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First Amendment and Private Property: A Sign for Free Speech, The

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Notes

The First Amendment and Private Property: A Sign for Free Speech

City of Ladue v. Gilleo[1]

I. INTRODUCTION

Freedom of speech is one of the best known of all the constitutional rights protected by the Bill of Rights.[2] Freedom of speech has received special attention from the courts for at least three reasons: (1) it is essential to the political process that is the foundation of our democracy;[3] (2) it is fundamentally important to the discovery of truth in the free marketplace of ideas;[4] and (3) it is an end in itself in a free country.[5]

In furtherance of a substantial interest, however, the freedom of speech falls subject to the police power of the state.[6] In *City of Ladue v. Gilleo*,[7] the Court was confronted with the task of balancing two competing interests: (1) the well-established authority of the State to regulate in furtherance of an aesthetic purpose; and (2) the right of a citizen to express her private political viewpoints while on her private property.

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

2. The First Amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press . . . ." U.S. CONST. amend. I.

3. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1938); New York Times Co. v. Sullivan, 376 U.S. 254, 269 (1964).

4. *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

5. *See* Cohen v. California, 403 U.S. 15, 24-25 (1971). *See, e.g.*, Dwight H. Merriam et al., *The First Amendment in Land Use Law*, C431 A.L.I.-A.B.A. 331, 334 (1989) [hereinafter Merriam, *Land Use*].

6. *See, e.g.*, Federal Communications Comm'n v. Pacifica Found., 438 U.S. 726 (1978) (regulation prohibiting the broadcast of indecent language justified by government's interest in protecting children and unwary adult listeners).

7. 114 S. Ct. 2038 (1994).

II. FACTS AND HOLDING

On December 8, 1990, Margaret Gilleo displayed a sign on the front lawn of her home in Ladue, Missouri[8] that read: "Say No to War in the Persian Gulf, Call Congress Now."[9] After that sign was removed, Gilleo put up a replacement sign, which was subsequently knocked down.[10] When Gilleo notified the police, they informed her that such signs were prohibited in Ladue.[11] After the City Council denied her petition for a variance, Gilleo filed an action under 42 U.S.C. § 1983 against the City, the Mayor, and members of the City Council, seeking a permanent injunction against enforcement of the ordinance.[12] Gilleo alleged that Ladue's sign ordinance violated her First Amendment right of free speech.[13]

The United States District Court for the Eastern District of Missouri issued a preliminary injunction against enforcement of the ordinance.[14] Gilleo then placed a small sign in the second story window of her home stating, "For Peace in the Gulf."[15]

In response to the injunction, the Ladue City Council repealed its ordinance and enacted a replacement.[16] The new ordinance, as its predecessor, contained a general prohibition of "signs," defining the term

8. Ladue is a suburb of St. Louis, Missouri. It has a population of almost 9,000 and an area of about 8.5 square miles. *Id.* at 2040 n.2.

9. *Id.* at 2040.

10. *Id.*

11. *Id.*

12. *Id. See* Gilleo v. City of Ladue, 774 F. Supp. 1564 (E.D. Mo. 1991), *aff'd*, 986 F.2d 1180 (8th Cir. 1993), *aff'd*, 114 S. Ct. 2038 (1994). The ordinance allowed the Council to "permit a variation in the strict application of the provisions and requirements of this chapter . . . where the public interest [would] be best served . . . ." *Gilleo*, 114 S. Ct. at 2040 n.3.

13. *Gilleo*, 114 S. Ct. at 2040.

14. *Id.* (citing City of Ladue v. Gilleo, 774 F. Supp. 1564 (E.D. Mo. 1991), *aff'd*, 986 F.2d 1180 (8th Cir. 1993), *aff'd*, 114 S. Ct. 2038 (1994)).

15. *Id.*

16. *Id.*

broadly.[17] The ordinance prohibited all signs except those falling within one of ten exemptions,[18] and it specifically prohibited Gilleo's window sign.[19]

The new ordinance, unlike its predecessor, contained a lengthy declaration of its purposes and policies, stating the proliferation of an unlimited number of signs in private, residential areas would create "ugliness, visual blight and clutter, tarnish the natural beauty of the landscape . . . impair property values . . . and may cause safety and traffic hazards to motorists, pedestrians, and children."[20]

Gilleo challenged the new ordinance in an amended complaint.[21] The United States District Court for the Eastern District of Missouri held the ordinance unconstitutional, and the Eighth Circuit Court of Appeals affirmed this decision.[22] Relying on *Metromedia, Inc. v. San Diego*,[23] the Court of Appeals held the ordinance invalid as a "content-based" regulation because it treated commercial speech more favorably than noncommercial speech and

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17. *Id.* Section 35-1 of the ordinance defined "sign" as:

> A name, word, letter, writing, identification, description, or illustration which is erected, placed upon, affixed to, painted or represented upon a building or structure, or any part thereof, or any manner upon a parcel of land or lot, and which publicizes an object, product, place, activity, opinion, person, institution, organization or place of business, or which is used to advertise or promote the interests of any person. The word 'sign' shall also include . . . 'ground signs,' . . . 'yard signs,' . . . and 'window signs,' wherever placed out of doors in view of the general public or wherever placed indoors as a window sign.

Gilleo, 114 S. Ct. at 2040-41 n.5.

18. *Id.* at 2041. The following examples were exceptions to the ordinance: "residential identification signs," signs advertising the sale of property, signs "for churches, religious institutions, and schools," "[c]ommercial signs in commercially or industrial zoned districts," "on-site signs advertising 'gasoline filling stations,'" and signs identifying safety hazards. *Id.*

19. *Id.* The full list of exceptions is as follows:

> (1) municipal signs; (2) subdivision and residence identification signs; (3) road signs and driveway signs for danger, direction, or identification; (4) health inspection signs; (5) signs for churches, religious institutions, and schools (subject to regulations set forth in § 35-5); (6) identification signs for other not-for-profit organizations; (7) signs identifying the location of public transportation stops; (8) ground signs advertising the sale or rental of real property; (9) commercial signs in commercially zoned or industrial zoned districts; and (10) signs that identify safety hazards.

Id. at 2041 n.6.

20. *Id.*

21. *Id.*

22. *Id.* (citing City of Ladue v. Gilleo, 986 F.2d 1180 (8th Cir. 1993)).

23. 453 U.S. 490 (1981).

favored some kinds of noncommercial speech over others.[24] Although the Court of Appeals acknowledged that Ladue had substantial interests for enacting the ordinance, such interests were "not sufficiently compelling to support a content-based restriction."[25]

On writ of certiorari,[26] the United States Supreme Court affirmed the decision of the Eighth Circuit, but for a different reason. Even assuming the ordinance to be content-neutral, the Court found that it violated a Ladue resident's right to free speech.[27] The Court held that where a government regulation of speech almost completely forecloses an important medium of communication without ample alternative channels, and where a sufficient government interest is not at stake, then the regulation infringes on the free speech guarantees of the First Amendment.[28]

III. LEGAL BACKGROUND

A. The First Amendment and Time, Place, and Manner Regulations

Freedom of expression is a protected constitutional right,[29] yet the government may regulate protected speech.[30] For instance, a content-neutral regulation that does not excessively hinder expression may regulate the time, place, and manner of speech.[31] In this instance, restrictions on speech are valid if (1) they are content-neutral; (2) they further a significant

24. *Gilleo*, 114 S. Ct. at 2041 (citing *Gilleo*, 986 F.2d at 1182).

25. *Id.* (citing *Gilleo*, 986 F.2d at 1183-84).

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

27. *Gilleo*, 114 S. Ct. at 2044, 2047.

28. *Id.* at 2046-47.

29. Procunier v. Martinez, 416 U.S. 396, 408-09 (1974); Stanley v. Georgia, 394 U.S. 557, 565 (1969).

Although the First Amendment only applies to the federal government, the Fourteenth Amendment Due Process clause incorporates the First Amendment's guarantee of freedom of expression to apply to the states. *See* Gitlow v. New York, 268 U.S. 652, 665 (1925).

30. Dwight H. Merriam et al., *The First Amendment in Land Use Law*, C851 A.L.I.-A.B.A. 1007, 1010 (1993).

31. *See* Barnes v. Glen Theatre, Inc., 501 U.S. 560, 566 (1991) ("time, place or manner" test applied to activity on private property); Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989); Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1983); Bolger v. Youngs Prods. Corp., 463 U.S. 60, 65 (1983); Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 535-36 (1980); Police Dept. v. Mosley, 408 U.S. 92, 95-96 (1972).

governmental interest; and (3) other alternatives exist for exercising First Amendment rights.[32]

The Supreme Court first addressed the validity of time, place, and manner restrictions in a series of decisions issued between 1939 and 1941.[33] For example, in *Cox v. New Hampshire*,[34] the Supreme Court upheld a regulation that required licensing for parades through city streets. The Court recognized that, in furtherance of legitimate government interests, a municipality may regulate the time, place, and manner of parades and demonstrations in public streets.[35]

On the other hand, content-based distinctions in speech regulations are disfavored and subject to a high level of scrutiny.[36] A regulation infringing on the content of protected speech is presumed to be unconstitutional.[37] Essentially, when a regulation is based on the content of speech, governmental action "must be scrutinized more carefully to ensure that communication has

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32. *See* United States v. Grace, 461 U.S. 171, 177 (1983); Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 640, 647-48 (1981); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 771 (1976).

33. *See* Cox v. New Hampshire, 312 U.S. 569, 576 (1941); Cantwell v. Connecticut, 310 U.S. 296, 306-07 (1940) (licensing regulation unconstitutional because of governmental discretion in defining "religious" causes); Hague v. CIO, 307 U.S. 496, 516 (1939) (freedom of speech on public property may be regulated in the interest of all).

34. 312 U.S. 569 (1941).

35. *Id.* at 575-76. The Court found that the city had legitimate interests in regulating traffic, securing public order, and insuring that simultaneous parades did not prevent all speakers from being heard. *Id.*

36. *See* Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 47 (1987); United States v. Eichman, 496 U.S. 310, 318 (1990); Police Dept. v. Mosley, 408 U.S. 92, 95 (1972) ("[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.").

Only a showing of substantial governmental interest will justify controlling the content of expression. Anne E. Swenson, Note, *A Sign of the Times: Billboard Regulation and the First Amendment*, 15 ST. MARY'S L.J. 635, 647 n.63 (1984). *Compare* Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 507-08 (1981) (aesthetics and traffic safety constitute substantial state interests) *with* Schneider v. New Jersey, 308 U.S. 147, 162 (1939) (clean streets are not sufficient governmental interest to support anti-leaflet regulation). Swenson, *supra*, at 647 n.63.

37. Russell W. Galloway, Note, *Basic Free Speech Analysis*, 31 SANTA CLARA L. REV. 883, text accompanying n.135 (1991) (citing United States v. Eichman, 496 U.S. 310, 318 (1990); Texas v. Johnson, 491 U.S. 397 (1989).

not been prohibited 'merely because public officials disapprove the speaker's views.'"[38]

In *Consolidated Edison Co. v. Public Service Commission*,[39] the Court invalidated an order of the Commission prohibiting inserts in monthly utility bills that discussed controversial issues.[40] Although time, place, or manner regulations serve a significant governmental interest,[41] the Court found that the suppression of inserts was not a content-neutral regulation because it "suppress[ed] certain bill inserts precisely because they address[ed] controversial issues of public policy."[42] The Court acknowledged that a content-neutral time, place, or manner restriction of speech may be imposed so long as it is reasonable.[43]

In addition to the requirement that time, place, or manner restrictions "not be based upon either the content or subject matter of speech,"[44] such regulations must also leave open ample alternative channels for communication.[45] Thus, although a content-neutral time, place, or manner restriction serves a significant governmental interest, it may be invalidated for adversely affecting overall communication.[46]

This analysis is especially important where the regulation results in the total ban of a communication medium.[47] However, while the availability of

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38. Consolidated Edision Co. v. Public Serv. Comm'n, 447 U.S. 530, 536 (1980) (quoting Niemotko v. Maryland, 340 U.S. 268, 282 (1951)).

39. 447 U.S. 530 (1980).

40. *Id.* at 532-33.

41. *Id.* at 535.

42. *Id.* at 537. The Commission allowed inserts presenting information to consumers on certain subjects, such as energy conservation measures, but forbade the use of inserts discussing public controversies. *Id.*

43. *Id.* at 536. "[T]he essence of time, place, or manner regulation lies in the recognition that various methods of speech, regardless of their content, may frustrate legitimate governmental goals. No matter what its message, a roving sound truck that blares at 2 a.m. disturbs neighborhood tranquility." *Id.*

44. *Id.* *See also* Papish v. University of Missouri Curators, 410 U.S. 667, 670 (1973).

45. *Consolidated Edison Co.*, 447 U.S. at 535; Linmark Assocs., Inc. v. Willingboro, 431 U.S. 85, 93 (1977); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 771 (1976).

46. *See* NAACP v. Button, 371 U.S. 415, 438 (1963) ("Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.").

47. Although the Court used the total ban analysis as early as 1938, it was not until Schad v. Borough of Mount Ephraim, 452 U.S. 61, 66-67 (1981), that the term "total ban" was recognized as representing a specific form of analysis in First Amendment litigation. Angela M. Liuzzi, Comment, *Metromedia, Inc. v. City of San Diego*, 11 HOFSTRA L. REV. 371, 386 (1982).

an alternative communication medium is necessary for a valid time, place, or manner restriction, such availability does not alone justify a regulation.[48] The Court has stated "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."[49]

In *Lovell v. City of Griffin*,[50] the Court invalidated an ordinance prohibiting "the practice of distributing, either by hand or otherwise, circulars, handbooks, advertising, or literature of any kind."[51] The Court expressed an uneasiness with the broad sweep of the ordinance, observing there was no "restriction in [the ordinance's] application with respect to time or place."[52] Additionally, in *Jamison v. Texas*,[53] the Court invalidated an ordinance that prohibited the distribution of all handbills and leaflets on city streets.[54] Relying on *Lovell*, the Court stated as "beyond controversy" that "[t]he right to distribute handbills concerning religious subjects on the streets may not be prohibited at all times, at all places, and under all circumstances."[55]

Accordingly, in *Linmark Associates, Inc. v. Township of Willingboro*,[56] the Court invalidated an ordinance banning "For Sale" and "Sold" signs from residential property.[57] The Court found that, while the ordinance did not amount to a total ban of the message to be conveyed, the ordinance did not "leave open ample alternative channels for communication."[58] The Court reasoned while alternatives might exist in theory, practically speaking, those alternatives were insufficient:

> Although in theory sellers remain free to employ a number of different alternatives, in practice realty is not marketed through leaflets, sound trucks,

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48. *See* Schneider v. New Jersey, 308 U.S. 147, 163 (1930); William E. Lee, *Lonely Pamphleteers, Little People, and the Supreme Court: the Doctrine of Time, Place, and Manner Regulations of Expression*, 54 GEO. WASH. L. REV. 757, 801 (1986).

49. *Schneider*, 308 U.S. at 163. *See also* Lee, *supra* note 48, at 800.

50. 303 U.S. 444 (1938).

51. *Id.* at 447.

52. *Id.* at 451. The Court noted the ordinance prohibited the distribution of literature "of any kind at any time, at any place, and in any manner without a permit from the city manager." *Id.*

53. 318 U.S. 413 (1943).

54. *Id.* at 413. A member of the Jehovah's Witnesses, charged with violation of the ordinance for distributing religious literature on the streets, challenged the ordinance. *Id.* at 413-14.

55. *Id.* at 416.

56. 431 U.S. 85 (1977).

57. *Id.* at 97.

58. *Id.* at 93 (citing *Virginia State Bd. of Pharmacy*, 425 U.S. at 771).

> demonstrations, or the like. The options to which sellers realistically are relegated primarily newspaper advertising and listing with real estate agents [sic] involve more cost and less autonomy than "For Sale" signs; are less likely to reach persons not deliberately seeking sales information; and may be less effective media for communicating the message that is conveyed by a "For Sale" sign in front of the house to be sold. The alternatives, then, are far from satisfactory.[59]

As demonstrated by *Linmark*, the Court considers not only the availability but also the sufficiency of alternate channels of communication. In determining the sufficiency of an alternate channel, the Court considers whether those channels detract from the speaker's message. In *Clark v. Community for Creative Non-Violence*,[60] the Court held a regulation prohibiting camping in Washington, D.C.'s Lafayette Park did not violate the First Amendment rights of demonstrators who wished to protest. Central to the Court's opinion was its belief that the prohibition on sleeping did not detract from the demonstrators' message.[61] The Court reasoned that other methods could be used to adequately convey this message.[62]

B. Sign Regulation and The First Amendment

The First Amendment addresses many forms of expression and is not limited to spoken or written words.[63] For instance, one mode of expression is a "sign" which includes everything from a bill board to a handbill.[64] Sign

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59. *Id.* (citations omitted).

60. 468 U.S. 288 (1984).

61. *Id.* at 294-95. *See also* Lee, *supra* note 48, at 767.

62. *Clark*, 468 U.S. at 295-97.

63. *E.g.*, City of Cincinnati v. Discovery Network, Inc., 113 S. Ct. 1505 (1993) (commercial handbills); City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984) (signs); Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 501 (1981) (billboards); Schad v. Borough of Mt. Ephraim, 452 U.S. 61, 66-67 (1981) (live nude dancing); Buckley v. Valeo, 424 U.S. 1, 14-15 (1976) (contribution of money); Shuttlesworth v. City of Birmingham, 394 U.S. 147, 152 (1969) (picketing); Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 505-06 (1969) (black armbands); Stromberg v. California, 283 U.S. 359, 369 (1931) (red flag).

Some speech does not receive full First Amendment protection. *See, e.g.*, Sable Communications of Cal., Inc. v. Federal Communications Comm'n, 492 U.S. 115, 124 (1990) (obscene speech); New York v. Ferber, 458 U.S. 747, 765 (1982) (child pornography); United States v. O'Brien, 391 U.S. 367, 382-85 (1968) (burning draft card); Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949) (criminal speech); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (fighting words).

64. Merriam et al., *supra* note 30, at 1014.

regulation naturally implements freedom of speech issues[65] because "communication by signs and posters is virtually pure speech."[66] Those that display political, religious, or non-commercial messages are given the most protection, whereas commercial speech is generally less guarded.[67]

Early efforts to regulate signs were pursued in the courts under a theory of public nuisance, based on aesthetic and public safety concerns.[68] However, the prevalent practice by courts prior to 1930 was to invalidate city ordinances that were justified only by aesthetic concerns.[69] These courts

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65. Merriam, *Land Use*, *supra* note 5, at 333.

66. Baldwin v. Redwood, 540 F.2d 1360, 1366 (9th Cir. 1976), *cert. denied*, 431 U.S. 913 (1977).

"Pure speech" is speech separate from "conduct." However, conduct may be protected as "pure speech" when the primary purpose of such action is to express ideas and conduct is only incidentally involved. *See* Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969) (armbands worn to protest Vietnam war).

Governmental regulations are valid restrictions on the time, place, and manner of speech, because what is being regulated is the way one speaks rather than what one says. *See* Cox v. Louisiana, 379 U.S. 559 (1965). It has been argued that the distinction between conduct and pure speech is not meaningful because all "speech is necessarily speech plus." Harry Kalven, *The Concept of the Public Forum:* Cox v. Louisiana, 1965 SUP. CT. REV. 1, 23. Some cases have declined to follow *Cox*. *See* Grayned v. Rockford, 408 U.S. 104 (1972); Food Employees Local 590 v. Logan Valley Plaza, 391 U.S. 308 (1968).

67. *See, e.g.*, Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 665 (1990) ("[T]he right to engage in political expression is fundamental to our constitutional system."); Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980) (Commercial speech may be given less protection than "pure" or noncommercial speech.); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976) (Although commercial speech is protected by the First Amendment, it is not equated with noncommercial speech.); Mills v. Alabama, 384 U.S. 214, 218 (1966) ("[T]here is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs."); Tauber v. Town of Longmeadow, 695 F. Supp. 1358 (D. Mass. 1988) (bylaws unconstitutional because favored commercial over noncommercial).

First Amendment protection of commercial speech was first recognized in Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976) (holding that pure commercial speech has a substantial degree of First Amendment protection).

68. Swenson, *supra* note 36, at 635 (citing St. Louis Gunning Advertising Co. v. City of St. Louis, 137 S.W. 929, 938 (Mo. 1911) (billboards allegedly served as "hide-outs" for criminals and shielded immoral acts)).

69. *See, e.g.*, Ware v. Wichita, 214 P. 99 (Kan. 1923); St. Louis v. Evraiff, 256 S.W. 489 (Mo. 1923). *See also* J.F. Ghent, Annotation, *Aesthetic Objectives or*

frequently held that aesthetics was not a legitimate purpose for land-use control.[70] Thus, some early decisions upholding sign controls as constitutional avoided the aesthetic purpose problem by citing a number of dangers justifying the regulation of signs.[71]

These piecemeal city efforts at sign control were streamlined in 1926 when the United States Supreme Court held that local governments could regulate the use of private property through zoning ordinances.[72] In *Village of Euclid v. Ambler Realty Co.*,[73] the Court approved the constitutionality of a municipality's zoning ordinance, finding it to be a valid exercise of police power.[74] In cases decided since *Euclid*, the authority of a municipality to regulate land usage under its police power has not been questioned.[75] Regulations of signs and billboards have been routinely upheld in the face of due process and equal protection challenges.[76]

The preservation of an area's aesthetic appearance has become a frequent basis on which sign regulation is justified. For example, in *Peltz v. City of South Euclid*[77] a city ordinance prohibited all political signs on both public

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Consideration as Affecting Validity of Zoning Ordinances, 21 A.L.R. 3D 1222 (1968) ("Aesthetic considerations are a matter of luxury and indulgence rather than of necessity, and it is necessity alone which justifies the exercise of [a state's] police power . . . .").

70. *See, e.g.*, DANIEL R. MANDELKER, LAND USE LAW 414-15 (2d ed. 1988) (citing City of Passaic v. Paterson Bill Posting Advertising & Sign Painting Co., 62 A. 267, 268 (N.J. 1905)).

71. MANDELKER, *supra* note 70, at 415 (citing *St. Louis Gunning Advertising Co.*, 137 S.W. at 929). *See also Patterson Bill Posting, Advertising & Sign Painting Co.*, 62 A. at 268 (city claimed severe weather caused billboards to become a threat to public safety). *But cf.* State *ex rel.* Civello v. New Orleans, 97 So. 440 (La. 1923); State *ex rel.* Carter v. Harper, 196 N.W.451 (Wis. 1923) (holding aesthetic purpose independently sufficient to justify zoning ordinance).

72. *See* Swenson, *supra* note 36, at 635.

73. 272 U.S. 365 (1926).

74. *Id.* at 397.

75. *See* Swenson, *supra* note 36, at 642 (citing J. NOWAK ET AL., HANDBOOK ON CONSTITUTIONAL LAW 442-43 (1978) (since Peltz v. City of Euclid, 228 N.E.2d 320 (Ohio 1967) extreme deference accorded to zoning power)).

76. Plaintiffs challenging billboard regulations typically assert two arguments: (1) their methods of advertising are not receiving the equal protection of the law, as they are improperly distinguished from other methods not similarly regulated; and (2) the ordinances are essentially takings of property without due process of law. *See* Thomas Packer Corp. v. Utah, 285 U.S. 105 (1932); Cusack Co. v. City of Chicago, 242 U.S. 526 (1917).

77. 228 N.E.2d 320 (Ohio 1967).

and private property.[78] This ordinance was enacted to prevent a possible traffic hazard and the "unsightliness resulting from the widespread use" of signs.[79] The Ohio Supreme Court found the ordinance unconstitutional.[80] The court stated the aesthetic goal did not "reasonably outweigh the loss of [the] liberty of speech."[81] Various devices may be used to regulate signs, yet such means must be less drastic than a total prohibition.[82]

In *Baldwin v. Redwood City*,[83] the city claimed that an ordinance regulating the use of temporary signs not only promoted aesthetics but also supported public safety, order, cleanliness and the quality of community life.[84] The constitutionality of the ordinance was challenged by property owners, residents, and registered voters of Redwood City.[85]

The United States Court of Appeals for the Ninth Circuit found the ordinance restricted the use of political signs.[86] Consequently, the regulation "directly infringe[d] the First Amendment rights of individuals who want to express political opinion in a traditional First Amendment forum."[87] Although the court recognized aesthetics as a valid interest, it noted that temporary signs are predominantly used during political elections, which occur infrequently.[88] The ban on political signs was struck down as "unnecessarily burdensome and contain[ing] an element of arbitrariness."[89]

In 1972 an ordinance that prohibited all outdoor political campaign signs was challenged as violative of the First and Fourteenth Amendments.[90] The United States District Court for Hawaii found the "selective prohibition of

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78. *Id.* at 321-22.

79. *Id.*

80. *Id.* at 324.

81. *Id.* at 323-24.

82. *Id.* at 324.

83. 540 F.2d 1360 (9th Cir. 1976), *cert. denied*, 431 U.S. 913 (1977).

84. *Id.* at 1366. Two additional interests furthered by the ordinance are: "administrative convenience" and "equalization of opportunity among political candidates." *Id.*

85. *Id.* at 1362.

86. *Id.* at 1366.

87. *Id.*

88. *Id.* at 1370.

89. *Id.* at 1372, 1375. The only provision of the ordinance that survived the court's scrutiny was the "limitation on the area of individual signs and the aggregate area of signs per parcel of property." *Id.* at 1375.

In 1979, a United States District Court cited *Baldwin* and found that an ordinance which prohibited the display of campaign signs in residential areas was unconstitutional. Martin v. Wray, 473 F. Supp. 1131, 1133 (E.D. Wis. 1979).

90. Ross v. Goshi, 351 F. Supp. 949, 950 (D. Haw. 1972).

political signs" was unconstitutional[91] and the preservation of the country's natural beauty was an insufficient basis on which to justify the ordinance.[92] The government must demonstrate that the ordinance has a "rational relationship to the effectuation of a proper governmental purpose,[93] [and] that it is necessary to promote a compelling state interest."[94] The court adopted the reasoning in of the court in *Peltz*[95] and stated a municipality must employ regulations that are less restrictive than an outright prohibition.[96]

Although the United States Supreme Court addressed a form of sign regulation in *Linmark Associates, Inc. v. Township of Willingboro*,[97] two other cases are recognized as landmark Supreme Court sign regulation cases.[98] The first case, *Metromedia, Inc. v. City of San Diego*,[99] involved an ordinance that substantially prohibited the erection of outdoor advertising

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91. *Id.* at 953.

92. *Id.*

93. *Id.* (citing Peltz v. City of South Euclid, 228 N.E.2d 320 (1967)).

94. *Ross*, 351 F. Supp. at 953 (quoting Dunn v. Blumstein 405 U.S. 330, 337 (1972)).

95. *Id.* at 954 (citing *Peltz*, 228 N.E.2d 320 (Ohio 1967)). *See supra* notes 73-78 and accompanying text.

96. *Ross*, 351 F. Supp. at 954.

97. 431 U.S. 85 (1977). *See infra* note 150. The Court struck down an ordinance that prohibited "For Sale" signs on private property. *Linmark*, 431 U.S. at 96-98. One reason for the Court's decision was the town did not enact the ordinance to promote any value "unrelated to the suppression of free expression," such as aesthetic values. *Id.* at 93-94. The Court expressly declined to decide whether a ban or limitation on the number of signs could "survive constitutional scrutiny if it were unrelated to the suppression of free expression." *Id.* at 94 n.7. *See Baldwin*, 540 F.2d at 1368-69.

By 1980, the court had applied some form of First Amendment analysis to seemingly every medium of communication but signs and billboards. The Court had considered, under the First Amendment, ordinances which regulated the distribution of pamphlets within the municipality (Lovell v. Griffin, 303 U.S. 444, 451-52 (1938)); handbills on the public streets (Jamison v. Texas, 318 U.S. 413, 416 (1943)); the door-to-door distribution of literature (Martin v. Struthers, 319 U.S. 141, 145-49 (1943); Schneider v. New Jersey, 308 U.S. 147, 164-65 (1939)); adult theaters (Young v. American Mini Theaters, 427 U.S. 50 (1976)); and sound trucks (Kovacs v. Cooper, 336 U.S. 77 (1949)).

98. City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984); Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981).

99. 453 U.S. 490 (1981).

signs.[100] The Court sought to clarify what protection billboards receive under the First Amendment.[101]

In evaluating the constitutionality of the San Diego ordinance, the Court applied the test used for scrutinizing commercial speech regulations developed in *Central Hudson Gas & Electric Corp. v. Public Service Commission.*[102] In its application of *Central Hudson*, the Court accepted the twin goals of the San Diego ordinance—traffic safety and aesthetics—as substantial governmental interests,[103] and found the ordinance directly advanced those interests.[104] In addition, the Court stated offsite commercial billboards may be prohibited even though onsite billboards are allowed.[105] Consequently, "insofar as it regulates commercial speech the San Diego ordinance meets the constitutional requirements [of *Central Hudson*]."[106]

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100. *Metromedia*, 453 U.S. at 493. Two exceptions to the general prohibition were on-site signs and signs falling within 12 specified categories. *Id.* at 494-95.

101. *See* Liuzzi, *supra* note 47, at 373.

Dealing with the First Amendment issues concerning the regulation of signs proved to be a difficult task. The Court produced five separate opinions with no clear majority. In his dissent, Justice Rehnquist referred to the Court's treatment of the subject as "a virtual Tower of Babel, from which no definitive principles can be clearly drawn." *Metromedia*, 453 U.S. at 569 (Rehnquist, J., dissenting).

102. 447 U.S. 557 (1980). Commercial speech is expression relating solely to the economic interests of the speaker and its audience. *Id.* at 561. In *Central Hudson* the Court adopted a four-part test for determining the validity of government regulations of commercial speech: The First Amendment protects commercial speech only if that speech (1) concerns lawful activity and is not misleading. A restriction on otherwise protected commercial speech is valid only if it (2) seeks to implement a substantial governmental interest, (3) directly advances that interest, and (4) reaches no further than necessary to accomplish the given objective. *Id.* at 563-66.

103. *Metromedia*, 453 U.S. at 507-10.

104. The United States Supreme Court accepted the California Supreme Court's holding that, as a matter of law, the ordinance relates to traffic safety. *Id.* at 508. The Court further found it was beyond speculation to "recognize that billboards, by their very nature" are aesthetic harms. *Id.* at 510.

105. *Id.* at 511-12. The ordinance permitted the occupant of property to use billboards located on that property to advertise goods or services offered at that location; identical billboards advertising goods or services available elsewhere were prohibited. *Id.* The Court stated three reasons for this conclusion: (1) prohibition of off-site advertising directly relates to furthering traffic safety and aesthetics; (2) off-site advertising is more problematic than on-site advertising; (3) although the city chose to value one kind of commercial speech over another, this decision reflects the city's determination that one interest is more important than traffic safety and aesthetics. *Id.*

106. *Id.* at 512.

In addressing the impact of the ordinance on noncommercial speech, a plurality of the Court found the ordinance unconstitutional.[107] The Court recognized its recent decisions consistently afforded noncommercial speech a greater degree of protection than commercial speech.[108] The San Diego ordinance effectively inverted that judgment by impermissibly giving more protection to commercial speech than to noncommercial speech.[109] Furthermore, the city, in allowing the twelve noncommercial exceptions to its general offsite ban, was unconstitutionally favoring certain kinds of noncommercial messages over others.[110]

The Court held the city had a valid interest in aesthetic appearance,[111] yet such interest would not justify a ban on noncommercial billboard speech.[112] Because commercial speech receives less protection than noncommercial speech, an ordinance could regulate commercial billboard

107. *Id.* at 513 (White, J., joined by Stewart, Marshall, & Powell, JJ.). Essentially, according to the plurality, the ordinance "reach[ed] too far into the realm of protected [noncommercial] speech," and was therefore unconstitutional. *Id.* at 521.

108. *Id.* at 513. *See, e.g.*, Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978); Bates v. State Bar, 433 U.S. 350 (1977); Young v. American Mini Theaters, Inc., 427 U.S. 50 (1976).

109. *Metromedia*, 453 U.S. at 513. The general prohibition of the ordinance read: "Only those outdoor advertising display signs . . . which are either signs designating the name of the owner or occupant of the premises upon which such signs are placed, or identifying such premises; or signs advertising goods manufactured or produced or services rendered on the premises upon which such signs are placed shall be permitted." *Id.* at 493.

110. *Id.* at 515. While the city could distinguish between the values of different categories of commercial speech, it did not have the same range of choice in the area of noncommercial speech to evaluate various communicative interests. *Id.* at 514. The Court stated that "[t]o allow a government the choice of permissible subjects for public debate would be to allow that government control over the search for political truth." *Id.* at 515 (citing Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 538 (1988)). *See also* Merriam et al., *supra* note 30, at 1015.

111. *Metromedia*, 453 U.S. at 508-12.

112. *Id.* at 513-14.

speech.[113] *Metromedia* was a landmark decision in sign regulation because the ordinance had contained typical prohibitions and exemptions for signs.[114]

In *City Council v. Taxpayers for Vincent*,[115] the Court applied its time, place, and manner analysis in one of the most protected of public forums—the city streets. The municipal ordinance in question prohibited the posting of signs on public property.[116] Vincent was a political candidate and signs supporting his election were attached to utility pole cross-arms around the city.[117] Acting under the ordinance, city employees routinely removed all posters on public property.[118] Vincent's supporters sued for injunctive relief, and the Court granted writ of certiorari to determine whether that prohibition abridged the campaign group's First Amendment freedoms.[119]

The Court first considered whether the city's interest in aesthetics was substantial enough to justify regulation of speech. The Court reaffirmed its decision in *Metromedia* that aesthetic interests do sufficiently justify a content-neutral prohibition of billboards.[120] A city may "legitimately exercise its police powers to advance aesthetic values."[121]

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113. *Id.* at 520. *See* James E. Lobsenz & Timothy M. Swanson, *The Residential Tenant's Right to Freedom of Political Expression*, 10 U. PUGET SOUND L. REV. 1, 35 (1986).

In New Castle County v. Delaware, 18 F.3d 1043, 1057, 1060 (3d Cir. 1994), the United States Court of Appeals, Third Circuit, stated that *Metromedia* was a "badly splintered" opinion that lacked precedential effect. Furthermore, the court stated that the district court believed City of Cincinnati v. Discovery Network, 113 S. Ct. 1505 (1993) undermined any governing standard that had been set by *Metromedia*. *New Castle County*, 18 F.3d at 1047.

In City of Cincinnati v. Discovery Network, 113 S. Ct. 1505 (1993), the United States Supreme Court considered whether an ordinance that prohibited distribution of commercial handbills through newsracks on public property violated the First Amendment. The Court distinguished *Metromedia* and invalidated the ordinance because there was not a reasonable fit between the ban and the city's legitimate interest in aesthetics and safety. *Id.* at 1514.

114. Merriam, *Land Use*, *supra* note 5, at 339.

115. 466 U.S. 789 (1984).

116. *Vincent*, 466 U.S. at 789.

117. *Id.* at 792-93.

118. *Id.* at 793.

119. *Id.* at 791-92. The Court found that unlike *Metromedia*, this ordinance was "neutral . . . concerning any speaker's point of view." *Id.* at 804. Thus, the test applicable to a "viewpoint neutral regulation" was applied.

120. *Id.* at 806-07 (citing *Metromedia*, 453 U.S. at 507-08).

121. *Id.* at 805. *Vincent* set general boundaries for sign regulations and "open[ed] a wide door to aesthetic regulation." *See* Merriam, *Land Use*, *supra* note 5, at 343.

The Court next considered whether the ordinance was narrowly tailored to serve the government's interest in eliminating visual clutter.[122] Noting the substantive evil at issue was not merely a by-product of the activity, but rather was created by the medium of the expression itself,[123] the Court found the ordinance precisely addressed the problem and "curtail[ed] no more speech than [was] necessary to accomplish its purpose."[124]

The Court finally considered whether the ordinance left adequate alternative means of communication. Justice Brennan noted that a Los Angeles citizen could exercise his or her right to speak and distribute literature in the same place where the posting of signs on public property is prohibited.[125] Citing the District Court's findings of fact that indicated there were ample alternative modes of communication, the Court concluded the posting of political posters was not a uniquely valuable mode of communication.[126] Thus, the *Vincent* decision left open to question the precise standard by which ample alternative channels were to be scrutinized.

It is important to note the ordinance did not prohibit signs on private property. "[B]y not extending the ban to all locations, a significant opportunity to communicate by means of temporary signs is preserved."[127] Since *Vincent*, many regulations have tested the proposition that the Court probably intended for signs on private property to be protected.[128]

For example, an ordinance that prohibited all political signs on private property was invalidated in *Matthews v. Town of Needham*.[129] The First Circuit distinguished this case from *Vincent* in that the ordinance was not content neutral and it affected residential property.[130] In *Arlington County Republican Committee v. Arlington County*,[131] a district court struck down an ordinance allowing residents to display only two political signs on their

122. *Vincent*, 466 U.S. at 808. The incidental restriction on expression resulting from a government's attempt to accomplish a substantial interest is "considered justified as a reasonable regulation of the time, place, or manner of expression if it is narrowly tailored to serve that interest." *Id. See also* Schad v. Mount Ephraim, 452 U.S. 61, 68-71 (1981); Carey v. Brown, 447 U.S. 455, 470-71 (1980).

123. *Vincent*, 466 U.S. at 810.

124. *Id.*

125. *Id.* at 812.

126. *Id.*

127. *Id.* at 811.

128. *See* Lobsenz & Swanson, *supra* note 113, at 16-17; Merriam et al., *supra* note 30, at 1025-26.

129. 764 F.2d 58 (1st Cir. 1985).

130. *Id.* at 61.

131. 790 F. Supp 618 (E.D. Va. 1992).

property. This ordinance regulated pure speech, which is entitled to receive the highest degree of protection under the First Amendment.[132]

The case of *Boos v. Berry*[133] presented an issue related to all free speech cases. In *Boos*, the Supreme Court examined a statute that purported to control political speech in public forums.[134] The ordinance was struck down because it was content-based.[135] However, Justice O'Connor's plurality opinion indicated a regulation of political speech could potentially be construed "content-neutral" and therefore, constitutional.[136] Justice O'Connor's proposition stems from the secondary effects doctrine,[137] which allows a content-based regulation absent improper motivation to be analyzed as content-neutral.[138] This approach is controversial because the Court has not been consistent in deciding whether content-based regulation can ever be valid.[139]

Justice Brennan concurred in the judgment yet explicitly disagreed with the proposition that a regulation of political speech could be constitutional.[140] Justice Brennan noted that this "ominous dictum . . . could set the Court on a road that will lead to the evisceration of First Amendment freedoms."[141]

Before *Boos* was decided, political speech was one of the most protected types of speech.[142] One commentator has called political speech "First

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132. *Id.* at 621-22.

133. 485 U.S. 312 (1988).

134. *Id.* at 312. In a public forum, speech may not be restricted unless the regulation is narrow and necessary to serve a governmental interest. *See* Schneider v. New Jersey, 308 U.S. 147 (1939); Hague v. CIO, 307 U.S. 496 (1939).

135. *Boos*, 485 U.S. at 319-21, 334.

136. *Id.* 318-23. *See also* J. Robert Dugan, Note, *Secondary Effects and Political Speech: Intimations of Broader Governmental Regulatory Power*, 34 VILL. L. REV. 995, 996-97 (1989) (Justice O'Connor raised the possibility that regulation of political speech could be constitutional.).

137. City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 46 (1986).

138. Dugan, *supra* note 136, at 998, 1003-04.

139. *Compare* Widmar v. Vincent, 454 U.S. 263 (1981) (denying use of public facilities to student religious group while permitting other groups to use such facilities is unconstitutional) and Consolidated Edison v. Public Serv. Comm'n, 447 U.S. 530 (1980) (holding as unconstitutional the prohibition of mailing on certain topics) *with* City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986) (content-based restriction on adult movie theatres is constitutional) and Greer v. Spock, 424 U.S. 828 (1976) (upholding military base regulation banning political speech but permitting other speech).

140. *Boos*, 485 U.S. at 334-39.

141. *Id.* at 338.

142. *See, e.g.*, United States v. Eichman, 496 U.S. 310 (1990); Austin v.

Amendment speech, with a first-class airline ticket."[143] Consequently, "local ordinances that seek to do more than ban signs from non-public forum public property[144] using content-neutral language will fail."[145]

IV. INSTANT DECISION

A. Majority Opinion

In *City of Ladue v. Gilleo*,[146] the United States Supreme Court began its analysis by noting that signs present special First Amendment problems.[147] The Court compared the government's regulation of the physical aspects of signs to the accepted regulation of audible expression[148] and noted the First Amendment had been applied to sign regulations in the past.[149]

Justice Stevens began a summary of these past decisions by discussing *Linmark Associates, Inc. v. Willingboro*.[150] The Court stated that in *Linmark*, an ordinance prohibiting homeowners from displaying "For Sale" or "Sold" signs was invalidated.[151] The Court noted *Willingboro* was a mirror image of *Gilleo*: the signs prohibited in *Linmark* were exempted in Ladue's ordinance, and where the ordinance in *Linmark* purported to "maintain stable,

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Michigan Chamber of Commerce, 494 U.S. 652 (1990); Mills v. Alabama, 384 U.S. 214 (1966). *See also* Merriam et al., *supra* note 30, at 1027-28.

143. SAMUEL KRISLOV, THE SUPREME COURT AND POLITICAL FREEDOM 96-97 (1968).

144. A non-public forum involves government property that is not a public forum. *See* United States v. Kokinda, 110 S. Ct. 3115 (1990) (sidewalk located next to post office). Such property may either be owned by the government or privately owned yet subject to governmental control. United States Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114 (1981) (letter boxes of private homes). In essence, a non-public forum allows the government to use the property for its primary purpose and without interruption from speech-related activities. *See Kokinda, supra*; Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788 (1985) (federal workplace used for annual charitable fund raising).

145. Merriam et al., *supra* note 30, at 1028 (citing National Advertising Co. v. Town of Babylon, 900 F.2d 551 (2nd Cir. 1990), *cert. denied*, 498 U.S. 852 (1990); National Advertising Co. v. City of Orange, 861 F.2d 246 (9th Cir. 1988)).

146. 114 S. Ct. 2038 (1994).

147. *Id.* at 2041.

148. *Id.* (citing Ward v. Rock Against Racism, 491 U.S. 781 (1989); Kovacs v. Cooper, 336 U.S. 77 (1949)).

149. *Id.* at 2042.

150. 431 U.S. 85 (1977). *See supra* notes 97-101 and accompanying text.

151. *Gilleo*, 114 S. Ct. at 2042.

integrated neighborhoods," the main focus of Ladue's ordinance was aesthetic appearance.[152]

The Court then discussed *Metromedia, Inc. v. City of San Diego*,[153] and stated that in *Metromedia*, a city's interest in traffic safety and aesthetic appearance "justif[ied] a prohibition of off-site commercial billboards even though similar on-site signs were allowed."[154] However, the Court noted that this particular ordinance was struck down because it constituted content-based discrimination.[155]

Finally, the Court examined *City Council v. Taxpayers for Vincent*.[156] In *Vincent*, a regulation that banned posting signs on public property was upheld.[157] The Court found that according to *Metromedia*, an "interest in avoiding visual clutter" justified such a prohibition.[158] The *Vincent* Court rejected the proposition that the city, by failing to apply the ban to private property, was acting inconsistently. According to the Court, a "private citizen's interest in controlling the use of his own property justifies the disparate treatment."[159]

The Court summarized the three cases by stating two recognized grounds for challenging an ordinance controlling sign use: (1) restriction of "too little" speech[160] and (2) prohibition of "too much" speech.[161] Although the Court discussed the restriction of too little speech, it based its decision in *Gilleo* on the prohibition of too much speech.[162]

Justice Stevens reasoned exemptions from a sign regulation may diminish the strength of the city's rationale for restricting speech.[163] Essentially, exemptions in Ladue's ordinance were evidence that the city had found certain speech conveyed by signs more important than the city's aesthetic appearance.[164] According to the Court, if the ordinance was underinclusive,

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152. *Id.*

153. 453 U.S. 490 (1981). *See supra* notes 99-114 and accompanying text.

154. *Gilleo*, 114 S. Ct. at 2042.

155. *Id.*

156. 466 U.S. 789 (1984). *See supra* notes 114-26 and accompanying text.

157. *Gilleo*, 114 S. Ct. at 2043.

158. *Id.*

159. *Id.*

160. The Court stated that "an exemption from an otherwise permissible regulation [may] attempt to give one side of a debatable public question an advantage . . . ." *Gilleo*, 114 S. Ct. at 2043 (citing First Nat. Bank v. Belloti, 435 U.S. 765, 785-86 (1978)).

161. *Gilleo*, 114 S. Ct. at 2043.

162. *Id.*

163. *Id.* at 2044.

164. *Id.*

the city may be able to remedy its defects by merely repealing all the exemptions.[165] However, if the ordinance also prohibits too much speech, such action would be ineffective.[166]

After assuming, arguendo, that the exemptions were not content-based discrimination, the Court addressed the question of whether Ladue may prohibit a resident from displaying a sign.[167] The Court stated the basic purpose of the ordinance was to limit the "visual clutter associated with signs,"[168] and found this valid interest is no more compelling than the interests supporting the ordinance in *Linmark*, which was invalidated.[169] Furthermore, the Court found Ladue's sign ordinance had an extensive impact on free speech[170] and that it practically eliminated an important manner of communication.[171]

The Court concluded that, although a restriction may not be content based discrimination, it may endanger one's freedom of speech by "suppress[ing] too much speech."[172] Justice Stevens reasoned whenever a regulation simply restricts the time, place, or manner of speech, it must "leave open ample alternative channels for communication."[173]

Justice Stevens noted residential signs are inexpensive and convenient and their location provides information about the speaker's identity, which is an important factor to one reading the sign.[174] Accordingly, the Court was not "persuaded that adequate substitutes exist for the important medium of speech that Ladue has closed off."[175] Furthermore, the Court found that individual residents have a substantial self-interest in limiting the proliferation of residential signs and, therefore, this "diminishes the danger of . . . 'unlimited' . . . signs that concerns the City of Ladue."[176] The Court unanimously concluded that, because the ordinance prohibited almost all

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165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.* Ladue's ordinance is broader than the *Linmark* ordinance, which only applied to commercial speech. *Id.*

170. *Id.* at 2045. The court specifically noted that a broad prohibition is not per se invalid. *Id.*

171. *Id.*

172. *Id.*

173. *Id.* (quoting Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984)).

174. *Id.* at 2046.

175. *Id.*

176. *Id.* at 2047.

residential signs, it unconstitutionally violated a resident's right to free speech.[177]

B. Concurring Opinion

Justice O'Connor, writing in concurrence, agreed with the majority that even if the ordinance were content-neutral, it would be invalid.[178] However, Justice O'Connor wrote separately to address what she considered the unusual manner in which the Court arrived at this conclusion.[179]

Justice O'Connor remarked that the Court assumed, arguendo, that the "exemptions [to the ordinance were] free of impermissible content or viewpoint discrimination."[180] However, she pointed out that the usual test mandates the Court to first determine whether an ordinance is "content-based or content-neutral, and then, based on the answer to that question, to apply the proper level of scrutiny."[181] Justice O'Connor stated that such an approach provides insight into the significance of free speech.[182] Furthermore, she noted as a practical matter, "sensible results" have been the effect of such a test.[183]

Justice O'Connor acknowledged that this approach, which on its face draws content distinctions, has notable weaknesses.[184] However, she thought that in sidestepping the entire issue, the Court had avoided confronting "the difficulties with the existing doctrine."[185]

V. COMMENT

Gilleo was the first case in which the Court addressed the regulation of private noncommercial speech on private property by the property owner. The two pivotal decisions in sign regulation, *Metromedia* and *Vincent*, had left

177. *Id.* at 2041-47.

178. *Id.* at 2048 (O'Connor, J., concurring).

179. *Id.*

180. *Id.* at 2047 (O'Connor, J., concurring).

181. *Id.*

182. *Id.* at 2048 (O'Connor, J., concurring). Justice O'Connor stated that "the content-based speech restrictions are especially likely to be improper attempts to value some forms of speech over others, or are particularly susceptible to being used by the government to destroy public debate." *Id.*

183. *Id.*

184. *Id.* at 2047-48 (O'Connor, J., concurring).

185. *Id.* at 2048 (O'Connor, J., concurring).

many questions unanswered, including the extent to which the Court would allow governmental regulation to intrude into private property.[186]

Metromedia was the first significant indication from the Court that sign regulations would be subjected to First Amendment scrutiny.[187] One unique aspect of the *Metromedia* decision is how its reliance on the First Amendment contrasts with how billboard cases were argued prior to the New Deal judicial revolution.[188] Justice White sought to distinguish these former precedents, which largely rejected challenges to billboard regulations, by asserting the prior cases involved due process and equal protection challenges, and not First Amendment considerations.[189]

Although the Court continued its trend towards greater protection of signs as a communication medium, it upheld the sign regulation in *City Council v. Taxpayers for Vincent*.[190] *Vincent* was a clear indication that the First Amendment did not provide absolute protection to signs as a communication medium, but that the government could permissibly regulate their use.

In finding the city's interest in visual aesthetics sufficiently strong to justify the ordinance, the *Vincent* Court failed to address many issues which set the stage for *Gilleo*. The Court offered neither a clear explanation of how a government's interest in visual aesthetics might be defined, nor substantial factual or legal support for its position that such aesthetics are in fact a substantial interest.[191] As one commentator suggested, the Court accepted

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186. *See supra* note 97-126 and accompanying text.

187. One commentator suggests, however, it was the Court, not the interests involved in billboard regulation, that had changed. DENNIS J. COYLE, PROPERTY RIGHTS AND THE CONSTITUTION, SHAPING SOCIETY THROUGH LAND USE REGULATION 176-78 (1993). Coyle suggests that had *Metromedia* been litigated exclusively on the grounds of property rights, the Court likely would have refused to reach the substantive issues or would not have found a constitutional violation. *Id.* at 177.

Cases prior to *Metromedia* involved due process and equal protection challenges. *See supra* notes 25-32 and accompanying text. Prior to the New Deal, the Court was more sympathetic to substantive due process attacks on commercial regulation but lacked a history of strong protection of free speech. *See* COYLE, *supra*, at 178. In contrast, the modern Court has given only ritualistic due process review but takes First Amendment claims very seriously. *Id.* at 178. Prior to the New Deal, plaintiffs sought to protect the speech aspects of outdoor advertising by claiming rights in property. *Id.* at 178. Today, the reverse is true: property may be protected by aligning it with free expression. *Id.* at 178.

188. *See supra* notes 25-32 and accompanying text.

189. Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 498 n.7 (1981).

190. 466 U.S. 789 (1984).

191. Harold L. Quadres, Note, *Content-Neutral Public Forum Regulations: The Rise of the Aesthetic State Interest, The Fall of Judicial Scrutiny*, 37 HASTINGS L.J. 439, 452 (1986).

the state's regulatory mechanism as protecting this undefined interest with little consideration of whether those means unduly affected free speech interests.[192]

Another dilemma created by the *Vincent* decision was that the Court did not weigh the city's aesthetic interest against the degree of speech infringement. The Court should have considered the extent of harm caused by Vincent and others like him and weighed this harm against the burden the ordinance placed on Vincent's expression considering his particular circumstances—"an underfinanced minority political candidate seeking to announce his candidacy in the most economically efficient way possible."[193]

Likewise, in *Clark v. Community for Creative Non-Violence*,[194] the Court failed to recognize that the prohibition on sleeping had a disproportionate impact on a particular message.[195] In a case such as *Clark*, where the message is tightly interwoven with the medium, the majority's belief—that regulation of the medium of communication does not adversely affect the message—is misplaced.[196]

In *Gilleo*, the Court attempted to address the concerns raised by *Metromedia*, *Vincent*, and *Clark*. However, the *Gilleo* Court's analysis varied from the decisions following the traditional analysis in several ways. Where traditionally the Ladue ordinance would be considered content-based in its exemptions, the Court started with the assumption that the ordinance was content-neutral.[197] In further break with traditional analysis,[198] the Court

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192. *Id.* at 452.

193. *Id.* at 453. It is unlikely that supporters of President Reagan's policies on homelessness would express their approval by sleeping in Lafayette Park during winter. *See* Lee, *supra* note 47, at 767-68. As Justice Marshall observed in dissent:

> A content-neutral regulation that restricts an inexpensive mode of communication will fall most heavily upon relatively poor speakers and the points of view that such speakers typically espouse. This sort of latent inequality is very much in evidence in this case for respondents lack the financial means necessary to buy access to more conventional modes of persuasion.

Clark v. Community for Creative Non-Violence, 468 U.S. 288, 314 n.14 (1984) (citation omitted) (Marshall, J., dissenting).

194. 468 U.S. 288 (1984). *See supra* note 56 and accompanying text for discussion.

195. *See* Lee, *supra* note 48, at 767.

196. *See* Lee, *supra* note 48, at 768.

197. In her concurrence, Justice O'Connor observed that "[i]t is unusual for [the Court], when faced with a regulation that on its face draws content distinctions, to 'assume arguendo, the validity of the City's submission that the various exemptions are free of impermissible content or viewpoint discrimination.'" *Gilleo*, 114 S. Ct. at 2047 (O'Connor, J., concurring) (citing *id.* at 2044). *See* discussion *supra* part IV.

did not consider whether the ordinance—content neutral or not—was a valid time, place, or manner regulation.[199] The *Gilleo* Court focused immediately on the impact the ordinance would have on overall communication in Ladue.

Although in the past the Court had endeavored to protect a widely diverse range of media from total prohibition, it had never clearly defined the alternative-access test.[200] Prior to *Gilleo*, it was unclear whether the test required that a speaker have some viable alternative for communicating his or her message, or whether the speaker must have alternative access to his or her chosen medium at some other time or place.[201]

In *Gilleo*, the Court provided its most comprehensive analysis of the "ample alternative channels" test[202] to date. The *Gilleo* Court elevated the alternate channels test to be the sole determinate of the issue and more completely defined the factors of that test.[203] Not only must alternate channels exist, but those channels must have an equivalent utility and achieve the same communicative effect as the medium being regulated.[204] The alternate channel must be more than just satisfactory or sufficient to convey the message—it must afford the speaker the same level of opportunity for expression.[205] In addition, the alternate channel must not effectively dissuade individuals from communicating, for the manner of communication must be the same in terms of cost and opportunity.[206]

Even though alternative modes of speech existed, the Ladue Court was not willing to forego the right to display a sign.[207] A sign "entails a relatively small expense in reaching a wide audience . . . and conveys its

198. *See* discussion *supra*, part IV. Traditionally, the Court has only considered whether ample alternative channels of communication are available after it considers whether the regulation is a valid time, place, or manner restriction.

199. *See supra* part IV.

200. *See* Quadres, *supra* note 191, at 482; discussion *supra*, part IV.

201. *See, e.g.*, Schad v. Borough of Mount Ephraim, 452 U.S. 61, 75-76 (1981) (Court emphasized that one should not be required to leave the borough's limits to exercise the right to view live nonobscene nude entertainment).

202. *See supra* notes 43-58 and accompanying text.

203. *Gilleo*, 114 S. Ct. at 2046-47.

204. *Id.* at 2046.

205. *Id.* The Court reasoned that "[d]isplaying a sign from one's own residence often carries a message quite distinct from placing the same sign someplace else, or conveying the same text or picture by other means." *Id.*

206. *Id.* Noting that residential signs are a "cheap and convenient forum of communication," the court stated that "for persons of modest means or limited mobility, a yard sign may have no practical substitute." *Id.*

207. An individual will "not have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other places." Schneider v. New Jersey, 308 U.S. 147, 163 (1939).

message in a manner that is easily read and understood by its reader or viewer."[208] Signs in the windows of homes convey that individual's personal viewpoints, which is "an impact that money can't buy."[209]

Ladue argued unsuccessfully that there were numerous alternatives by which a resident could express political views.[210] Ladue went so far as to state that Gilleo "may hold a sign while standing or sitting on her lawn as Ladue's sign ordinance only prohibits signs that are attached to the ground or to a structure on the ground."[211] The Court found that forcing Gilleo to display her sign takes away the benefit of using this mode of expression. Furthermore, all of the alternatives suggested by Ladue arguably require more effort, are more expensive, or are less effective.[212]

One potential problem with such a strong application of the alternative access test is its extensive foreclosure on the state's right to regulate the manner of communication. Any restriction on time, place, or manner may, in some degree, diminish the effectiveness of the speaker's message and will certainly impact the speaker's choice of when and where to communicate.[213] Nonetheless, a state has the right to regulate to some extent the time, place, and manner of communication.

In a case such as *Gilleo*, when the Court is faced with such substantial policy reasons against upholding an ordinance, the Court must invalidate it. As the *Gilleo* Court noted: "A special respect for individual liberty in the home has long been part of our culture and our law; that principle has special resonance when the government seeks to constrain a person's ability to speak there."[214] There is an innate sense that an American citizen has a right to express political views, especially on his or her own private property. As the *Gilleo* Court observed: "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."

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208. *Vincent*, 466 U.S. at 819 (Brennan, J., dissenting). Gilleo acquired her yard sign for $4.00 and spent three minutes hammering it into the ground. Brief for Respondent at 44.

209. Brief for Respondent at 18 (quoting DICK SIMPSON, WINNING ELECTIONS: A HANDBOOK IN PARTICIPATORY POLITICS 87 (Swallow Press 1981)).

210. Brief for Petitioners at 40-41; Ladue listed the following alternatives to posting a sign: letters, handbills, flyers, telephone calls, newspaper advertisements, bumper stickers, speeches, and neighborhood or community meetings. *Id.*

211. Brief for Petitioners at 41.

212. *See* Linmark Assocs., Inc. v. Township of Willingboro, 431 U.S. 85 (1977) (ban on real estate signs invalid because suggested alternatives "may be less effective media for communicating the message").

213. *See, e.g.*, Quadres, *supra* note 191, at 453.

214. *Gilleo*, 114 S. Ct. at 2041 (citing Payton v. New York, 445 U.S. 573, 596-97 (1980); Spence v. Washington, 418 U.S. 405, 406, 409, 411 (1974)).

By striking down Ladue's ordinance, the Supreme Court accomplished two objectives. First, it upheld the "special respect for individual liberty in the home that has long been part of culture and our law."[215] Second, the Court declined to expand the government's regulatory power.[216] By examining each objective individually, the issues in *Gilleo* become clear and the precedential value of the case emerges.

First, the Court respected the individual liberty that has traditionally been part of our law. "The posting of signs is . . . a time-honored means of communicating a broad range of ideas and information, particularly in our cities and towns."[217] Essentially, Gilleo's sign was virtually (1) pure speech[218] that addressed a (2) political topic.[219] Furthermore, the sign was situated on (3) private property, so that it could be viewed from the street, a traditional (4) public forum.[220] These represent areas that in the past received the highest protection from the First Amendment.[221]

Ladue's ordinance, on the other hand, had attempted to ban practically all signs throughout the city. Ladue argued the ordinance did not endorse or

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215. *Gilleo*, 114 S. Ct. at 2047 (citing *Payton*, 445 U.S. at 596-97).

216. *See* Boos v. Berry, 485 U.S. 312 (1988) (some indication that political speech could be regulated); Dugan, *supra* note 136, at 995.

217. *Vincent*, 466 U.S. at 818-19 (Brennan, J., dissenting).

218. Baldwin v. Redwood, 540 F.2d 1360, 1366 (9th Cir. 1976), *cert. denied*, 431 U.S. 913 (1977). "Pure speech" receives more First Amendment protection than speech combined with conduct. *See* Texas v. Johnson, 491 U.S. 397, 406 (1989).

219. Mills v. Alabama, 384 U.S. 214, 218 (1966) ("[T]here is practically universal agreement that a major purpose of [the First Amendment] was to protect the free discussion of governmental affairs").

220. Hague v. CIO, 307 U.S. 496, 515 (1939) ("[S]treets . . . have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. [Such rights] must not, in the guise of regulation, be abridged or denied."). *See* Frisby v. Schultz, 487 U.S. 474, 479-81 (1988).

221. *See, e.g.*, Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 688 (1990) ("the right to engage in political expression is fundamental to our constitutional system"); *Metromedia*, 453 U.S. at 512-13 (noncommercial billboard speech afforded higher constitutional protection than commercial billboard speech); *Hague*, 307 U.S. at 515 (use of streets for discussing public questions has traditionally "been a part of the privileges, immunities, rights, and liberties of citizens"). *Compare* Spence v. Washington, 418 U.S. 405 (1974) (emphasis on activity occurring on private property, rather than "in an environment over which the State by necessity must have certain supervisory powers unrelated to expression") *with* General Outdoor Advertising Co. v. Department of Pub. Works, 193 N.E. 799, 815 (Mass. 1935) (constitutional right to own land and determine its use, but such individual right may be regulated for the common good).

denounce any particular viewpoint expressed through a sign and that "political, nonpolitical, controversial and noncontroversial *signs are all prohibited.*"[222] Such argument, however, led to the downfall of the ordinance. The Court assumed the ordinance was content-neutral and yet found that the prohibition eliminated an important means of expression.[223]

The second Court objective was to avoid broadening the regulatory power of the government. Although the decision in *Gilleo* was without dissent, the Court could have pursued another route. For instance, aesthetic appearance has repeatedly been recognized as a valid governmental interest, especially when the government demonstrates extensive evidence.[224] Although the City of Ladue presented comprehensive evidence of their interest in maintaining aesthetics,[225] the Court voted in favor of free speech.[226]

Furthermore, in *Boos*,[227] there was some indication that political speech could be regulated.[228] The phrase "Say No to the Gulf War" seems to qualify as political speech, and thus, the Court could have validated the ordinance by applying the "motivation test" and allowing facially content-based regulation to be deemed content-neutral.[229] However, the Court did not even explore this theory, holding that even if the ordinance was content-neutral it would still be unconstitutional.[230] The Court stated that by setting aside the question of content discrimination, "we need not address . . . [whether the ordinance] targets the undesirable secondary effects associated with certain kind of signs."[231]

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222. Brief for the Petitioners at 2-3. (emphasis added)

223. *Gilleo*, 114 S. Ct. at 2044.

224. *Vincent*, 466 U.S. at 821-22 (Brennan, J., dissenting). *See* Lobsenz & Swanson, *supra* note 113, at 36.

225. *See* Brief for Petitioners at 3-6.

226. *Gilleo*, 114 S. Ct. at 2047. *See* City of Cincinnati v. Discovery Network, 113 S. Ct. 1505 (1993); Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981); Baldwin v. Redwood City, 540 F.2d 1360 (9th Cir. 1970), *cert. denied*, 431 U.S. 913 (1977); Peltz v. City of South Euclid, 228 N.E.2d 320 (Ohio 1967).

227. Boos v. Berry, 485 U.S. 312 (1988).

228. *Id.* at 318-23.

229. *See* City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986).

230. *Gilleo*, 114 S. Ct. at 2044 n.11.

231. *Id.*

The Court assumed, arguendo, that the ordinance did not contain content-based discrimination. *Id.* at 2044. In past decisions, the Court has employed a two-part test when confronted with a regulation that appears to be content-based. *Id.* Generally, the Court has determined (1) whether a regulation is content based and then (2) applied the correct level of scrutiny. *Id.* at 2047 (O'Connor, J., concurring). As pointed out by the concurring opinion of Justice O'Connor, the traditional rule reflects insight into the meaning of free speech. *Id.* at 2048.

Justice O'Connor was disturbed by the Court's decision not to apply the traditional test in order to determine whether the regulation was content based. This concern may be valid because the First Amendment involves a hierarchy of values that gives different speech different protection.[232] Commentators have suggested that if a court does not use a hierarchy, "a more restrictive free speech environment would develop."[233]

In short, *Gilleo* clearly established that a regulation banning all signs in a residential area will be struck down as unconstitutional. Furthermore, the Court reaffirmed that freedom of speech and the right to exercise control over one's own property are important rights that should be free of interference.

Based on *Gilleo* and the trend of other cases, the following should be taken into account when writing a regulation addressing the use of signs:

1. A total ban on political signs in residential areas is unconstitutional.[234] Such an ordinance will probably be unconstitutional even though it extends to public as well as private property.[235] Furthermore, a restriction on the number of political signs that a resident may display is likely to be held unconstitutional.[236]

2. A regulation of the use of temporary signs may be construed as a restriction on political signs and therefore be held unconstitutional.[237] However, a restriction on the total cumulative time that signs may be displayed per year may be constitutional.[238] In addition, courts may be more

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232. Dugan, *supra* note 136, at 1016-18; Paul B. Stephan, *The First Amendment and Content Discrimination*, 68 VA. L. REV. 203, 206 (1982) (Hierarchy implies a "ranking of particular categories of expression, according to the degree the expression implicates the underlying values" of the First Amendment.).

233. Dugan, *supra* note 136, at 1017. Speech that is highly valued would be protected, whereas low value speech would not. On the other hand, if speech of low value were protected, "without hierarchy that low value speech would command the same protection as that granted highly valued speech." *Id.* As a result, the protection of highly valued speech would decrease. The flexibility of a hierarchy approach discounts the "all or nothing approach." *Id.*

234. City of Ladue v. Gilleo, 114 S. Ct. 2038 (1994); Matthews v. Town of Needham, 764 F.2d 58 (1st Cir. 1985). *See supra* notes 96-97 and accompanying text.

235. Peltz v. City of South Euclid, 228 N.E. 320 (Ohio 1967). *See supra* notes 41-46 and accompanying text. *See also* Ross v. Goshi, 351 F. Supp. 949 (D. Hawaii 1972) (total ban on all outdoor political signs held unconstitutional). *See supra* notes 54-60 and accompanying text.

236. Arlington County Republican Comm. v. Arlington County, 790 F. Supp 618 (E.D. Va. 1992). *See supra* notes 98-99 and accompanying text.

237. Baldwin v. Redwood City, 540 F.2d 1360 (9th Cir. 1976), *cert. denied*, 431 U.S. 913 (1977). *See supra* notes 47-53 and accompanying text.

238. Mobile Sign, Inc. v. Town of Brookhaven, 670 F. Supp. 68 (E.D.N.Y. 1987) (commercial signs).

lenient in upholding regulation of portable signs.[239] In fact, a total ban of portable signs could be constitutional.[240]

3. A ban on offsite commercial speech will be constitutional provided that it furthers a legitimate governmental interest.[241] However, a prohibition of all commercial speech will be struck down unless there is a reasonable fit between the legislature's ends and the means chosen to accomplish those ends.[242]

4. In promoting a governmental interest, an ordinance may prohibit the posting of signs on public property.[243]

VI. CONCLUSION

Many people view controversial signs on private property as either an eyesore or an unwelcome intrusion into their stream of consciousness. Signs are, however, an important means of communication for all of society. The right to free speech depends upon the ability to effectively communicate through a viable medium.[244] If a medium is permitted to be totally eliminated, without allowing ample alternative channels for communication, "a grave injustice is worked upon the democratic society."[245] Regulations attempting to severely restrict a communication medium on private property, such as the display of signs, deserve severe scrutiny by the Court; any incidental and unpleasant aesthetic consequences are the price to be paid for rigorous enforcement of the First Amendment.[246]

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239. City of Hot Springs v. Carter, 836 S.W.2d 863 (Ark. 1992).

240. Don's Porta Signs, Inc. v. City of Clearwater, 829 F.2d 1051 (11th Cir. 1987), *cert. denied*, 485 U.S. 981 (1988) (regulation furthered substantial governmental interest by promoting aesthetic interests, eliminating visual clutter and improving visual character of city).

241. Metromedia Inc. v. City of San Diego, 453 U.S. 490 (1981). *See supra* notes 69-81, 120-22 and accompanying text.

242. City of Cincinnati v. Discovery Network, Inc., 113 S. Ct. 1505 (1993). *See supra* note 80.

243. City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984). *See supra* notes 82-95, 123-27 and accompanying text.

244. Liuzzi, *supra* note 47, at 410.

245. Liuzzi, *supra* note 47, at 410.

246. *See* Quadres, *supra* note 191, at 411.