultimately applied the standards set forth in *Central Hudson* and *Fox*, its analysis at least suggested that those standards might not apply to the type of regulation at issue in this case. For if commercial speech is entitled to "lesser protection" only when the regulation is aimed at either the content of the speech or the particular adverse effects stemming from that content, it would seem to follow that a regulation that is not so directed should be evaluated under the standards applicable to regulations on fully protected speech, not the more lenient standards by which we judge regulations on commercial speech. Because we conclude that Cincinnati's ban on commercial newsracks cannot withstand scrutiny under *Central Hudson* and *Fox*, we need not decide whether that policy should be subjected to more exacting review.

[12]As we stated in *Fox:*

"[W]hile we have insisted that the free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing . . . the harmless from the harmful, we

There is ample support in the record for the conclusion that the city did not "establish the reasonable fit we require." *Fox*, 492 U. S., at 480. The ordinance on which it relied was an outdated prohibition against the distribution of any commercial handbills on public property. It was enacted long before any concern about newsracks developed. Its apparent purpose was to prevent the kind of visual blight caused by littering, rather than any harm associated with permanent, freestanding dispensing devices. The fact that the city failed to address its recently developed concern about newsracks by regulating their size, shape, appearance, or number indicates that it has not "carefully calculated" the costs and benefits associated with the burden on speech

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have not gone so far as to impose upon them the burden of demonstrating that the distinguishment is 100% complete, or that the manner of restriction is absolutely the least severe that will achieve the desired end. What our decisions require is a `fit' between the legislature's 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, as we have put it in the other contexts discussed above, a means narrowly tailored to achieve the desired objective. Within those bounds we leave it to governmental decisionmakers to judge what manner of regulation may best be employed. . . .

"Here we require the government goal to be substantial, and the cost to be carefully calculated. Moreover, since the State bears the burden of justifying its restrictions, it must affirmatively establish the reasonable fit we require." *Fox*, 492 U. S., at 480 (internal quotation marks and citations omitted).

imposed by its prohibition.[13] The benefit to be derived from the removal of 62 newsracks while about 1,500–2,000 remain in place was considered "minute" by the District Court and "paltry" by the Court of Appeals. We share their evaluation of the "fit" between the city's goal and its method of achieving it.

In seeking reversal, the city argues that it is wrong to focus attention on the relatively small number of newsracks affected by its prohibition, because the city's central concern is with the overall number of newsracks on its sidewalks, rather than with the unattractive appearance of a handful of dispensing devices. It contends, first, that a categorical prohibition on the use of newsracks to disseminate commercial messages burdens no more speech than is necessary to further its interest in limiting the number of newsracks; and, second, that the prohibition is a valid "time, place, and manner" regulation because it is content-neutral and leaves open ample alternative channels of communication.

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[13]We reject the city's argument that the lower courts' and our consideration of alternative, less drastic measures by which the city could effectuate its interests in safety and esthetics somehow violates *Fox*'s holding that regulations on commercial speech are not subject to "least-restrictive-means" analysis. To repeat, see n. 12, *supra*, while we have rejected the "least-restrictive-means" test for judging restrictions on commercial speech, so too have we rejected mere rational basis review. A regulation need not be "absolutely the least severe that will achieve the desired end," *Fox*, *supra*, at 480, but if there are numerous and obvious less-burdensome alternatives to the restriction on commercial speech, that is certainly a relevant consideration in determining whether the "fit" between ends and means is reasonable.

We consider these arguments in turn.

The city argues that there is a close fit between its ban on newsracks dispensing "commercial handbills" and its interest in safety and esthetics because every decrease in the number of such dispensing devices necessarily effects an increase in safety and an improvement in the attractiveness of the cityscape. In the city's view, the prohibition is thus *entirely* related to its legitimate interests in safety and esthetics.

We accept the validity of the city's proposition, but consider it an insufficient justification for the discrimination against respondents' use of newsracks that are no more harmful than the permitted newsracks, and have only a minimal impact on the overall number of newsracks on the city's sidewalks. The major premise supporting the city's argument is the proposition that commercial speech has only a low value. Based on that premise, the city contends that the fact that assertedly more valuable publications are allowed to use newsracks does not undermine its judgment that its esthetic and safety interests are stronger than the interest in allowing commercial speakers to have similar access to the reading public.

We cannot agree. In our view, the city's argument attaches more importance to the distinction between commercial and noncommercial speech than our cases warrant and seriously underestimates the value of commercial speech.

This very case illustrates the difficulty of drawing bright lines that will clearly cabin commercial speech in a distinct category. For respondents' publications share important characteristics with the publications that the city classifies as "newspapers." Particularly, they are "commercial handbills" within the meaning of §714–1–C of the city's Code because they contain advertising, a feature that apparently also places

ordinary newspapers within the same category.[14] Separate provisions in the code specifically authorize the distribution of "newspapers" on the public right of way, but that term is not defined.[15] Presumably, respondents' publications do not qualify as newspapers because an examination of their content discloses a higher ratio of advertising to other text, such as news and feature stories, than is found in the exempted publications.[16] Indeed, Cincinnati's City Manager has determined that publications that qualify as newspapers and therefore *can* be distributed by newsrack are those that are published daily and or weekly and "*primarily* presen[t] coverage of, and commentary on, current events." App. 230 (emphasis added).

The absence of a categorical definition of the difference between "newspapers' and "commercial handbills" in the city's Code is also a characteristic of our opinions considering the constitutionality of regulations of commercial speech. Fifty years ago, we concluded that the distribution of a commercial handbill was unprotected by the First Amendment, even though half of its content consisted of political protest. *Valentine* v. *Chrestensen*, 316 U. S. 52 (1942). A few years later, over Justice Black's

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[14]See n. 2, *supra*.

[15]Cincinnati Municipal Code §862–1 (1992) provides:

"Permission is hereby granted to any person or persons lawfully authorized to engage in the business of selling newspapers to occupy space on the sidewalks of city streets for selling newspapers, either in the morning or afternoon, where permission has been obtained from the owner or tenant of the adjoining building."

[16]Some ordinary newspapers try to maintain a ratio of 70% advertising to 30% editorial content. See generally C. Fink, Strategic Newspaper Management 43 (1988).

dissent, we held that the "commercial feature" of door-to-door solicitation of magazine subscriptions was a sufficient reason for denying First Amendment protection to that activity. *Breard* v. *Alexandria*, 341 U. S. 622 (1951). Subsequent opinions, however, recognized that important commercial attributes of various forms of communication do not qualify their entitlement to constitutional protection. Thus, in *Virginia Pharmacy Bd.* v. *Virginia Citizens Consumer Council, Inc.,* 425 U. S. 748 (1976), we explained:

> "We begin with several propositions that already are settled or beyond serious dispute. It is clear, for example, that speech does not lose its First Amendment protection because money is spent to project it, as in a paid advertisement of one form or another. *Buckley* v. *Valeo*, 424 U. S. 1, 35–59 (1976); *Pittsburgh Press Co.* v. *Human Relations Comm'n*, 413 U. S., at 384; *New York Times Co.* v. *Sullivan*, 376 U. S., at 266. Speech likewise is protected even though it is carried in a form that is `sold' for profit, *Smith* v. *California*, 361 U. S. 147, 150 (1959) (books); *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495, 501 (1952) (motion pictures); *Murdock* v. *Pennsylvania*, 319 U. S., at 111 (religious literature), and even though it may involve a solicitation to purchase or otherwise pay or contribute money. *New York Times Co.* v. *Sullivan, supra; NAACP* v. *Button*, 371 U. S. 415, 429 (1963); *Jamison* v. *Texas*, 318 U. S., at 417; *Cantwell* v. *Connecticut*, 310 U. S. 296, 306–307 (1940).
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> "If there is a kind of commercial speech that lacks all First Amendment protection, therefore it must be distinguished by its content. Yet the speech whose content deprives it of protection cannot simply be speech on a commercial subject. No one would contend that our pharmacist may be prevented from being heard on the subject of whether, in general,

> pharmaceutical prices should be regulated, or their advertisement forbidden. Nor can it be dispositive that a commercial advertisement is noneditorial, and merely reports a fact. Purely factual matter of public interest may claim protection. *Bigelow* v. *Virginia*, 421 U. S., at 822; *Thornhill* v. *Alabama*, 310 U. S. 88, 102 (1940)." *Id.*, at 761–762.

We then held that even speech that does no more than propose a commercial transaction is protected by the First Amendment. *Id.*, at 762.[17]

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[17]JUSTICE BLACKMUN, writing for the Court in *Bates* v. *State Bar of Arizona*, 433 U. S. 350 (1977), summarized the reasons for extending First Amendment protection to "core" commercial speech: "The listener's interest [in commercial speech] is substantial: the consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue. Moreover, significant societal interests are served by such speech. Advertising, though entirely commercial, may often carry information of import to significant issues of the day. See *Bigelow* v. *Virginia*, 421 U. S. 809 (1975). And commercial speech serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system. See *FTC* v. *Procter & Gamble Co.*, 386 U. S. 568, 603–604 (1967) (Harlan, J., concurring). In short, such speech serves individual and societal interests in assuring informed and reliable decisionmaking." *Id.*, at 364.

Of course, we were not the first to recognize the value of commercial speech:

"`[Advertisements] are well calculated to enlarge and enlighten the public mind, and are worthy of being enumerated among the many methods of awakening and maintaining the popular attention, with which

In later opinions we have stated that speech proposing a commercial transaction is entitled to lesser protection than other constitutionally guaranteed expression, see *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447, 455–456 (1978). We have also suggested that such lesser protection was appropriate for a somewhat larger category of commercial speech—"that is, expression related solely to the economic interests of the speaker and its audience." *Central Hudson Gas & Elec. Corp.* v. *Public Service Comm'n of New York*, 447 U. S., at 561. We did not, however, use that definition in either *Bolger* v. *Youngs Drug Products*, 463 U. S. 60 (1983), or in *Board of Trustees of State Univ. of New York* v. *Fox,* 492 U. S. 469 (1989).

In the *Bolger* case we held that a federal statute prohibiting the mailing of unsolicited advertisements for contraceptives could not be applied to the appellee's promotional materials. Most of the appellee's mailings consisted primarily of price and quantity information, and thus fell "within the core notion of commercial speech—`speech which does "no more than propose a commercial transaction."'" *Bolger*, 463 U. S., at 66 (quoting *Virginia Pharmacy*, 425 U. S., at 762, in turn quoting *Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Relations*, 413 U. S. 376, 385 (1973)). Relying in part on the appellee's economic motivation, the Court also answered the "closer question" about the proper label for informational pamphlets that were concededly advertisements referring to a specific product, and concluded that they also were "commercial speech."

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more modern times, beyond all preceding example, abound.'" D. Boorstin, The Americans: The Colonial Experience 328, 415 (1958), quoting I. Thomas, History of Printing in America with a Biography of Printers, and an Account of Newspapers (2d ed. 1810).

463 U. S., at 66–67. It is noteworthy that in reaching that conclusion we did not simply apply the broader definition of commercial speech advanced in *Central Hudson*—a definition that obviously would have encompassed the mailings—but rather "examined [them] carefully to ensure that speech deserving of greater constitutional protection is not inadvertently suppressed." 463 U. S., at 66.[18] In *Fox*, we described the category even more narrowly, by characterizing the proposal of a commercial transaction as "*the test* for identifying commercial speech." 492 U. S., at 473–474 (emphasis added).

Under the *Fox* test it is clear that much of the material in ordinary newspapers is commercial speech and, conversely, that the editorial content in respondents' promotional publications is not what we have described as "core" commercial speech. There is no doubt a "common sense" basis for distinguishing between the two, but under both the city's Code and our cases the difference is a matter of degree.[19]

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[18]When the Court first advanced the broader definition of commercial speech, a similar concern had been expressed. See 447 U. S., at 579 (STEVENS, J., concurring in judgment).

[19]We note that because Cincinnati's regulatory scheme depends on a governmental determination as to whether a particular publication is a "commercial handbill" or a "newspaper," it raises some of the same concerns as the newsrack ordinance struck down in *Lakewood* v. *Plain Dealer Publishing Co*., 486 U. S. 750 (1988). The ordinance at issue in *Lakewood* vested in the mayor authority to grant or deny a newspaper's application for a newsrack permit, but contained no explicit limit on the scope of the mayor's discretion. The Court struck down the ordinance, reasoning that a licensing scheme that vests such unbridled discretion in a government

Nevertheless, for the purpose of deciding this case, we assume that all of the speech barred from Cincinnati's sidewalks is what we have labeled "core" commercial speech and that no such speech is found in publications that are allowed to use newsracks. We nonetheless agree with the Court of Appeals that Cincinnati's actions in this case run afoul of the First Amendment. Not only does Cincinnati's categorical ban on commercial newsracks place too much importance on the distinction between commercial

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official may result in either content or viewpoint censorship. *Id.*, at 757, 769–770. Similarly, because the distinction between a "newspaper" and a "commercial handbill" is by no means clear—as noted above, the city deems a "newspaper" as a publication "*primarily* presenting coverage of, and commentary on, current events," App. 230 (emphasis added)—the responsibility for distinguishing between the two carries with it the potential for invidious discrimination of disfavored subjects. See also, *Metromedia*, *Inc.* v. *San Diego*, 453 U. S. 490, 536–537 (1981) (Brennan, J., concurring in judgment) (ordinance which permits governmental unit to determine, in the first instance, whether speech is commercial or noncommercial, "entail[s] a substantial exercise of discretion by a city's official" and therefore "presents a real danger of curtailing noncommercial speech in the guise of regulating commercial speech"). Cf. *Arkansas Writers' Project, Inc.* v. *Ragland*, 481 U. S. 221, 230 (1987) ("In order to determine whether a magazine is subject to sales tax, Arkansas' enforcement authorities must necessarily examine the content of the message that is conveyed . . . . Such official scrutiny of the content of publications as the basis for imposing a tax is entirely incompatible with the First Amendment's guarantee of freedom of the press") (internal quotation marks and citation omitted).

and noncommercial speech, but in this case, the distinction bears no relationship *whatsoever* to the particular interests that the city has asserted. It is therefore an impermissible means of responding to the city's admittedly legitimate interests. Cf. *Simon & Schuster, Inc.,* v. *Members of New York State Crime Victims Bd.*, 502 U. S. ___, ___ (1991) (distinction drawn by Son of Sam law between income derived from criminal's descriptions of his crime and other sources "has nothing to do with" State's interest in transferring proceeds of crime from criminals to victims); *Carey* v. *Brown*, 447 U. S. 455, 465 (1980) (State's interest in residential privacy cannot sustain statute permitting labor picketing, but prohibiting nonlabor picketing when "nothing in the content-based labor-nonlabor distinction has any bearing whatsoever on privacy").[20]

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[20]*Metromedia, Inc.* v. *San Diego*, 453 U. S. 490 (1981), upon which the city heavily relies, is not to the contrary. In that case, a plurality of the Court found as a permissible restriction on commercial speech a city ordinance that, for the most part, banned outdoor "offsite" advertising billboards, but permitted "onsite" advertising signs identifying the owner of the premises and the goods sold or manufactured on the site. *Id.*, at 494, 503. Unlike this case, which involves discrimination between commercial and noncommercial speech, the "offsite-onsite" distinction involved disparate treatment of two types of commercial speech. Only the onsite signs served both the commercial and public interest in guiding potential visitors to their intended destinations; moreover, the plurality concluded that a "city may believe that offsite advertising, with its periodically changing content, presents a more acute problem than does onsite advertising," *id.*, at 511–512. Neither of these bases has any application to the disparate treatment of newsracks in this case.

The city has asserted an interest in esthetics, but respondent publishers' newsracks are no greater an eyesore than the newsracks permitted to remain on Cincinnati's sidewalks. Each newsrack, whether containing "newspapers" or "commercial handbills," is equally unattractive. While there was some testimony in the District Court that commercial publications are distinct from noncommercial publications in their capacity to proliferate, the evidence of such was exceedingly weak, the Court of Appeals discounted it, 946 F. 2d, at 466–467, and n. 3, and Cincinnati does not reassert that particular argument in this Court. As we have explained, the city's primary concern, as argued to us, is with the aggregate number of newsracks on its streets. On that score, however, all newsracks, regardless of whether they contain commercial or noncommercial publications, are equally at fault. In fact, the newspapers are arguably the greater culprit because of their superior number.

Cincinnati has not asserted an interest in preventing commercial harms by regulating the information distributed by respondent publishers' newsracks, which is, of course, the typical reason why commercial speech can be subject to greater

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THE CHIEF JUSTICE is correct that seven Justices in the *Metromedia* case were of the view that San Diego could completely ban offsite commercial billboards for reasons unrelated to the content of those billboards. *Post*, at 7. Those seven Justices did not say, however, that San Diego could *distinguish* between commercial and noncommercial offsite billboards that cause the same esthetic and safety concerns. That question was not presented in *Metromedia*, for the regulation at issue in that case did not draw a distinction between commercial and noncommercial offsite billboards; with a few exceptions, it essentially banned *all* offsite billboards.

governmental regulation than noncommercial speech. See, *e.g., Bolger*, 463 U. S., at 81 (STEVENS, J., concurring in judgment) ("[T]he commercial aspects of a message may provide a justification for regulation that is not present when the communication has no commercial character"); *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447, 455–456 (1978) (commercial speech, unlike other varieties of speech, "occurs in an area traditionally subject to government regulation").[21]

A closer examination of one of the cases we have mentioned, *Bolger* v. *Youngs Drug Products,* demonstrates the fallacy of the city's argument that a reasonable fit is established by the mere fact that the entire burden imposed on commercial speech by its newsrack policy may in some small way limit the total number of newsracks on Cincinnati's sidewalks. Here, the city contends that safety concerns and visual blight may be addressed by a prohibition that distinguishes between commercial and noncommercial publications that are equally responsible for those problems. In *Bolger*, however, in rejecting the Government's reliance on its interest

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[21]Moreover, the principal reason for drawing a distinction between commercial and noncommercial speech has little, if any, application to a regulation of their distribution practices. As we explained in *Bolger:* "Advertisers should not be permitted to immunize false or misleading product information from government regulation simply by including references to public issues." *Bolger*, 463 U. S., at 68. The interest in preventing commercial harms justifies more intensive regulation of commercial speech than noncommercial speech even when they are intermingled in the same publications. On the other hand, the interest in protecting the free flow of information and ideas is still present when such expression is found in a commercial context.

in protecting the public from "offensive" speech, "[we] specifically declined to recognize a distinction between commercial and noncommercial speech that would render this interest a sufficient justification for a prohibition of commercial speech." 436 U. S., at 71–72 (citing *Carey* v. *Population Services International*, 431 U. S. 678, 701, n. 28 (1977)). Moreover, the fact that the regulation "provide[d] only the most limited incremental support for the interest asserted," 436 U. S., at 73—that it achieved only a "marginal degree of protection," *ibid.*, for that interest-supported our holding that the prohibition was invalid. Finally, in *Bolger*, as in this case, the burden on commercial speech was imposed by denying the speaker access to one method of distribution—there the United States mails, and here the placement of newsracks on public property—without interfering with alternative means of access to the audience. As then JUSTICE REHNQUIST explained in his separate opinion, that fact did not minimize the significance of the burden:

> "[T]he Postal Service argues that Youngs can communicate with the public otherwise than through the mail. [This argument falls] wide of the mark. A prohibition on the use of the mails is a significant restriction of First Amendment rights. We have noted that `"[t]he United States may give up the Post Office when it sees fit, but while it carries it on the use of the mails is as much a part of free speech as the right to use our tongues."' *Blount* v. *Rizzi*, 400 U. S., at 416, quoting *Milwaukee Social Democratic Publishing Co.* v. *Burleson*, 255 U. S. 407, 437 (1921) (Holmes, J., dissenting)." 463 U. S., at 79–80 (footnote omitted).

In a similar vein, even if we assume, *arguendo,* that the city might entirely prohibit the use of newsracks on public property, as long as this avenue of communication remains open, these devices continue

to play a significant role in the dissemination of protected speech.

In the absence of some basis for distinguishing between "newspapers" and "commercial handbills" that is relevant to an interest asserted by the city, we are unwilling to recognize Cincinnati's bare assertion that the "low value" of commercial speech is a sufficient justification for its selective and categorical ban on newsracks dispensing "commercial handbills." Our holding, however, is narrow. As should be clear from the above discussion, we do not reach the question whether, given certain facts and under certain circumstances, a community might be able to justify differential treatment of commercial and noncommercial newsracks. We simply hold that on this record Cincinnati has failed to make such a showing. Because the distinction Cincinnati has drawn has absolutely no bearing on the interests it has asserted, we have no difficulty concluding, as did the two courts below, that the city has not established the "fit" between its goals and its chosen means that is required by our opinion in *Fox*. It remains to consider the city's argument that its prohibition is a permissible time, place, and manner regulation.

The Court has held that government may impose reasonable restrictions on the time, place or manner of engaging in protected speech provided that they are adequately justified "`without reference to the content of the regulated speech.'" *Ward* v. *Rock Against Racism*, 491 U. S. 781, 791 (1989), quoting *Clark* v. *Community for Creative Non-Violence*, 468 U. S. 288, 293 (1984). Thus, a prohibition against the use of sound trucks emitting "loud and raucous" noise in residential neighborhoods is permissible if it applies equally to music, political speech, and advertising. See generally *Kovacs* v. *Cooper*, 336

U. S. 77 (1949). The city contends that its regulation of newsracks qualifies as such a restriction because the interests in safety and esthetics that it serves are entirely unrelated to the content of respondents' publications. Thus, the argument goes, the *justification* for the regulation is content neutral.

The argument is unpersuasive because the very basis for the regulation is the difference in content between ordinary newspapers and commercial speech. True, there is no evidence that the city has acted with animus toward the ideas contained within respondents' publications, but just last Term we expressly rejected the argument that "discriminatory . . . treatment is suspect under the First Amendment only when the legislature intends to suppress certain ideas." *Simon & Schuster* v. *Members of New York State Crime Victims Bd.*, 502 U. S., at ___ (slip op., at 10). Regardless of the *mens rea* of the city, it has enacted a sweeping ban on the use of newsracks that distribute "commercial handbills," but not "newspapers." Under the city's newsrack policy, whether any particular newsrack falls within the ban is determined by the content of the publication resting inside that newsrack. Thus, by any commonsense understanding of the term, the ban in this case is "content-based."

Nor are we persuaded that our statements that the test for whether a regulation is content-based turns on the "justification" for the regulation, see, *e.g.*, *Ward*, 491 U. S., at 791; *Clark*, 468 U. S., at 293, compel a different conclusion. We agree with the city that its desire to limit the total number of newsracks is "justified" by its interest in safety and esthetics. The city has not, however, limited the number of newsracks; it has limited (to zero) the number of newsracks *distributing commercial publications*. As we have explained, there is no justification for that particular regulation other than the city's naked assertion that commercial speech has "low value." It

is the absence of a neutral justification for its selective ban on newsracks that prevents the city from defending its newsrack policy as content-neutral.

By the same reasoning, the city's heavy reliance on *Renton* v. *Playtime Theatres, Inc.*, 475 U. S. 41 (1986), is misplaced. In *Renton*, a city ordinance imposed particular zoning regulations on movie theaters showing adult films. The Court recognized that the ordinance did not fall neatly into the "content-based" or "content-neutral" category in that "the ordinance treats theaters that specialize in adult films differently from other kinds of theaters." *Id.*, at 47. We upheld the regulation, however, largely because it was justified not by an interest in suppressing adult films, but by the city's concern for the "secondary effects" of such theaters on the surrounding neighborhoods. *Id.*, at 47–49. In contrast to the speech at issue in *Renton*, there are no secondary effects attributable to respondent publishers' newsracks that distinguish them from the newsracks Cincinnati permits to remain on its sidewalks.

In sum, the city's newsrack policy is neither content-neutral nor, as demonstrated in Part III, *supra*, "narrowly tailored." Thus, regardless of whether or not it leaves open ample alternative channels of communication, it cannot be justified as a legitimate time, place, or manner restriction on protected speech.

Cincinnati has enacted a sweeping ban that bars from its sidewalks a whole class of constitutionally protected speech. As did the District Court and the Court of Appeals, we conclude that Cincinnati has failed to justify that policy. The regulation is not a permissible regulation of commercial speech, for on this record it is clear that the interests that Cincinnati has asserted are unrelated to any distinction between "commercial handbills" and "newspapers." Moreover,

because the ban is predicated on the content of the publications distributed by the subject newsracks, it is not a valid time, place, or manner restriction on protected speech. For these reasons, Cincinnati's categorical ban on the distribution, via newsrack, of "commercial handbills" cannot be squared with the dictates of the First Amendment.

The judgment of the Court of Appeals is

Affirmed.