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Beauty Conquers the First Amendment - Members of the City of Los Angeles v. Taxpayers for Vincent

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BEAUTY CONQUERS THE FIRST AMENDMENT—*Members of the City of Los Angeles v. Taxpayers for Vincent.*

I think that I shall never see
a Billboard lovely as a tree.
Indeed, unless the Billboards fall,
I'll never see a tree at all.

—Ogden Nash[1]

It is theoretically, though remotely, possible that a form of speech could be so distinctively unaesthetic that a comprehensive program aimed at eliminating the eyesore it causes would apply only to the unpleasant form of speech. Under the approach I suggest, such a program would be invalid because it would only restrict speech, and the community, therefore, would have to tolerate the displeasing form of speech. This is no doubt a disadvantage of the approach. But at least when the form of speech that is restricted constitutes an important medium of communication and when the restriction would effect a total ban on the use of that medium, that is the price we must pay to protect our first amendment liberties from those who would use aesthetics alone as a cloak to abridge them.[2]

INTRODUCTION

In recent years local government ordinances which regulate signs and billboards and the first amendment have been on a collision course.[3] Signs and billboards have been protected by the first amendment as effective formats of expression, while on the other hand, their physical structure subjects them to regulation in pur-

1. Metromedia v. City of San Diego, 23 Cal. 3d 762, 592 P.2d 728, 748, 154 Cal. Rptr. 212, 232 (1979), *rev'd*, 26 Cal. 3d 848, 610 P.2d 4007, 164 Cal. Rptr. 510 (1980), *rev'd*, 453 U.S. 490 (1981).

2. Members of the City of Los Angeles v. Taxpayers for Vincent, 104 S. Ct. 2118, 2141 (1984) (Brennan, J., dissenting).

3. Comment, *Zoning, Aesthetics and the First Amendment*, 62 COLUM. L. REV. 81 (1964); Michelman, *Toward a Practical Standard for Aesthetic Regulation*, 15 PRAC. LAW. 36 (1969); Williams, *Subjectivity, Expression and Privacy: Problems of Aesthetic Regulation*, 62 MINN. L. REV. 1 (1977); Costonis, *Law and Aesthetics*, 80 MICH. L. REV. 355, (1981); Pearlman, *Zoning and the First Amendment*, THE URBAN LAWYER, Vol. 16, No. 2, 217 (1984).

suit of traditional police goals. This conflict was heightened by the recognition of aesthetic goals as legitimate objectives of police power.

In an effort to balance these competing concerns, the Supreme Court has allowed reasonable regulations of "time, place and manner"[4] of the medium. In *Members of the City of Los Angeles v. Taxpayers for Vincent*[5] [hereinafter referred to as *Taxpayers*], the Court upheld a total ban on posted signs on public property as a proper "time, place and manner" regulation and as a valid exercise of the city's power to rid the community of "visual" garbage to promote aesthetic goals.[6] The Court equated "ugliness" with noxious waste which means the State can treat "ugliness" like it treats litter or disease. This aesthetic power raises serious legal and social questions. What is beauty? Who defines it? To what extent may aesthetic values override free speech and expression? Are there acceptable alternatives to a total ban? This note will demonstrate that *Taxpayers* may too easily empower local governments to ban "unpleasant formats" of communication in their efforts to beautify the community without first offering sufficient evidence that the infringement on the first amendment is necessary.

THE CASE

Taxpayers for Vincent contracted with Candidate Outdoor Graphic Services (COGS) to post temporary political signs in support of their political candidate, Roland Vincent.[7] COGS posted signs on utility poles and cross wires, among other places.[8] However, Los Angeles, [hereinafter referred to as "City"], had enacted a city ordinance which forbade the posting of any signs on public property,[9] with a few exceptions.[10] The City removed the signs from the utility poles and crosswires.[11] Taxpayers sought an injunction, and compensatory and punitive damages for the alleged

4. Cox v. New Hampshire, 312 U.S. 569 (1941).

5. *Taxpayers*, 104 S. Ct. at 2135.

6. *Id.*

7. *Id.* at 2122 (COGS produced 15 by 44 inch cardboard signs and attached them to utility poles at various locations by draping them over crosswires. The signs read "Roland Vincent — City Council.").

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

first amendment violation.[12] The district court granted summary judgment for the City finding that the signs were removed without regard to content.[13] The court concluded that the City had a compelling interest in ridding the community of "visual blight" and that adequate alternative methods of expression were available.[14]

The Court of Appeals for the Ninth Circuit[15] reversed the district court and held the ordinance unconstitutional as it significantly abridged the exercise of free speech.[16] The court said that the City failed to demonstrate that the total ban was part of a comprehensive plan and that less drastic alternatives were available to the City.[17]

The Supreme Court in a six-to-three decision upheld the validity of the ordinance.[18] The Court found that the aesthetic interests offered by the City, ridding the City of visual clutter produced by signs, was a substantial governmental interest.[19] The Court held that this aesthetic interest was sufficient to support a total ban on posted signs because the ordinance was narrowly drawn[20] and that adequate alternative forms of expression remained.[21]

BACKGROUND

The Supreme Court's decision in *Taxpayers* is better understood after examining the conflict when aesthetic-based land use ordinances clash with the exercise of first amendment rights.

A. Aesthetic-Based Land Use Ordinances

In order to constitute a valid exercise of the state's police power, an ordinance regulating land use must seek to achieve an objective within the permissible scope of the police power.[22] If the ordinance promotes a permissible objective and the means employed are rational, courts rarely find the means employed objec-

12. *Id.* at 2123.
13. *Id.*
14. *Id.*
15. Members of the City of Los Angeles v. Taxpayers for Vincent, 682 F.2d 847 (9th Cir. 1982).
16. *Id.* at 849.
17. *Id.* at 852-53.
18. *Taxpayers*, 104 S. Ct. at 2135.
19. *Id.* at 2130.
20. *Id.* at 2134.
21. *Id.* at 2133.
22. Village of Euclid v. Amber Realty Co., 272 U.S. 365, 395 (1926).

tionable.[23] This is due primarily to the presumption of validity that an exercise of the police power carries. The court will defer to the legislative judgment.

Traditional objectives of the police power are the promotion of the health, safety and welfare of the public.[24] Aesthetic goals were first received with hostility. This hostility was caused, in part, by opposition to a regulation on the use of private property.[25] But the most serious objection was that aesthetic values are too subjective and lack measuring criteria to afford meaningful review.[26]

> (M)ere aesthetic considerations cannot justify the use of the police power . . . . It is commendable and desirable, but not essential to the public need that our aesthetic desires be gratified . . . . Certain legislatures might consider that it was more important to cultivate a taste for jazz than Beethoven, for posters than Rembrandt, and for limericks than for Keats. Successive city councils might never agree as to what the public needs from an aesthetic standpoint and this fact makes the aesthetic standard entirely impractical for use restriction upon property. The world would be at a continual seesaw of aesthetic considerations were they permitted to govern the use of the police power.[27]

Still, the courts continued to search for objective criteria of aesthetics. In order to uphold ordinances which promoted aesthetics, the courts linked the aesthetic goals with traditional police power goals.[28] This linkage proved, more often than not, to be hollow.[29]

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23. Note, *Stronger than Dirt: Aesthetic Based Municipal Regulations May Be a Proper Exercise of the Police Power: State v. Jones*, 18 WAKE FOREST L. REV. 1167, 1173 (1982).

24. Mulger v. Kansas, 123 U.S. 623 (1887).

25. City of Passaic v. Paterson Bill, Posting, Advertising & Sign Painting Co., 72 N.J.L. 285, 287, 62 A. 267, 268 (1905). "No case has been cited . . . which holds that a man may be deprived of his property because his tastes are not those of his neighbors. Aesthetic considerations are a matter of luxury and indulgence rather than of necessity alone which justifies the exercise of the police power to take property without compensation."

26. Williams, *supra* note 3, at 5; Costonis, *supra* note 3, at 376-77.

27. City of Youngstown v. Kahn Bros. Bldg. Co., 112 Ohio St. 654, 148 N.E. 842, 844 (1925). The court struck down an ordinance which restricted the height of billboards based on aesthetics.

28. *See infra* notes 29-39.

29. St. Louis Gunning Advertising Co. v. City of St. Louis, 235 Mo. 99, 145, 137 S.W. 929, 942 (1911), *appeal dismissed*, 231 U.S. 761 (1913), upholding a billboard ban. The court said that billboards were "a constant menace to the public

For example, aesthetic goals weighed as heavy or heavier than the traditional "health, safety and welfare" concerns when an ordinance protected property values,[30] regulated junkyards,[31] promoted tourism,[32] traffic safety,[33] and crime prevention.[34] As long as the primary purpose of the ordinances also promoted health, safety or economic objectives, then they were upheld.[35]

> There are areas in which aesthetics and economics coalesce, areas in which a discordant sight is as hard an economic fact as an annoying odor or sound. We refer not to some sensitive or exquisite preference but to concepts of congruity held so widely that they are inseparable from the enjoyment and hence the value of property.[36]

Since the late 1950's, the courts have not required local governments to masquerade aesthetic-based ordinances as traditional health and safety ordinances. Perhaps the courts tired of the legal fiction or were caught up by the national attitude favoring aesthetics. For whatever reason, aesthetic goals have gained wide acceptance. In *Berman v. Parker*,[37] the Court upheld an urban renewal ordinance which was based, in part, on aesthetic considerations. The Court maintained that a community should be "beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled."[38] Since *Berman*, most jurisdictions have ac-

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safety and welfare of the city; they endanger the public health, promote immorality, constitute hiding places and retreats for criminals and all classes of miscreants . . . . [T]he ground in the rear thereof is being constantly used as privies and dumping grounds for all kinds of waste and deleterious matter, and . . . behind these obstructions the lowest form of prostitution and other acts of immorality are frequently carried on, almost under the public gaze . . . ."

30. State v. Wieland, 269 Wis. 262, 69 N.W.2d 217 (1955), upheld an ordinance requiring a permit for different new architectural structures so that they would not contrast with existing ones so as to cause depreciation in property values.

31. City of Houston v. Johnny Frank's Auto Parts Co., 480 S.W.2d 774 (Tex. Civ. App. 1972), ordinance which required the screening of junkyards upheld on the grounds of safety; flammable material was a fire hazard, the junkyard was an attractive nuisance to children and an invitation for theft.

32. Opinion of the Justices, 103 N.H. 268, 169 A.2d 762 (1961).

33. Swisher & Son v. Johnson, 149 Fla. 132, 5 So. 2d 441 (1941).

34. Highway 100 Auto Wrecker, Inc. v. City of W. Allis, 6 Wis. 2d 637, 96 N.W.2d 85 (1959).

35. United Advertising Corp. v. Metuchen, 42 N.J. 1, 198 A.2d 447 (1964).

36. *Id.* at 5, 198 A.2d at 449.

37. Berman v. Parker, 348 U.S. 26 (1954).

38. *Id.* at 33.

cepted aesthetics as a legitimate goal and properly within the police power.[39]

The Supreme Court's most recent affirmation of aesthetics was in *Metromedia v. City of San Diego.*[40] In *Metromedia*, the Court struck down an ordinance which banned offsite billboards but exempted some that carried certain messages.[41] The Court said, "it is not speculative to recognize that billboards by their very nature, wherever located and however constructed, can be perceived as an 'esthetic harm' . . . . [There is n]o substantial doubt that the twin goals that the ordinance seeks to further—traffic safety and the appearance of the city—are substantial governmental goals as it is far too late to contend otherwise."[42]

B. First Amendment Protection of Access to Public Property

The first amendment provides: "Congress shall make no law . . . abridging the freedom of speech or of the press."[43] It rests on the presumption that the widest possible dissemination of information from adverse and antagonistic sources is essential to the welfare of the public.[44] This attitude presupposes a "marketplace of ideas" in which all advocates may argue the merits of their positions and submit their views to public scrutiny and consideration.[45] In addition, the first amendment rests on the right to use effective media of expression in order to reach a desired audience.[46] The Supreme Court has found that picketing,[47] distributing leaflets,[48] canvassing door-to-door,[49] sit-ins[50] and armbands[51] are among the

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39. Suffolk Outdoor Advertising Co. v. Hulse, 43 N.Y.2d 483, 373 N.E.2d 263 (1977); John Donnelly & Sons, Inc. v. Outdoor Advertising Board, 369 Mass. 206, 339 N.E.2d 709 (1975). The court said that prior courts had engaged in a "legal fiction;" State v. Diamond Motors, Inc., 50 Hawaii 33, 429 P.2d 825 (1967); National Used Cars, Inc. v. City of Kalamazoo, 61 Mich. App. 520, 233 N.W.2d 64 (1975).

40. *Metromedia*, 453 U.S. at 520-21.

41. *Id.* at 510.

42. *Id.* at 507-08.

43. U.S. CONST. amend I.

44. Stone, *Fora Americana*, 1974 SUP. CT. REV. 233.

45. *Id.*

46. *Id.* at 256.

47. Police Dept. of the City of Chicago v. Mosely, 408 U.S. 92 (1972).

48. Schneider v. State, 308 U.S. 147 (1939).

49. Martin v. City of Struthers, 319 U.S. 141 (1943).

50. Brown v. Louisiana, 383 U.S. 131 (1966).

51. Tinker v. Des Moines Independent Community School District, 393 U.S.

media which the first amendment protects.

Several issues are raised when the court is faced with an ordinance, such as the one in *Taxpayers*, which totally bans an effective medium of expression. When does a person have a right of access to publicly-owned property for the purpose of exercising first amendment rights? When may the government restrict speech in order to define and preserve the proper use of public property and maintain peace? When a conflict arises, how does the court weigh the competing interests?

1. The Public Forum Doctrine

The theory that certain public-owned property should be open to the public in order to effectively preserve freedom of expression is known as the "public forum" doctrine.[52] The public forum "saga began and very nearly ended with Justice Holmes' uncharacteristically forgettable opinion"[53] for the Supreme Court of Massachusetts in *Commonwealth v. Davis*.[54] In that case, a preacher gave a sermon on the Boston Common and was convicted under an ordinance which forbade the public address upon publicly-owned property. The court upheld the conviction.[55] In dictum Justice Holmes said, "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."[56] This theory of the right of access to public property survived until the Supreme Court's decision in *Hague v. CIO*.[57] In *Hague*, the Court struck down a New Jersey ordinance which required a permit for an open air meeting. Speaking for the Court, Mr. Justice Roberts laid the foundation of the doctrine.

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such

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503 (1969).

52. Kalven, *The Concept of the Public Forum*, 1965 SUP. CT. REV. 1, 10; Stone, *supra* note 44, at 233-34.

53. Stone, *supra* note 44, at 236.

54. Commonwealth v. Davis, 162 Mass. 510, 39 N.E. 113 (1895).

55. *Id.* at 511, 39 N.E. at 113.

56. *Id.*

57. Hague v. CIO, 307 U.S. 496 (1939).

> 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 of views 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.[58]

Since *Hague*, the Court has grappled with the right of access to the public forum. In the early cases, the Court was faced with claims of access to traditional forums, such as streets and parks.[59] Then, the Court was confronted with claims of access to non-traditional forums.[60] The Court extended the public forum to include public property in which the Government had allowed expressive activity. The public property became a public forum by dedication.

Later, the public forum was extended further to include the right of access to public property that had not been used, traditionally or by dedication, for the exercise of first amendment rights.[61] This theory of the public forum turns on whether the particular form of communication involved seriously interferes with the normal uses of the property.

In the Burger Court, Justices Rehnquist, O'Connor, White, Powell, and the Chief Justice tend to acknowledge only the public forums which by tradition or dedication have been used for expression.[62] "The character of the right of access depends on the charac-

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58. *Id.* at 515-16.

59. Hague v. CIO, 307 U.S. 496; Schneider v. State, 308 U.S. 147 (1939); Cox v. New Hampshire, 312 U.S. 569 (1941); Jamison v. Texas, 318 U.S. 413 (1943).

60. Widmar v. Vincent, 454 U.S. 263 (1981) (University meeting facilities open for students); Greer v. Spock, 424 U.S. 828 (1976) (Political candidate sought access to army base to distribute literature. Property not transformed into public forum merely because people enter and leave freely.); Adderly v. Florida, 385 U.S. 39 (1966) (Students demonstrating county jail convicted for trespass. Conviction upheld. Jail not traditionally or by dedication a public forum.); Edwards v. South Carolina, 372 U.S. 229 (1963) (State capitol historically open to the public for speech).

61. Tinker v. Des Moines Community School Dist., 393 U.S. 503 (1969) (Three students suspended for wearing black armbands at school in protest of the Vietnam conflict. Court held that students did not shed constitutional rights at the schoolhouse gate.); Brown v. Louisiana, 381 U.S. 131 (1966) (Blacks protesting segregated library by peaceful sit-in. Conviction under breach of peace statute reversed. Library is a public forum.).

62. Perry Education Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37

ter of the property. Property which is not by tradition or designation open to the public is not a public forum."[63] Justices Marshall, Brennan, and Stevens tend to recognize a more liberal definition of the public forum which is not tied to traditional property law concepts. "The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place."[64]

The Court has not clearly established the scope of the right of access to a public forum.[65] If a minimum right of access is required, then access to the public forum cannot be banned, only regulated. If merely an "equal right" exists, then theoretically all access can be banned. The question for the Court becomes whether the ordinance creates an impermissible distinction between certain people's rights of access or bans everyone's access.

2. *Permissible Restrictions On Access to Public Property*

The scope of permissible governmental restrictions on the right of access to public property also depends upon the character of the public property.[66] If the property is a traditional or a limited

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(1983). Teachers' letterboxes not traditionally or by designation a public forum.

63. *Id.*; *see also* United States Postal Service v. Council of Greenburgh Civic Ass'n, 453 U.S. 114, 128 (1983). "There is neither historical nor constitutional support for the characterization of letterboxes as a public forum."

64. Grayned v. City of Rockford, 408 U.S. 104, 116 (1972). "The nature of a place, the pattern of its normal activities dictate the kind of time, place and manner that are reasonable. Although a silent vigil may not unduly interfere with a public library, . . . making a speech in the reading room almost certainly would. That same speech should be perfectly appropriate in a park. The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time. Our cases make clear that in assessing the reasonableness of a regulation, we must weigh heavily the fact that communication is involved; the regulation must be narrowly tailored to further the State's legitimate interest;" United States v. Grace, 460 U.S. 171, 184-85 (1983) (Marshall, J., concurring, "Every citizen lawfully present in a public place has a right to engage in peaceable and orderly expression that is not incompatible with the primary activity of the place."); *See also United States Postal Service*, 453 U.S. 114, 118. (Marshall, J., dissenting.).

65. Note, *The Public Forum: Minimum Access, Equal Access, and the First Amendment*, 28 STAN L. REV. 117, 121-27 (1975). The Court has evaded the question altogether by deciding the case on procedural grounds, or by diverting attention to the conduct vs. speech dichotomy or content distinctions. *See also*, Reddish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113, 134 (1981).

66. *Perry*, 460 U.S. at 44.

public forum, the government may enforce content-neutral regulations of "time, place and manner" which are "narrowly tailored to serve a significant governmental interest and leave open ample alternative channels of communication."[67] An absolute prohibition on a "particular type of expression will be upheld only if narrowly drawn to accomplish a compelling governmental interest."[68]

If the property has been dedicated by the Government as a place for expressive activity, the Government has to abide by the same standards as a traditional forum.[69] The Government, however, does not have to "retain the open character" of the property.[70]

If a public forum is not involved then the Government may "reserve the forum for its intended purpose" as long as the regulations are not viewpoint related.[71] "[T]he state, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated."[72]

3. *Weighing the Competing Interests*

Absent a compelling state interest, the Government may not restrict speech in a public forum on the basis of content.[73] Content-based regulations restrict communication because of the message conveyed. A law may be content-neutral on its face but also be directed at a harm caused by the content of the speech or enacted due to the hostility the government may have towards expression by a certain group. In *Police Dept. of the City of Chicago v. Mosely*,[74] the Court struck down an ordinance which banned all picketting near a school building except for peaceful picketting on the subject of the school's labor dispute. The Court found the ordinance to restrict speech on the basis of content. "The operative distinction is the message on the picket sign. But above all else,

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67. *Id.*
68. United States v. Grace, 461 U.S. at 177.
69. *Perry*, 460 U.S. at 45.
70. *Id.* at 46.
71. *Id.*
72. *Id.*; *see also Adderly*, 385 U.S. at 47.
73. *Mosely*, 408 U.S. at 95.
74. *Id.* at 95. *See also Grayned*, 408 U.S. at 116. The court said. "Clearly government has no power to restrict such activity because of its message. Our cases make equally clear, however, that reasonable time, place and manner regulations which may be necessary to further significant governmental interests are permitted."

the first amendment means that government has no power to restrict expression because of its message, its ideas or its subject matter."[75]

"Strict scrutiny" is applied when an ordinance regulates the content of speech.[76] The governmental objective must be necessary to the promotion of a legitimate end and the means employed must be the least restrictive.[77] In judging the reasonableness of valid content-neutral ordinances, the Supreme Court engages in a balancing of first amendment interests against competing governmental concerns. The Court applies a "middle-level" scrutiny.[78] The ordinance must "[further] an important or substantial government interest . . . [and] . . . the incidental restriction on alleged first amendment freedoms [must be] no greater than is essential to the furtherance of that interest."[79]

Until recently, a total ban on a medium of expression has met with little success. The ordinance was attacked either because it did not leave adequate alternatives for expression[80] or the ordinance had "slipped from the neutrality of time, place and manner into a concern about content."[81] Today, a content-neutral total ban on expression may be upheld if it is narrowly drawn and leaves open adequate alternatives.[82]

The Supreme Court, in *Metromedia*, considered the constitutionality of a substantial, if not total, ban based on aesthetic and

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75. *Mosely*, 408 U.S. at 95.

76. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW, 1269-97, (10th ed., 1981).

77. *Id.*

78. United States v. O'Brien, 391 U.S. 367 (1973). The defendant was convicted for burning his draft registration certificate. The defendant challenged his conviction on the ground that he burned his certificate as a protest to the draft. The Court upheld his conviction over his first amendment argument.

79. *Id.* at 377.

80. Erznonzik v. Jacksonville, 422 U.S. 205 (1975). The Court struck down an ordinance which prohibited drive-in movies which could be seen from the street that contained nudity. The Court said that the ordinance was overbroad as it would also forbid "trivial nudity," such as the showing of a baby's behind.

81. Schad v. Borough of Mt. Ephraim, 452 U.S. 61 (1981). The city had prohibited all live entertainment in the suburbs. The Court struck it down as the city had failed to show that a substantial governmental interest was furthered and because there were inadequate alternatives of communication. However, the Court expressly left open the possibility that a total ban might be constitutional if the ordinance was more narrowly drawn.

82. *Schad*, 452 U.S. at 79 (Powell, J., concurring.).

traffic safety.[83] In that case, the city of San Diego banned all offsite billboards while exempting billboards which contained certain messages.[84] The Court, in a six-to-three decision struck down the ordinance, but no majority of the justices could agree on the reasons. A plurality[85] found that as the ordinance exempted certain billboard messages,[86] the exceptions rendered the ordinance content-based. A majority[87] of the Court acknowledged that a total ban could be supported by either the traffic or aesthetic interest if the ordinance was content-neutral, narrowly drawn to further a substantial state interest and left open adequate alternative methods of expression.[88]

ANALYSIS

In *Taxpayers*, the Court upheld an ordinance which banned posted political signs on public property as a proper exercise of the police power by the city to rid the community of the "visual clutter" which the signs produced.[89] The Court examined three bases upon which to find the ordinance unconstitutional under the first amendment. First, the Taxpayers for Vincent contended that the ordinance was unconstitutional on its face under the "overbreadth doctrine."[90] The Court rejected this contention.[91] Second, Taxpayers for Vincent argued that the ordinance was an impermissible restriction on speech because it was too broad and the City had not used the least restrictive means.[92] The Court found that the ordinance applied even-handedly to everyone because it banned all signs on public property.[93] Further, the Court said that the ordinance was narrowly drawn[94] and advanced a substantial governmental interest.[95] "Signs," Mr. Justice Stevens said, create "visual

83. *Metromedia*, 453 U.S. at 493.
84. *Id.* at 494.
85. *Id.* (Justices White, Stewart, Marshall and Powell).
86. *Id.* at 495.
87. Justices Brennan, Blackmun, Stevens, Burger and Rehnquist.
88. *Id.* at 495.
89. *Taxpayers*, 104 S. Ct. at 2135.
90. *Id.* at 2123-28.
91. *Id.* at 2128-30.
92. *Id.* at 2128.
93. *Id.* at 2132.
94. *Id.* at 2129-30.
95. *Id.* at 2130.

clutter" and are synonymous to garbage.[96] Therefore, sign regulations are properly within the police power.[97] A total ban of all signs was "merely" the only way to effect the purpose of the ordinance.[98] The Court rejected the argument that the ordinance did not leave the appellees with adequate alternatives[99] or that signs were a valuable method of expression.[100]

Third, the Court dismissed the contention that a public forum was involved.[101] The Court said that even though a street is a public forum, a utility pole on that street on which the sign is posted is not a public forum.[102] "Appellees fail to demonstrate that utility poles were by tradition or by designation a forum for public communication."[103] The Court noted that the ordinance "does not affect any individual's right to speak and to distribute literature in the same place where the posting of signs on public property is prohibited."[104]

The dissent agreed that a properly drawn ordinance could support a total ban.[105] In this case, however, the City had failed to provide "tangible proof of the legitimacy and substantiality of its aesthetic objective."[106]

The *Taxpayer* decision is significant for two reasons. First, the decision represents a dilution of vital first amendment rights. The Court diverts attention from the first amendment issue to "content discrimination" and artificial distinctions between "conduct" and "speech." This diversion allowed the Court to avoid giving the proper weight to significant first amendment rights of expression. Second, the decision's effect will open the door to improper judicial review and administrative abuse under the guise of promoting "aesthetics." Although aesthetic considerations have recently gained wide acceptance, the dangers associated with aesthetics remain. The *Taxpayer* decision leaves the final word on the permissible scope of important first amendment rights on public and pri-

96. *Id.*
97. *Id.* at 2132.
98. *Id.* at 2134-35.
99. *Id.* at 2133.
100. *Id.* at 2133-34.
101. *Id.* at 2134.
102. *Id.*
103. *Id.* at 2133.
104. *Id.*
105. *Id.* at 2139 (Brennan, J., dissenting).
106. *Id.* at 2141 (Brennan, J., dissenting).

vate property to the local governments.

A. *Dilution of First Amendment Protections*

Part of the problem with the *Taxpayer* decision lies in the "content-based vs. content-neutral" distinction to which the Court has adhered. The level of scrutiny "triggered" depends upon whether an ordinance is content-based or content-neutral. This preoccupation with content discrimination sidetracks the real first amendment issue.[107] No bright line can be drawn. While a conceptual difference may be maintained, the effect on the first amendment is the same.[108]

In *Taxpayers*, the Court upheld the ordinance as a valid regulation of the "time, place and manner" of expression. However, a total ban regulates much more than the "time, place and manner" of expression. Content-neutral ordinances are favored because they presume an alternative time, place and manner of comparable expression. In this case, the antithesis of a valid "time, place and manner" restriction is not a content-based regulation; it is a total ban.[109] At present a total ban has only to meet an intermediate-level of scrutiny to be sustained.[110] It is anomalous for the Court to require a higher level of scrutiny for ordinances which restrict content or viewpoint of expression, but to require a lesser degree of scrutiny for ordinances which ban expression altogether. Therefore, the Court should have subjected the ordinance in *Taxpayers* to the heightened scrutiny reserved for content-based ordinances.

Another problem is the Court's wooden application of the "conduct" vs. "speech" dichotomy. The Court labelled the posting of signs as "conduct"[111] and applied the intermediate level of scrutiny as stated in *United States v. O'Brien*.[112] The conduct label, like content distinction, diminishes first amendment rights.[113] If an activity can be labelled "conduct" and not "speech," then the Court will uphold a regulation aimed at that conduct. The infringement on speech is allowed if the ordinance is narrowly tai-

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107. GUNTHER, *supra* note 76, at 1269-97.
108. Reddish, *supra* note 65, at 115-21.
109. *Id.* at 115-16.
110. United States v. O'Brien, 391 U.S. 367 (1968).
111. *Taxpayers*, 104 S. Ct. at 2131.
112. *O'Brien*, 391 U.S. at 377.
113. GUNTHER, *supra* note 76, at 1270.

lored to regulate the "conduct."[114] No bright line exists between "speech" or "conduct." "If it is oral, it is noise and may interrupt someone else; if it is written, it may be litter . . . . [B]ut [the format of expression is] not simply litter; it is litter with ideas."[115]

The "conduct" label that the Court applies leads to an "all or nothing" scrutiny of the ordinance. The result is the avoidance of balancing the vital first amendment interests with the state's police power interests. The Court does not ask whether the asserted governmental interest is sufficiently "substantial" to justify the "incidental" impact on the first amendment.[116] At best, the distinction is one of degree.[117] "The dichotomy between speech and action, while often helpful to analysis, is too uncertain to serve as the dispositive factor in charting the outer boundaries of first amendment concern."[118]

The *Taxpayer* Court turns a blind eye to precedent. The Court upheld an ordinance which banned the posting of signs because the signs caused "visual" litter.[119] Yet, in *Schneider v. State*,[120] the Court struck down an ordinance which banned the distribution of leaflets because the leaflets caused litter.[121] In *Taxpayers*, Justice Stevens attempted to distinguish *Schneider*. In *Schneider*, the Court said, the citizens were "actively expressing their right to communicate. The conduct continued only while the speakers . . . remained on the scene." In this case, "appellees posted signs . . . [which] would remain unattended until removed."[122] Thus, the Court equated the unattended signs with leaflets which had been scattered in the air "or toss[ed] in large quantities . . . from the window of a tall building."[123]

This analysis only begs the question. The reason posting signs is valuable is that signs can be left unattended. The reason why signs are now less protected than leaflets is because they are unattended. "The right recognized in *Schneider* is to tender the written

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114. *O'Brien*, 391 U.S. at 377-78.
115. Kalven, *supra* note 52, at 23.
116. Reddish, *supra* note 65, at 127.
117. GUNTHER, *supra* note 76, at 1270.
118. Saxbe v. Washington Post Co., 417 U.S. 843, 858 (1974).
119. *Taxpayers*, 104 S. Ct. at 2131.
120. Schneider v. State, 308 U.S. 147 (1939).
121. *Id.* at 150-51.
122. *Taxpayers*, 104 S. Ct. at 2131.
123. *Id.*

material to the passerby who may reject it or accept it . . . ."[124] A person holding a sign is exercising his first amendment rights. A person who posts a sign and leaves it is littering. It is the sign as a tangible medium of expression that has the adverse impact on the landscape.[125]

The Court noted that in *Schneider* an "anti-littering" statute could have "addressed the substantive evil without prohibiting" all leaflets.[126] The Court would not discuss whether the City could have enacted a narrower ordinance which would have prohibited signs posted longer than a certain amount of time, or controlled the density or size. The Court said that although a less restrictive ordinance might be good public policy, it was not constitutionally mandated.[127]

The Court said the "visual" litter produced by the signs is not just a "by-product of the activity but is created by the medium of expression itself."[128] The "ordinance curtails no more speech than is necessary to accomplish its purpose."[129] The Court's logic is faulty. All signs are litter. The City can ban litter. Therefore, the City can ban all signs. This argument is tautological. The statement "all signs are litter" may only become true by defining signs as litter. It is this type of unsubstantiated legislation that presents a threat to the first amendment.

Nor did the Court satisfactorily deal with the "public forum" issue. If the first amendment is based on a presumption that there is a "marketplace of ideas"[130] then it must protect not only the "ideas" but also the "market." In order to preserve this "market," there must be a forum in which to communicate and media available that will afford even the poorest in society a channel of communication. A total ban would be unconstitutional if a public forum is involved or if an effective method of communication is banned. The Court, in *Taxpayers*, rejected that either had been eliminated.

The Court held that a political candidate has no right to claim a right of access to the street of the City via the utility poles and

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124. *Id.*
125. *Id.* at 2132.
126. *Id.* at 2135.
127. *Id.* at 2132.
128. *Id.*
129. *Id.*
130. Red Lion Broadcasting v. FCC, 395 U.S. 367, 390 (1969); Abrams v. United States, 250 U.S. 616, 630 (1919).

crosswires because they had not by tradition or dedication been used for expressive activity.[131] This analysis of the public forum is incomplete. The Court has previously held that non-traditional public property can be a public forum.[132] Under this theory, the question is whether the particular mode of expression interferes with the normal activity of the public property. This theory provides a better foundation for the public forum than the traditional theory because of the unique nature of each medium of communication. "Each method of communicating ideas is a law unto itself and that law must reflect the differing nature, values, abuses and dangers of each method."[133]

However, in *Taxpayers*, the Court rejected signs as a unique or valuable method of communication.

> To the extent that the posting of signs on public property has advantages over [other] forms of expression, there is no reason to believe that these same advantages cannot be obtained through other means . . . . Notwithstanding appellees' general assertions in their brief concerning the utility of political posters, nothing in the findings indicates that the posting of political posters on public property is a uniquely valuable or important mode of communication, or that appellees' ability to communicate effectively is threatened by ever-increasing restrictions on expression.[134]

Mr. Justice Stevens noted that although "special solicitude" has previously been afforded these media of expression which are "less expensive than feasible alternatives and hence may be important to a large segment of the citizenry . . . this solicitude has practical boundaries."[135] As posted signs are "unpleasant formats" of expression, the City can remove them and prohibit their use under the police power.[136] These "unpleasant formats" of expression are the:

> poor man's printing press . . . and have been the media of communication exploited by those with little access to the more genteel means of communication. We would do well to avoid the occasion for any new epigrams of the law prohibiting the rich man,

131. *Taxpayers*, 104 S. Ct. at 2134.
132. *See supra* notes 58-66.
133. Kovacs v. Cooper, 336 U.S. 77, 97 (1939).
134. *Taxpayers*, 104 S. Ct. at 2133.
135. *Id.*
136. *Id.* at 2131.

too from distributing leaflets or picketting.[137]

Finally, the Court's public forum analysis lacks common sense. The right of access depends upon an effective method of communication.[138] In this case, the streets, a traditional public forum, are inaccessible. The pace of today's society makes standing on a "soapbox" or distributing leaflets on a street corner in downtown Los Angeles ineffective as a means of communication. A person who stands on a "soapbox" or distributes leaflets on the corner of a busy highway cannot reach the same audience as one who posts a sign. The pace of today's society renders the right of access to the street as a public forum ineffectual.

The utility of posted signs for the political candidate cannot be understated. The alternatives available to him which would allow him to reach the same audience with the least expense are severely restricted. Television, billboards, radio and newspapers are not comparable. The media that is left to the candidate are door-to-door canvassing, distribution of leaflets and, of course, carrying the signs. These media are less effective than posted signs because they require speaker participation. The poorer political candidate will have a harder if not impossible task of reaching the public because he cannot "speak" in several places at once without great expense. The whole theory behind the public forum is to leave open forums for the "poor" so as to preserve the quality of their speech and allow them to reach a desired audience. In *Taxpayers*, the Court has missed the point.

B. Aesthetics

The judicial fears expressed by the early courts have not been dispelled by the *Taxpayer* decision. Aesthetic values remain couched in terms of ultimate values such as "beauty," "pleasant" and "ugly." The primary arguments against aesthetic values as a legitimate police power goal are that they defy verification[139] and are incapable of articulation sufficient to define measuring criteria. The statement "signs are ugly" eludes verification by way of empirical,[140] rational[141] or rhetorical analysis.[142] The inability to verify

137. Kalven, *supra* note 52, at 30.

138. Stone, *supra* note 44, at 245.

139. Williams, *supra* note 3, at 8. Verification is the process of determining the truth or accuracy of a statement.

140. Williams, *supra* note 3, at 9-11. Under empirical verification, the Legislature begins with a premise which can either be supported or attacked by gather-

aesthetic values leaves the ordinance bereft of quantification. Without the ability to articulate measuring criteria, the agencies who implement the legislation are unable to define the scope of their power. Not only does it lead to arbitrary agency action, but it

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ing data. When legislators base their claims directly on ultimate values, however, empirical verification becomes impossible. Raw facts cannot resolve the ultimate issue of what values ought to be preferred.

	Claims in Support of non-aesthetic regulations.	Claims in Support of aesthetic regulations.
1. Ultimate value claims (not as such empirically verifiable.)	"Equality of income is fair."	"Billboards on highways are ugly."
2. Ancillary values claims		
a. The empirical end of the spectrum (empirically verifiable if such pragmatic problems as control group isolation can be overcome.)	"Equality of income will lessen crime."	"Removal of billboards will attract tourist dollars."
b. The non-empirical end of the spectrum (empirically verifiable in form, but in practice largely an assertion of ultimate value.)	"Centralization of power corrupts."	"Billboards will destroy the tone of San Clemente."
3. Mingling of value judgments with assertions about human psychology (empirical verification precluded by problems in defining the relevant psychological condition.)	"A regime that does not assure equality of income can never command the true allegiance of the people."	"The souls of our people will be deadened unless we protect the environment from defacement by billboards."

141. Williams, *supra* note 3, at 12-14. "[Reason's] role is limited to defining categories and drawing lines between them in a coherent consistent way. The refinement of categories is . . . for evaluation, but any resolution of normative issues, such as determining what is beautiful or good, must rely on other factors. This limitation on the power of reason is often obscured by the human incapacity to utter absolute truths. Reason's role is limited to establishing a system of terms and distinctions that can be used without internal inconsistency. It alone cannot be used to evaluate the merits of any competing values, whether aesthetic or non-aesthetic."

142. Williams, *supra* note 3, at 14-15. "The difficulty with rhetoric is that there must first be some agreement among the parties on the correct ethical evaluation of a case comparable to the one under discussion. . . . [A]nyone who can point to a distinction between the cases and honestly maintain that the distinction has some value for him can resist being persuaded."

also leaves the courts powerless to properly review the legislation.

Because of these defects, the early courts decided that aesthetics were unfit for legislation. The Court in *Taxpayers* simply ignores the problem. At both extremes, the courts have "elected to throw up their hands in despair rather than attempt to deal systematically with the [aesthetic] issues presented by the facts of each case."[143]

The fact that aesthetics may cause difficulties does not mean that government may not promote aesthetics. Where first amendment rights are in the balance, the Court should require local governments to justify a use of the aesthetic power with more precision than it requires justification for other traditional police power goals which conflict with first amendment freedoms.[144] Proper judicial review demands that the legislature make findings which can be objectively weighed and that the courts seriously assess these findings.[145] In *Taxpayers*, the Court abdicates to the local government's discretion and ignores the difficulties in determining what the measuring criteria is for "ugliness." The search for objective values of beauty are ageless. In *Taxpayers*, the Court merely states that "it is well-settled that the State may legitimately exercise its police power to advance esthetic values . . . . [M]unicipalities have a weighty, essentially esthetic interest in proscribing intrusive and unpleasant formats for expression."[146]

Under traditional police power goals, it could be maintained that a total ban on signs would be unreasonable as size and density restrictions could effectively fulfill the purpose of a traffic or safety ordinance. Under the aesthetic analysis, one can say that all signs are ugly no matter where they are.[147] The problem is that no one can either prove or deny that statement. As long as aesthetic goals are composed in the language of ultimate values, effective judicial review under any scrutiny is evaded.[148]

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143. Williams, *supra* note 3, at 4.

144. *Id.*

145. Costonis, *supra* note 3, at 360-61; Williams, *supra* note 3, at 58.

146. *Taxpayers*, 104 S. Ct. at 2130.

147. *See supra* notes 140-141 and accompanying text.

148. Costonis, *supra* note 3, at 356. "Aesthetic policy, as currently implemented at the federal, state and local levels often partakes more of high farce than of the rule of law. Its purposes are seldom accurately or candidly portrayed, let alone understood, by its most vehement champions. Its diversion to dubious or flatly deplorable social ends undermines the credit that it may merit when soundly conceived and executed. Its indiscriminate, often quixotic demands have

The Ninth Circuit Court of Appeals suggested that the City should try a regulation of "size, design [or] construction, . . . institute clean up or removal requirements, or provide stringent regulations for the areas of the City more in need of protection."[149] The court said "while we cannot be certain that the alternatives we have suggested . . . will be successful, . . . in light of the first amendment interest . . . some should be tried."[150] The court of appeals noted that the testing of alternatives was appropriate where, as in this case, the City's present ordinance is clearly ineffective. The court said that the City could later reenact the ordinance, if its "experience shows that the alternative is ineffective in satisfying its interest. We could then reconsider the matter in light of that experience."[151] The dissent argued that the court should require some evidence that the aesthetic purpose advanced was supported by the City's showing that it was serious about eliminating "visual clutter."[152] This approach at least recognizes that objective standards are needed by which to measure the aesthetic value, especially when it competes with the first amendment. This, at the very least, is what the first amendment requires.

> In every case . . . where legislative abridgment of the [right of freedom of speech] is asserted, the courts should be astute to examine the effect of the challenged legislation. 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 . . . . [T]he delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the right.[153]

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overwhelmed legal institutions, which all too frequently have compromised the integrity of legislative, administrative and judicial processes in the name of 'beauty'."

149. Members of the City of Los Angeles v. Taxpayers for Vincent, 682 F.2d 847, 852-53 (9th Cir. 1982).

150. *Id.*

151. *Id.* at 853.

152. *Id.*; Ratner, *The Function of the Due Process Clause*, 116 U. PA. L. REV. 1048, 1110-11 (1968) (discussion of judicial use of less intrusive alternatives).

153. *Taxpayers*, 104 S. Ct. at 2139-42 (Brennan, J., dissenting).

C. Aftermath.

What effect will *Taxpayers* have outside of the billboard and sign arena? Perhaps, very little for the reason that local ordinances cannot easily reach other forms of communication. The cases will turn on other grounds. For example, in *H & H Operations, Inc. v. City of Peachtree*,[154] the court struck down an ordinance on first amendment grounds which prohibited signs which contained "prices" while permitting signs containing the names of businesses and categories of products.[155] The court said while the aesthetic goals were valid, "numbers" are not aesthetically inferior to letters or pictures. The court said that the ordinance was actually a form of content suppression.[156]

Similarly, the court in *Kuhns v. Santa Cruz County Board of Supervisors*[157] struck down an ordinance which prohibited an applicant for an adult bookstore from using the name "Frenchy's."[158] The court said that "there is no authority which allows the prohibition of non-offensive names . . . simply because the name may attract undesirable clientele."[159]

In *Spiritual Psychic Science Church of Truth, Inc. v. City of Azusa*,[160] the court struck down an ordinance on first amendment grounds which prohibited fortune-telling for consideration.[161] The city said that the ordinance was justified to prevent the "deteriorating effect of fortune-telling 'parlors' on the appearance and integrity of the community."[162] The court said that "Azusa might well have restricted fortune-telling to designated areas of the city . . . but Azusa has elected to fire the blunderbuss of complete prohibition where a rifle shot—in this instance 'time, place and circumstance' regulations—would have sufficed."[163]

Outside the arena of billboards and signs, aesthetic concerns have had an impact on first amendment rights. In *Gouge v. City of Snellville*,[164] a zoning ordinance was challenged which enjoined the

154. 248 Ga. 500, 283 S.E.2d 867 (1981), *cert. denied*, 456 U.S. 961 (1982).
155. *Id.*
156. *Id.* at 501, 283 S.E.2d at 869.
157. 128 Cal. App. 3d 369, 181 Cal. Rptr. 1 (1982).
158. *Id.* at 377, 181 Cal. Rptr. at 5.
159. *Id.* at 376, 181 Cal. Rptr. at 5.
160. 154 Cal. App. 3d 1187, 201 Cal. Rptr. 852 (1984).
161. *Id.* at 870.
162. *Id.* at 862.
163. *Id.*
164. 249 Ga. 91, 287 S.E.2d 539 (1982).

owner from maintaining a satellite TV antenna in his front yard.[165] The court upheld the ordinance, citing *Metromedia* for the proposition that aesthetic concerns were properly within the scope of the police power.[166] The court said the ordinance did not infringe upon the first amendment in that it did not attempt to control the dissemination or reception of ideas, only the location of the antenna.[167]

In *People v. Moon*,[168] a car owner was convicted of violating an ordinance which prohibited parking vehicles on a public street for the purpose of selling them.[169] The city offered aesthetics and safety as a justification for the ordinance. The court found that these objectives were legitimate, but struck down the ordinance because the means employed were not necessary to the achievement of the ends.[170]

The New York Court of Appeals in *People v. Stover*[171] upheld a conviction for violation of an ordinance prohibiting maintenance of a clothesline in the front yard of the property owner.[172] The defendant property owner had erected the clothesline as a protest against tax assessment. The court held that the ordinance was not an unconstitutional infringement of the defendant's freedom of expression.[173]

An ordinance which banned searchlight promotions was upheld in *Reike Building Co. v. City of Overland Park*.[174] In that case, the court said that the ordinance only regulated the "conduct" aspect of the promotions and therefore was not in violation of the first amendment.

D. North Carolina.

North Carolina has followed the national trend. Historically, North Carolina required traditional police power goals to accom-

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165. *Id.*, 287 S.E.2d at 540.
166. *Id.* at 92, 287 S.E.2d at 541.
167. *Id.*
168. 89 Cal. App. 3d Supp. 1, 152 Cal. Rptr. 704 (1978).
169. *Id.* at Supp. 2, 152 Cal. Rptr. at 705.
170. *Id.* at Supp. 5, 152 Cal. Rptr. at 705.
171. 12 N.Y.2d 462, 240 N.Y.S.2d 734, 191 N.E.2d 272, *appeal dismissed*, 375 U.S. 42 (1963).
172. *Id.* at 464, 240 N.Y.S.2d at 735, 191 N.E.2d at 273.
173. *Id.* at 470, 240 N.Y.S.2d at 740, 191 N.E.2d at 277.
174. 232 Kan. 634, 657 P.2d 1121 (1983).

pany aesthetics as a basis for zoning regulations.[175] Even as late as 1960, the supreme court, in *Little Pep Delmonico Restaurant, Inc., v. Charlotte*[176] said:

> Courts are properly hesitant to interfere with a legislative body when it purports to act under the police power, but the exercise of the power must rest upon something more than mere aesthetic considerations. If it appears that the ordinance is arbitrary, discriminatory, and based solely on aesthetic considerations, the court will not hesitate to declare the ordinance invalid.[177]

The turning point came in *State v. Jones*.[178] In *Jones*, the supreme court upheld an ordinance which required a junkyard to be enclosed by a fence. The ordinance was based primarily on aesthetic grounds. The decision overruled prior cases which prohibited regulations based solely upon aesthetic considerations. The court said that aesthetic regulations may benefit the community in the "protection of property values, promotion of tourism, indirect protection of health and safety, preservation of the character and integrity of the community, and the promotion of the comfort, happiness and emotional stability of the residents."[179]

Since *Jones*, the court has upheld aesthetic-based regulations. In *County of Cumberland v. Eastern Federal Corp.*,[180] the court of appeals upheld an ordinance which restricted commercial signs to one hundred square feet.[181] The court held that the ordinance could lawfully be based on aesthetic considerations.[182]

In *Goodman Toyota v. City of Raleigh*,[183] the court of appeals upheld a challenge to an ordinance which banned the use of "windblown signs" except in special circumstances. "Windblown signs" are defined as "any banner, flag, pennant, spinner, streamer, moored blimp or gas balloon."[184] The plaintiff owned and displayed a large white fabric blimp which displayed the words "Goodman Toyota." The court, citing *State v. Jones*, found that

175. State v. Staple, 157 N.C. 542, 73 S.E. 637 (1911); State v. Whitlock, 149 N.C. 542, 63 S.E. 123 (1908).
176. 252 N.C. 324, 113 S.E.2d 422 (1960).
177. *Id.* at 326, 113 S.E.2d at 424.
178. 305 N.C. 520, 290 S.E.2d 675 (1982).
179. *Id.* at 530, 290 S.E.2d at 681.
180. 48 N.C. App. 518, 269 S.E.2d 672 (1980).
181. *Id.*
182. *Id.* at 524, 269 S.E.2d at 676.
183. 63 N.C. App. 660, 306 S.E.2d 192 (1983).
184. *Id.* at 661, 306 S.E.2d at 193.

the aesthetic considerations were valid and outweighed the burden imposed on the plaintiff.[185] The court did not address the first amendment issue.

Conclusion

Taxpayers upheld an ordinance based primarily on aesthetics which banned all posted signs on public property. The Court held that the aesthetic concerns were a substantial governmental interest properly within the police power and that the total ban was necessary to achieve those interests. The Court also found that the infringements on the exercise of first amendment rights were only incidental and that alternative means of communication were left open.

A total ban, in this case, takes the first amendment protection of expression away from the Court and gives it to the legislature. The legislature and not the courts will determine the permissible scope of expression. Signs are effective and vital media of expression to the poor who have little access to other effective forums. The ordinance that was upheld by the Court in *Taxpayers* effectively silences a portion of the community to whom posting signs is an inexpensive and important means of communication. It also restricts the political arena. Candidates with little money will have a hard time reaching the public.

More importantly, *Taxpayers* is a signal to the local governments that almost any aesthetic justification offered will qualify as a "substantial governmental interest" and the state courts should defer to the local governments' judgment with respect to the means employed to achieve "beauty."

Elaine J. Strickland

185. *Id.* at 663-64, 306 S.E.2d at 194.