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CONSTITUTIONAL LAW—FREEDOM OF SPEECH—HOMEOWNER WINS
IN BATTLE TO LIMIT CITY GOVERNMENT'S POWER TO BAN RESIDENTIAL
SIGNS. *CITY OF LADUE V. GILLES*, 114 S. Ct. 2038 (1994).

I. INTRODUCTION

In *City of Ladue v. Gilleo*,¹ the United States Supreme Court considered whether a Ladue, Missouri, ordinance, prohibiting Margaret Gilleo's display of a small sign² from the upstairs window in her home, violated her constitutional right to free speech. A unanimous Court held Ladue's ordinance violated the First Amendment³ because the ordinance eliminated an essential form of expression and prohibited too much protected speech.⁴

In *Ladue*, the Supreme Court clarified the constitutional boundaries for aesthetic-based government regulations that control the display of residential signs and dramatically altered its traditional analysis of the constitutionality of government's restrictions on speech.⁵ *Ladue* signals the Court's shift to a position more protective of the individual's right to free expression and its willingness to increase the burden government faces in defending its restrictive regulation of that expression.⁶

Following a discussion of the facts specific to *Ladue*, this note will review the analytical frameworks and tests the Court uses to examine freedom of speech issues, while emphasizing the body of law most analogous to the regulation of commercial and noncommercial signs. The note then examines the significance of *Ladue*, including its possible effect on municipal governments.

II. FACTS

In December, 1990, as the United States and its allies prepared for war against Iraq in the Persian Gulf, Margaret P. Gilleo⁷ protested the possibility

1. 114 S. Ct. 2038 (1994).

2. Ladue's ordinance banned "homeowners from displaying any signs on their property except 'residence identification' signs, 'for sale' signs, and signs warning of safety hazards[.] . . . [while] permit[ting] commercial establishments, churches, and nonprofit organizations to erect certain signs that [would] not [be] allowed at residences." *Id.* at 2040. The ordinance specifically prohibited "'window signs,' wherever placed out of doors in view of the general public or wherever placed indoors as a window sign." *Id.* at 2040-41 n.5. Gilleo's sign was 8.5 by 11 inches, stating "For Peace in the Gulf." *Id.* at 2040.

3. "Congress shall make no law . . . abridging the freedom of speech . . ." U.S. CONST. amend. I.

4. *Ladue*, 114 S. Ct. at 2047.

5. See discussion *infra* part V.

6. See discussion *infra* part V.

7. Gilleo, a widow with three grown children, was not a novice regarding political protest and unpopular causes. She protested the Vietnam War, campaigned for presidential

of that war by placing a sign⁸ in the front yard of her Ladue, Missouri, home.⁹ Soon afterwards, the sign disappeared.¹⁰ Gilileo replaced her sign, only to find it knocked down shortly thereafter.¹¹ While reporting the vandalism to the Ladue police, Gilileo learned that her sign was prohibited by a Ladue city ordinance.¹² Gilileo sought a variance¹³ for her sign from the city council which was denied.¹⁴

Gilileo then filed suit in federal district court, under 42 U.S.C. § 1983,¹⁵ against the City of Ladue, the Mayor of Ladue, and the City Council of Ladue, alleging Ladue's sign ordinance unconstitutionally prohibited her

candidate Eugene McCarthy, and participated in a letter campaign critical of the Reagan administration's military buildup. Judith Newman et al., *A Sign of the Times: The Supreme Court Must Decide Whether Free Speech Starts in the Front Yard*, PEOPLE WEEKLY, March 21, 1994, at 115.

8. The sign was 24 by 36 inches with the message: "Say No to War in the Persian Gulf, Call Congress Now." *City of Ladue v. Gilileo*, 114 S. Ct. 2038, 2040 (1994). Gilileo paid \$4.00 for the sign. Brief for Respondent at 31, *City of Ladue v. Gilileo*, 114 S. Ct. 2038 (1994) (No. 92-1856), *microformed on* U.S. Supreme Court Records and Briefs (Microform, Inc.). The legal fees in the litigation of this case cost Ladue approximately \$450,000. Carolyn Bower, *Ladue's Bill For Fighting Case Could Exceed \$467,000*, ST. LOUIS POST-DISPATCH, June 14, 1994, at A9.

9. Ladue is a suburb of St. Louis, Missouri, where approximately 9,000 residents live within an area of about 8.5 square miles. *Ladue*, 114 S. Ct. at 2040 n.2. Ladue's residents have an average income of \$56,000, ranking the city as one of the wealthiest in the nation. Bower, *supra* note 8, at A9.

10. *Ladue*, 114 S. Ct. at 2040.

11. *Id.*

12. *Gilileo v. City of Ladue*, 774 F. Supp. 1559, 1560 (E.D. Mo. 1991). The original ordinance prohibited almost all signs in Ladue. For a description of the only signs allowed in Ladue at the time, see *Gilileo v. City of Ladue*, 986 F.2d 1180, 1181-82 n.2 (8th Cir. 1993) (quoting LADUE, MO., CODE ch. 35 (rep'd Jan. 21, 1991)).

13. In zoning law, a variance is the "[p]ermission to depart from the literal requirements of a zoning ordinance by virtue of unique hardship due to special circumstances regarding [a] person's property." BLACK'S LAW DICTIONARY 1553 (6th ed. 1990). Ladue's original ordinance allowed the city council to grant a variance, stating: "The council may . . . permit a variation in the strict application of the provisions and requirements of this chapter where there are practical difficulties or unnecessary hardships, or where the public interest will be best served by permitting such variations." *Gilileo*, 774 F. Supp. at 1561 n.3 (quoting LADUE, MO., CODE ch. 35-5 (rep'd Jan. 21, 1991)).

14. *Id.* at 1561. Gilileo's variance application was the first such request Ladue had considered from one of its homeowners. All other variance applications concerned commercially related requests. *Id.*

15. *City of Ladue v. Gilileo*, 114 S. Ct. 2038, 2040 (1994). 42 U.S.C. § 1983 (1988) provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1988).

freedom of speech.¹⁶ The district court agreed and issued a preliminary injunction, which prevented the city council's enforcement of the sign ordinance.¹⁷ Gilleo then removed her yard signs and taped a small sign inside her home's upstairs window.¹⁸

The city council reacted to the preliminary injunction by repealing the original sign ordinance and enacting a new one.¹⁹ The new ordinance removed the city council's authority to allow variances²⁰ and added a statement of purpose that declared the city's intention not to discriminate against any form of legal speech or expression.²¹ According to the new ordinance, however, Ladue's interests in preventing the "visual blight" of unlimited signs in the city made it necessary for the council to continue the prohibition of residential signs.²²

Gilleo responded to Ladue's new ordinance by filing an amended complaint in federal district court and by moving for summary judgment for a permanent injunction against Ladue's enforcement of the new ordinance.²³ Ladue counterclaimed and requested the court to issue a declaratory judgment that its new ordinance was constitutional.²⁴

The district court granted Gilleo's motion for summary judgment and issued a permanent injunction to prevent Ladue's enforcement of its sign ordinance because the new ordinance, like the old one, was an unconstitutional, content-based discrimination of speech.²⁵

16. *Ladue*, 114 S. Ct. at 2040.

17. The court held that Ladue's sign ordinance had unconstitutionally discriminated against noncommercial speech in favor of commercial speech and unlawfully restricted speech based on its content. *Gilleo*, 774 F. Supp. at 1564.

18. *Ladue*, 114 S. Ct. at 2040. All of the remaining litigation involved the display of the 8.5 by 11 inch sign. *Id.* at 2040-41.

19. *Id.* at 2040.

20. *Id.* at 2040 n.4.

21. *Gilleo*, 774 F. Supp. at 1566-67.

22. *Ladue*, 114 S. Ct. at 2041. The new ordinance stated:

[P]roliferation of an unlimited number of signs in private, residential, [or] . . . public areas of the City of Ladue would create ugliness, visual blight and clutter, tarnish the natural beauty of the landscape as well as the residential and commercial architecture, impair property values, substantially impinge upon the privacy and special ambience of the community, and may cause safety and traffic hazards to motorists, pedestrians, and children[.]

Id. (quoting LADUE, MO., CODE ch. 35 (amended Feb. 25, 1991)). In addition, the new ordinance defined sign to include any type of "name, word, letter, [or] writing . . . used to advertise or promote the interests of any person." *Ladue*, 114 S. Ct. 2040-41 n.5.

23. *Gilleo*, 774 F. Supp. at 1565.

24. *Id.*

25. *Id.* at 1567-68; see *infra* parts III.A.1-2 (discussing the significance of content-based and content-neutral distinctions in freedom of speech litigation).

Ladue appealed to the United States Court of Appeals for the Eighth Circuit, which affirmed the district court's holding that Ladue's sign ordinance violated the First Amendment.²⁶ Relying on the Supreme Court's plurality opinion's analysis in *Metromedia, Inc. v. City of San Diego*,²⁷ the court found Ladue's ordinance to be a content-based regulation,²⁸ therefore requiring Ladue to have a compelling justification for it.²⁹

The court acknowledged Ladue's substantial interests in its ordinance,³⁰ but those interests were not compelling enough to support a restriction of Gilleo's freedom of speech based solely on the content of her sign.³¹ Because Ladue's ordinance allowed the display of certain exempted signs yet prohibited others,³² the court held that Ladue's ordinance unconstitutionally favored commercial speech over noncommercial speech and discriminated against some types of noncommercial speech.³³

On appeal from Ladue, the United States Supreme Court granted certiorari³⁴ and affirmed the lower courts' decisions.³⁵ The Court held that Ladue's sign ordinance was an unconstitutional restriction of Gilleo's right to express herself from the sanctity of her home.³⁶

III. BACKGROUND ON FREEDOM OF SPEECH JURISPRUDENCE

The First Amendment to the United States Constitution forbids Congress from making any law that would restrict the fundamental personal

26. *Gilleo v. City of Ladue*, 986 F.2d 1180, 1184 (8th Cir. 1993).

27. 453 U.S. 490 (1981); see discussion of case *infra* part III.B.1.

28. *Gilleo*, 986 F.2d at 1182.

29. See discussion *infra* parts III.A.1-2 (discussing the standards of review for content-based restrictions and the distinctions between content-based and content-neutral restrictions).

30. *Gilleo*, 986 F.2d at 1183. The court cited Ladue's reasons for its ordinance as the following: "(1) to preserve the natural beauty of the community; (2) to protect the safety of residents; and (3) to maintain the value of real estate." *Id.* at 1182 (citing LADUE, MO., CODE ch. 35, art. I (amended Feb. 25, 1991)).

31. *Id.* at 1184.

32. *Id.* at 1182.

33. *Id.* at 1184. For example, if a Ladue homeowner displayed two signs in her yard that were identical except that one stated "For Sale" (commercial speech) and the other stated "Peace Now" (noncommercial speech), Ladue's ordinance would prohibit the "Peace Now" sign. In addition, Ladue's ordinance would allow a church to display a sign stating "Jesus Saves" (noncommercial speech) but prohibit a homeowner from displaying the same sign in her yard, thus discriminating between types of noncommercial speech.

34. *City of Ladue v. Gilleo*, 114 S. Ct. 55 (1993).

35. *City of Ladue v. Gilleo*, 114 S. Ct. 2038, 2041 (1994).

36. Justice Stevens, writing for the Court, stated: "Most Americans would be understandably dismayed . . . to learn that it was illegal to display from their window an 8-by 11-inch sign expressing their political views." *Id.* at 2047.

liberty of freedom of speech.³⁷ Furthermore, the Fourteenth Amendment to the Constitution³⁸ makes this restriction applicable to the States, including municipal ordinances adopted under state authority.³⁹

Nevertheless, the Supreme Court has stated the right of free speech is not absolute and may be restricted in the face of a significant and justifiable government interest.⁴⁰ For example, speech, by its very nature, combines communicative and noncommunicative features.⁴¹ As a result, the Court has stated that whenever speech and nonspeech components are combined in an individual's expression, a legitimate governmental interest in regulating the nonspeech component may justify some restriction of an individual's First Amendment rights.⁴²

Because the legitimate regulation of the noncommunicative nature of speech affects the actual speech, the Court frequently confronts the dilemma of applying the dictate of the First Amendment to a particular form of communication.⁴³ This confrontation between the government's interests in regulating aspects of speech and First Amendment principles has led to the emergence of the doctrine that any analysis of a freedom of speech restriction issue must be from a viewpoint that recognizes that each form of expression is a unique area of law that reflects the distinctive features inherent in that form of expression.⁴⁴ Thus, the Court confronts different

37. *Lovell v. City of Griffin*, 303 U.S. 444, 450 (1938) (citations omitted).

38. "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law[.]" U.S. CONST. amend. XIV, § 1.

39. *Lovell*, 303 U.S. at 450 (citations omitted).

40. *Members of the City Council v. Taxpayers For Vincent*, 466 U.S. 789, 804 (1984) (citations omitted); see also Justice John Paul Stevens, *The Freedom of Speech*, Address at the Inaugural Ralph Gregory Elliot First Amendment Lecture at Yale Law School (Oct. 27, 1992), in 102 YALE L.J. 1293 (1993). In his address, Justice Stevens explained the Court's rationale: "Whereas the First Amendment sets forth an absolute prohibition against abridgment of 'the' freedom of speech, the Fourteenth Amendment's protection against state deprivations of liberty is, by its terms, a qualified immunity, prohibiting only deprivations 'without due process of law.'" *Id.* at 1299 (footnote omitted).

41. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 502 (1981). A yard sign, for example, consists of the words printed on it and the materials used to construct the sign.

42. *United States v. O'Brien*, 391 U.S. 367, 376 (1968) (upholding a law that punished an anti-war protester's draft-card burning).

43. *Metromedia*, 453 U.S. at 500-01 (citing as examples: *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530 (1980) (regarding billing envelope inserts); *Carey v. Brown*, 447 U.S. 455 (1980) (regarding picketing in residential areas); *Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620 (1980) (regarding door-to-door and on-street solicitation); *Greer v. Spock*, 424 U.S. 828 (1976) (regarding Army bases); *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975) (regarding outdoor movie theaters); *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) (regarding advertising space within city-owned transit system)).

44. *Id.* at 501. "Each method of communicating ideas is 'a law unto itself' and that law

First Amendment problems with each form of speech involved in its analysis.⁴⁵

Accordingly, this note restricts its exploration of First Amendment jurisprudence to that area of constitutional law that is most closely analogous to the issues concerning the government's limitations in restricting speech in the form of signs. In order to adequately discuss the Court's analysis of these issues when it considers the question of the constitutionality of a government ordinance, this note will first review certain key concepts and distinctions critical to First Amendment jurisprudence.⁴⁶

In the next section, this note will discuss: (1) standards of review—levels of scrutiny; (2) content-neutral vs. content-based restrictions; (3) commercial vs. noncommercial speech; and (4) speech on public property vs. speech on private property.

A. Concepts and Distinctions in Freedom of Speech Issues

While the law of signs is a distinct area of First Amendment jurisprudence, several concepts and terms are consistently used by the Court in its analysis of constitutional issues regarding the regulation of speech. The following is an examination of those concepts and terms as they may apply to the regulation of signs.

1. *Standards of Review—Levels of Scrutiny*

The First Amendment forbids government from infringing on its citizens' right to free speech. As discussed above, freedom of speech is not unqualified. Yet, if a law restricts speech, the burden of justifying the purpose of that law falls on the government. Whether the Court will accept a government's purpose as a sufficiently valid reason for restricting protected speech depends upon the Court's application of differing standards of review.⁴⁷

must reflect the 'differing natures, values, abuses and dangers' of each method [of communication]." *Id.* (paraphrasing Justice Jackson's remarks in *Kovacs v. Cooper*, 336 U.S. 77, 97 (1949)).

45. *Id.* at 517. Justice White stated: "[E]ach medium of communication creates a unique set of First Amendment problems[.]" *Id.*

46. "Contemporary free speech jurisprudence is a befuddling array of theories, . . . tests, doctrines, and subject areas. Phrases like . . . 'strict scrutiny,' 'content neutrality,' . . . and 'commercial speech' swirl across the landscape of judicial opinions and scholarly writings, spinning out confusion in their wake." RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH: A TREATISE ON THE FIRST AMENDMENT § 2.01[1] (1994) [hereinafter SMOLLA].

47. See generally Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV.

The Court uses three relatively distinct standards of review in scrutinizing a law restricting speech.⁴⁸ The first, and least difficult, standard for government to meet is reserved for speech generally considered unprotected by the First Amendment. The Court applies this reduced or minimal level of scrutiny to a narrow range of speech categories including obscene speech, defamatory speech, or speech consisting of "fighting words."⁴⁹ The Court will generally defer to government if the restriction "rationally" serves a valid governmental interest.⁵⁰

The intermediate or second level of scrutiny is applied to content-neutral restrictions, where the Court demands the government to have a "significant" or "substantial" interest in furthering its purpose for the restriction.⁵¹ An example of this level of scrutiny is the standard applied to a "time, place, or manner"⁵² restriction. In *Metromedia, Inc. v. City of San Diego*, the Court stated that time, place, or manner restrictions are constitutional if government justifies them without referring to the content of the regulated speech, and the restriction serves a significant governmental interest while leaving sufficient alternative channels available for communi-

46 (1987). The author elaborates on the standards of review and examines in depth the Court's application of those standards. Professor Stone's model of three distinct standards and his insight into the effects of those standards were invaluable in writing this section of the note. The scope of this note, however, does not permit as detailed an analysis. For simplicity's sake, this note will offer a capsule model of the standards of review as used by the Court in other freedom of speech issues.

48. Stone, *supra* note 47, at 47-54.

49. See Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189 (1983) (discussing the merits and limitations of the content-based/content-neutral distinction). Stone notes the Court's position "that several classes of speech have only low first amendment value, including express incitement, false statements of fact, obscenity, commercial speech, fighting words, and child pornography." *Id.* at 194-95 (footnotes omitted). See generally, Paul B. Stephan III, *The First Amendment and Content Discrimination*, 68 VA. L. REV. 203 (1982) (discussing the Court's discrimination of various forms of speech). Stephan defends the Court's "hierarchy" of types of speech, stating:

The approach reflected in the Court's free speech opinions . . . posits some hierarchy of values entitled to constitutional protection. Such a hierarchy implies a similar ranking of particular categories of expression, according to the degree the expression implicates the underlying values. No sensible approach to first amendment questions can dispense with such a hierarchy, although the particular categories and the degree of protection they receive vary with the theory adopted.

Id. at 206. Furthermore, he states: "[D]istinguishing speech according to its content is the only intelligible way to commence any first amendment [sic] analysis." *Id.* at 251.

50. Stone, *supra* note 47, at 50; see also SMOLLA, *supra* note 46, § 3.01[2][b][iv].

51. SMOLLA, *supra* note 46, § 3.01[2][b][I]; see also Stone, *supra* note 47, at 52-53 and discussion *infra* part III.A.2 (discussing content distinctions).

52. A "time, place, or manner" restriction imposes restraints based on when, where, or how speech occurs, and not based on the content of the speech. SMOLLA, *supra* note 46, § 3.02[3][a].

cation.⁵³

In *United States v. O'Brien*,⁵⁴ the Court stated it would also demand that the regulation's purpose not be specifically aimed at the suppression of speech, and the restriction of speech must be no more than essential to the advancement of the purpose of the regulation.⁵⁵ However, a valid restriction does not need to be the least restrictive means available to the government, if the regulation effectively furthers the governmental interest in regulating the speech.⁵⁶

The highest level of review is a standard of strict scrutiny.⁵⁷ This standard insists that the governmental interest be "compelling" rather than substantial or significant and requires government to show the necessity of the challenged restriction to achieve that interest.⁵⁸ The Court reserves this standard of review for content-based laws, and rarely will a law be upheld when subjected to this standard.⁵⁹

2. *Content-Neutral vs. Content-Based Restrictions*

A crucial question in First Amendment jurisprudence is whether a restriction is content-neutral or content-based.⁶⁰ The outcome of most freedom-of-speech litigation depends on the Court's classification of a restriction because the Court increases its level of scrutiny if it finds the restriction content-based and decreases its level of scrutiny for content-neutral restrictions.⁶¹

Content-neutral restrictions regulate speech without regard to its content. Often, these restrictions aim at the noncommunicative aspects of

53. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 516 (1981) (quoting *Virginia State Pharmacy Bd. v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771 (1976)).

54. *United States v. O'Brien*, 391 U.S. 367 (1968).

55. *Id.* at 377. The Court stated the "regulation is sufficiently justified if . . . it furthers an important or substantial governmental interest; if the . . . interest is unrelated to the suppression of free expression; and if the incidental restriction . . . is no greater than is essential to the furtherance of that interest." *Id.*

56. *Ward v. Rock Against Racism*, 491 U.S. 781 (1989) (clarifying the legal standard applicable to time, place, or manner restrictions).

57. *Stone*, *supra* note 47, at 53-54.

58. *Stone*, *supra* note 47, at 53-54.

59. *SMOLLA*, *supra* note 46, § 3.02[1][a]; *see also* PHILIP B. KURLAND AND GERHARD CASPER, 126 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 903 (Supp. 1980) (presenting the reprinted oral arguments of *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981), where an unidentified Justice suggested that the compelling state interest test is a test that a state cannot pass).

60. *See SMOLLA*, *supra* note 46, § 3.02[1][a]. *See also Stone*, *supra* note 49, at 189-190.

61. *SMOLLA*, *supra* note 46, § 3.02[1][a].

speech. For example, a city government's regulation may prohibit all signs posted on utility poles, regardless of any particular sign's content, in an effort to maintain the city's aesthetics.⁶² Content-neutral laws face a decreased burden, or level of scrutiny, and often are upheld by the Court.⁶³

In contrast, content-based restrictions regulate the message conveyed by speech. For example, a city regulates the message, not the medium, when it prohibits all "For Sale" signs displayed in residential areas, due to the fear that those signs will induce widespread "panic selling."⁶⁴ The Court increases the government's burden to justify such restrictions, utilizing a level of scrutiny termed strict scrutiny. Usually government cannot meet this burden and thus the Court will strike down the law.⁶⁵

In determining the constitutionality of a government's restriction of speech, the Court follows a set of predictable rules.⁶⁶ First, the Court determines whether the contested regulation is content-based or content-neutral. The traditional rule presumes any content-based restriction of protected speech unconstitutional,⁶⁷ based on the principle that government has no right to restrict the message or content of speech, otherwise enabling it to control public debate.⁶⁸ The Court tempers this sweeping pronouncement by acknowledging government's legitimate interests in regulating the noncommunicative features of speech.⁶⁹ As a result, the Court will follow a general rule that government's content-neutral restrictions are permissible, so long as government's purpose is significant or substantial.⁷⁰

62. See, e.g., *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984); see also discussion of case *infra* part III.B.2.

63. SMOLLA, *supra* note 46, § 3.02[1][a].

64. See, e.g., *Linmark Assocs., Inc. v. Township of Willingboro*, 431 U.S. 85 (1977).

65. "[W]e reaffirm that it is the rare case in which we have held that a law survives strict scrutiny." *Burson v. Freeman*, 504 U.S. 191, 211 (1992) (upholding a Tennessee statute prohibiting solicitation of votes and display or distribution of campaign materials near polling place).

66. See generally Kathleen Sullivan, Foreword, *The Supreme Court, 1991 Term*, 106 HARV. L. REV. 22, 56-69 (1992) (discussing how the Court uses rules and standards in its decisions).

67. *Simon & Schuster, Inc. v. Members of the New York Crime Victims Bd.*, 502 U.S. 105, 115 (1991) (citations omitted) (holding unconstitutional a law requiring accused or convicted criminal's income from literary works describing his or her activity be made available to crime victims). "Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment." *Id.*

68. "[A]bove 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 Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) (citations omitted) (holding unconstitutional an ordinance prohibiting all picketing except that involving labor disputes).

69. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 517 (1981).

70. *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984) (citations omitted).

Ironically, the Court's traditional adherence to these "black-letter" rules,⁷¹ which distinguish between content-neutral and content-based restrictions of speech, creates the possibility government could restrict much more total speech with a content-neutral law than it could with an explicit content-based law.⁷²

Government, theoretically, could impose a content-neutral ban of an entire mode of expression and avoid strict scrutiny, while surreptitiously targeting a specific speaker, thus achieving its unstated purpose of content discrimination.⁷³ Therefore, critics of the Court's content-distinction rules suggest the Court apply a single standard of strict review to any restriction of speech.⁷⁴

Defenders of the Court's unequal standards of review for content-neutral and content-based restrictions emphasize government's legitimate

71. Stevens, *supra* note 40, at 1301. In his address, Stevens noted: "While black-letter rules have their appeal as a means of deciding cases, they also carry the risk that specific facts may be discounted and, as a result, that deserving speech may be left unprotected while unimportant speech is overprotected." Stevens, *supra* note 40, at 1301. Stevens added: "[I]t seems to me that the attempt to craft black-letter or bright-line rules of First Amendment law often produces unworkable and unsatisfactory results, especially when an exclusive focus on rules of general application obfuscates the specific facts at issue and interests at stake in a given case." Stevens, *supra* note 40, at 1307.

72. *Clark v. Community For Creative Non-Violence*, 468 U.S. 288, 312-13 (1984) (Marshall, J., dissenting) (upholding regulation prohibiting protesters camping in certain national parks). In dissent, Justice Marshall observed:

[T]he Court has dramatically lowered its scrutiny of governmental regulations once it has determined that such regulations are content-neutral. . . . By narrowly limiting its concern to whether a given regulation creates a content-based distinction, the Court has seemingly overlooked the fact that content-neutral restrictions are also capable of unnecessarily restricting protected expressive activity.

Id. at 313. Justice Marshall added:

[T]his case reveals a mistaken assumption regarding the motives and behavior of government officials who create and administer content-neutral regulations. The Court's salutary skepticism of Governmental decisionmaking in First Amendment matters suddenly dissipates once it determines that a restriction is not content-based. . . . What the Court fails to recognize is that public officials have strong incentives to overregulate even in the absence of an intent to censor particular views.

Id. at 314-15; see also Martin H. Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113 (1981) (suggesting that all governmental regulations of speech be subjected to strict scrutiny). The author states: "While governmental attempts to regulate the content of expression undoubtedly deserve strict judicial review, it does not logically follow that equally serious threats to first amendment freedoms cannot derive from restrictions imposed to regulate expression in a manner unrelated to content." Redish, *supra*, at 150.

73. See, e.g., Redish, *supra* note 72 and accompanying text.

74. See, e.g., Redish, *supra* note 72, at 150.

interests in regulating certain aspects of speech.⁷⁵ The supporters argue the Court already provides adequate protection against government's impermissible regulation of the content of speech by demanding a compelling governmental interest in furthering its purpose for speech's regulation.⁷⁶ Alternatively, a content-neutral restriction sustained by a legitimate governmental interest must be considered without the undue hindrance of the Court's strict scrutiny.

Notwithstanding the legitimate criticism of the Court's traditional content-distinction rules, thus far the rules have provided the Court a relatively predictable framework of analysis in its attempt to maintain a dynamic and essential public debate.⁷⁷

3. *Commercial vs. Noncommercial Speech*

Another critical distinction in First Amendment jurisprudence exists between commercial speech and noncommercial speech. Lower courts once assumed that commercial speech was left unprotected by the First Amendment.⁷⁸ In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,⁷⁹ the Court removed all doubt concerning the extension of the First Amendment to commercial speech,⁸⁰ when it specifically held commercial speech within the purview of the First Amendment.⁸¹ The Court did not, however, grant commercial speech equality of treatment with noncommercial speech under the First Amendment.⁸²

75. See, e.g., Stone, *supra* note 47, at 117. "[E]xtension of the strict standards of content-based review to content-neutral restrictions would hamstring regulations that are practical and necessary exercises of state power and lead ultimately to a dilution of the strict standards of content-based review." *Id.* See also Stone, *supra* note 49, at 251, in which the author states: "An understanding of the first amendment that fails to distinguish between content-neutral and [content]-based restrictions would treat problems that are different as if they were alike. . . . It would unduly enhance the protection accorded to content-neutral restrictions, at the expense of competing governmental interests[.]"

76. See generally Stone, *supra* note 49, at 251-52.

77. Stone, *supra* note 47, at 117.

78. See, e.g., *Bigelow v. Virginia*, 421 U.S. 809, 825 (1975) (holding a Virginia statute that criminalized the advertisement of abortion services an unconstitutional infringement of protected speech). "We conclude, therefore, that the Virginia courts erred in their assumptions that advertising . . . was entitled to no First Amendment protection[.]" *Id.*

79. 425 U.S. 748 (1976).

80. *Id.* at 760-62.

81. *Id.* at 761. "Our question is whether speech which does 'no more than propose a commercial transaction' . . . lacks all [First Amendment] protection. Our answer is that it is not." *Id.* at 762 (citations omitted).

82. *Id.* at 771 n.24. The Court noted: "In concluding that commercial speech enjoys First Amendment protection, we have not held that it is wholly undifferentiable from other forms." *Id.*

Since *Virginia State Board of Pharmacy*, the Court has remained consistent in its doctrine of limited constitutional protection for commercial speech.⁸³ The Court imposes an intermediate level of scrutiny when confronted with the constitutionality of a regulation of commercial speech. The Court requires commercial speech regulations to be supported by a substantial governmental interest that is directly advanced by the regulation, with the regulation being no more extensive than necessary to serve that purpose.⁸⁴ In *Metromedia*, the Court stated it would continue to observe the distinction between commercial and noncommercial speech, noting commercial speech could be banned or regulated in situations where noncommercial speech could not be.⁸⁵

The Court affords commercial speech less First Amendment protection than it does noncommercial speech. Consequently, government faces a considerably lessened burden when justifying its restriction on commercial speech than the burden it faces in justifying the same restriction on noncommercial speech.⁸⁶

4. *Speech on Public Property vs. Private Property*

Speech receives varying degrees of First Amendment protection depending on where the speech occurs. The First Amendment provides the least protection when speech occurs on nonpublic forum property and the highest level of protection when speech occurs on private property or is broadcast from one's home.⁸⁷

Public property, when viewed as a forum for speech, is divided into two traditional categories: nonpublic forum property, and designated, or traditional, public forum property.⁸⁸ The nonpublic forum property classification applies to government owned property that is not traditionally, or by designation, an area for public use or public expression.⁸⁹ For example, public speech on a military base, albeit publicly owned in a literal sense, may be severely restricted. In these instances, the Court extends

83. *SMOLLA*, *supra* note 46, § 3.01[2][b][iv] (citing *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980)).

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

85. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 506 (1981) (citations omitted); *see also* discussion of case *infra* part III.B.1.

86. *See* discussion *supra* part III.A.1 (discussing the effect of the Court's application of its standards of review).

87. *Stone*, *supra* note 47, at 86-94.

88. *See Stone*, *supra* note 47, at 88-90.

89. *Stone*, *supra* note 47, at 89.

government all the inherent rights it would a private property owner.⁹⁰

First Amendment protection is increased substantially, however, for traditional, or designated, public forum property.⁹¹ For example, people use public streets and parks as areas for assembly and open discussion of important (and trivial) topics.⁹² The Court increases the government's burden by heightening its scrutiny in examining laws restricting speech in these traditionally public forums.⁹³

Speech on private property, especially delivered from one's home, receives the most protection of the property classifications. For example, in *Spence v. Washington*,⁹⁴ the Court upheld a citizen's right to express himself from his home and emphasized it would carefully examine any restriction of speech occurring on private property.⁹⁵

The significance of where speech occurs is that it establishes the different standards of review applied to each forum and how each standard affects the likelihood of that restriction withstanding constitutional review. Thus, a law restricting a particular mode of communication may be constitutional in one area and unconstitutional in another.

B. Application of Concepts and Distinctions

In freedom-of-speech litigation, the battle begins, and often ends, with each opposing litigant's efforts to characterize the disputed law in the light most favorable to his or her cause. Obviously, government seeks to have its law reviewed by the Court's lowest level of scrutiny and the restricted speaker seeks the Court's strict scrutiny of the objectionable regulation. The following review of two Supreme Court cases involving the display of signs illustrates this battle and further clarifies the previously discussed concepts and distinctions.

90. Stone, *supra* note 47, at 86.

91. *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 813 (1983) (citation omitted). See discussion of case *infra* part III.B.2.

92. *Hague v. CIO*, 307 U.S. 496, 515-16 (1939).

93. See Stone, *supra* note 47, at 90-94.

94. *Spence v. Washington*, 418 U.S. 405 (1974) (involving a person's right to protest the Vietnam War by displaying a U.S. flag affixed with a peace symbol from his home's window).

95. *Id.* at 411. The Court stated that any law restricting speech from private property would be "examine[d] with particular care." *Id.*

1. *Metromedia, Inc. v. City of San Diego*⁹⁶

The Court first addressed the constitutionality of billboard regulation in *Metromedia*.⁹⁷ This case involved San Diego's ordinance prohibiting all billboards⁹⁸ in the city, except on-site⁹⁹ commercial billboards. The ordinance provided another exception for specific types of signs, including temporary political signs.¹⁰⁰ Billboard owners challenged the ordinance, claiming it unlawfully prohibited two modes of communication: off-site commercial signs and noncommercial signs.¹⁰¹

In Justice White's plurality opinion,¹⁰² the Court upheld the city's right to restrict commercial speech, but only if the city's restriction advanced a substantial interest or purpose.¹⁰³ San Diego's interest in maintaining its aesthetics and its concern for traffic safety met the Court's test of substantiality,¹⁰⁴ but the ordinance failed constitutional muster because it allowed commercial signs in locations where noncommercial signs were prohibited.¹⁰⁵ In addition, the ordinance was unconstitutionally content-based because it preferred some noncommercial speech over other noncommercial speech.¹⁰⁶

Concurring, Justice Brennan viewed the ordinance as a total ban of protected speech.¹⁰⁷ Agreeing with the plurality that the ordinance was

96. 453 U.S. 490 (1981).

97. See *id.* at 556 (Burger, C.J., dissenting).

98. *Id.* at 493. The city defined billboards as "outdoor advertising display signs." *Id.* Those signs included "any sign that 'directs attention to a product, service or activity, event, person, institution or business.'" *Id.* at 494.

99. *Id.* "On-site" refers to a sign whose message refers to that property. For example, a restaurant owner could erect a sign on the property where the restaurant was located, but could not erect a sign "off-site," that is, on some other property.

100. *Id.* at 494-96.

101. *Id.* at 503-04.

102. Five Justices wrote opinions: See *id.* at 493 (White, J., for the Court); *id.* at 521 (Brennan, J., concurring); *id.* at 540 (Stevens, J., dissenting in part, concurring in part); *id.* at 555 (Burger, C.J., dissenting); *id.* at 569 (Rehnquist, J., dissenting). Justice Rehnquist, commenting on the numerous opinions in this case, observed: "In a case where city planning commissions and zoning boards must regularly confront constitutional claims of this sort, it is a genuine misfortune to have the Court's treatment of the subject be a virtual Tower of Babel, from which no definitive principles can be clearly drawn[.]" *Id.* at 569.

103. *Id.* at 507-09.

104. *Id.* at 508-09.

105. *Id.* at 511-12. Justice White noted: "San Diego effectively inverts this judgment [of noncommercial speech accorded more protection than commercial speech], by affording a greater degree of protection to commercial than to noncommercial speech." *Id.* at 513.

106. *Id.* at 515.

107. *Id.* at 522. Because the ordinance contained exceptions to a general ban, the plurality did not consider the constitutionality of a total ban on billboards. *Id.* at 514 n.20 ("Because a total prohibition of outdoor advertising is not before us, we do not indicate

unconstitutional, Justice Brennan disagreed that San Diego had met its burden of showing a substantial interest in support of its restriction.¹⁰⁸ He did not believe that San Diego's concerns for its aesthetics were sufficient justification for a total ban of a particular mode of communication.¹⁰⁹

Metromedia's plurality reinforced several critical First Amendment distinctions. First, a local government's restrictions may not favor commercial speech over noncommercial speech. Second, content-based restrictions are subject to a high level of scrutiny. Nevertheless, *Metromedia* left unanswered the significant question whether a total ban of signs issued to serve aesthetic concerns is constitutional.

2. *Members of the City Council v. Taxpayers for Vincent*¹¹⁰

In *Taxpayers for Vincent*, the Court considered the constitutionality of a Los Angeles ordinance that completely prohibited posting signs on public property.¹¹¹ Taxpayers for Vincent, a political support group for city council candidate Roland Vincent,¹¹² challenged the ordinance on First Amendment grounds because it prevented the group from posting campaign signs on the city's utility poles.¹¹³

Taxpayers argued the city's aesthetic concerns could not justify the sweeping prohibition of speech.¹¹⁴ The Court disagreed and upheld the ordinance. Relying on its reasoning in *Metromedia*, the Court found the city's aesthetic interest in avoiding "visual clutter" substantial, justifying the ordinance's content-neutral ban.¹¹⁵

whether such a ban would be consistent with the First Amendment.").

108. *Id.* at 528.

109. *Id.* Justice Stevens, however, supported the city's power to ban all billboards based on its aesthetic concerns. *Id.* at 553 (Stevens, J., dissenting). He stated any ordinance restricting outdoor advertising would pass First Amendment review if the regulation was content-neutral and "the market which remains open . . . is ample and not threatened by gradually increasing restraints." *Id.* at 522. Justice Rehnquist agreed, stating "[t]he aesthetic justification alone is sufficient to sustain a total prohibition of billboards within a community." *Id.* at 570 (Rehnquist, J., dissenting) (citations omitted).

110. 466 U.S. 789 (1984).

111. *Id.* at 791-92. The ordinance banned all signs posted on public property, regardless of content. *Id.* at 791 n.1.

112. *Id.* at 792.

113. *Id.* at 793-94.

114. *Id.* at 802.

115. *Id.* at 806-07. In his opinion, Justice Stevens stated: "We reaffirm the conclusion of the majority in *Metromedia*. The problem addressed by this ordinance—the visual assault on the citizens of Los Angeles presented by an accumulation of signs posted on public property—constitutes a significant substantive evil within the City's power to prohibit." *Id.* at 807.

In its analysis, the Court determined the ordinance provided the petitioners with adequate alternative modes of communication because the ordinance did not affect a person's speech or right to distribute campaign material other than to prohibit the posting of signs on public property.¹¹⁶ Also, the Court dismissed Taxpayers' argument that the city's utility poles and other public property covered by the ordinance should be considered public forum property, thus entitling it to greater First Amendment protection.¹¹⁷ The Court noted the failure of Taxpayers to show any traditional right extended by government to its citizens to have access to utility poles in the same manner as the right extended to the access of traditional public forum sites, like parks or streets.¹¹⁸

Finally, the Court rejected Taxpayers' contention that political campaign signs must be exempted from the ordinance due to the First Amendment protection given political speech.¹¹⁹ The Court explained that an ordinance with exceptions for political speech, or any equally valued form of speech, would constitute an unlawful content discrimination.¹²⁰ More importantly, any exceptions to the total ban would undermine the effectiveness of the ordinance in maintaining the city's aesthetics.¹²¹

IV. REASONING OF THE COURT IN *LADUE*

In *City of Ladue v. Gilleo*,¹²² the Supreme Court held Ladue's sign ordinance violated Margaret Gilleo's First Amendment rights to freedom of expression, despite Ladue's valid interest in protecting against the potential visual blight of sign proliferation.¹²³

116. *Id.* at 812. The Court explained: "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." *Id.* (citations omitted).

117. *Id.* at 813-14.

118. *Id.* at 814. "Appellees' reliance on the public forum doctrine is misplaced. They fail to demonstrate the existence of a traditional right of access respecting such items as utility poles . . . comparable to that recognized for public streets and parks, and it is clear that 'the First Amendment does not guarantee access to government property simply because it is owned or controlled by the government.'" *Id.* (citing *United States Postal Serv. v. Greenburgh Civic Ass'ns*, 453 U.S. 114, 129 (1981)).

119. *Id.* at 816. The Court emphasized in its analysis the mode of communication involved as opposed to the content of the speech. "[N]othing in the findings indicates that the posting of political posters on public property is a uniquely valuable or important mode of communication[.]" *Id.* at 812.

120. *Id.* at 816-17.

121. *Id.*

122. 114 S. Ct. 2038 (1994).

123. *Id.* at 2047.

The Court began its analysis by emphasizing the unique problems municipalities face in sign regulation.¹²⁴ The Court indicated a municipality's regulations will be much less constitutionally suspect if its regulations narrowly limit certain aspects of signs as opposed to simply prohibiting them.¹²⁵

The Court then identified the framework it would use to analyze the constitutionality of a municipal ordinance regulating the display of signs: either an ordinance is underinclusive in its prohibitions, or an ordinance is overinclusive in its prohibitions.¹²⁶ If an ordinance restricts signs based on their content or message, then the Court considers that ordinance underinclusive.¹²⁷ Further, if the ordinance is content-based, the Court demands the municipality have a compelling purpose for that discrimination, due to the Court's concern that if an ordinance regulated messages based on content, the ordinance could easily be transformed into government's unlawful attempt to control public debate.¹²⁸

Ladue argued the exemptions to its sign ordinance were content-neutral and that those exemptions were based solely on the grounds that certain types of signs tended to proliferate and other types did not.¹²⁹ Departing from its traditional First Amendment analysis,¹³⁰ the Court accepted, *arguendo*, Ladue's assertion that its sign ordinance's exemptions were content-neutral and proceeded to an overinclusive analysis of Ladue's sign ordinance.

The Court indicated the first question it asks when using an overinclusive analysis is whether Ladue could lawfully prohibit Gilleo from displaying her sign, thereby eliminating an entire means of communication.¹³¹ If the Court determined it was constitutionally proper for Ladue to

124. *Id.* at 2041-42.

125. *Id.* at 2045.

126. *Id.* at 2043 (citing *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 512-17, 525-34 (1981)). The Court consolidates two of *Metromedia*'s concurring opinions and forges a two-pronged analysis for constitutional challenges of municipal ordinances regulating signs.

127. *Id.*

128. *Id.* Concurring, Justice O'Connor stated: "With rare exceptions, content discrimination in regulations of the speech of private citizens on private property or in a traditional public forum is presumptively impermissible, and this presumption is a very strong one." *Id.* at 2047 (citation omitted). Justice Stevens, however, notes that while content-discriminatory restrictions are strictly scrutinized, "[o]f course, not every law that turns on the content of speech is invalid." *Id.* at 2043 n.10 (citation omitted).

129. *Id.* at 2043-44.

130. Justice O'Connor thought Ladue's ordinance did draw content distinctions, therefore, "[t]he normal inquiry . . . is, first, to determine whether a regulation is content-based or content-neutral, and then, based on the answer to that question, to apply the proper level of scrutiny." *Id.* at 2047 (O'Connor, J., concurring).

131. *Id.* at 2043. The prohibition was overinclusive because it restricted too much

restrict Gilleo's sign, only then should the Court consider if it was unconstitutional for Ladue to allow the display of other signs while restricting Gilleo's sign.¹³²

To determine the constitutionality of a regulation prohibiting an entire mode of communication, the Court indicated it would consider several factors, including the following: (1) whether the mode of communication is completely prohibited or whether the mode is merely limited, with satisfactory alternatives available to the persons affected;¹³³ (2) whether the mode of communication is uniquely valuable or important;¹³⁴ and (3) whether the government's purposes for the prohibitions are sufficiently compelling.¹³⁵ The Court emphasized it would be particularly concerned with any law that foreclosed an entire mode of speech or expression¹³⁶ because the law still presented the danger of suppressing too much speech, even if the law's prohibitions were content-neutral.¹³⁷

The Court determined that Ladue's ordinance was all but complete in its prohibition of residential signs and effectively closed off that medium to political and personal messages.¹³⁸ In addition, Ladue did not leave adequate alternative means of communicating the prohibited speech.¹³⁹ According to the Court, residential signs provide an especially convenient and inexpensive method of communicating, without practical substitutes, which enable people to actively participate in vital public debate.¹⁴⁰ As a result, citizens might shirk their responsibility of involvement in public debate if forced to seek more expensive and less available alternatives.¹⁴¹

The Court next discussed the unique stature of residential signs as a medium of expression.¹⁴² The Court noted signs have historically been an essential form of expression available to people from all walks of life for expression of their views on pivotal issues, especially in support of political

speech. *Id.*

132. *Id.* at 2044.

133. *Id.* at 2045.

134. *Id.*

135. *Id.* at 2044-45.

136. *Id.* at 2044.

137. *Id.* at 2045.

138. *Id.*

139. *Id.* at 2046. Gilleo argued Ladue's ordinance lacked the precision necessary to allow alternate means for her expression. "Ladue's ordinance has all the precision of a meat-ax." Brief for Respondent at 29, *City of Ladue v. Gilleo*, 114 S. Ct. 2038 (1994) (No. 92-1856), *microformed on* U.S. Supreme Court Records and Briefs (Microform, Inc.).

140. *Ladue*, 114 S. Ct. at 2046.

141. *Id.*

142. "Ladue has almost completely foreclosed a venerable means of communication that is both unique and important." *Id.* at 2045.

candidates, issues, and parties.¹⁴³

Residential signs perform an essential role in community life, according to the Court, because they provide a distinctive message about the identity of the speaker.¹⁴⁴ Furthermore, a person who puts a sign in her yard may intentionally wish to communicate with her neighbors, choosing this medium as the most effective way to express her thoughts or ideas to other residents.¹⁴⁵

More importantly, the Court acknowledged the respect our culture and law accords the sanctity of the home, especially when government attempts to restrict speech within that sanctity.¹⁴⁶ The Court held that Ladue's purposes for its prohibition¹⁴⁷ were not compelling enough to regulate speech expressed from the privacy of a person's home.¹⁴⁸ The Court stated that while there will always be a need for government mediation between competing uses for public areas and facilities, the government's need to regulate speech from the home is much less compelling.¹⁴⁹

In rejecting Ladue's contention that its purposes for the sign prohibition justified the suppression of Gilleo's freedom of speech,¹⁵⁰ the Court noted it did not leave Ladue without the means to address the visual blight caused by proliferation of residential signs.¹⁵¹ Regulations that fall short of a total ban would be far more agreeable to the Court when under its review.¹⁵² The Court left most of the responsibility to regulate residential signs to those most directly affected—the residents.¹⁵³ Residents' interests, particularly that

143. *Id.*

144. *Id.* at 2046 ("A sign advocating 'Peace in the Gulf' in the front lawn of a retired general or decorated war veteran may provoke a different reaction than the same sign in a 10-year-old child's bedroom window or the same message on a bumper sticker of a passing automobile.").

145. *Id.*

146. *Id.* at 2047 (citing *Spence v. Washington*, 418 U.S. 405, 406 (1974)); see also Brief for Respondent at 19, *City of Ladue v. Gilleo*, 114 S. Ct. 2038 (1994) (No. 92-1856), *microformed on* U.S. Supreme Court Records and Briefs (Microform, Inc.) ("[I]f the First Amendment does not protect a citizen's right to maintain a small unobtrusive sign at her own home expressing her views on an important public issue, it is hard to imagine what it does protect.").

147. "Ladue's sign ordinance is supported principally by the City's interest in minimizing the visual clutter associated with signs, an interest that is concededly valid . . ." *Ladue*, 114 S. Ct. at 2044-45.

148. *Id.* at 2047.

149. *Id.*

150. *Id.* at 2043.

151. *Id.* at 2047.

152. *Id.* ("We are confident that more temperate measures could in large part satisfy Ladue's stated regulatory needs without harm to the First Amendment rights of its citizens.")

153. *Id.*

of maintaining their property values, should diminish the likelihood of visual blight caused by the proliferation of signs.¹⁵⁴

In the only concurring opinion, Justice O'Connor agreed with the Court's conclusion that Ladue's ordinance was unconstitutional.¹⁵⁵ Nevertheless, she expressed regret the Court did not use its traditional analysis in its inquiry into the permissibility of Ladue's sign ordinance.¹⁵⁶ She thought the Court should have first determined if the ordinance was content-neutral or content-based and then applied the proper level of scrutiny.¹⁵⁷ Her regret was not in preferring one analysis over another, but rather in the belief that in using and confronting the existing First Amendment doctrine regarding content-based versus content-neutral regulations, the Court might have modified the traditional doctrine in order to correct its weaknesses.¹⁵⁸

V. SIGNIFICANCE

At first glance, the Court's decision in *Ladue* did not break new ground in First Amendment jurisprudence. Although the Court had never confronted the issue before *Ladue*, lower state and federal courts have never upheld a complete ban on all noncommercial residential signs.¹⁵⁹ *Ladue*'s outcome was predictable; no one, except perhaps the city, imagined the Court would allow Ladue to restrict Gilleo's small window sign displayed inside her home.¹⁶⁰ Yet, *Ladue* may stand as a significant departure from the Court's traditional analysis of government's content-neutral speech restrictions.¹⁶¹

154. *Id.*

155. *Id.* at 2047-48.

156. *Id.*

157. *Id.*

158. *Id.* at 2048.

159. The Solicitor General, as amicus curiae supporting Gilleo, stated: "Our review of published federal and state court decisions has revealed no case upholding such a ban." Brief for the United States as Amicus Curiae Supporting Respondent at 18 n.18, *City of Ladue v. Gilleo*, 114 S. Ct. 2038 (1994) (No. 92-1856), *microformed on* U.S. Supreme Court Records and Briefs (Microform, Inc.); *see also id.* at 18-19 for a list of cases supporting position.

160. *See, e.g.,* Dwight Merriam et al., *The First Amendment In Land Use Law*, C851 A.L.I.-A.B.A. 1007 (1993), *available in* Westlaw, TP-ALL database. The article, written before the *Ladue* decision, recommends how city planners and lawyers may avoid drafting constitutionally suspect sign ordinances, noting that "[a] total ban on all political or ideological signs in residential areas is unconstitutional." *Id.* at 1034.

161. *See* Gerald P. Greiman, *A Good Sign in Ladue*, ST. LOUIS POST DISPATCH, June 19, 1994, at B3. According to Greiman (who was Gilleo's counsel in *Ladue*), "[t]he Supreme Court [in *Ladue*] signaled a new willingness to examine carefully and sometimes invalidate content-neutral speech restrictions. This approach stands in contrast to the court's [sic] hands-off attitude toward content-neutral speech restrictions in recent years." *Id.*

In *Metromedia*, the Court declined to answer whether a city's content-neutral ban on billboards, without allowing exceptions that would otherwise dilute the totality,¹⁶² would be constitutional. Both Justice Stevens and then Justice Rehnquist, however, stated in *Metromedia* their approval of a content-neutral ban of all billboards, based on government's aesthetic purposes.¹⁶³ In *Taxpayers for Vincent*, the Court upheld a total ban on all signs based on the city's aesthetic purposes, although the ban only applied to the display of signs on public property.¹⁶⁴ The question remained whether the Court would extend this philosophy to noncommercial signs in residential areas.

Ladue answered the question with a unanimous no. The Court subtly shifted the balance of interests in the battle over government's power to restrict its citizens' speech away from a posture favoring government and towards one more sensitive to citizens' right to speak without undue restriction.¹⁶⁵ *Ladue* sent a clear message to government that its restrictions must be narrowly defined and must leave adequate alternatives to the mode of communication it seeks to restrict.¹⁶⁶ In addition, *Ladue* established that government's aesthetic purposes will not be sufficiently substantial to justify a total ban of residential signs.¹⁶⁷

Above all, *Ladue* signals the possibility the Court may revise its standard of review for government's restrictions of speech.¹⁶⁸ Justice

162. Once government allows any exceptions to an otherwise complete ban it subjects the ban to attack because the exemptions are a form of content discrimination. In *Ladue*, Justice Stevens gave an additional reason: "Exemptions from an otherwise legitimate regulation of a medium of speech may be noteworthy for a reason quite apart from the risks of . . . content discrimination: they may diminish the credibility of the government's rationale for restricting speech in the first place." *Ladue*, 114 S. Ct. at 2044.

163. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 542 and 570 (1981).

164. *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 817-18 (1983).

165. See, e.g., *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 312-316 (1984) (Marshall, J., dissenting). Justice Marshall indicated his concern that the Court's "salutary skepticism of Governmental decisionmaking in First Amendment matters suddenly dissipates once it determines that a restriction is not content-based." *Id.* at 314-15.

166. *Ladue*, 114 S. Ct. at 2046. The Court emphasized the unique qualities of yard signs and cautioned that a particular mode of communication may not have an adequate substitute. *Id.* Justice Stevens noted: "Residential signs are an unusually cheap and convenient form of communication. Especially for persons of modest means or limited mobility, a yard or window sign may have no practical substitute." *Id.* Moreover, "[w]e do not think the mere possibility that another medium could be used in an unconventional manner to carry the same messages alters the fact that *Ladue* has banned a distinct and traditionally important medium of expression." *Id.* at 2046 n.16 (citations omitted) (responding to *Ladue*'s argument that flags, which were not banned by its ordinance, were "viable alternative[s] to signs").

167. The Court's decision rested entirely on whether *Ladue*'s ordinance, based on concerns for its aesthetics, justified a complete ban of signs. *Id.* at 2047.

168. Justice O'Connor, concurring with the Court's holding, noted the departure from the Court's usual analysis of first determining whether a regulation is content-neutral or content-

Stevens' approach is simple, yet profound in its effect.¹⁶⁹ Before considering whether the restriction is content-neutral or content-based, Steven's analysis begins with the question: Does government seek to restrict too much speech?¹⁷⁰ If the Court determines the regulation is not too restrictive,¹⁷¹ then, and only then, will the Court inquire into the content-neutral or content-based nature of the restriction.¹⁷² By shifting the Court's emphasis away from the traditionally deferential review of content-neutral regulations, *Ladue's* analysis increases the burden government bears to justify its restriction of noncommercial speech on private property.¹⁷³

based and then applying the appropriate level of scrutiny. *Id.* at 2047 (O'Connor, J., concurring). She defended the Court's normal rule, stating "though our rule has flaws, it has substantial merit as well. It is a rule, in an area where fairly precise rules are better than more discretionary and more subjective balancing tests. . . . On a practical level, it has . . . led to seemingly sensible results. And, *perhaps most importantly, no better alternative has yet come to light.*" *Id.* at 2048 (citations omitted) (emphasis added).

169. Justice Steven's constitutional philosophy seems to have greatly influenced *Ladue's* First Amendment analysis. His influence on the decision is noteworthy for two reasons. First, Stevens has persuaded the Court to abandon its traditional rule analysis (*see supra* note 168), in favor of an analysis that "considers the content and context of the regulated speech, and the nature and scope of the restriction on speech." *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2567 (1992) (Stevens, J., concurring in the judgment). In *R.A.V.*, Stevens elaborates on his disapproval of black-letter rules or categorical approaches in First Amendment jurisprudence by stating:

Admittedly, the categorical [or black-letter rule] approach to the First Amendment has some appeal: either expression is protected or it is not—the categories create safe harbors for governments and speakers alike. But this approach sacrifices subtlety for clarity and is, I am convinced, ultimately unsound. . . . [T]he concept of "categories" [or rules] fits poorly with the complex reality of expression. Few dividing lines in First Amendment law are straight and unwavering, and efforts at categorization inevitably give rise only to fuzzy boundaries. . . . The quest for doctrinal certainty through the definition of categories and subcategories is, in my opinion, destined to fail.

Id. at 2566 (citations omitted); *see also* Norman Dorsen, *Tribute: John Paul Stevens*, 1992-93 ANN. SURV. AM. L. xxv (April 1993), available in Westlaw, TP-ALL database. Dorsen notes Stevens "[e]schews bright-line rules in favor of standards that permit judges adequate discretion to tailor results to nuanced evaluation of facts and circumstances." *Id.* at xxvi.

Second, Justice Stevens has forged a unanimous decision from a Court usually splintered over First Amendment issues. *See, e.g.,* *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981) (a 6-3 decision with five separate opinions); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981) (a 7-2 decision with five separate opinions). Stevens, once thought to be "too much of a 'maverick' . . . to consistently lead a majority of the Court," has apparently united the Court in an area where divisiveness is the norm. *See* Dorsen, *supra*, at xxviii (discussing fellow justices' comments on Stevens).

170. *Ladue*, 114 S. Ct. at 2044.

171. Obviously, if the Court determines the regulation unduly restrictive, the regulation will be held unconstitutional without further analysis.

172. *Id.* at 2044.

173. The Court's traditional application of less than strict scrutiny for content-neutral restrictions could lead to governmental abuse of its power. For example, the lower courts

In conclusion, *Ladue* sends a subtle, yet notable signal to local government. The Court has shifted from its traditional stance of deference to government's content-neutral regulation of speech to one more respectful of the individual's right to free speech. Local ordinances and zoning laws based on aesthetic concerns must be narrowly tailored to restrict as little protected speech as possible. Blanket prohibitions, even those unquestionably content-neutral, will be invalid if they restrict too much speech, especially modes of speech uniquely valuable to the common citizen. The Court's message to that common citizen is one of good news.

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struck down *Ladue*'s ordinance because, in their analysis, the ordinance's exemptions created an unconstitutional content discrimination of commercial speech favored over noncommercial speech. See *Gilleo v. City of Ladue*, 986 F.2d 1180, 1184 (8th Cir. 1993) and *Gilleo v. City of Ladue*, 774 F. Supp. 1559, 1564 (E.D. Mo. 1991). Consequently, government could "theoretically remove the defects in its [content-neutral] ordinance by simply repealing all of the exemptions." *Ladue*, 114 S. Ct. at 2044. Justice Stevens' analysis in *Ladue* closes this theoretical loophole by focusing on the amount of speech restricted, before considering content distinctions.

