Members of the City Council v. Taxpayers for Vincent: The Constitutionality of Prohibiting Temporary Sign Posting on Public Property to Advance Local Aesthetic Concerns

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NOTE

MEMBERS OF THE CITY COUNCIL V. TAXPAYERS
FOR VINCENT: THE CONSTITUTIONALITY
OF PROHIBITING TEMPORARY SIGN
POSTING ON PUBLIC PROPERTY TO
ADVANCE LOCAL AESTHETIC CONCERNS

I. INTRODUCTION

The United States Supreme Court has long recognized “a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.”¹ When the right to freedom of speech and governmental regulatory interests collide, however, the speech may be restricted or confined.² In Members of the City Council v. Taxpayers for


2. See, e.g., Konigsberg v. State Bar, 366 U.S. 36 (1961) (rejecting argument that the first amendment must be read literally and accepting view that the first amendment does not prohibit regulations which inordinately limit speech); see also Greer v. Spock, 424 U.S. 828 (1976) (upholding a ban on political speeches on a military base); Kovacs v. Cooper, 336 U.S. 77 (1949) (upholding city ban on “loud and raucous” sound trucks); Cox v. New Hampshire, 312 U.S. 569 (1941) (a state may reasonably restrict the time, place, and manner of demonstrations on public streets).

The court’s conclusion that local governments may regulate expression at all reflects a “marketplace of ideas” concept of the first amendment’s freedom of speech guarantee. Free speech is thus protected as long as the government does not prevent the speaker from introducing his or her beliefs into the “marketplace of ideas.” See Baker, Unreasoned Reasonableness: Mandatory Parade Permits and Time, Place, and Manner Regulations, 78 Nw. U.L. Rev. 937 (1983). Baker suggests that this approach merely ensures that “everything worth saying shall be said,” but does not protect the total sum of expressive possibilities. He notes that an “individual autonomy” or “self-realization” interpretation would not support governmental substitution of a convenient forum of speech for that which the speakers themselves choose. Id. at 945-46. Baker suggests that three predominant tendencies of modern courts have resulted in the overregulation of public places at the expense of free expression. First, courts have a tendency to view the first amendment not as a limitation on governmental authority, but as a guarantee of an individual right to speak. Id. at 939-40. Second, courts bear prejudice toward the notion of current middle class ideology being the appropriate balance between regulation and speech. This essentially would favor the “status quo” and give very little protection to dissenter. Id. at 944. Third, courts favor the “marketplace of ideas” theory of first amendment speech guarantees, without recognizing the possibility that a marketplace of ideas can consist exclusively of the ideas of persons most able to effectively participate in that marketplace. Id. at 944-45; see also Whitney v. California, 274 U.S. 357 (1927) (open discussion will protect against political untruth).
Vincent, the Supreme Court approved a municipality's absolute and permanent ban on the posting of temporary signs on public property. The Court reasoned that aesthetic values, just recently recognized as sufficient to support any restriction on speech, were sufficient to satisfy the complete prohibition of a particular mode of communication. The Vincent Court deferentially evaluated the governmental interest, giving little weight to the plaintiff's political speech interests, because the regulation did not affect a traditional public forum. The Court's treatment of the competing interests marks a turning point in first amendment analysis. By broadly authorizing aesthetic regulations and narrowly limiting the scope of a highly protected public forum, the Court has delegated new authority to cities to prohibit offensive or troublesome methods of communication.

This Note begins by reviewing the Supreme Court's methods for analyzing restrictions on communication generally, and will focus particularly on the public forum concept and the traditionally high level of protection that the Court extends to political speech. The Vincent decision is then discussed in light of this background. This Note concludes by suggesting that the Court ignored the constitutional significance of political speech and inverted well-recognized priorities by valuing aesthetic interests above freedom of speech.

II. BACKGROUND

Where first amendment protections of speech begin and end is unclear; Supreme Court Justices and legal scholars have heatedly debated the contours of the first amendment. Of course, not all speech is protected by

4. Id. at 2135-36.
5. Section 28.04 of the Los Angeles Municipal Code prohibits posting of any handbill or sign: [T]o or upon any sidewalk, crosswalk, curb, curbside, street lamp post, hydrant, tree, shrub, tree stake or guard, railroad trestle, electric light or power or telephone or telegraph or trolley wire pole, or wire appurtenance thereof or upon any fixture of the fire alarm or police telegraph system or upon any lighting system, public bridge, drinking fountain, life buoy, life preserver, life boat or other life saving equipment, street sign or traffic sign.
104 S. Ct. at 2122.
7. 104 S. Ct. at 2135-36.
8. Id. at 2134. For an authoritative definition of a public forum, see Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45-46 (1983) (describing the levels of scrutiny the court will use to review regulations of speech on the various types of public property).
9. See, e.g., Konigsberg v. State Bar, 366 U.S. 36 (1961) (majority adopted a balancing approach recognizing that speech may be restricted to favor a "subordinating" governmental interest). Justice Harlan delivered the majority opinion in Konigsberg, specifically rejecting the
the first amendment. For example, the Court has refused to extend constitutional protection to obscenity,\(^{10}\) child pornography,\(^{11}\) libel,\(^{12}\) and "fighting words" which directly elicit a violent response.\(^{13}\) Additionally, commercial speech receives a lesser level of protection than non-commercial speech.\(^{14}\) Wherever the extreme perimeters of protected speech may lie, it is clear that, at a minimum, the first amendment protects political speech.\(^{15}\)

"absolutist" approach of Justice Black. Id. at 49-50. As does Justice Black, Alexander Meiklejohn, a noted advocate of free speech, views the first amendment as an absolute—a specific reservation of sovereign power by the people to themselves. Meiklejohn, The First Amendment Is An Absolute, 1961 Sup. Ct. Rev. 245, 253-54. Meiklejohn proposed that the first amendment necessarily must protect all communication that insures that the people will acquire and maintain the experience and knowledge to effectively govern themselves. According to Meiklejohn, protected speech therefore includes, among other things, education and any speech promoting an understanding of philosophy, the sciences, literature, the arts, and public issues. Id. at 256-57.

For other theories regarding first amendment protection, see Baker, supra note 2, at 939-40 (advocating a view that the first amendment constitutes not an individual right, but a limit on governmental authority); Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L.J. 1 (1971) (proposing protection of only political speech); Emerson, Toward a General Theory of the First Amendment, 72 Yale L.J. 877 (1963) (arguing for "definitional balancing").

For a general discussion of the first amendment, see BeVier, The First Amendment and Political Speech: An Inquiry Into the Substance and Limits of the Principle, 30 Stan. L. Rev. 299 (1978) (overview of the scope of first amendment protections); DuVal, Free Communication of Ideas and the Quest for Truth: Toward a Teleological Approach to First Amendment Adjudication, 41 Geo. Wash. L. Rev. 161 (1972) (general discussion of approaches to first amendment protections).


12. See, e.g., New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (libelous speech is unprotected if made in regard to a public official by one who knows it is false or who speaks with reckless disregard of its truth or falsity). In a consolidated case decided three years after New York Times, the New York Times standard was extended to libelous speech made in regard to all "public figures." See Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967); see also Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (establishing that libelous statements are unprotected under the first amendment even when made only negligently if the object of the defamation is a private individual).


15. See Carey v. Brown, 447 U.S. 455, 467 (1980) (discussion of public issues "has always rested on the highest rung of the hierarchy of First Amendment values"); Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964) ("speech concerning public affairs is more than self-expression; it is the essence of self-government"); see also Stephan, The First Amendment and Content
Although political speech is not free from governmental restriction, the Supreme Court recognizes political speech as among the most highly protected forms of speech, particularly when directly related to a political campaign. The Court has stated that the most stringent scrutiny is necessary when reviewing restrictions affecting political speech. The Court's own use of heightened scrutiny, however, has not been consistent. It apparently depends on factors other than the political nature of the speech. When the issue is voting or access to the ballot, for example, the Court readily rejects

Discrimination, 68 Va. L. Rev. 203, 207 (1982) ("Perhaps the leading theme in the Supreme Court's cases is the primacy of political speech."). Stephan noted that Meiklejohn's theory that political speech must be completely open to support a representative democracy is so well accepted that the only remaining issue for debate is whether only political speech should be protected. Id. at 208.

16. See, e.g., Garrison v. Louisiana, 379 U.S. 64, 75 (1964) ("That speech is used as a tool for political ends does not automatically bring it under the protective mantle of the Constitution."). Initially, the Court recognized state authority to prohibit and punish speech that created a "clear and present danger" of a resultant "substantive evil," such as an attempted obstruction of the draft. See Schenck v. United States, 249 U.S. 47 (1919). The Court later adopted a more stringent test requiring that the speaker advocate subversive policy, not merely express ideas, before the government could prohibit or punish his speech. See Dennis v. United States, 341 U.S. 494 (1951) (reversing convictions under the Smith Act because the law allowed punishment without requiring that the speaker had advocated action). In the latest stage of refinement in the scope of protected political speech, all speech is protected except that constituting an incitement to imminent lawless action which is also likely to result in that action. Brandenburg v. Ohio, 395 U.S. 444 (1969).

17. See cases cited supra note 15.

18. Brown v. Hartlage, 456 U.S. 45 (1982). The Brown Court rejected Kentucky's application of a statute designed to prohibit solicitation for the sale of votes to a candidate who had promised to reduce costs to taxpayers by cutting his own salary if elected. Id. at 56-57. The Court stated that "[t]he free exchange of ideas provides special vitality to the process traditionally at the heart of American constitutional democracy—the political campaign." Id. at 53; accord Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 (1971) (first amendment "has its fullest and most urgent application precisely to the conduct of campaigns for political office").

19. See First Nat'l Bank v. Bellotti, 435 U.S. 765, 795 (1978) (majority applied strict scrutiny to invalidate a criminal law aimed at preventing corporations from spending money to influence public opinion); Buckley v. Valeo, 424 U.S. 1, 44-45 (1976) (noting that "exact[ing] scrutiny" must be applied to government limitations "on core first amendment rights of political expression").

20. One of the first and most famous statements advocating "heightened scrutiny" to protect individual rights was made by Chief Justice Stone in 1938:

There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth.

United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938). The Court has frequently employed "heightened scrutiny" to strike down legislation despite the existence of a rational relation between the legislation and a "legitimate" state interest when the Court finds that the legislation infringes upon a paramount constitutional right. See, e.g., Roe v. Wade, 410 U.S. 113 (1973) (a pregnant woman's privacy interest is paramount to the state's interests in her health and the life of her unborn child until those interests become "compelling" at the end of the first and second trimesters, respectively).
burdensome restrictions. Conversely, if the Court finds the location at issue to be inappropriate for political speech, it uses a lesser level of review. Thus, when a restriction abridges political speech, the appropriate level of review is uncertain. If the abridged speech is not political, the appropriate level of protection is even more uncertain. The resultant case law is a confusing array of overlapping tests and doctrines, all of which culminate in the balancing of competing interests. The following background is, therefore, necessarily a generalized analysis of the Supreme Court’s approach to first amendment restrictions.

A. Analytical Tools for Review of First Amendment Restrictions

Generally, a court that reviews an ordinance or statute abridging speech will make an initial analysis in the following manner. If the law prohibits only a category of speech unprotected by the first amendment, the law will stand because there has been no constitutionally-relevant abridgement of free speech. If the regulation as written is wholly contradictory to the freedom of speech guarantee, the court will strike it down as unconstitutional "on its face." For example, the court will strike down a regulation for vagueness

21. See, e.g., Anderson v. Celebrezze, 103 S. Ct. 1564 (1983). The Anderson Court struck down Ohio's law requiring an early filing date for independent presidential candidates because it "heavily burdened" the independent voters' rights to associate freely in their support of a candidate. Id. at 1569. The Court concluded that the voters' rights "unquestionably" outweighed the minimal state interests. Id. at 1579; see also Kramer v. Union Free School Dist. No. 15, 395 U.S. 621 (1969) (striking down restrictions allowing only real estate owners and parents of enrolled children to vote in local school district election); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (striking down the imposition of a fee to obtain a ballot). But see Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719 (1973) (upholding restriction allowing only landowners to vote on a proposal for supplying farmers with water and apportioning the cost among the recipients).

22. See, e.g., Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) (plurality opinion) (plurality upheld city's refusal to allow political advertising on its transit vehicles, noting that the vehicles were not among "traditional settings" for political speech).

23. See, e.g., FCC v. Pacifica Found., 438 U.S. 726 (1978) (upholding FCC's decision to consider administrative sanctions against Pacifica for broadcasting a non-obscene comic monologue); Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976) (upholding ordinance requiring adult theatres to be placed 1,000 feet apart). See generally Stephan, supra note 15, at 209 ("[o]utside the area of political speech . . . the Court's decisions reflect confusion of purpose and uncertainty about the meaning of 'full' first amendment protection").

24. See, e.g., BeVier, supra note 9, at 299. Professor BeVier noted that "abundant first amendment literature has failed to dispel the climate of uncertainty and intellectual disorder that permeates the concept and implementation of freedom of speech." Id.

25. See, e.g., Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). The Chaplinsky Court concluded that the Constitution does not prohibit a state from punishing "fighting words" or speech which is "lewd and obscene." Id. at 571-72.

26. See, e.g., Lovell v. Griffin, 303 U.S. 444 (1938). The Lovell Court found an ordinance requiring a license to distribute religious pamphlets invalid on its face. The Court stated that the regulation struck "at the very foundation of the freedom of the press." Id. at 451. For Justice Stone's now famous statement that legislation which directly encroaches upon the domain of one of the first ten amendments must fall within a "narrower scope" to receive the Court's "presumption of constitutionality," see United States v. Carolene Prods., 304 U.S. 144, 152
if the wording of the law is unclear and leaves speakers uncertain as to whether their speech will fall within the rule’s prohibition. The uncertainty resulting from such a vague rule may cause would-be speakers to remain silent rather than risk punishment. Thus, the exercise of their free speech rights is “chilled.”

Reviewing courts will also strike down a regulation that chills speech if the regulation is overbroad, that is, if it reaches speech that is protected by the first amendment as well as unprotected speech. A statute, although properly aimed at speech not protected by the first amendment, may be drafted too broadly for its legitimate targets, and thus may restrict protected speech as well. Even a speaker whose speech is in a category not protected by the first amendment may challenge an overbroad ordinance. The overbreadth rule is therefore an exception to general standing requirements—it

n.4 (1938). See also Kovacs v. Cooper, 336 U.S. 77, 93 (1949) (Frankfurter, J., concurring) (“the likelihood, however great, that a substantive evil will result cannot alone justify a restriction upon freedom of speech or the press”).

27. See, e.g., Baggett v. Bullitt, 377 U.S. 360 (1964) (striking down as vague two state requirements that state employees swear they are unaffiliated with any “subversive organization”); Cramp v. Board of Pub. Instruction, 368 U.S. 278 (1961) (striking down as vague requirement that public employees declare they had no affiliation with the Communist Party). Vague laws are unconstitutional because they do not give adequate notice of what conduct is impermissible. See Jordan v. DeGeorge, 341 U.S. 223, 231-32 (1951) (establishing that a statute or ordinance must provide a “definite warning as to the proscribed conduct when measured by common understanding and practices”). Similarly, vague laws allow law enforcement officials an inordinate amount of discretion in making arrests. See Papachristou v. Jacksonville, 405 U.S. 156 (1972) (vagrancy ordinance held unconstitutionally vague because it afforded no fair notice and allowed arbitrary enforcement). See generally Shaman, The First Amendment Rule Against Overbreadth, 52 Temp. L.Q. 259, 262-65 (1979) (distinguishing the unconstitutionally vague from the unconstitutionally overbroad law).

28. See generally Shaman, supra note 27, at 259-60 (1979) (discussion of the chilling effect on speech caused by a vague or overbroad law which deters protected speech).

29. See, e.g., New York v. Ferber, 458 U.S. 747 (1982). The Ferber Court stated with regard to the chilling effect in the overbreadth context: “It is for this reason that we have allowed persons to attack overly broad statutes even though the conduct of the person making the attack is clearly unprotected and could be proscribed by a law drawn with the requisite specificity.” Id. at 769. See generally Note, The First Amendment Overbreadth Doctrine, 83 Harv. L. Rev. 844 (1970) (comprehensive discussion of the overbreadth doctrine).

30. The overbreadth rule allows a court to strike down a statute that, while designed to prohibit activities not protected by the Constitution, also prohibits activities which are constitutionally protected. See J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 868 (2d ed. 1983). See generally Shaman, supra note 27. Professor Shaman notes that overbreadth regulations are facially unconstitutional, and that the overbreadth doctrine is an exception to two general rules of constitutional law: 1) courts normally construe statutes so as to save their constitutionality, and 2) courts generally only review a statute with regard to its application to the complaining party. Id. at 260-61.

31. See, e.g., NAACP v. Alabama, 377 U.S. 288 (1964) (holding that governmental regulations may not sweep unnecessarily into the realm of constitutionally protected rights).

32. See, e.g., Schad v. Borough of Mt. Ephraim, 452 U.S. 61 (1981). The Schad Court stated that “[b]ecause appellants’ claims are rooted in the First Amendment, they are entitled to rely on the impact of the ordinance on the expressive activities of others as well as their own.” Id. at 66; see also Village of Schaumburg v. Citizens for a Better Env’t, 444 U.S. 620
allows the challenger to assert the rights of unnamed third parties. The court will review the effects that the challenged ordinance has on these third parties, and, if the ordinance results in an unconstitutional restriction of the third parties' protected speech, the court will strike down the entire ordinance as overbroad.

In recent years the Supreme Court has narrowed the scope of the overbreadth doctrine. Only when a reviewing court determines that a statute or ordinance is substantially overbroad may the court strike it down under the doctrine. The substantiality of the statute's overbreadth is determined by comparing the instances of the legitimate and illegitimate applications of the statute. Presumably, only a statute or ordinance which reaches a proportionately high level of protected speech is overbroad under the current application of the rule. It is not clear, however, whether the proportionality comparison is a quantitative test. The Court has left open the

(1980). The Schaumburg Court struck down an ordinance that allowed solicitation of funds only by charitable organizations who devoted at least 75% of their collections to their ultimate charitable goals. The Court found the ordinance to be overly broad because some charitable organizations (unlike the challenging group) whose primary goal was to accumulate and disseminate information regarding public opinion could not meet the "75% test," and yet were involved in speech protected by the first amendment. See also U.S. v. Robel, 389 U.S. 258 (1967) (invalidating statute requiring disclosure of all associations with Communist groups because it allowed no consideration of degree of association).

33. The overbreadth rule is an exception to the general principle that an individual to whom a statute may properly be applied cannot challenge it because it may be applied unconstitutionally to others. See, e.g., NAACP v. Button, 371 U.S. 415 (1963); Thornhill v. Alabama, 310 U.S. 88 (1940) (both cases noting validity of challenges to rules which prohibit activities protected by the first amendment whether or not the challengers' speech is protected); see also U.S. v. Raines, 362 U.S. 17 (1960) (stating general rule that one does not have standing to challenge a rule because it limits the exercise of another's constitutional rights). See generally New York v. Ferber, 458 U.S. 747, 767 (1982) (thorough discussion of the reasons for, and proper extent of, the standing requirement exception); Redish, The Warren Court, The Burger Court and the First Amendment Overbreadth Doctrine, 78 NW. U.L. REV. 1031 (1983) (analysis of Supreme Court's changing approach to overbreadth challenges) [hereinafter cited as Overbreadth Doctrine].


35. See Broadrick v. Oklahoma, 413 U.S. 601 (1973). The Broadrick Court rejected an overbreadth challenge to Oklahoma's limitation on permissible political activity by civil servants. The majority concluded that: "particularly where conduct and not merely speech is involved . . . the overbreadth of a statute must not only be real, but substantial as well. . . ." Id. at 615; see also New York v. Ferber, 458 U.S. 747 (1982). The Ferber Court concluded that New York's statute prohibiting the sale of any material depicting a child engaged in sexual activity was not unconstitutionally overbroad. The Court determined that "the extent of deterrence of protected speech can be expected to decrease with the declining reach of the regulation." Id. at 772. The Ferber Court extended the substantiality requirement from cases involving conduct combined with speech to traditional forms of speech—books and films. Id. at 771.


37. New York v. Ferber, 458 U.S. 747, 773 (1982). The Ferber Court concluded that improper application of New York's prohibition of material depicting children involved in sexual conduct probably amounted to no more than a "tiny fraction of the materials within the statute's reach." Id.

38. See generally Overbreadth Doctrine, supra note 33, at 1065-67 (analysis of the Ferber
possibility that either the particularly offensive nature of the target speech or the extraordinary value of the protected speech may tip the balance of the substantiality test.\(^3\)

A related issue in the review of speech-restrictive regulations is whether the legislature or regulating body should have used less restrictive means to achieve its end.\(^4\) The "least restrictive means" analysis may often be employed in cases raising freedom of speech issues even when no overbreadth challenge is made.\(^4\) Frequently, however, the reviewing court combines the issues, making no clear distinction between them.\(^4\)

If the court dismisses these initial challenges, it must still adjudicate the individual's own first amendment claim by balancing the first amendment free speech interests against the regulatory interests of the state or municipality. In striking this balance, the court will consider the setting which the challenged restriction affects; regulations in a traditional public forum are less favored than regulations in a more restricted setting.\(^4\) In addition, the court will determine whether the regulation impermissibly discriminates against particular speech because of its content or because of the speaker's

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\(^3\) In New York v. Ferber, 458 U.S. 747, 773 (1982), the Court stated that the New York statute's "legitimate reach dwarf[ed] its arguably impermissible applications." This phrase can be interpreted as a qualitative rather than a quantitative test. Then the importance of preventing instances of child pornography greatly outweighs, if the instances do not outnumber, the chilling effect of improper applications of the statute. The Court also expressed doubt regarding the very existence of circumstances which might legitimately require the use of children involved in sexual conduct, id., and noted that the value of using children in this manner was "exceedingly modest, if not de minimis," id. at 762. Read together, this may mean that either the heinous nature of the target speech or the unimportance of the protected, but prohibited, speech can tip the substantiality balance.

\(^4\) See United States v. Robel, 389 U.S. 258 (1967) (invalidating law that prohibited all Communist organization members from working in defense plants); Keyishian v. Board of Regents, 385 U.S. 589 (1967) (invalidating law making members in Communist Party ineligible to teach school in New York); Shelton v. Tucker, 364 U.S. 479 (1960) (invalidating rule that teachers disclose all organization memberships). Compare Overbreadth Doctrine, supra note 33, at 1035-36 (less drastic means analysis is "the focus of the overbreadth doctrine") with J. NOWAK, R. ROTUNDA, & J. YOUNG, supra note 30, at 873 (treating overbreadth and less drastic means as distinct analyses).

\(^5\) See, e.g., Shelton v. Tucker, 364 U.S. 479 (1960) (statute requiring teachers to name all organization memberships invalid because state's interest in ensuring teacher fitness and competency could be served by more narrow means).

\(^6\) See, e.g., Village of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620 (1980) (Court discussed both less restrictive alternatives and third party interests as it invalidated ordinance limiting authority to solicit to charitable organizations that donate 75% of receipts to charitable end); United States v. Robel, 389 U.S. 258 (1967) (ban on defense facility employment of Communist party member swept too broadly; legislature's goal achievable by less drastic means); see also Overbreadth Doctrine, supra note 33, at 1051-52 (discussion of the risks a court assumes when it declares that a legislature has not used the least restrictive means, but does not state what narrower means are available).

\(^7\) See Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45-46 (1983) (describing the heightened level of scrutiny applicable to a regulation restricting speech in a public forum).
The reviewing court also will determine the governmental interests, how important the enforcement of the regulation is to those interests, and how significantly the regulation impacts on a speaker's ability to communicate his message. These balancing factors are treated independently below, because each is capable of swaying a reviewing court's decision.

B. The Right to Speak in Public Places

The first amendment prohibits the government from infringing upon the people's right to free speech. The most logical location for effective speech is in public places. Yet, the first amendment, as initially interpreted, did not establish any right of access to public property for use as a forum for speech. In fact, in an early case the Supreme Court emphatically rejected the suggested right of access. The Court equated the state's position to that of a private property owner, with as much authority to prohibit even communicative activity on state property.

Forty years later, however, a plurality of the Court strongly supported a public right of access to streets and parks in *Hague v. C.I.O.* The Hague

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44. The Supreme Court has held that "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." Police Dept. v. Mosley, 408 U.S. 92, 95 (1972).

45. See, e.g., United States v. Grace, 103 S. Ct. 1702 (1983) (striking down prohibition on displaying signs and distributing literature in front of the Supreme Court building because the regulation was not logically necessary to maintain security); Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 640 (1981) (upholding regulation prohibiting distribution of literature except from assigned booths at a state fair because the regulation was important to the maintenance of order at the crowded, temporary fair).

46. The Supreme Court is less likely to uphold a speech restrictive regulation if there are not sufficient alternative avenues of communication available. See, e.g., Schad v. Borough of Mt. Ephraim, 452 U.S. 61 (1981) (striking down ban on live entertainment in a borough when the borough failed to demonstrate that adequate alternatives existed).

47. The first amendment provides, in part: "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. The first amendment is extended to the states through the fourteenth amendment. For cases applying the first amendment to the states, see Stromberg v. California, 283 U.S. 359 (1931); Gitlow v. New York, 268 U.S. 652 (1925).


49. Davis v. Massachusetts, 167 U.S. 43 (1897). The *Davis* Court unanimously concluded that the Constitution created no such individual right of access to public property. The decision affirmed the famous opinion of Justice Holmes: "For the Legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house." Commonwealth v. Davis, 162 Mass. 510, 511, 39 N.E. 113, 113 (1895).

50. The Court approved the Massachusetts's Supreme Court ruling. See Davis v. Massachusetts, 167 U.S. 43 (1897).

51. 307 U.S. 496 (1939). Justice Roberts stated: wherever the title of streets and parks may rest, they have immemorially been held
plurality, faced with a city ordinance banning public assemblies without a permit, stated that "streets and parks . . . have immemorially been held in trust for the use of the public and, time out of mind, have been used for . . . discussing public questions." The plurality recognized that while a citizen's right of access to the streets and parks is not absolute, it must not be abridged or denied in the guise of regulation. The regulations that the Court has most consistently rejected as unacceptable are content-based regulations which abridge access for speech purposes.

1. Content-based Regulations

Local governments may validly regulate the time, place, and manner of speech in public places, but cannot censor the content of that speech. The Supreme Court's prohibition of official censorship also encompasses those regulations which delegate broad administrative discretion for interpretation in trust for the use of the public and, time out of mind have been used for purposes of assembly, communicating thought between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.

Id. at 515-16.

52. Id. See generally Stone, supra note 48, at 237-38. Stone notes that Justice Roberts, while rejecting the government's authority to prohibit speech, started from the same point Justice Holmes did—consideration of property rights and interests. Id.

53. 307 U.S. at 516.

54. Cox v. New Hampshire, 312 U.S. 569 (1941). Cox is a leading first amendment case establishing the acceptability of time, place, and manner regulations. The Cox Court upheld New Hampshire's licensing requirement for parades and outdoor meetings. The Court noted that the New Hampshire Supreme Court had limited the rule to grant authority to restrict only the time, place, or manner of the speech to avoid public disturbance or inconvenience. The New Hampshire court allowed officials no authority to refuse a license based on the content of the speech and no arbitrary power since officials were required to treat applicants uniformly.

55. See, e.g., Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981) (striking down ordinance limiting billboard advertisements to those locations where advertised product or service available, because no similar exception was allowed for non-commercial speech); Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530 (1980) (striking down commission's ban on only those bill enclosure statements which expressed opinions regarding controversial subjects); Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975) (striking down ordinance prohibiting display of movies containing nudity at drive-in theatres as discrimination based on context); Police Dept. v. Mosley, 408 U.S. 92, 95 (1972) (above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content); Carey v. Brown, 447 U.S. 455, 460 (1910) (striking down ban on residential picketing which exempted persons involved in labor disputes).

There are some notable exceptions to the rule that speech cannot be regulated because of its content. See, e.g., Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983) (upholding public school district's policy denying access to teachers' mail boxes to one union
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and enforcement. The stated purpose of the Court is to prevent regulation of speech due to its content—regardless of whether that discrimination is blatant or covert. The Court thus rejects content discrimination whether it occurs in the regulation's creation or in its enforcement.

Describing the court's rejection of official censorship as a prohibition of content discrimination is common, but perhaps misleading. The cases show a firm disapproval of regulations which discriminate between speakers because of their viewpoints. For example, the Court will not support a regulation that permits the speech of a person advocating one side of a public issue, but which prohibits the speech of one taking the opposing viewpoint. At

while permitting access to another union and other outside organizations); FCC v. Pacifica Found., 438 U.S. 726 (1978) (upholding the keeping of customer complaints to radio station's broadcast of comedian's "indecent" monologue in FCC licensing file); Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976) (plurality opinion) (upholding ordinance requiring adult theatres to be located at least 500 feet apart from one another); Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) (upholding city's ban on political advertising while permitting all other advertisements on placard space in public transit vehicles).

For a general discussion of content discrimination and the first amendment, see Redish, The Content Distinction in First Amendment Analysis, 34 Stan. L. Rev. 113 (1981) (discussion of Court's treatment of content of speech) [hereinafter cited as Content Distinction]; Stephan, supra note 15 (describing the Court's failure to adhere to a broad content-neutrality rule).


57. See Stromberg v. California, 283 U.S. 359 (1931). The Stromberg Court invalidated a statute prohibiting the display of any symbol demonstrating opposition to the government. The Court noted that the statute "as authoritatively construed is so vague and indefinite as to permit the punishment [of free political discussion]." Id. at 369.

58. For cases requiring careful judicial scrutiny of regulations to ensure that no covert content-based restrictions exist, see Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530 (1980); Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975); Niemotko v. Maryland, 340 U.S. 268, 282 (1951) (Frankfurter, J., concurring).

59. See, e.g., Vincent, 104 S. Ct. at 2125 n.14 (suggesting that the purpose of the ordinance in Stromberg v. California, 283 U.S. 359 (1981), was to suppress ideas).

60. See, e.g., Cantwell v. Connecticut, 10 U.S. 296 (1940) (Court suggested that officials had enforced the breach of the peace statute to prevent the speaker's communication because they disliked his ideas); see also Edwards v. South Carolina, 372 U.S. 229 (1963) (reversing breach of peace convictions of "peaceful" demonstrators); Kunz v. New York, 340 U.S. 290 (1951) (reversing conviction under arbitrarily enforced ordinance prohibiting religious discussion without permit).


62. See generally Stephan, supra note 15. Stephan argues that while the Court firmly rejects state discrimination against particular viewpoints, it has not adhered firmly to any broader
every level of public speech analysis, the Court gives the greatest protection to individuals whose speech is restricted not because of the way or the place in which they wish to speak, but merely because of what they wish to say.63

Nevertheless, while advocating complete content-neutrality, the Court has frequently approved regulations which treat different types of speech, with inherently diverse contents, differently.64 Furthermore, the Court has concluded that, in some circumstances, one speaker may be treated differently from all others.65 For example, in Brown v. Socialist Workers '74 Campaign Committee66 the Court concluded that Ohio's otherwise valid law requiring political candidates to disclose the names and addresses of campaign contributors and the recipients of campaign funds could not be applied constitutionally to the Socialist Workers Party.67 The Court noted the contributors' and recipients' particular vulnerability to harassment due to the party's dissident political beliefs and concluded that only a "compelling" state interest, to which the disclosure requirement was substantially related, would support the application of the rule to the contributors and recipients.68 Although such constitutionally compelled exemptions69 are rare, they demonstrate that the Court's advocacy of content-neutrality is less than absolute.

The Court's espoused prohibition of content-based regulations is based both on equal protection grounds70 and on a first amendment grant of equal content-neutrality rule. Id. at 214-15. Stephan analyzes the Court's numerous decisions advocating content-neutrality and concludes that the decisions establish not one, but five possible approaches to the prevention of discrimination in regulating speech. Id. at 218-31. For example, the Court concluded in Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983), that a state must demonstrate that its content-based regulation of speech in a traditional public forum is "necessary to serve a compelling state interest," while content-neutral regulations in the same forum need only be "narrowly tailored to serve a significant . . . interest." Id. at 45. On public property that is not a public forum, the state may regulate speech in a reasonable manner "as long as the regulation . . . is not an effort to suppress expression merely because public officials oppose the speaker's view." Id. at 46.


65. See, e.g., Bates v. City of Little Rock, 361 U.S. 516 (1960) (exempting the NAACP from disclosure requirements); NAACP v. Alabama, 357 U.S. 449 (1958) (invalidating state court order requiring NAACP to present its membership lists to determine whether the organization had violated a statute requiring registration before conducting business in the state).


67. Id. at 101-02.

68. Id. at 92-93.

69. See Stone & Marshall, Brown v. Socialist Workers: Inequality as a Command of the First Amendment, 1983 SUP. CT. REV. 583. Professors Stone and Marshall concluded that the Court's rationale in Brown could best be explained by viewing the "constitutionally compelled exemption" as based on the Court's independent interpretation of the Constitution. Id. at 602-04. The Court thus permits itself discretion that would be improper if delegated to the legislature. Id. at 602. The decision can further be explained as based on the Court's desire to provide a form of "affirmative action" to an unpopular political party. Id. at 604-06.

70. See Kalven, supra note 48, at 29-30; see also Stone, supra note 48, at 272-80 (discussion
access to an open forum. The more difficult question, however, is whether the first amendment embraces an absolute minimum right of access to public property that prohibits the government from banning all speech, notwithstanding the fact that the government's ban applies without regard to content, viewpoint, or the speaker's identity.

2. Content-neutral Regulations

Content-neutral restrictions on speech ordinarily are not designed to censor the ideas of a speaker, but they effectively reduce the number of communicative methods available. To be valid, content-neutral regulations must afford the speaker the opportunity to reach his willing audience. When such regulations restrict speech in a public area, the only permissible regulations are those which restrict the time, place, or manner of speech. When content-neutral regulations that restrict speech are challenged, the Court enters into a balancing process, weighing the asserted governmental interests against the restriction of speech. In this process, speech interests are given a pre-
ferred position. This is particularly true when the speech occurs in an appropriate public forum.

a. Balancing Regulatory and Speech Interests in a Public Forum

Three categories of regulation affect the freedom to speak on public property: 1) regulations in a traditional public forum; 2) regulations in a state-opened forum; and 3) regulations in other public places. The Court applies the highest level of scrutiny to regulations of speech in traditional public forums. Accordingly, when a traditional public forum is affected, the regulation of speech must further a compelling state interest and must be narrowly drawn to achieve that end. If the regulation restricts only the time, place, or manner of speech, however, and make no reference to the content of that speech, it must be narrowly tailored to serve a significant government interest and must leave ample alternatives open to a speaker. A comparable level of protection is afforded speech in the second category of regulation—regulation of areas opened by the state for use as forums for expression. The third category consists of regulations of speech on public

76. See, e.g., Saia v. New York, 334 U.S. 558, 562 (1948) (balancing process should "keep the freedoms of the First Amendment in a preferred position"); United States v. Carolene Prods., 304 U.S. 144, 152 n.4 (1938) (recognizing that heightened scrutiny is appropriate when reviewing the regulations which encroach upon freedoms recognized in the first ten amendments).

77. See generally Hague v. C.I.O., 307 U.S. 496 (1939) (identifying the streets and parks as traditional sites for public communication).

78. See Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983). The Perry Court refused to require a public school district to allow a rival union the same access to teachers' mailboxes that was allowed to the union that had been elected the exclusive bargaining agent. Id. The Court stated:

In places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the state to limit expressive activity are sharply circumscribed. At one end of the spectrum are streets and parks, . . . quintessential public forums, [in which] the government may not prohibit all communicative activity. For the State to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. The State may also enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave upon ample alternative channels of communication.

A second category consists of public property which the state has opened for use . . . as a place for expressive activity . . . [The state] is bound by the same standards as apply in a traditional public forum. Reasonable time, place and manner regulations are permissible, and a content-based prohibition must be narrowly drawn to effectuate a compelling state interest.

Public property which is not by tradition or designation a forum for public communication is governed by different standards. . . . In addition to time, place, and manner regulations, the State may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view.

Id. at 45-46 (citations omitted).

79. Id. These forums, however, are more closely controlled by the state that is not required
property that is not traditionally classified as a public forum. This third category of regulations receives the least scrutiny. The government may use time, place, and manner regulations, as well as any additional restrictions that ensure the forum will be reserved for its governmentally intended purpose.

The concept of the public forum was first approved in the *Hague* decision. Justice Roberts recognized the traditional dedication of the streets and parks to public communication. The *Hague* opinion, however, required that the public right to speak be limited when doing so was necessary to advance the "general comfort, and convenience," so long as the right is not denied in the "guise of regulation." This limitation substantially deferred to local regulators the control over the level of effective access to public places.

In two handbilling regulation cases closely following *Hague*, the Court formally denied state authority to foreclose the streets and parks to the public for speech simply because the property belonged to the state. In *Jamison v. Texas*, a majority of the Court invalidated an ordinance banning distribution of handbills on public streets and sidewalks. The *Jamison* Court cited *Hague* as a direct rejection of state authority to absolutely prohibit speech on public streets. In *Schneider v. State*, the Court invalidated three ordinances similar to the one in *Jamison*. The *Schneider* Court stated that the government may not interfere with the freedom of an individual to speak and distribute literature when that individual is rightfully on the street. The Court concluded that "the streets are natural and proper places for the dissemination of information and opinion; and one is not to have the ability to keep them open indefinitely. *Id.*

80. *Id.* at 46.
81. *Id.*
82. 307 U.S. at 515-16.
83. *Id.*; see *supra* note 51 for the complete quotation.
84. 307 U.S. at 515-16. It is also noteworthy that Justice Roberts's recognition of a public right of access to the streets and parks was based on the adverse possession property doctrine developed at common law. He concluded that the public had a right to speak on the streets and parks because the public, in a sense, owned those areas. See *Stone, supra* note 48, at 238. It was the state's property interest that had earlier led Justice Holmes to conclude that the state could absolutely foreclose the use of the streets as a public forum. *Id.*
86. See *Stone, supra* note 48, at 239-44. Stone believes that the *Schneider* and *Jamison* cases established definite post-*Hague* limits to a state's authority to control speech in public places.
87. 318 U.S. 413 (1943).
88. *Id.* at 415-16.
89. 308 U.S. 147 (1939).
90. *Id.* at 160. The *Schneider* Court concluded that the state's interest in preventing litter was insufficient to support a ban on distribution of literature to willing recipients. *Id.* at 162. With regard to legislative choices, the Court stated:

Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions. *Id.* at 161.
exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.” The Court thus firmly established a high level of protection for public use of streets and parks (traditional forums) for speech.

The Court appeared to break with the requirement that a public forum must traditionally have been used for public speech in *Grayned v. City of Rockford.* The *Grayned* Court considered an ordinance prohibiting disruptive noise on grounds adjacent to a school in session. While the Court upheld the ordinance because it applied only at narrowly defined places and times, the Court limited governmental authority to restrict speech in a public place. The correct inquiry, according to the Court, must take into account “the nature of a place . . . and whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time.” Nevertheless, this “compatibility with the forum” test did not ignore the relevance of the forum’s traditional use. Instead, it appeared to promise that traditional public access would no longer be the exclusive test of an established public forum.

91. *Id.* at 163. This statement from *Schneider* has sparked a great deal of discussion, especially when considered in connection with the Court’s recent emphasis on ample alternatives in cases in which it has upheld speech restrictions. See, e.g., *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n,* 460 U.S. 37 (1983). This approach would tend to indicate that the existence of alternative locations strengthens a state’s authority to restrict speech in certain locations. See generally *Baker, Unreasoned Reasonableness: Mandatory Parade Permits and Time, Place and Manner Regulations,* 78 Nw. U.L. Rev. 937, 967-68 (1983) (*Schneider* and later cases compatible only if taken to mean a government restricting speech must provide alternatives, but existence of alternatives alone not adequate reason to restrict speech); *Stone,* supra note 48, at 255-56 (restricting speaker to alternative forums is consistent with *Schneider* in the case of a speaker who merely needs a place to speak, because his audience will follow).

92. The *Hague* Court had specifically noted that streets and parks had from “time out of mind” been used for public speech. 307 U.S. at 515-16.

93. 408 U.S. 104 (1972).

94. *Id.* at 106-08. The *Grayned* Court invalidated the city’s anti-picketing ordinance challenged in the same action. The Court found the ordinance that was identical to that invalidated in a decision handed down earlier the same day, see *Police Dep’t v. Mosley,* 408 U.S. 92 (1972), because it allowed a content-based exception—picketing was permitted only for those involved in a labor dispute. *Grayned,* 408 U.S. at 107.

95. The ordinance applied only to areas adjacent to the school and only when school was in session. 408 U.S. at 111.

96. *Id.* at 116.

97. The history of the place is relevant to evaluate the incompatibility of the speech and the forum. See *Stone,* supra note 48, at 251-52.

98. Cf. *Amalgamated Food Employees Local 590 v. Logan Valley Plaza,* 391 U.S. 308 (1968). Although later overruled in *Lloyd Corp. v. Tanner,* 407 U.S. 551 (1972), and *Hudgens v. NLRB,* 424 U.S. 507 (1976), *Logan Valley* illustrates the development of the Court’s current standards. *Logan Valley* rejected the application of a trespass law to demonstrators picketing a store in a private shopping mall. The shopping mall was apparently sufficiently similar to traditional public forums to warrant similar protection of communication. The Court concluded that “streets, sidewalks, parks, and other similar public places are so historically associated with the exercise of the First Amendment rights that access to them . . . cannot constitutionally
The Supreme Court recently clarified its position regarding public forum property in *Perry Educational Association v. Perry Local Educators' Association.* Justice White's majority opinion characterized the forums that deserve the greatest protection as those that "by long tradition or by government fiat have been devoted to assembly and debate." Justice White concluded that heightened protection for public-forum speech is limited to those locations which have traditionally been devoted to speech or which the government chooses to identify as a public forum. Thus, the "compatibility with the forum" test is apparently an issue only when the government chooses to establish a new area as a public forum.

The *Perry* Court clearly re-established that speech in traditional public forums must be afforded generous protection. Justice White noted that "in these quintessential public forums, the government may not prohibit all communicative activity." Although that statement is dictum, a majority of the Court approved a constitutionally mandated minimum right of access to traditional public forums for speech. Consequently, any future finding that a location constitutes a public forum must result in the conclusion that all communication cannot be prohibited in that location, and that time, place, or manner restrictions must leave open effective, alternative methods of communication.

b. Regulation of Speech on Public Property That Is Not a Traditional Public Forum

Regulation of speech in areas not set aside as public forums by "tradition or design" was the least scrutinized category of speech regulations recognized

be denied broadly and absolutely." *391 U.S. at 315* (emphasis added); accord *Heffron v. International Soc'y for Krishna Consciousness,* 452 U.S. 640, 650-51 (1981) ("consideration of a forum's special attributes is relevant . . . since the significance of the governmental interest must be assessed in light of the characteristic nature and function of the particular forum involved"). *See generally Stone,* *supra* note 48, at 251-52 (proposing that *Grayned* indicated an expansion of the public forum concept).

99. *460 U.S. 37* (1983). If the *Grayned* decision implied that any public property with which free expression was compatible constituted a public forum, the Court's recent decisions have eliminated that possibility. See, e.g., *Perry,* 460 U.S. at 45 (public forums, identified as "places which by long tradition or by government fiat . . . devoted to assembly and debate"); *United States Postal Serv. v. Council of Greenburgh Civic Ass'ns,* 453 U.S. 114, 128 (1981) (requiring "historical or constitutional support" to characterize a place as public forum); *Hudgens v. NLRB,* 424 U.S. 507 (1976) (demonstration that similarity to streets and parks is not enough where the forum is on private property).

100. *460 U.S. at 45.*

101. The *Perry* Court used the term "character of the property," but apparently only as an introduction for the three types of property used for speech and their respective levels of constitutional protection. *Id.* at 44.

102. *Id.* at 45.

103. *Id.*

104. *Id.*; see also *Linmark Assoc., Inc. v. Willingboro,* 431 U.S. 85, 93 (1977) (rejecting ordinance banning "for sale" signs in front of homes because available alternatives were too costly or ineffective).
by the Perry Court.\textsuperscript{105} This category includes regulations of speech on jailhouse grounds,\textsuperscript{106} in front of a courthouse,\textsuperscript{107} and on military bases.\textsuperscript{108} Government regulation of this type of public property has been historically more permissible than regulation in traditional public forums. Courts do not, however, automatically uphold such restrictions on speech. They especially reject those which are content-based.\textsuperscript{109}

The Court also has rejected regulations that restrict speech by limiting what normally would be considered a traditional public forum.\textsuperscript{110} In United States v. Grace,\textsuperscript{111} for example, the Supreme Court invalidated a federal statute interpreted to prohibit the display of signs or the distribution of literature on the sidewalk in front of the Supreme Court building.\textsuperscript{112} The Court concluded that the sidewalks could not be distinguished from any others in the city and therefore they constituted a public forum.\textsuperscript{113} The character of the public forum could not be altered by "the [government] expedient of including it within the statutory definition of what might be considered a non-public forum parcel of property."\textsuperscript{114}

Although the Court rejected governmental authority to transform a public forum into a non-public forum, the Court has permitted narrowing a public

\textsuperscript{105} 460 U.S. at 46.
\textsuperscript{107} See Cox v. Louisiana, 379 U.S. 536 (1965) (Court broadly viewed the right of regulators to restrict disruptive conduct even if associated with speech).
\textsuperscript{109} See, e.g., Tinker v. Des Moines School Dist., 393 U.S. 503 (1969) (invalidating school policy prohibiting wearing of armbands in protest of Vietnam War while permitting the wearing of other symbols).

Content-based restrictions are not limited to viewpoint censorship, but can be based on official censorship of an entire category of speech or an entire subject area. \textit{See Perry,} 460 U.S. at 58-59 (Brennan, J., dissenting); \textit{accord} Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530 (1980) (rejecting Public Service Commission's ban only on discussion of \textit{controversial} public issues in bill enclosures).

\textsuperscript{111} 103 S. Ct. 1702 (1983).
\textsuperscript{112} \textit{Id.} at 1706.
\textsuperscript{113} \textit{Id.} at 1708.
\textsuperscript{114} \textit{Id.}
forum's availability by the use of neutral time, place, and manner regulations when particular circumstances create a need for such regulation. In *Heffron v. International Society for Krishna Consciousness*, the Court upheld a Minnesota state fair rule prohibiting the distribution of handbills or the solicitation of funds except from an assigned booth. In lowering the applicable level of scrutiny, the *Heffron* Court emphasized the temporary nature of the fair and the large crowds expected, and concluded that these circumstances sufficiently distinguished the fair from streets and parks. The Court noted that the regulation satisfied the requirement of a reasonable time, place, or manner restriction: It was content-neutral, served a significant governmental interest, and left open ample alternative channels for communication. The Court thus approved the regulation as a justifiable restriction on speech in a forum that was distinguishable from streets and parks.

The particular need for regulation is also apparent when the state has reserved property for uses other than communication. Speech is more likely to be disruptive in such locations and, consequently, the Court may afford greater weight to the local government's regulatory interests. The value of the governmental interest thus becomes a more important factor in evaluating the regulation.

**C. The Weight of the Competing Governmental Interests**

When considering the constitutionality of speech regulations, the weight that is given to governmental interests can never be considered independently

115. "If a statute is sufficiently narrow in scope, and applied without regard to content, it can apply to remove certain public areas from the public forum." J. NOWAK, R. ROTUNDA, & J. YOUNG, supra note 30, at 868; cf. Grayned v. City of Rockford, 408 U.S. 104 (1972) (upholding anti-noise ordinance on public property adjacent to school in session); Adderly v. Florida, 385 U.S. 39 (1966) (upholding trespass convictions of demonstrators on county jail grounds).


117. Id. at 633-34.

118. Id. at 651.

119. Id. at 654.

120. Id. at 647-48 (citing Virginia State Bd. of Pharmacy v. Virginia Citizens' Consumer Council, 425 U.S. 748, 771 (1976)).

121. Id. at 651. The Court has recently placed increasing emphasis on the existence of alternative forums when analyzing restrictions on speech. See, e.g., *Perry*, 460 U.S. at 45, 53 (noting bulletin boards, meetings, and U.S. mail as alternatives to teachers' mailboxes).

122. *Perry*, 460 U.S. at 46. The *Perry* Court discussed governmental reservation of an area for other uses only in connection with regulations in a non-public forum. *Id*. The Court's allowance, however, for time, place, and manner regulations in traditional public forums suggests that government may reserve even the most public of places for other uses as long as it does not totally foreclose opportunities for speech in those places. *Id*. at 45. A determination regarding public forum status thus effects not whether speech in a public area can be governmentally regulated, but how it may be regulated.

from the setting. That reservation aside, the level of scrutiny afforded various speech regulations varies with the nature of the governmental interest.124

1. Regulation of Speech to Preserve Order

Every form of speech is not appropriate in every setting. A government office building, for example, is not a public forum simply because it is public property.125 Rather, there is a recognized governmental need to maintain order on certain public property. The Supreme Court has thus approved restrictions on speech to preserve morale on a military base126 and to maintain discipline in a prison.127 The Court has also deferred to legislative or administrative judgment when confronted with a specialized setting128 or when administrative judgments are directed toward the control of a governmentally-operated commercial enterprise.129

124. See, e.g., Kalven, supra note 48, at 23-25. Professor Kalven notes that even Alexander Meikeljohn, a great advocate of freedom of speech, recognized the need for restrictions to maintain sufficient order for any group to accomplish its business. Id.

125. See, e.g., United States Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 129 (1981) ("First Amendment does not guarantee access to property simply because it is owned . . . by the government").

126. See Greer v. Spock, 424 U.S. 828, 838-39 (1976) (upholding bans on partisan political speeches and restrictions on leafletting on military base). But see Flower v. United States, 407 U.S. 197 (1972) (reversing conviction for distribution of leaflets on military base). There were, however, factual differences between the two cases. The Flower Court noted that the street involved was indistinguishable from a city street. Id. at 198. No such finding was made in Greer. The Greer Court noted that the leaflet restriction prohibited only the distribution of literature which "presents a clear danger to the loyalty, discipline, or morale of troops." 424 U.S. at 831 n.2 (quoting Army Reg. 210-10, ¶ 5-5(c) (1970)). See generally Goldberger, Judicial Scrutiny in Public Forum Cases: Misplaced Trust in the Judgment of Public Officials, 32 BUFFALO L. REV. 175, 195-96 (1983) (discussing the factual distinctions between the Greer and Flower decisions).


128. See, e.g., United States Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114 (1981) (upholding federal statute reserving letter boxes exclusively for posted mail; noting Congress' establishment of an elaborate regulatory scheme to control the postal system and the need for nationwide uniformity for efficient operation); Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 640 (1981) (emphasizing special importance of crowd control and safety in upholding restriction of handbilling and solicitation to assigned booths); Lehman v. City of Shaker Heights, 418 U.S. 298, 304 (1974) (plurality opinion) (plurality upheld city ban on political advertising on transit cars emphasizing need to avoid "sticky administrative problems"). See generally Goldberger, supra note 126. Goldberger noted that the lowest level of scrutiny appears to be applied in cases in which "the administrator is an expert who is regulating a closed institution with volatile or extremely complex administrative problems." Id. at 203.

129. See, e.g., Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) (plurality opinion). The Lehman plurality refused to require the city to accept political advertising as it did commercial advertising on its transit vehicles. The inappropriateness of transit vehicles as a public
For example, in *Perry* the Court upheld a school district rule allowing one teachers' union access to teachers' mailboxes while refusing access to another. The Court deferred to the administrative determination that the exclusion was necessary to prevent a dispute between the unions in school. The school district was not required to produce any affirmative evidence that the disruption they sought to prevent had occurred or was likely to occur in the absence of the rule. Thus, the Court showed great deference to regulations aimed at preventing disruption.

The Court, however, has not given such deferential treatment to regulations advancing speculative interests in more accessible public areas. For example, the Court has invalidated an ordinance aimed at preventing fraud that prohibited public distribution of leaflets not identifying the distributor. Similarly, the Court rejected a ban on handbilling and picketing in front of the Supreme Court building which was intended to avoid the appearance that the judiciary is influenced by "pressure groups." Thus, when the forum in question is generally open to the public and the governmental interest is speculative, the regulation is likely to be rejected.

This analysis, however, is applied only to those situations in which the Court has not made a specific finding that the area in question is not a public forum. If the location is a non-public forum, the governmental authority need not demonstrate that the regulation effectively advances its
asserted interest. Thus, when a non-public forum is involved, the speculative nature of the governmental interest may not be fatal to the regulation. Accordingly, the Court has upheld speech-restrictive regulations purportedly aimed at preventing disturbances without any evidence that such disturbances would result in the absence of the regulations.

2. Regulation of Speech to Protect the Audience from Offensive Sights and Sounds

Among the most infrequently upheld governmental regulations on speech are those which the Court views as attempts to protect audience sensibilities. When the governmental goal is to prevent annoyance, for example, the Court requires that the audience be unable to avoid the annoying speech before it will uphold a speech-restrictive regulation. This encompasses, but is not limited to, the "captive audience" problem, and requires the balancing of audience privacy interests against first amendment speech guarantees.

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136. See Perry, 460 U.S. at 52 n.12.
137. See id. (upholding school district’s rule limiting union access to internal mail system to teachers’ exclusive bargaining agent following determination that mail system was non-public forum property); Heffron v. International Soc’y for Krishna Consciousness, 452 U.S. 640 (1981). The Heffron case was an apparent rejection of public forum status for the Minnesota State Fair. The Court noted that the comparison between the fair and public streets was "necessarily inexact," id. at 651, but also emphasized that the regulation was merely a time, place, and manner restriction rather than a ban on a particular mode of communication, id. at 655 n.16. Thus, the Heffron Court’s deference to the Minnesota rule (which prohibited the sale and distribution of materials except from an assigned booth) was not thoroughly explained. It could have resulted either from a finding that the fair was not a public forum, or a finding that it was a public forum, but that the regulation amounted to only a permissible time, place, or manner restriction.
138. See, e.g., Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975) (invalidating ordinance prohibiting drive-in movie theaters from displaying movies containing nudity if screen visible from street); Cohen v. California, 403 U.S. 15 (1971) (reversing offensive conduct conviction of man in county courthouse wearing jacket with "fuck the draft" printed on the back); see also Stone, supra note 48, at 263 (proposition that a distinction must be made between the privacy interest in avoiding unwanted exposure to ideas, and avoiding an annoying mode of speech).
139. See, e.g., Erznoznik v. City of Jacksonville, 422 U.S. 205, 209 (1975) (noting that selective restrictions in public places require that "the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure"); Cohen v. California, 403 U.S. 15, 21 (1971) (noting ability of others to avert their eyes from the offensive words printed on jacket).

The captive audience problem as such is not applicable to most situations in which the government attempts to protect an entire community from offensive speech. In these cases, the government does not claim that citizens cannot avoid the offensive sights or sounds, but instead claims that citizens should not have to avoid them, and that citizens should be allowed to establish their own community standards. For an excellent discussion of the distinction between the
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The Court engaged in such balancing in Erznoznik v. Jacksonville\(^\text{141}\) when it struck down an ordinance prohibiting the display of movies containing nudity at drive-in theaters with screens visible from the street. The Erznoznik Court noted that the Constitution prohibits the government from singling out a particular type of speech for prohibition on the basis that it is offensive to an unwilling audience.\(^\text{142}\) Although the Court in Erznoznik rejected a total ban on an offensive form of speech,\(^\text{143}\) it concluded that time, place, or manner restrictions on the offensive speech may be proper.\(^\text{144}\)

Schad v. Borough of Mt. Ephraim\(^\text{145}\) exemplifies the distinction between time, place, or manner restrictions and a total ban. In Schad, the plurality struck down an ordinance prohibiting live entertainment within Mt. Ephraim’s limits because the ordinance impermissibly banned an entire category of speech.\(^\text{146}\) The plurality carefully distinguished a previous case, Young v. American Mini-Theatres, Inc.,\(^\text{147}\) in which the Court had upheld a Detroit zoning ordinance requiring adult theatres to be located at least 1,000 feet apart. According to the Schad plurality, while a city can disperse the locations of an offensive form of speech, as Detroit had done in Young,\(^\text{148}\) a city cannot institute a total ban on a form of speech as Mt. Ephraim had attempted to do.\(^\text{149}\) Thus, the Schad decision firmly endorsed the Erznoznik

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\(^\text{141}\) 422 U.S. 205 (1975).

\(^\text{142}\) Id. at 209-10. One notable exception is Lehman v. City of Shaker Heights, 418 U.S. 298 (1974). The Lehman Court upheld a municipality’s ban on political speech in its transit vehicles while permitting the display of commercial ads. The Court noted the fact that the audience was “captive” and that the municipality was involved in operating a commercial enterprise into which “sticky administrative problems” would be introduced if political speech were permitted. Id. at 304.

The Lehman decision has been strongly criticized. See, e.g., Stone, supra note 48, at 275-80. The Court itself has limited the scope of Lehman to its particular facts. For example, in his dissenting opinion in Perry Justice Brennan notes and enumerates the many instances in which the Court itself has limited the weight of the Lehman holding. 460 U.S. at 55 (Brennan, J., dissenting); see also F.C.C. v. Pacifica Found., 438 U.S. 726 (1978). The Pacifica Court upheld the FCC’s plan to maintain a record of customer complaints to Pacifica’s broadcast of a comedian’s “filthy words” monologue and review them when considering the renewal of Pacifica’s license. The Pacifica Court stressed that the invasion of audience privacy had occurred where it is most protected—the listener’s home. Id. at 748.

\(^\text{143}\) 422 U.S. at 209-10.

\(^\text{144}\) Id. at 209.


\(^\text{146}\) Id. at 65.

\(^\text{147}\) 427 U.S. 50 (1976).

\(^\text{148}\) 452 U.S. at 71. The Court noted that the Detroit ordinance in Young had been supported by evidence of the detrimental effects of a concentration of adult bookstores in a neighborhood. Id. at 71-72.

\(^\text{149}\) Id.; see also Kovacs v. Cooper, 336 U.S. 77 (1949). The Kovacs Court upheld a prohibition on sound trucks because the regulation prohibited only loud and raucous, not all sound trucks. The Court stated that an “absolute prohibition . . . of all sound amplification, even if reasonably regulated in place, time, and volume . . . [would] probably [be] unconstitutional
Court's conclusion that offensive forms of communication may not be totally banned.  

Another important issue when regulators attempt to protect audience sensibilities is the availability of a less restrictive method of furthering the governmental goal. The best recognized example of this "less restrictive means" analysis is Martin v. City of Struthers. In Martin, the Court struck down a ban on door-to-door handbill distribution that was enacted, in part, to prevent the annoyance of residents. The Court emphasized that the city had ignored the less restrictive alternative of requiring residents who desire not to be disturbed to post notices to that effect. In striking a balance, the Court recognized the need to place the burden on the unwilling recipient to affirmatively avoid offensive speech. The less restrictive alternative is not being utilized when a government prohibits a mode of communication because it is offensive to the community as a whole.

3. Regulations Based on Aesthetic Interests

Many governmental authorities have prohibited modes of communication in an attempt to eliminate aesthetically offensive conduct. In Schneider...
v. *State,* for example, the Court considered a ban on handbill distribution aimed at the prevention of litter. The *Schneider* Court noted that a less restrictive alternative existed—a prohibition on littering itself—and consequently struck down the regulation. The Court stated that the legislative interest in aesthetics was insufficient to justify the restriction on first amendment rights. Clearly, the Court’s early position when balancing aesthetic interests with first amendment rights reflected a hesitance to accept subjective legislative preferences.

While aesthetic interests, as such, were acknowledged by the Court as early as 1954, such interests have just recently been weighed directly against the first amendment’s protection of free speech. In *Metromedia, Inc. v. San Diego,* a plurality of the Court accepted San Diego’s desire for aesthetic improvement as a substantial governmental interest sufficient to support the city’s ban on off-site commercial billboard advertisements. "[I]t is not
speculative," the plurality concluded," to recognize that billboards by their very nature, can be perceived an aesthetic harm."\footnote{167} Yet, the plurality recognized that because aesthetic judgments are necessarily subjective, they must be "carefully scrutinized" to ensure that they conceal no impermissible governmental purpose.\footnote{168} Metromedia left open, however, the question of whether an aesthetic goal would support a total ban on non-commercial speech or a total ban on outdoor advertising,\footnote{169} but did suggest that "constitutional problems [would be] created by a total prohibition of a particular expressive forum."\footnote{170} Metromedia thus established that aesthetic interests are clearly legitimate goals, but they require careful scrutiny when weighed against free speech interests because their subjective nature creates a high risk of impermissible speech restrictions.

In \textit{Schad},\footnote{171} the Court considered a regulation creating a limited commercial district that was justified in part by aesthetic concerns.\footnote{172} The borough of Mt. Ephraim prohibited live entertainment within a specified district because it wished to avoid the largely aesthetic problems that live entertainment was likely to produce—litter, traffic, and a greater need for law enforcement.\footnote{173} The Court rejected the prohibition and required the borough to demonstrate that its interests could not be served by means less restrictive of speech.\footnote{174} According to the Court, the borough had not left open adequate alternatives to this form of speech.\footnote{175} In effect, the \textit{Schad} Court required the regulator to prove the ex-
istence of adequate alternatives and establish that it used the narrowest restrictions available in banning an entire category of speech as offensive or inconvenient.

4. Incidental Restrictions of Speech

Incidental restrictions of speech are considered separately here because the goal of the challenged regulations is to control particular conduct unrelated to speech. The first amendment protects certain types of conduct as a symbolic form of speech. When the government attempts to regulate the conduct aspect of that speech, however, it necessarily affects an incidental restriction on the speech.

The Supreme Court developed an analysis for incidental restrictions on speech in *United States v. O'Brien*. In *O'Brien*, a draft resister challenged his conviction under a federal statute that prohibited the destruction of draft cards; O'Brien contended that the statute infringed upon his freedom of speech. The *O'Brien* Court upheld the federal statute and O'Brien's conviction. In doing so, it established a four-part test for evaluating a regulation that governs conduct, but incidentally restricts speech.

The regulation will stand if 1) the government had the authority to enact it, 2) the interest served by the regulation is "important" or "substantial," 3) the interest is not related to suppressing free expression, and 4) the "incidental restriction" of speech is "no greater than is essential" to further that interest.

Nevertheless, the *O'Brien* test offers minimal protection to speech interests. Although the *O'Brien* test sets forth a heightened level of scrutiny, the way

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176. This is the symbolic speech area of the first amendment, which is based on the presumption that the regulatory target is conduct—not speech. See generally J. NOWAK, R. ROTUNDA, & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW Part 3, sec. XIV, 988 (2d ed. 1983) (discussion of symbolic speech adjudication).


179. Id. at 377. The Court noted that a "sufficiently important governmental interest in regulating the non-speech element can justify incidental limitations on First Amendment freedoms." Id. at 376.

180. Id. at 377.


The *O'Brien* Court disallowed any inquiry into subjective legislative motives. 391 U.S. at 383. But see Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575 (1983) (Court put heavy burden on state to justify tax which singled out eleven publishers); Spence v. Washington, 418 U.S. 405, 410-11 (1974) (per curiam) (Court struck down State statute which infringed upon a form of protected symbolic speech); see also Board of Educ.,
in which it has been applied by the Court has resulted in only a rational-basis level of scrutiny being applied to regulations. Only if the municipality has restricted speech virtually without reason will a speech-restrictive regulation be invalidated. The test’s four parts are all directed at the governmental interest and allow no consideration of the extent of the restriction on speech interests. Thus, the effect of employing the O’Brien test is to divert the focus of review from first amendment protections. Notwithstanding the focus of the O’Brien test on conduct rather than speech, the Vincent majority identified the O’Brien test as applicable to Los Angeles’ content-neutral restriction of speech.

III. THE VINCENT DECISION

The Los Angeles Municipal Code, section 28.04, prohibits the posting of signs on public property. Roland Vincent, a candidate for city council,
posted campaign signs on utility poles throughout the city. City employees routinely removed Vincent's signs.\textsuperscript{187} Taxpayers for Vincent (Taxpayers), an organization supporting Vincent, filed suit in the United States District Court, demanding damages and injunctive relief. Taxpayers claimed that the removal of its campaign signs infringed upon its right of free speech.\textsuperscript{188}

The district court granted Los Angeles' motion for summary judgment.\textsuperscript{189} The court noted that the ordinance was enacted to promote appropriate land use,\textsuperscript{190} and that posted signs in Los Angeles created a "visual blight."\textsuperscript{191} The court thus concluded that the regulation was a reasonable and necessary place and manner restriction, narrowly tailored to advance the city's interests.\textsuperscript{192} The city's purported interests included promoting the safety of workmen who must scale utility poles, eliminating traffic hazards, and improving the appearance of the city.\textsuperscript{193} According to the court, the ordinance did not regulate speech based on its content and did not affect speech in an "open forum."\textsuperscript{194}

The United States Court of Appeals for the Ninth Circuit reversed the lower court, stating that the ordinance was presumptively unconstitutional as an abridgment of first amendment freedoms. The burden of rebutting the unconstitutionality was placed on the city.\textsuperscript{195} The court found the aesthetic interests advanced by the City of Los Angeles to be insubstantial because the city had not sufficiently demonstrated the importance of its goal.\textsuperscript{196} The city did establish its interest in avoiding interference with the primary use of public property,\textsuperscript{197} but failed to demonstrate that less restrictive solutions

\begin{thebibliography}{197}
\bibitem{187} 104 S. Ct. at 2122.
\bibitem{188} Id. at 2123.
\bibitem{190} Id. Finding 11.
\bibitem{191} Id. Finding 14; Conclusion 5.
\bibitem{192} Id. Conclusion 9.
\bibitem{193} Id. Conclusions 2, 4, and 5.
\bibitem{194} Id. Conclusions 8 and 12.
\bibitem{195} Taxpayers for Vincent v. Members of the City Council, 682 F.2d 847, 849-50 (9th Cir. 1982). The appellate court used the framework adopted in an earlier Ninth Circuit case, Rosen v. Port of Oakland, 641 F.2d 1243, 1246 (9th Cir. 1981). Under the Rosen analysis, a state or municipality must rebut a presumption that a statute or ordinance regulating first amendment rights is unconstitutional. The state or municipality must establish that the law has a "substantial relationship" to a "weighty," not merely legitimate, government interest. The law must also be the least drastic method of protecting that interest—extending no greater into the realm of protected freedoms than is necessary or essential. Vincent, 682 F.2d at 849.
\bibitem{196} 682 F.2d at 851-52. The appellate court relied on Justice Brennan's concurring opinion in Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981). Justice Brennan suggested that a city could restrict speech in favor of aesthetic appearances only upon making a demonstration that the city was engaged in a comprehensive program of aesthetic and environmental improvement. 453 U.S. at 531 (Brennan, J., concurring). In Vincent, the appellate court concluded that Los Angeles had failed to make a sufficient demonstration of involvement in an aesthetic program. 682 F.2d at 852.
\bibitem{197} 682 F.2d at 852. The court rejected, in addition to the city's aesthetic goals, its interest
were not available. The court concluded that, because first amendment rights were involved, alternatives had to be tried, and shown to be ineffective, before the court could approve Los Angeles' total ban. In a six to three decision, the United States Supreme Court reversed the Ninth Circuit and upheld the Los Angeles ordinance. Justice Stevens delivered the majority opinion which emphasized the validity and substantiality of the city's aesthetic interest. The Court first rejected Taxpayers' overbreadth challenge to the ordinance, noting that to prevent the overbreadth doctrine from consuming general standing requirements, the doctrine must be confined to instances in which there is a significant risk to first amendment protections. The Court restated the substantiality requirement, and concluded that the ordinance did not present a risk of substantially inhibiting the protected speech of third parties not before the Court. In fact, the Court noted, Taxpayers had failed to even identify these third parties and their protected interests. Further, Taxpayers' political speech was likely to receive as much protection as any third party's speech. Consequently, the Court chose to address Taxpayers' challenge to the ordinance only as related to Taxpayers' own conduct.

The Court next rejected Taxpayers' argument that utility poles should be treated as a public forum because Taxpayers failed to demonstrate a traditional right of access to utility poles. This rejection of the public forum in preventing traffic safety hazards as insufficiently established. Id.

198. Id. at 852-53. The court stated that the ordinance restricted speech in areas that had traditionally been used for posting signs. The traditional use for posting signs, according to the court, went a long way toward establishing that posting signs was not basically incompatible with the primary use of the property. 682 F.2d at 850-51 n.3. The court cited Grayned v. City of Rockford, 408 U.S. 104, 115 (1972), as authority for the "basic incompatibility" test. 682 F.2d at 851 n.3.

199. 682 F.2d at 853. The court suggested a number of alternatives, such as size and design restrictions or removal requirements. Id. at 852-53. The court noted that a requirement that the city first try alternatives to its ban was particularly appropriate when, as here, the prohibition was obviously ineffective. The court quoted Justice Steven's dissenting opinion in U.S. Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 155 (1981), regarding an apparently ineffective federal prohibition on placing unstamped mail in homeowners' mailboxes:

I have the impression that the general public is at best only dimly aware of the law and that numerous otherwise law-abiding citizens regularly violate it with impunity. This impression supports the conclusion that the statute is indeed much broader than necessary to serve its limited purpose.

682 F.2d at 853 n.6. The Ninth Circuit noted that in less than five months Los Angeles street inspectors had removed 51,662 signs posted in violation of the ordinance. Id.

200. 104 S. Ct. at 2135-36.

201. Id. at 2129-30.

202. Id. at 2127.

203. Id. at 2126.

204. Id. The Court cited both New York v. Ferber, 458 U.S. 747, 772 (1982), and Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973) for the limitation of the overbreadth doctrine to substantial overbreadth, as measured by the reach of the regulation's deterrent effect on speech. 104 S. Ct. at 2126.

205. 104 S. Ct. at 2127.

206. Id. at 2127-28.
argument dropped the level of scrutiny to that used for speech regulation in the third category of public property—property not traditionally reserved as a forum.\textsuperscript{207} The Court reviewed the ordinance under the \textit{O'Brien} four-part test for analyzing regulations of conduct which incidentally restrict speech.\textsuperscript{208} The \textit{Vincent} Court concluded that the prohibition was acceptable as a content-neutral ordinance serving a legitimate governmental interest and leaving available alternative methods of communication.\textsuperscript{209}

Justice Brennan's dissent, which was joined by Justices Marshall and Blackmun,\textsuperscript{210} took issue with the Court's lenient approach to aesthetic regulation. The dissent considered the Court's approach particularly subjective and susceptible to content-based applications.\textsuperscript{211} The dissent concluded that the regulation was a prohibition of an important medium of communication, which left available only unsatisfactory alternatives.\textsuperscript{212} According to the dissent, aesthetic interests warrant restrictions on speech only if the governmental authority is engaged in a comprehensive aesthetic program that includes methods which do not restrict speech, and if the governmental authority can demonstrate the substantiality of its aesthetic goals in an objective manner.\textsuperscript{213}

IV. \textbf{ANALYSIS OF \textit{VINCENT}}

The \textit{Vincent} opinion reflects broad judicial deference to the judgment of municipal officials. The decision misapplies first amendment precedent, ignores the primacy of political speech, and waters down the definition of "public forum." In addition, the Court's application of the \textit{O'Brien} test is misguided and neglects the availability of less restrictive means.

When it rejected Taxpayers' overbreadth challenge, the Court did not consider the broad applicability of the ordinance to any public property upon which a sign might be posted.\textsuperscript{214} By refusing to consider Taxpayers' overbreadth challenge because it had failed to present third party interests, the Court decided that an overbreadth challenge only can be made by a party

\textsuperscript{207} Id. at 2134.
\textsuperscript{208} Id. at 2129.
\textsuperscript{209} Id. at 2134.
\textsuperscript{210} Id. at 2136.
\textsuperscript{211} Id. at 2136, 2138.
\textsuperscript{212} Id. at 2137, 2139.
\textsuperscript{213} Id. at 2141.
\textsuperscript{214} It is worth noting that the Court did not consider the interests of parties who might choose other locations for their signs. The Court referred to the city's proscription of postings at other locations, but dismissed the issue because it concluded that Taxpayers considered it improper to post signs on sidewalks, crosswalks, curbs, lampposts, or safety equipment. \textit{Id.} at 2127 n.20 (citing Brief for Appellees at 22 n.16, \textit{Vincent}, 104 S. Ct. 2118 (1984) [hereinafter cited as Brief for Appellees]). Taxpayers' listing of sites upon which it did not contest the city's prohibition did not approach those actually included in the ban, however. Brief for Appellees, \textit{supra}, at 22 n.16. The exclusion of this issue was significant because the Court's later rejection of Taxpayers' argument that the signs were posted in a public forum was based solely on the use of utility poles.
whose speech is not well-protected by the first amendment.\textsuperscript{215} The Court apparently considered the loss of this facial overbreadth challenge to be unimportant to parties whose speech is protected because they have independent standing to challenge the ordinance as applied to their own conduct. The Court's reasoning, however, ignored another overbreadth argument by dismissing the possibility that the ordinance swept too broadly because it prohibited posting on all public property, including areas which might be more appropriate for posting signs than the utility poles selected by Taxpayers. The Court reserved the related "least restrictive means" issue, but nevertheless, the analysis was narrowed to the ordinance as applied to Taxpayers' conduct and the posting sites Taxpayers had chosen.\textsuperscript{216}

The Court next reviewed the scope of the ordinance as applied to Taxpayers. Valid regulations of speech must be content-neutral, both facially and in effect.\textsuperscript{217} The Vincent Court summarily concluded that the Los Angeles ordinance was content-neutral because the regulation referred to no particular viewpoint, but rather banned posting generally.\textsuperscript{218} Yet, a facially neutral ordinance that prohibits a relatively inexpensive, yet effective, form of speech may place a disproportionately heavy burden on those who cannot afford alternative methods.\textsuperscript{219} The Court disposed of this argument in a footnote, stating that the Court's solicitude for inexpensive forms of speech "has practical boundaries."\textsuperscript{220} The Court failed to identify what special consideration, if any, is appropriate when a prohibition threatens to eliminate an inexpensive mode of speech. Similarly, the Court failed to explain why the "practical boundaries" of that special consideration had been exceeded in this

\textsuperscript{215} The Vincent Court stated that "there must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds." 104 S. Ct. at 2126. The Court went on to state that "Taxpayers . . . have not attempted to demonstrate that the ordinance applies to any conduct more likely to be protected by the First Amendment than their own cross-arm signs." Id. at 2127. The result is that the party with the standing to complain that an ordinance improperly restricts its own speech cannot make an overbreadth challenge.

\textsuperscript{216} Id. at 2128.

\textsuperscript{217} See supra notes 54-69 and accompanying text.

\textsuperscript{218} 104 S. Ct. at 2128. Justice Stevens noted that "there is not even a hint of bias or censorship in the city's enactment or enforcement of this ordinance." Id.

\textsuperscript{219} See, e.g., Kalven, supra note 48, at 30. Kalven notes: "We would do well to avoid the occasion for any new epigrams about the majestic equality of the law prohibiting the rich man, too, from distributing leaflets or picketing." Id.

Justice Brennan, in his dissent, suggested that the related problem, a facially neutral prohibition, like the one at issue, might effect a ban on messages which consistently take the prohibited form. 104 S. Ct. at 2139 (Brennan, J., dissenting). The ban, while facially neutral, may greatly limit the political speech of local candidates typically carried by temporary signs. Id. The same argument was also advanced by Taxpayers. Brief for Appellees, supra note 214, at 20 (noting that an incumbent is "likely to find any opponent's sign offensive to the eye"). The Vincent Court did not address the issue, perhaps because it recognized that the ban would limit equally the campaigns of incumbents and challengers.


\textsuperscript{220} 104 S. Ct. at 2133 n.30.
case. This foreclosure of perhaps the only effective access the poor have to the public eye is particularly disturbing in Vincent because the Court was dealing with political speech in the context of a political campaign—where the first amendment has "its fullest and most urgent application." 221 If solicitude for inexpensive forms of speech is unnecessary in this context, there may well exist no circumstances in which solicitude would be required.

The Court left open the possibility, however, that solicitude was inappropriate only in the case before it. The Court noted the lack of evidence that temporary signs were "uniquely valuable," and that Taxpayers' ability to communicate was not generally threatened. Apparently, the Vincent Court classified the signs as nuisances. 222 Perhaps, then, inexpensive speech requires no special protection when alternate methods of speech are available or when the method of speech at issue can be considered a nuisance.

The Court thus limited its analysis by treating the ordinance as a content-neutral ban that reduced the total number of available forms of speech. 223 The Court acknowledged the heightened protection accorded speech in a traditional public forum, 224 but concluded that the utility poles to which Taxpayers' signs were attached did not constitute such a public forum. 225 In light of Taxpayers' failure to demonstrate a traditional right of access to utility poles, the Court briefly considered the character of the property, and concluded that the mere fact that it is perhaps conducive to sign posting does not mandate that the city permit such use. 226 The Court thus denied public forum status to utility poles because there was no traditional right of access to utility poles, because the city had not determined that speech on utility poles must be protected as in a public forum, 227 and because the city had not opened the forum for speech. 228 Consequently, the Vincent Court categorized utility poles as public property meriting the least protection against speech-restrictive regulations, and concluded that the city could permissibly reserve property in this least protected category for its intended uses. 229

222. 104 S. Ct. at 2133, 2133 n.30 (noting that graffiti may be properly banned despite absence of effective alternatives).
223. Id. at 2128.
224. Id. at 2133.
225. The Court concluded that Taxpayers had not demonstrated that utility poles had traditionally been recognized and used as a forum for speech. The Vincent Court stated that the mere fact that they were public property was not enough to create a public forum. Id. at 2134.
226. Id.
227. The highly protected public forum areas are those which have been dedicated to public speech "by long tradition or by government fiat." Perry, 460 U.S. at 45.
228. The fact that the city had not opened the property to speech foreclosed examination of the regulation as one limiting speech in the second category of public property, property the government has established as a forum. Id. at 45-46.
229. 104 S. Ct. at 2134; see also Perry, 460 U.S. at 46 (concluding that a government may reserve non-public forum property for intended purposes, if restriction reasonable and not based on speakers viewpoint).
The Court's avoidance of a public forum analysis is particularly inappropriate in an analysis of an ordinance that prohibits the posting of signs on any public property, including almost any conceivable public forum.\textsuperscript{230} The narrow focus on the utility poles themselves allowed the Court, by applying the Perry categorizations, to eliminate all but the most minimal scrutiny of the Los Angeles ordinance. The narrow focus also allowed the Court to ignore the long tradition of posting temporary political signs in highly visible public places\textsuperscript{231} because utility poles, a relatively recent phenomena, historically were not the sites for such signs.\textsuperscript{232} Thus, the Court's narrow focus precluded any true scrutiny of a regulation that prohibits an entire form of communication in public places. The utility poles on which Taxpayers' signs were posted were located along city streets—recognized as "quintessential public forums."\textsuperscript{233} The Vincent Court, however, apparently considered the poles sufficiently distinguishable from the streets on which they were located to exclude them from that public forum.

According to the Supreme Court's decision in Grace,\textsuperscript{234} a state can not transform a public forum into non-public property by statutory phrasing.\textsuperscript{235} The Grace Court concluded that the statute impermissibly redefined "public forum." The Vincent Court distinguished between utility poles and the streets on which they stand. The redefinition which the Grace Court found inappropriate, however, distinguished between two otherwise identical city sidewalks. The differing facts thus may allow one to reconcile the two cases, but the Vincent Court made no attempt to explain its narrow focus. The Vincent Court's distinction appears to be no more analytically supportable than a conclusion that demonstrators' activities in a public park are fully protected until they step on the grass, which is not a traditional public forum.

The Court noted that it was "of limited utility . . . to focus on whether the tangible property itself should be deemed a public forum."\textsuperscript{236} By this language the Court implied that the result could be based alternatively on

\textsuperscript{230} Street and parks are the most recognized of traditional public forums. See, e.g., Perry, 460 U.S. at 45. Los Angeles' ban prohibits sign posting on sidewalks, crosswalks, curbs, curbstones, lampposts, street and traffic signs, electric light, power, telephone, and telegraph or trolley poles which line the city's street. It also prohibits posting on the trees, shrubs, bridges and drinking fountains commonly found in public parks. See Los Angeles Mun. Code § 28.04 (1981). The Los Angeles Police Department recognized the ban as a prohibition of any sign posting on any public property. See Brief for Appellees, supra note 214, at 5.

\textsuperscript{231} See Metromedia, Inc. v. San Diego, 453 U.S. 490, 501 (1981) (plurality opinion) (recognizing the historical role of outdoor posters and billboards); see also Talley v. California, 362 U.S. 60, 64-65 (1960) (discussing the traditional use of handbills).

\textsuperscript{232} The Vincent Court required Taxpayers to demonstrate a traditional access right to utility poles "comparable to that recognized for streets and parks." 104 S. Ct. at 2134.

\textsuperscript{233} Perry, 460 U.S. at 45.

\textsuperscript{234} See supra text accompanying notes 111-14.

\textsuperscript{235} 103 S. Ct. at 1708.

\textsuperscript{236} 104 S. Ct. at 2134 n.32.
a finding that the property is a public forum, but that the regulation con-
stituted only a time, place, or manner restriction. Yet, the Court’s reliance
on this implication assumes that an absolute prohibition of a communicative
medium could be acceptable as a time, place, or manner restriction—an
assumption not supported by earlier cases. The Court did not thoroughly
explain this alternative position, however, thereby possibly indicating an
intention to limit its narrow view of the disputed property (utility poles)
to the specific facts of Vincent.

The elimination of a public forum approach consequently shifted the focus
of the Court’s analysis to a review of Los Angeles’ interest in aesthetics
and of the regulation itself. The Court applied the test announced by the
Court in O’Brien. The O’Brien test was established to analyze regulations
which restrict the conduct aspect of symbolic speech. The test requires
that the regulation be within the government’s authority, that the govern-
mental interest be substantial or important, and that the governmental interest
be unconnected to the suppression of expression. Also, the restriction of
speech must be “no greater than is essential to the furtherance of that
interest.”

The Vincent Court stated that the O’Brien test was the “appropriate
framework for reviewing a viewpoint neutral regulation of this kind.” Thus,

237. The Court stated that the identification of particular property as a public forum serves
as a “workable analytical tool,” and noted that there is a gray area between the identifica-
tion of property as a non-public forum and the permissible application of reasonable time,
place, and manner limits on a traditional public forum. Id.

238. In Kovacs v. Cooper, 336 U.S. 77 (1949), the plurality noted that a flat ban on
loudspeakers would likely be unconstitutional. Id. at 81-82. The Erznoznik Court’s conclusion,
however, may have been based on a finding that the government was censoring ideas, and
not just a mode of communication. The Court stated:

A state or municipality may protect individual privacy by enacting reasonable time,
place, and manner regulations applicable to all speech irrespective of content. . . .

But when the government, acting as censor, undertakes selectively to shield the
public from some kinds of speech on the grounds that they are more offensive
than others, the First Amendment strictly limits its power.

422 U.S. at 209 (citations omitted).

The Schad Court noted that earlier cases had not implied the existence of municipal authority
to prohibit an entire method of speech—live entertainment. 452 U.S. at 71. Similarly, the
Metromedia plurality implied that a total prohibition of a particular method of expression
presented Constitutional problems. See 453 U.S. at 515 n.20.

239. See supra text accompanying note 181.

240. 391 U.S. at 376. The O’Brien Court noted that its decision concerned regulation of
conduct which also contained an element of speech. Id.; see supra notes 176-80 and accom-
panying text. See generally J. Nowak, R. Rotunda, & J. Young, supra note 30, at 989 (iden-
tifying the O’Brien test as applicable to analyzing restrictions of symbolic speech); Alfange,
Free Speech and Symbolic Conduct: The Draft-Card Burning Case, 1968 Sup. Ct. Rev. 1 (discus-
sion of the O’Brien case). But see Ely, supra note 181, at 1484 (suggesting that the O’Brien
test is not limited to symbolic speech).


243. 104 S. Ct. at 2129.
the Court raised an important issue without clarification—the Court failed to identify which attributes of the Los Angeles ordinance required the use of the O'Brien test. If the Court was indicating its intention to apply the deferential O'Brien test to any content-neutral regulation, the heightened protection of speech in traditional public forums likely will be eviscerated in future decisions.\textsuperscript{244} The question of the Court's intention went unanswered, however, as the Court proceeded to evaluate the ordinance under the O'Brien test.

The Court showed a surprising deference to the City of Los Angeles by accepting its professed aesthetic goals as being sufficient to outweigh Taxpayers' first amendment interests without carefully analyzing the city's interests.\textsuperscript{245} The avoidance of visual clutter was a valid interest of the city\textsuperscript{246} according to the Court, which also noted the district court's finding that Taxpayers' signs contributed somewhat to the visual blight and "inevitably would encourage greatly increased posting" by others.\textsuperscript{247}

To establish the substantiality of the city's aesthetic interest under the O'Brien analysis,\textsuperscript{248} the Court relied heavily on Metromedia, noting that posted signs, like billboards, constitute a form of aesthetic harm.\textsuperscript{249} Metromedia and Vincent, however, are distinguishable. The Metromedia plurality had identified billboards as large, permanent structures.\textsuperscript{250} The Vincent Court did not identify any similar traits in posted signs, which generally are small and temporary. The Vincent majority also purported to reaffirm the opinion of seven Justices in Metromedia that the prevention of visual clutter was a sufficient municipal interest to support the city's prohibition of billboards.\textsuperscript{251} Yet, Justice White's plurality opinion in Metromedia,
in which three Justices joined, concluded only that the city's ban on commercial billboards, a less protected form of speech, was justified.\footnote{453 U.S. at 512. The Metromedia Court struck down the city's billboard restriction because it exempted certain commercial billboards, but made no similar exception for non-commercial billboards. \textit{Id.} at 514, 520-21; \textit{see also} Blumoff, \textit{supra} note 71, at 190 ("Seven Justices agreed that San Diego could prohibit all off-site commercial signs.") (emphasis added).} In fact, the Metromedia plurality implied that a ban on all outdoor advertising would be constitutionally problematic as a ban on an entire expressive forum.\footnote{453 U.S. at 515 n.20; \textit{see also id.} at 564. (Burger, C.J., dissenting) (noting that the plurality implied that municipalities may not totally prohibit signs); Blumoff, \textit{supra} note 71, at 189 (plurality suggests total prohibition impermissible).} Nevertheless, the \textit{Vincent} Court went as far in approving Los Angeles' restriction on political speech as the Metromedia plurality had gone in approving San Diego's restriction on commercial speech. The Court examined several decisions in which it had considered restrictions of offensive mediums of speech,\footnote{104 S. Ct. at 2129-30. The Court cited \textit{Erznoznik}, 422 U.S. at 209-10, 209-10 n.5 (movies containing nudity at drive-in theatres); Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) (political advertising on buses); and Kovacs v. Cooper, 336 U.S. 77 (1949) (loud and raucous loudspeakers). \textit{See supra} notes 138-50 and accompanying text.} and concluded that the decisions established that municipalities have a weighty interest in aesthetics sufficient to support a \textit{prohibition} of speech that is intrusive or unpleasant.\footnote{104 S. Ct. at 2130.} In none of the cited cases, however, had the Court upheld a \textit{total ban} on a form of expression.\footnote{In Kovacs v. Cooper, 336 U.S. 77 (1949), for example, the Court prohibited only "loud and raucous" sound trucks and implied that a prohibition of all sound trucks would be unconstitutional. \textit{Id.} at 81-82. Similarly, the \textit{Erznoznik} majority specifically rejected the claim that a city could censor particular forms of speech as "offensive." 422 U.S. at 210. In Lehman v. City of Shaker Heights, 418 U.S. 298 (1974), the city banned political posters only on a city transit system, not on all public property. \textit{Id.} at 299-300; \textit{see also Perry}, 460 U.S. at 60 n.3 (Brennan, J., dissenting) (noting several cases that have limited the scope of \textit{Lehman}); Young v. American Mini-Theatres, Inc., 427 U.S. 50, 71 (1976) (upholding zoning regulation requiring adult theatres be 1,000 feet apart to 'preserve the quality of urban life').} The \textit{Vincent} Court nonetheless concluded that an aesthetic concern constituted a legitimate and significant state interest for preventing aesthetically offensive speech;\footnote{104 S. Ct. at 2130.} the Court decided that that interest supported Los Angeles' total ban on the posting of signs on public property.

The final \textit{O'Brien} requirement is that the regulation prohibit no more speech than is essential to the furtherance of the state's interest.\footnote{104 S. Ct. at 2129.} In phrasing the issue, however, the \textit{Vincent} Court asked whether the restriction was "\textit{substantially broader} than necessary."\footnote{104 S. Ct. at 2130 (emphasis added).} Which of these two standards the Court applied is unclear, but the phrasing suggested that the Court was prepared to give broad deference to the city's aesthetic interest, even if it unnecessarily restricted some speech.

The \textit{Vincent} Court recognized that nuisances cannot be attacked through prophylactic restrictions on speech, and took great care to distinguish the
Schneider Court's conclusion that litter prevention was insufficient to justify a flat ban on handbilling. In Schneider, the litter was potentially to be created by the listeners, not the speaker, and the Schneider Court required that the actual littering, not handbilling, be prohibited. In contrast, the visual clutter Los Angeles sought to prevent was created by the speech itself. The distinction seems arbitrary, however, because the aesthetic problems created by each are so similar, and the Court's suggested solution to the littering problem in Schneider was unlikely to be successful.

The Vincent Court was able to conclude that the ban restricted no more speech than necessary by reasoning that Los Angeles' ban struck directly at the aesthetic problem rather than at speech which created an aesthetic problem merely as a by-product. Nonetheless, the fact that a ban strikes directly at the source of an aesthetic problem does not demonstrate that the ban restricts no more speech than is essential. The Court's analysis closely parallels the requirement that restrictions of commercial speech directly advance the governmental interest.

Consideration of the Court's decision in Martin demonstrates the flawed logic of the Court's approach. In Martin, door-to-door handbill distribution

260. Id. at 2131-32.
261. Id.
262. The Vincent Court stated that "[I]n Schneider, an anti-littering statute could have addressed the substantive evil without prohibiting expressive activity. . . . Here, the substantive evil—visual blight—is not merely a possible by-product of the activity, but is created by the medium of expression itself." Id. The Court also implied that the handbill distributors in Schneider were more protected because they directly confronted their audience. The Court noted that a person "rightfully on a street. . . . 'carries with him there as elsewhere the constitutional right to express his views in an orderly fashion.'" Id. at 2131 (quoting Jamison v. Texas, 318 U.S. 413, 416 (1943)).
263. See, e.g., Stone, supra note 48, at 258. ("Indeed, an absolute ban on all public issue billboards or signs for aesthetic or traffic safety reasons would be no more justifiable than an absolute ban on leafleting to prevent littering, . . . or an absolute ban on door-to-door canvassing to prevent crime.") (citation omitted).
264. 104 S. Ct. at 2132.
265. See Central Hudson Gas v. Public Serv. Comm'n, 447 U.S. 557 (1980). The Central Hudson Court stated:
   In commercial speech cases . . . 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 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.
Id. at 566 (emphasis added); see, e.g., Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981). The Metromedia Court noted that San Diego's prohibition of commercial billboards must directly advance the city's aesthetic interests to satisfy the Central Hudson test for regulations which permissibly regulate commercial speech. Id. at 508.
266. See supra text accompanying notes 152-55.
was the precise source of annoyance to residents. The city reacted by banning all such distribution. Under the Vincent analysis, this ban would have been constitutional because the ordinance struck directly at the source of the problem. The Martin Court, however, noted a less restrictive alternative, rejected the ban, and required the city to ask irritated residents to post notices expressing their preference not to be disturbed. The Vincent Court avoided reaching a similar conclusion by dividing the issue: The Court first concluded that Los Angeles’ ban restricted only as much speech as necessary, satisfying the last of the O’Brien requirements, and then the Court considered possible less restrictive alternatives as a separate, subordinate question.

The Court took a negative view of Taxpayers’ contention that less restrictive means were available to further the city’s aesthetic interests. The Court considered only possible exceptions to the ordinance and concluded that such exceptions would not be constitutionally necessary and perhaps would be unconstitutional in themselves. According to the Court, such exceptions would be perhaps content-based, or would perhaps require the illogical finding that, for the exempted categories of speech, the city’s aesthetic goals were not jeopardized.

The fact that exceptions to Los Angeles’ ban might be content based should not dispose of the issue. In the past the Court has permitted content-based regulations to stand so long as they were not viewpoint-discriminatory. For example, in FCC v. Pacifica Foundation, the Court upheld the FCC’s authority to use administrative sanctions against a broadcaster which aired a sexually explicit monologue over the radio in mid-afternoon. The Pacifica Court openly permitted the use of content-based sanctions. Application of the Vincent analysis in Pacifica would have mandated that content-based

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267. 319 U.S. at 144.
268. Id. at 142.
269. The Metromedia plurality noted the application of Burger’s formulation that the test should be in furtherance of a substantial government interest and essential neutrality to content. 453 U.S. at 517. The plurality concluded that Berger’s approach would require reversal of the Martin and Schneider decisions and that “democracy stands on a stronger footing against legislative disruptions of First Amendment freedoms.” Id. at 519.
270. 319 U.S. at 148.
271. 104 S. Ct. at 2132.
272. Id. at 2134-35.
273. Id.
274. The conclusion that exceptions would discredit the city’s purported aesthetic interests seems inconsistent with the Court’s dismissal of the Ninth Circuit’s conclusion that the inapplicability of the ban to private property had discredited the city’s position. Id. at 2132.
277. Id. at 730.
sanctions not be considered. Similarly, in *Brown v. Socialist Workers '74 Campaign Committee*, the Court decided that the Constitution compelled an exemption to Ohio's campaign disclosure laws for the Socialist Workers Party. The *Brown* Court could not have reached the decision that it did had it avoided the risk of "engaging in constitutionally forbidden content discrimination" as the *Vincent* Court had. While the *Vincent* Court concluded that an exemption for political signs during campaigns would require an illogical finding that the city's aesthetic interests were not jeopardized by the exempted signs, that finding seems no more illogical than the conclusion of the *Brown* Court that people have a diminished interest in being informed regarding the viewpoints of minor political parties.

The Court's adherence to a broad content-neutral approach has perhaps forced a choice between denying any first amendment protection to many types of speech, and minimizing the level of protection that the first amendment affords. The *Vincent* Court's decision not to use content-based exemptions risks giving very little protection to one of the most highly protected categories of speech—political speech during a campaign. The effect of such a narrow analysis of alternative regulations is to favor a total, unconditional ban on speech rather than a restriction drawn as narrowly as possible. This preference for a flat ban, however, was specifically rejected by the *Metromedia* plurality, which stated that the general prohibition, not the exceptions, created the impermissible infringement upon speech.

In *Metromedia*, Justice Stevens and Chief Justice Burger vehemently criticized the plurality for reaching a decision that they believed favored a broad rather than narrow restriction of speech. Yet both Justices effectively supported a broad restriction on speech in *Vincent*. While rejecting the less restrictive alternatives suggested by Taxpayers, the Court failed to require Los Angeles to demonstrate that its ordinance would in fact advance its aesthetic interests. Instead, the Court merely noted that the district court's finding included nothing upon which to base an assumption that the prohibition was ineffective.

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279. Id. at 101-02.
280. 104 S. Ct. at 2135.
281. Id.
282. 459 U.S. 92-93.
283. See Stephan, supra note 15, at 213-14. Stephan notes that despite the Court's advocacy of strict content neutrality, it has not adhered well to the rule. Id. at 205. Stephan states that if the Court did follow so strict a rule, ignoring the categories of speech, it might be forced to choose between "a more restricted concept of protected speech or a dilution of the level of protection given to the most significant speech." Id. at 213-14.
284. 453 U.S. at 515 n.20 ("Despite Justice Stevens' insistence to the contrary, we do not imply that the ordinance is unconstitutional because it 'does not abridge enough speech.'").
285. Id. at 520.
286. See id. at 540-41 (Stevens, J., dissenting); id. at 564 (Burger, C.J., dissenting).
287. Justice Stevens delivered the *Vincent* opinion, in which Chief Justice Burger joined.
288. 104 S. Ct. at 2132. To the extent that Los Angeles was not required to demonstrate that its ordinance advanced its aesthetic interest, the Court may have been relying on the district
Next, when it considered whether the prohibition left open adequate alternative means of communication, the Court again relied on the district court finding that ample alternatives did exist. The Court reasoned that the speaker's right to communicate by handbill distribution and direct speech remained intact at the precise locations at which the signs had been posted. Consequently, the Court decided that the ordinance complied with the Schneider mandate that the right to speak not be abridged solely because it might be exercised elsewhere. As interpreted by later cases, however, the Schneider mandate is not so simplistic: It requires not that the speaker be allowed to stand without exception in a particular place, but that the speaker not be prevented from reaching a particular audience. It is unreasonable to expect Taxpayers to reach its largely driving audience by standing along the same well-traveled routes of Los Angeles attempting to distribute handbills to drivers. In fact, the majority recognized the advantages of posting signs on public property. Nevertheless, the Court upheld the ordinance based on the district court's findings.

Further, the Court failed to investigate fully the weight the city placed upon its interest in aesthetics. The Court rejected the Ninth Circuit's reliance on Justice Brennan's Metromedia opinion, which required a comprehensive aesthetic plan to support a municipality's restriction of speech. Yet, The Metromedia plurality also had examined San Diego's entire approach to billboard regulation to ensure an objective determination of the weight which the city accorded to its aesthetic goals. The Vincent majority, on the contrary, made no similar objective investigation, but instead presumed the substantiality of the city's aesthetic interest, and allowed aesthetics—a value never mentioned in the Constitution—to outweigh the first amendment's protection of free speech.

court findings. In that case, the broad deference that the court gave to Los Angeles' speech-restrictive ban may be limited to the Vincent decision.

289. Id. at 2133. The "ample alternatives" inquiry was identified in Perry as a part of the heightened scrutiny of time, place, or manner restrictions of speech in a public forum. 460 U.S. at 45; accord Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 640, 655 (1981) (considering the existence of ample alternatives when time, place, or manner restrictions are used). This reversion to a public forum analysis was in apparent support of the Court's earlier implication that the Vincent decision might alternatively be based on an analysis of the ordinance as a reasonable time, place, or manner restriction in a public forum. 104 S. Ct. at 2134 n.32; see supra note 237 and accompanying text.

290. 104 S. Ct. at 2118.

291. Id. (citing Schneider, 308 U.S. at 163).

292. See supra note 91 and accompanying text.

293. See Brief for Appellees, supra note 214, at 39-40 (noting that the person who can post signs along the best-traveled highways will reach the widest audience); see also Stone, supra note 48, at 257 (describing the popularity and effectiveness of posting signs).

294. 104 S. Ct. at 2133.

295. Id. Justice Brennan, however, criticized the Court for having failed to examine the effectiveness of existing alternatives. Id. at 2137 (Brennan, J., dissenting).

296. Id. at 2130 n.25.

297. 453 U.S. at 520. There were four Justices, White, Stewart, Marshall, and Powell, in
Ultimately, the *Vincent* Court upheld a total ban on a particular medium of expression—the temporary posting of signs on public property. The Los Angeles' ordinance in *Vincent* is not limited to a temporary or sensitive area as were the prohibitions in *Heffron*. Instead, the Los Angeles ordinance applies broadly to all public property at all times. Although the Court could have classified the particular form of speech as offensive, the Court instead approved a complete prohibition of any speech, an approach rejected by the *Erznoznik* and *Schad* Courts. Los Angeles' complete prohibition was supported only by a subjective municipal preference that was rejected as insufficient by the *Schneider* Court. The prohibition effectively requires Taxpayers and other speakers seeking a forum to rely on private property owners who, unlike Los Angeles, may discriminate based on the content of the speech. The ability of private property owners to discriminate limits the speech opportunities of those expressing views that are contrary to the views of property owners, or that are unpopular. In short, the Court's analysis fails to protect a speaker's right to reach an audience.

V. Regulation of Aesthetically Unpleasant Forms of Speech After *Vincent*

The *Vincent* Court limited the outlets available for the first amendment's most protected category of speech to familiar, largely outdated, and increasingly ineffective methods of communication. The Court did so by defining disputed public property narrowly and by requiring a demonstration of traditional public access to that property. Proselytizing on a street corner or distributing handbills no longer is an effective method of reaching an audience, particularly if those with opposing viewpoints have sufficient

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299. 422 U.S. at 210; *see supra* notes 141-44 and accompanying text. The large number of signs removed from public fixtures by city works demonstrates the popularity of sign posting there and the inconsistency of enforcement. Brief for Appellees, *supra* note 214, at 16-17 (noting that 68,869 signs were illegally posted in fiscal year 1977).

300. 452 U.S. at 71-72; *see also* *supra* notes 145-49 and accompanying text.

301. 308 U.S. at 161.

302. 104 S. Ct. at 2137 (Brennan, J., dissenting); *see also* Talley v. California, 363 U.S. 60, 64-65 (1960) (establishing the need for anonymity especially when espousing unpopular viewpoints).

303. The Court noted with approval its earlier decisions rejecting prohibitions on handbill distribution, *id.* at 2131, and door-to-door distribution of literature, *id.* at 2133. *See generally* Ely, *supra* note 181 at 1488-89 (predicting that the Court would continue to firmly protect traditional and familiar methods of speech—"pamphlets, pickets, public speeches and rallies," while offering little or no protection to new or unorthodox methods of expression).

304. The *Vincent* Court focused on the utility poles on which Taxpayers' signs were posted and required a demonstration of a traditional right of access to those poles. 104 S. Ct. at 2134.
financial backing to use the mass media. By permitting a flat ban on the "nuisance" of posted signs, the Vincent Court closed one of the few remaining effective, yet inexpensive, methods of speech simply because it might be considered troublesome or ugly. A city apparently need not demonstrate the weight of its aesthetic interest, as long as the district court record is void of evidence reflecting that the regulation is ineffectual in achieving that goal.

Vincent lowers the level of review for a broad speech restriction which is based on purported aesthetic interests to that of a regulation which incidentally restricts symbolic speech. Moreover, when applying that deferential standard, the Court's focus will be only on the ordinance and the governmental interests supporting the ordinance. The ordinance must only be viewpoint neutral and leave open other channels of communication. This focus effectively precludes judicial consideration of the relevant first amendment values.

The Court also has demonstrated a willingness to focus on the specific tangible property involved when determining whether public property warrants public forum status. Such a focus on the specific property will reserve the heightened protection accorded to speech in a public forum to methods of communication that are familiar and generally less effective. The Court also has showed a willingness to accept content-neutral advancements of municipal aesthetic goals, while turning a blind eye to the realistic difficulty of effectively and inexpensively reaching a mobile audience. Thus, when

305. A speaker who is not well-financed simply cannot effectively reach a large audience. The Court has refused to recognize any guaranteed right of access to the truly effective expressive mediums. See, e.g., Stet v. Democratic Nat'l Comm., 412 U.S. 94 (1973) (no minimum right of access to television for editorials); see also Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) (no right of access or reply to privately owned newspapers); cf. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) (broadcasters who present one viewpoint of an issue must allow reply time to speakers with opposing viewpoints).

306. Justice Brennan criticized the Court for its deference to the city's aesthetic interests without demanding that the city demonstrate all intention to implement a comprehensive aesthetic plan not limited to speech-restrictive measures. 104 S. Ct. at 2141-42 (Brennan, J., dissenting). Brennan believed that the majority overlooked the significant risk that the city's purported aesthetic interest was tailored to fit the already existing prohibition, rather than being the true reason for the restriction. Id. at 2139-40 (Brennan, J., dissenting).


308. Id. at 2129 (applying the O'Brien test); see also supra notes 181-84 and accompanying text.

309. Vincent, 104 S. Ct. at 2134.

310. See supra note 181 and accompanying text.

311. Vincent, 104 S. Ct. at 2134; see also supra notes 226-28. See generally Perry, 460 U.S. at 45-46 (establishing three types of public property and appropriate level of review for speech restrictive regulations in each).

312. See supra notes 305-06 and accompanying text.

313. See id.
the speech method employed can be deemed offensive, the Court has demonstrated an intention to give local regulators broad deference to prohibit that method of speech in order to advance local aesthetic goals.\textsuperscript{314} After \textit{Vincent}, apparently, only methods of speech that traditionally have been recognized remain protected.\textsuperscript{315}

VI. Conclusion

The City of Los Angeles banned the posting of signs on public property to prevent a reputed eyesore, and received the emphatic approval of a majority of the Supreme Court.\textsuperscript{316} The \textit{Vincent} decision inverted previously recognized constitutional priorities. In effect, the decision thoroughly subordinated the concern for effective communicative outlets to undefined aesthetic values. This subordination is particularly troublesome because the speech at issue in \textit{Vincent} was political campaign material, to which the first amendment has “its fullest and most urgent application.”\textsuperscript{317}

The Court’s decision in \textit{Vincent} demonstrates a surprising insensitivity to the first amendment’s protection of free speech in the face of subjective aesthetic regulation. The Court’s opinion contains a confusing application of tests and uncertain conclusory judgments. The decision effectively charts a new course in the review of aesthetic regulations of “annoying” speech, without acknowledging the change in direction. After \textit{Vincent}, the precedential value of many previous cases is questionable, and the position of the first amendment among the growing number of countervailing governmental interests is uncertain.

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\textsuperscript{314} 104 S. Ct. at 2130.
\textsuperscript{315} Id. at 2131 (Court indicating its approval of previously recognized heightened protection for handbilling on public streets).
\textsuperscript{316} Id. at 2130.