

**CITY OF LADUE V. GILLES:**  
**FREE SPEECH FOR SIGNS,**  
**A GOOD SIGN FOR FREE SPEECH**

**GERALD P. GREIMAN\***

**I. INTRODUCTION**

During the Persian Gulf war, Margaret Gilleo sought to display a small sign at her home, in Ladue, Missouri, stating her opposition to American involvement in the war.<sup>1</sup> City officials informed her that Ladue's sign ordinance prohibited such signs.<sup>2</sup> Gilleo brought a federal civil rights action under 42 U.S.C. § 1983, asserting that Ladue's ordinance violated the First Amendment.<sup>3</sup> She prevailed in the district court<sup>4</sup> as well as in the court of appeals.<sup>5</sup> The Supreme Court granted certiorari and unanimously affirmed, holding that Ladue's sign ordinance unconstitutionally infringed Gilleo's free speech rights.<sup>6</sup>

That the Supreme Court decided the case in Gilleo's favor was not surprising. The ultimate outcome of the case never seemed much in doubt. What *was* surprising, in light of the seemingly clear correctness of the rulings below, was the Court's decision to review the case.

When the Supreme Court granted certiorari, two theories arose as to what prompted the Court to take the case. One was that the Court intended to use the case as a vehicle to clarify sign law in general and, in particular, what constitutes content-discrimination in the context of sign regulation. The Supreme Court last had spoken on that subject in *Metromedia, Inc. v. City of San Diego*,<sup>7</sup> which was a badly fractured plurality decision.

The other theory was that the Court wanted to make clear that the First Amendment guaranteed the right to display a small political sign at one's own home. Several cases had arisen in recent years in which local governments sought to ban political signs, usually on aesthetic grounds.<sup>8</sup> Although the state and lower federal courts which considered those cases consistently invalidated the sign bans as contravening the First Amendment,<sup>9</sup> the question continued to arise

---

\* The author was one of Ms. Gilleo's lawyers in *City of Ladue v. Gilleo*, 114 S. Ct. 2038 (1994), and argued the case on her behalf before the United States Supreme Court. He is a partner in the St. Louis, Missouri law firm of Dankenbring, Greiman, Osterholt & Hoffmann, P.C.

<sup>1</sup> *Gilleo v. City of Ladue*, 774 F. Supp. 1559, 1560 (E.D. Mo. 1991).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* (granting preliminary injunction); *Gilleo v. City of Ladue*, 774 F. Supp. 1564 (E.D. Mo. 1991) (granting permanent injunction).

<sup>5</sup> *Gilleo v. City of Ladue*, 986 F.2d 1180 (8th Cir. 1993).

<sup>6</sup> *City of Ladue v. Gilleo*, 114 S. Ct. 2038 (1994).

<sup>7</sup> 453 U.S. 490 (1981).

<sup>8</sup> See *infra* note 82.

<sup>9</sup> *Id.*

periodically. Some theorized that the Supreme Court wanted to put the issue to rest once and for all.

The Court's decision in *City of Ladue v. Gilleo* proved to be a strong pro-free speech statement, particularly concerning citizens' rights to use their own homes as a platform for political speech, but otherwise did little to clarify sign law. The decision thus might be regarded as vindicating the first theory posited above. It is not so clear, however, that what the Court ultimately did in *Ladue* is what it had in mind when it decided to review the case. It can be inferred that the Court originally contemplated using the case as a vehicle to clarify what constitutes content-discrimination in the context of sign regulation, but backed off from doing so – perhaps because it was unable to agree on an approach that would lessen the confusion in this area.

In any event, regardless of what the Supreme Court initially set out to do, it ultimately rendered a decision striking a strong free speech chord. It sounded some First Amendment themes that had not been heard from the Court in some time, and did so in sweeping terms. The case thus proved to be a highly significant First Amendment decision.

As also discussed below, the question of what constitutes content-discrimination in the context of sign regulation remains a perplexing problem in First Amendment jurisprudence. The *Ladue* decision neither answers that question nor precludes it from arising in the future. Finally, discussed below are some thoughts as to the direction in which the Supreme Court might go if and when it tackles the issue of content-discrimination in the context of sign regulation.

## II. BACKGROUND OF THE LADUE CASE<sup>10</sup>

In December, 1990, Margaret Gilleo was deeply concerned about the prospect of war with Iraq, which seemed imminent.<sup>11</sup> A St. Louis area group was distributing yard signs to raise public awareness of the issue and encourage people to contact their elected representatives in Washington, D.C.<sup>12</sup> Gilleo obtained a sign and placed it in the front yard of her home.<sup>13</sup> The sign was twenty-four by thirty-six inches and read “Say No to War in the Persian Gulf, Call Congress Now.”<sup>14</sup>

Gilleo lived in a residential subdivision of the City of Ladue, a suburb of St. Louis, Missouri.<sup>15</sup> Vandals stole the sign and subsequently knocked down a replacement.<sup>16</sup> Gilleo reported these incidents to the Ladue police, who informed her that a Ladue ordinance prohibited

---

<sup>10</sup> The factual background discussed in this section is drawn principally from the Brief for Respondent filed on behalf of Gilleo in the Supreme Court. Brief for Respondent at 2-4, *City of Ladue v. Gilleo*, 114 S. Ct. 2038 (1994) (No. 92-1856).

<sup>11</sup> Respondent's Brief at 2, *Ladue* (No. 92-1856).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

such signs.<sup>17</sup>

The ordinance (hereinafter Old Chapter 35)<sup>18</sup> prohibited all signs in *Ladue* except those expressly authorized. Permitted signs included “[a]ll municipal signs,” “[s]ubdivision identification signs,” . . . “road signs for danger, direction or identification,” “[s]igns . . . on a residence building stating only the name and profession of an occupant,” real estate “for sale” or “for rent” signs, signs for churches or schools, and certain commercial signs in commercial districts.<sup>19</sup>

After being rebuffed in her efforts to obtain a permit for her sign under the ordinance’s variance provision,<sup>20</sup> Gilleo filed suit against the City of Ladue and various of its officials in the United States District Court for the Eastern District of Missouri under 42 U.S.C. §1983.<sup>21</sup> She alleged that Ladue’s sign ordinance, on its face and as applied, violated her rights to free speech guaranteed by the First Amendment.<sup>22</sup> Her complaint sought declaratory and injunctive relief.<sup>23</sup>

Following an evidentiary hearing,<sup>24</sup> the court ruled that Ladue’s sign ordinance, on its face, violated the First Amendment, and entered a preliminary injunction against its enforcement.<sup>25</sup> Relying principally on the Supreme Court’s plurality opinion in *Metromedia, Inc. v. City of San Diego*,<sup>26</sup> the district court concluded that “Ordinance 35 impermissibly places greater value upon commercial than noncommercial speech and impermissibly values the content of certain noncommercial speech over that of other noncommercial speech. . . .”<sup>27</sup> The court highlighted the fact that the ordinance allowed real estate “for sale” signs but banned all signs of a political nature, and permitted certain categories of noncommercial signs while prohibiting others.<sup>28</sup>

---

<sup>17</sup> *Id.*

<sup>18</sup> LADUE, MO., CODE OF ORDINANCES, ch. 35 (repealed 1991) [hereinafter Old Chapter 35].

<sup>19</sup> *Id.* art. I, §§ 35-2, 35-3, 35-6 to 35-11.

<sup>20</sup> Old Chapter 35 permitted variances “where there are practical difficulties or unnecessary hardships or where the public interest will be best served by permitting such variation.” *Id.* art. I, § 35-5. Taking note of the variance provision, Gilleo made a trip to City Hall and subsequently appeared at a meeting of the Ladue City Council to seek a permit for her sign. Respondent’s Brief at 3, *Ladue* (No. 92-1856). The City Council voted 7-0 to deny Gilleo a permit. *Id.* at 4. At the City Council meeting, part of the discussion centered around the “controversial” nature of Gilleo’s sign. *Id.* at 3-4. Ladue officials also voiced fear of sign proliferation to which they objected on aesthetic grounds. *Id.*

<sup>21</sup> *Ladue*, 774 F. Supp. at 1560.

<sup>22</sup> The Fourteenth Amendment makes the First Amendment applicable to the states. *Gitlow v. New York*, 268 U.S. 652 (1925). The First Amendment has been extended to local governments. *Lovell v. Griffin*, 303 U.S. 444 (1938).

<sup>23</sup> Respondent’s Brief at 4, *Ladue* (No. 92-1856).

<sup>24</sup> Ladue’s witnesses at the hearing testified to a general objection to signs based on aesthetic tastes, and a particular aversion to signs like Gilleo’s that were perceived to be controversial. Respondent’s Brief at 4-5, *Ladue* (No. 92-1856).

<sup>25</sup> *Ladue*, 774 F. Supp. at 1564.

<sup>26</sup> 453 U.S. 490 (1981).

<sup>27</sup> *Ladue*, 774 F. Supp. at 1564.

<sup>28</sup> *Id.* at 1562-63.

Fourteen days after the preliminary injunction ruling, Ladue repealed Old Chapter 35 and adopted a replacement ordinance (hereinafter New Chapter 35).<sup>29</sup> New Chapter 35 was virtually identical to Old Chapter 35 with respect to its preferential treatment of commercial speech over noncommercial speech, and its valuing of some types of noncommercial speech over others. Like its predecessor, New Chapter 35 prohibited all signs except those authorized in the ordinance.<sup>30</sup> Exempted from the general ban were ten categories of signs:<sup>31</sup>

- (a) Municipal signs but said signs shall not be greater than nine (9) square feet.
- (b) Subdivision and residence identification signs of a permanent character but said subdivision identification signs shall not be greater than six (6) square feet and said residence identification signs shall not be greater than one (1) square foot.
- (c) Road signs and driveway signs for danger, direction, or identification but said signs shall not be greater than twelve (12) square feet.
- (d) Health inspection signs but said signs shall not be greater than two (2) square feet.
- (e) Signs for churches, religious institutions, and schools subject to the restrictions described in Section 35-5.<sup>32</sup>
- (f) Identification signs for not-for-profit organizations not otherwise described herein but said signs shall not be greater than sixteen (16) square feet.
- (g) Signs identifying the location of public transportation stops but said signs shall not be greater than three (3) square feet.
- (h) Ground signs advertising the sale or rental of real property subject to the restrictions described in Section 35-10.<sup>33</sup>
- (i) Commercial signs in commercially zoned or industrial zoned districts subject to the restrictions as to size, location, and time of placement hereinafter described.
- (j) Signs identifying safety hazards but said signs shall not be greater than twelve (12) square feet.<sup>34</sup>

The principal change in the new ordinance from the old was that Ladue prefaced New Chapter 35 with a lengthy and self-serving preamble, captioned “Declaration of Findings,

---

<sup>29</sup> LADUE, MO., CODE OF ORDINANCES, ch. 35 (amended 1991) [hereinafter New Chapter 35].

<sup>30</sup> *Id.* art. II, § 35-2.

<sup>31</sup> *Id.* art. II, § 35-4 (footnotes added).

<sup>32</sup> Section 35-5 of New Chapter 35 provided that churches, religious institutions, and schools could erect, on the premises they occupied, “one (1) identification sign and one (1) wall bulletin or one (1) ground sign, none of which shall be more than sixteen (16) square feet in area. . . .” Such signs could contain “announcements relating to the name of such church, religious institution, or school, its services, activities or other functions. . . .” *Id.* art. II, § 35-5. Such institutions further could “erect a temporary sign during a continuous period of not more than sixty (60) days, subject to the same limitations as to area and announcements.” *Id.*

<sup>33</sup> Section 35-10 of New Chapter 35 limited “for sale” and “for lease” signs to “a single ground sign advertising the sale or rental of the real property upon which it is maintained”; limited the size of such signs to “not greater than six (6) square feet”; and limited the permissible content to statements “(a) that the property is for sale, lease or exchange by the owner or his agent; (b) the owner’s or agent’s names; and (c) the owner’s or agent’s address or telephone number.” *Id.* art. II, § 35-10.

<sup>34</sup> *Id.* art. II, § 35-4 (footnotes added).

Policies, Interests and Purposes.”<sup>35</sup> The preamble declared that the sign restrictions contained in New Chapter 35 “are necessary to protect and preserve the City of Ladue’s interests in privacy, aesthetics, safety and property values.”<sup>36</sup>

Gilleo filed an amended complaint challenging the constitutionality of New Chapter 35 on essentially the same basis as Old Chapter 35, and Ladue filed a counterclaim seeking a declaratory judgment that New Chapter 35 was valid and enforceable.<sup>37</sup> At the time these pleadings were filed, Gilleo no longer was maintaining her yard sign, but was displaying a small sign inside a second-floor window of her home, visible from the street. The sign was eight and one-half by eleven inches and stated “For Peace in the Gulf.”<sup>38</sup> The subsequent proceedings pertained to Gilleo’s window sign.<sup>39</sup>

The parties filed cross motions for summary judgment.<sup>40</sup> The district court granted Gilleo’s summary judgment motion, denied Ladue’s motion, and permanently enjoined the enforcement of certain portions of New Chapter 35.<sup>41</sup> The district court found that “New Chapter 35 suffers the same infirmities as Old Chapter 35 in that it prefers some protected speech to other speech based on content.”<sup>42</sup> On that basis, the court concluded that “[t]he general principles of law stated in the order of this Court granting Plaintiff’s request for preliminary injunction with respect to Old Chapter 35 apply as well to New Chapter 35.”<sup>43</sup>

The City of Ladue appealed, and a panel of the United States Court of Appeals for the Eighth Circuit unanimously affirmed.<sup>44</sup> The court of appeals, guided by the plurality opinion in *Metromedia*, found New Chapter 35 to be a content-based regulation of speech in that it “favors commercial speech over noncommercial speech, and it favors certain types of noncommercial

---

<sup>35</sup> *Id.* art. I, New Chapter 35 also circumscribed the City Council’s authority to grant variances, in order to obviate the constitutional difficulties inherent in Old Chapter 35’s allowance of unfettered discretion regarding variances. *Id.* art. II, § 35-22.

<sup>36</sup> *Id.* art. I. Worthy of note is that New Chapter 35, by its terms, seemed to prohibit the display of flags, including the American flag. Under New Chapter 35, the term “sign,” in the context of the ordinance’s general ban against signs, was defined to include “[a] name, word, letter, writing, identification, description, or illustration . . . which publicizes an object, product, place, activity, opinion, person, institution, organization or place of business. . . .” *Id.* art. II, § 35-I. (emphasis added). New Chapter 35 further provided that “[t]he word ‘sign’ shall also include ‘banners’, ‘pennants’ . . .” *Id.* Ladue maintained, however, that all flags, including “an American flag or a flag containing the messages contained on respondent’s signs” may be “displayed in Ladue regardless of their message as long as they are made of fabric and are not in the shape of a banner or pennant.” Brief for Petitioners at 40, *City of Ladue v. Gilleo*, 114 S. Ct. 2038 (1994) (No. 92-1856).

<sup>37</sup> Respondent’s Brief at 9, *Ladue* (No. 92-1856).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Gilleo v. City of Ladue*, 774 F. Sup. 1564 (E.D. Mo. 1991).

<sup>42</sup> *Id.* at 1567.

<sup>43</sup> *Id.*

<sup>44</sup> *Gilleo v. City of Ladue*, 986 F.2d 1180 (8th Cir. 1993).

speech over others.”<sup>45</sup>

Because Ladue’s ordinance was a content-based restriction, the court of appeals held that it must withstand strict scrutiny to survive; it “must be necessary to serve a compelling interest and must be narrowly drawn to achieve that end.”<sup>46</sup> While the court viewed Ladue’s asserted interests as “substantial,” it held that “the interests are not sufficiently ‘compelling’ to support a content-based restriction.”<sup>47</sup> The court further found that “Ladue’s ordinance is not the least restrictive alternative.”<sup>48</sup>

Ladue petitioned for certiorari. To the surprise of many, the Supreme Court accepted the case for review.<sup>49</sup>

### III. LIKELY REASONS FOR THE GRANT OF CERTIORARI

Few observers believed that the Supreme Court’s undertaking to review *Ladue* foreshadowed a reversal of the ultimate result in the case. Rather, for reasons discussed below, it seemed likely that the Court contemplated using the case as a vehicle to (1) clarify sign law in general and, in particular, what constitutes content-discrimination, or (2) make clear once and for all that the First Amendment protects the kind of speech at issue in *Ladue*.

#### A. Clarification of Sign Law

The seminal case concerning First Amendment constraints on sign regulation is *Metromedia, Inc. v. City of San Diego*,<sup>50</sup> which involved a challenge to a San Diego ordinance regulating outdoor advertising displays, i.e., billboards. The ordinance generally prohibited outdoor advertising displays except for on-site signs, meaning signs bearing some relationship to the property on which they are situated,<sup>51</sup> and twelve categories of other signs specifically

---

<sup>45</sup> *Id.* at 1182 (footnote omitted). The court rejected Ladue’s assertion that the “secondary effects doctrine,” adopted in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47-49 (1986), required that New Chapter 35 be viewed as content-neutral. *Ladue*, 986 F.2d at 1183. The court stated that “[a]ssuming arguendo that the ‘secondary effects’ doctrine extends to cases involving the prohibition of political signs on private property,” Ladue’s secondary effects argument fails for want of sufficient support in that “Ladue has not shown that the prohibited signs cause more aesthetic, safety, and property value problems than the permitted signs.” *Id.* (footnote omitted). The court further stated that the lack of correlation between Ladue’s asserted interests in eliminating the claimed secondary effects and the categories of signs singled out for discriminatory treatment “undermines Ladue’s commitment to its secondary-effects justification and supports the contention that the ordinance is aimed at the content of the signs.” *Id.*

<sup>46</sup> *Id.* at 1183.

<sup>47</sup> *Id.* at 1183-84 (footnote omitted).

<sup>48</sup> *Id.* at 1184.

<sup>49</sup> *City of Ladue v. Gilleo*, 114 S. Ct. 55 (1993).

<sup>50</sup> 453 U.S. 490 (1981).

<sup>51</sup> On-site signs were defined as those “designating the name of the owner or occupant of the premises upon which such goods 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.” *Metromedia*, 453 U.S. at 494, (quoting San Diego, Cal. Ordinance No. 10795 (New Series) (1972)) [hereinafter San Diego Ord.].

exempted from the ban.<sup>52</sup> The stated purposes of the ordinance were “to eliminate hazards to pedestrians and motorists brought about by distracting sign displays’ and ‘to preserve and improve the appearance of the City.’”<sup>53</sup>

Justice White, writing for a four-justice plurality, observed that billboards have communicative aspects and therefore implicate free speech interests, but that they have noncommunicative aspects as well and are subject to regulation.<sup>54</sup> The plurality proceeded to consider separately the ordinance’s impact on commercial and noncommercial speech. The plurality concluded that insofar as the ordinance regulated commercial speech, it met the tests set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission*,<sup>55</sup> and was valid.<sup>56</sup> However, the plurality concluded that the ordinance was unconstitutional as applied to noncommercial speech, for two reasons.<sup>57</sup>

First, the plurality construed the on-site exception in the San Diego ordinance as extending only to commercial advertising, and found no similar exception for noncommercial speech.<sup>58</sup> On that basis, the plurality viewed the ordinance as impermissibly valuing commercial over noncommercial speech. Justice White stated that “our recent commercial speech cases have consistently accorded noncommercial speech a greater degree of protection than commercial speech,” and “San Diego effectively inverts this judgment, by affording a greater degree of protection to commercial than to noncommercial speech.”<sup>59</sup>

Second, the plurality concluded that a general billboard ban coupled with several categories of exceptions placed the City in the position of choosing permissible subjects for public discourse via signs.<sup>60</sup> This was deemed to constitute impermissible content-based discrimination.

The plurality viewed the San Diego ordinance as a regulation of outdoor advertising, not a total ban. Accordingly, Justice White did not reach the question of whether a total ban would contravene the First Amendment.<sup>61</sup>

Justice Brennan, in an opinion joined by Justice Blackmun, concurred in the

---

<sup>52</sup> *Id.* The exempted signs included: “government signs; signs located at public bus stops; signs manufactured, transported, or stored within the city, if not used for advertising purposes; commemorative historical plaques; religious symbols; signs within shopping malls; for sale and for lease signs; signs on public and commercial vehicles; signs depicting time, temperature, and news; approved temporary, off-premises, subdivision directional signs; and [t]emporary political campaign signs.” *Id.* at 494-95 (quoting San Diego Ord. § 101.0700(F)).

<sup>53</sup> *Id.* at 493 (quoting San Diego Ord.).

<sup>54</sup> *Id.* at 501-03.

<sup>55</sup> 447 U.S. 557 (1980).

<sup>56</sup> *Metromedia*, 453 U.S. at 512.

<sup>57</sup> *Id.* at 512-13.

<sup>58</sup> *Id.* at 513.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 514-15.

<sup>61</sup> 453, U.S. at 515 n.20.

judgment.<sup>62</sup> Unlike the plurality, Justice Brennan believed that the case did present the question of whether a total ban against billboards could be justified, because the “practical effect of the San Diego ordinance is to eliminate the billboard as an effective medium of communication” for certain speakers.<sup>63</sup> In his view, the ordinance should be assessed under the tests applicable to a content-neutral ban against a particular mode of communication.<sup>64</sup> He concluded that a total ban could be justified only if it “directly furthered” a “sufficiently substantial governmental interest,” and “any more narrowly drawn restriction . . . would promote less well the achievement of that goal.”<sup>65</sup> Applying those tests, Justices Brennan and Blackmun concluded that San Diego had “failed to provide adequate justification for its substantial restriction on protected activity.”<sup>66</sup>

Justice Stevens dissented in part.<sup>67</sup> As did Justices Brennan and Blackmun, he agreed that the case presented the question of “whether a city may entirely ban one medium of communication.”<sup>68</sup> In his view, the relevant test was twofold. The first inquiry was “is there any reason to believe that the regulation is biased in favor of one point of view or another, or that it is a subtle method of regulating the controversial subjects that may be placed on the agenda for public debate?”<sup>69</sup> The second inquiry was “is it fair to conclude that the market which remains open for the communications of both popular and unpopular ideas is ample and not threatened with gradually increasing restraints?”<sup>70</sup> Applying those tests, Justice Stevens would have upheld the San Diego ordinance.<sup>71</sup>

Chief Justice Burger and Justice Rehnquist also wrote dissenting opinions.<sup>72</sup> Chief Justice Burger opined that a city has the authority “to protect its citizens’ legitimate interests in traffic safety and the environment by eliminating distracting and ugly structures from its buildings and roadways, to define which billboards actually pose that danger, and to decide whether, in certain instances, the public’s need for information outweighs the dangers perceived.”<sup>73</sup> Justice Rehnquist expressed substantial agreement with the views of Chief Justice Burger and Justice Stevens, and went on to state that, in his view, aesthetic interests alone were sufficient to justify totally banning billboards within a community.<sup>74</sup> Justice Rehnquist also

---

<sup>62</sup> *Id.* at 521.

<sup>63</sup> *Id.* at 525-26 (emphasis in original).

<sup>64</sup> *Id.* at 526-27.

<sup>65</sup> *Id.* at 528.

<sup>66</sup> *Id.* Justice Brennan also disagreed with the plurality’s reading of the on-site exception in the San Diego ordinance as being applicable only to commercial speech, stating that he found no such limitation in the ordinance, 453 U.S. at 535. He also disagreed with the notion that it would be constitutional to ban commercial billboards but allow noncommercial billboards, stating that this would vest city officials with the power to determine whether a proposed message was commercial or noncommercial. *Id.* at 536.

<sup>67</sup> *Id.* at 540 (Stevens, J., dissenting).

<sup>68</sup> *Metromedia*, 453 U.S. at 542.

<sup>69</sup> *Id.* at 552.

<sup>70</sup> *Id.*

<sup>71</sup> 453 U.S. at 552-53.

<sup>72</sup> *Id.* at 555 (Burger, C.J., dissenting); *Id.* at 569 (Rehnquist, J., dissenting).

<sup>73</sup> *Id.* at 557.

<sup>74</sup> *Id.* at 569-70.

characterized the array of opinions in *Metromedia*, as “a virtual Tower of Babel, from which no definitive principles can be clearly drawn.”<sup>75</sup>

Justice Rehnquist’s comments concerning the lack of clear guidance to be drawn from *Metromedia* were quite apt. Where a plurality combines with one or more concurring justices to decide a case, the holding of the case generally is derived from the common ground shared by the plurality and concurring opinions.<sup>76</sup> In *Metromedia*, however, it is impossible to apply this principle because the reasoning of the concurrence is not simply narrower than that of the plurality opinion, it is diametrically opposed to it.

In some respects, the concurring justices had more in common with the dissenting justices than with the plurality. For instance, the concurring justices agreed with the dissenters that, at least in some circumstances, a total ban against billboards within a community could be justified. Further, only the plurality construed the on-site exception in the San Diego ordinance as being limited to commercial signs; the concurring and dissenting justices perceived no such limitation. Also, a total of seven justices – the plurality and the dissenters – agreed that the existing record in *Metromedia* was sufficient to justify a ban against commercial billboards.<sup>77</sup>

Focusing solely on the plurality’s opinion in *Metromedia*, the plurality’s reasoning raises some perplexing questions regardless of whether one agrees with the result reached by it. For instance, the notion that *any* exception to a general sign ban – no matter how limited and benign – will render a sign regulation content-discriminatory is troublesome. It suggests, for example, that an ordinance allowing street signs and house numbers but no other signs would be constitutionally suspect. Such an approach seems overly mechanistic. It does not engender a feeling that the inquiry has focused squarely on the central First Amendment concerns – whether the government is engaging in the kind of picking and choosing of topics for permissible public discussion via signs that is anathema to the First Amendment.

Moreover, insofar as the *Metromedia* plurality opinion relied on presumed hierarchial differences in the constitutional value of commercial and noncommercial speech, it rested on a premise from which the Supreme Court currently seems to be distancing itself. Illustrative of that point is *City of Cincinnati v. Discovery Network, Inc.*<sup>78</sup> which concerned the validity of an ordinance that banned newsracks distributing commercial advertising publications. The ordinance was intended to partially address aesthetic and traffic safety concerns arising both from newsracks purveying commercial publications and those distributing noncommercial publications.<sup>79</sup> The Court invalidated the ordinance, holding that the lesser constitutional protection accorded to commercial speech did not permit Cincinnati to single out commercial newsracks for a selective ban.<sup>80</sup>

---

<sup>75</sup> *Id.* at 569.

<sup>76</sup> *See* Marks v. United States, 430 U.S. 188, 193 (1977).

<sup>77</sup> The difficulties in attempting to derive governing principles from the various opinions in *Metromedia* are discussed in Rappa v. New Castle County, 18 F.3d 1043, 1056-61 (3d Cir. 1994) and Scadron v. City of Des Plaines, 734 F.Supp. 1437, 1447 n.20 (N.D. Ill. 1990).

<sup>78</sup> 113 S. Ct 1505 (1993).

<sup>79</sup> *Id.* at 1511.

<sup>80</sup> *Id.* at 1514.

In short, the *Metromedia* plurality approach may lead to the right result; however, it does not produce a satisfying feeling that the most meaningful First Amendment analysis possible has been undertaken. Nor, for that matter, does the *Metromedia* plurality approach engender confidence that the aesthetic and land use interests present in that case have been accorded due consideration.

Against this backdrop, the issues that confronted the Court in *Metromedia* certainly cry out for renewed consideration, and it is not surprising that many thought the Court contemplated using *Ladue* to do so. In one sense, *Ladue* may not have seemed an appropriate vehicle for revisiting *Metromedia*, since it was not likely that one resolution or another of the *Metromedia* issues would have any impact on the ultimate outcome of *Ladue*.<sup>81</sup> On the other hand, the seeming lack of controversy over the proper result in *Ladue* may have been attractive to the Supreme Court. The Court may have felt that revisiting the *Metromedia* issues in the context of a case in which the ultimate outcome at least was clear, might advance the likelihood of producing a ruling reflecting greater unity and clarity than was achieved in *Metromedia*.

## **B. Free Speech Statement**

Another popular theory for why the Supreme Court granted certiorari in *Ladue* was that it wanted to make clear that signs like Gilleo's are protected by the First Amendment, and that nobody should think otherwise. From one perspective, the proposition that signs like Gilleo's constitute protected free speech which cannot be banned seems obvious. If the First Amendment does not protect a citizen's right to display a small sign at her own home, expressing her views on an important public issue, it is hard to imagine what it does protect.

However, the proposition has not been obvious to all. Over the past several years, there has been a steady stream of cases in the state and lower federal courts involving broad

---

<sup>81</sup> Another factor mitigating against using *Ladue* to revisit *Metromedia* was that *Metromedia* dealt with billboards while *Ladue* concerned small signs. While certain parallels exist between small signs and billboards, there are important differences. "[W]hatever its communicative function, the billboard remains a 'large, immobile, and permanent structure which like other structures is subject to . . . regulation.'" *Metromedia*, 453 U.S. at 502 (plurality opinion) (quoting lower court opinion, *Metromedia, Inc. v. City of San Diego*, 610 P.2d 407, 419 (Cal. 1980)). Indeed, in *Metromedia*, it was settled even before the case arrived in the Supreme Court that the San Diego ordinance restricting "outdoor advertising display signs" should be construed as not extending to "a small sign placed in one's front yard proclaiming a political or religious message." *Id.* at 410 n.2. Noting that such signs "present no significant aesthetic blight or traffic hazard" and are "of a character very different from commercial billboards," the California Supreme Court adopted a narrowing construction "to avoid the risk of unconstitutional overbreadth which a broad construction of the ordinance might entail." *Id.*; see *Metromedia*, 453 U.S. at 494 n.2 (plurality opinion).

The Supreme Court repeatedly has recognized that "[e]ach method of communicating ideas is 'a law unto itself and that law must reflect the 'differing natures, values, abuses and dangers' of each method.'" *Metromedia*, 453 U.S. at 501 (plurality opinion) (footnote omitted). See *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975); *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952). Accordingly, the legal principles pertaining to small signs and billboards are not necessarily fully interchangeable.

restrictions against residential signs.<sup>82</sup> None of these cases has upheld a ban against small residential signs of a political nature. Yet, as illustrated by *Ladue*, the issue has continued to arise periodically.

Moreover, many of the sign cases that have arisen in recent years have been resolved based on the *Metromedia* plurality approach.<sup>83</sup> If the Court was not disposed to squarely reconsider *Metromedia*, it at least may have wanted to sidestep it and provide the lower courts with an alternative conceptual framework for deciding cases like *Ladue*.

Making a broad free speech statement about residential political signs as a constitutionally protected mode of communication would fit with the Court's past approach towards other modes of expression. Over the years, the Court has had occasion to consider whether, consistent with the First Amendment, a local government may entirely ban the distribution of pamphlets,<sup>84</sup> handbilling on public streets,<sup>85</sup> door-to-door distribution of literature,<sup>86</sup> and live entertainment.<sup>87</sup> In each instance, the Court's answer was "No." In taking *Ladue*, perhaps the Court felt that it was time to make a similar statement with respect to small residential political signs.

#### IV. THE SUPREME COURT'S DECISION IN *LADUE*

In June 1994, the Supreme Court decided the *Ladue* case in Ms. Gilleo's favor, by a 9-0

---

<sup>82</sup> *Arlington County Republican Comm. v. Arlington County*, 983 F.2d 587 (4th Cir. 1993); *Matthews v. Town of Needham*, 764 F.2d 58 (1st Cir. 1985); *Venilli v. City of Concord*, 548 F.2d 262 (9th Cir. 1977); *Baldwin v. Redwood City*, 540 F.2d 1360 (9th Cir. 1976), *cert. denied*, *Leipzig v. Baldwin*, 431 U.S. 913 (1977); *Loftus v. Township of Lawrence Park*, 764 F. Supp. 354 (W.D. Pa. 1991); *Tauber v. Town of Longmeadow*, 695 F. Supp. 1358 (D. Mass. 1988); *Meros v. City of Euclid*, 594 F. Supp. 259 (N.D. Ohio 1984), *vacated*, 780 F.2d 1020 (6th Cir. 1985); *City of Antioch v. Candidates' Outdoor Graphic Serv.*, 557 F.Supp. 52 (N.D. Cal. 1982); *Martin v. Wray*, 473 F. Supp. 1131 (E.D. Wis. 1979); *Orazio v. Town of North Hempstead*, 426 F. Supp. 1144 (E.D.N.Y. 1977); *Ross v. Goshi*, 351 F. Supp. 949 (D. Haw. 1972); *City of Lakewood v. Colfax Unlimited Ass'n*, 634 P.2d 52 (Colo. 1981) (en banc); *Goward v. City of Minneapolis*, 456 N.W.2d 460 (Minn. Ct. App. 1990); *State v. Miller*, 416 A.2d 821 (N.J. 1979); *Farrell v. Township of Teaneck*, 315 A.2d 424 (N.J. Super. Ct. Law Div. 1974); *Peltz v. City of South Euclid*, 228 N.E.2d 320 (Ohio 1967); *City of Euclid v. Mabel*, 484 N.E.2d 249 (Ohio Ct. App. 1984); *Van v. Travel Info. Council*, 628 P.2d 1217 (Or. Ct. App. 1981); *Fisher v. City of Charleston*, 425 S.E.2d 194 (W. Va. 1992).

<sup>83</sup> *Matthews v. Town of Needham*, 764 F.2d 58 (1st Cir. 1993); *Tauber v. Town of Longmeadow*, 695 F. Supp. 1358 (D. Mass. 1988); *Meros v. City of Euclid*, 594 F. Supp. 259 (N.D. Ohio 1984), *vacated*, 780 F.2d 1020 (6th Cir. 1985); *City of Antioch v. Candidates' Outdoor Graphic Sent.*, 557 F. Supp. 52 (N.D. Cal. 1982); *Goward v. City of Minneapolis*, 456 N.W.2d 460 (Minn. Ct. App. 1990); *City of Euclid v. Mabel*, 484 N.E.2d 249 (Ohio Ct. App. 1984); *Fisher v. City of Charleston*, 425 S.E.2d 194 (W. Va. 1992).

<sup>84</sup> *Lovell v. City of Griffin*, 303 U.S. 444 (1938).

<sup>85</sup> *Jamieson v. Texas*, 318 U.S. 413 (1943).

<sup>86</sup> *Martin v. City of Struthers*, 319 U.S. 141 (1943); *Schneider v. New Jersey*, 308 U.S. 147 (1939).

<sup>87</sup> *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981); *see also Frisby v. Schultz*, 487 U.S. 474 (1988) (picketing in residential neighborhoods not focused on a particular residence).

vote.<sup>88</sup> The Court affirmed the ruling below that Ladue’s sign ordinance was unconstitutional as violative of the First Amendment.<sup>89</sup> Justice Stevens authored the opinion of the Court.<sup>90</sup> Justice O’Connor wrote a concurring opinion and also joined the opinion of the Court.<sup>91</sup>

Justice Stevens began by observing that while signs constitute speech protected by the First Amendment, they possess certain “physical characteristics” which may pose “distinctive problems” and are subject to governmental regulation.<sup>92</sup> Noting that “regulation of a medium inevitably affects communication itself,”<sup>93</sup> he proceeded to review past cases in which the Court had considered the constitutionality of ordinances prohibiting the display of certain signs.

Justice Stevens took note of *Linmark Associates, Inc. v. Township of Willingboro*,<sup>94</sup> in which the Court invalidated an ordinance that prohibited the display of “For Sale” or “Sold” signs,<sup>95</sup> *Metromedia*<sup>96</sup>, and *City Council of Los Angeles v. Taxpayers for Vincent*,<sup>97</sup> in which the Court upheld a Los Angeles ordinance that prohibited posting signs on public utility poles. He observed that these decisions identify two different grounds for constitutional challenges to sign restrictions – one being that a regulation “in effect restricts too little speech because its exemptions discriminate on the basis of the signs’ messages,”<sup>98</sup> and the other being that the challenged restrictions “simply prohibit too much protected speech.”<sup>99</sup>

With respect to the discrimination issue, Ladue had contended that its selective ban against most, but not all, signs turned on “legitimate differences among the side effects of various kinds of signs,” and that these differences were unrelated to content and sufficiently justified the regulatory scheme reflected in its sign ordinance.<sup>100</sup> Justice Stevens stated, however, that even assuming that Ladue’s arguments sufficed to allay any fear that Ladue was engaging in impermissible viewpoint or subject matter discrimination, the fact that Ladue permitted some signs while banning others was relevant to the question of whether the ordinance prohibited too

---

<sup>88</sup> *City of Ladue v. Gilleo*, 114 S. Ct. 2038 (1994).

<sup>89</sup> *Id.* at 2041.

<sup>90</sup> *Id.* at 2040.

<sup>91</sup> *Id.* at 2047-48.

<sup>92</sup> *Ladue*, 114 S. Ct. at 2041. “Unlike oral speech, signs take up space and may obstruct views, distract motorists, displace alternative uses for land, and pose other problems that legitimately call for regulation.” *Id.*

<sup>93</sup> *Id.* at 2042.

<sup>94</sup> 431 U.S. 85 (1977).

<sup>95</sup> The ordinance in *Linmark* was intended to promote stable, integrated neighborhoods by stemming white flight. *Id.* at 94-95.

<sup>96</sup> 453 U.S. 490 (1981); *see supra* part III.A.

<sup>97</sup> 466 U.S. 789 (1984).

<sup>98</sup> *Ladue*, 114 S. Ct. at 2043. The Court explained that a regulation which restricts too little speech and is, therefore, impermissibly underinclusive, is problematic because it may place the government in the position of selecting permissible topics for public discussion, or giving one side in a public debate some advantage in expressing its views. *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 2043-44.

much speech.<sup>101</sup> He said that “[i]n this case, at the very least, the exemptions from Ladue’s ordinance demonstrate that Ladue has concluded that the interest in allowing certain messages to be conveyed by means of residential signs outweighs the City’s aesthetic interest in eliminating outdoor signs.”<sup>102</sup>

Also, the Court questioned the soundness of assessing the validity of Ladue’s ordinance under the content-discrimination rationale employed by the court of appeals because any defects found on that basis theoretically might be removed by repealing all of the exemptions.<sup>103</sup> Justice Stevens observed that repealing the exemptions would not save the ordinance from a flaw that it prohibits too much speech.<sup>104</sup>

The approach adopted by the Court, therefore, was to “first ask whether Ladue may properly prohibit Gilleo from displaying her sign, and then, only if necessary, consider the separate question whether it was improper for the City simultaneously to permit certain other signs.”<sup>105</sup> The Court said that “[i]n examining the propriety of Ladue’s near-total prohibition of residential signs, we will assume, arguendo, the validity of the City’s submission that the various exemptions are free of impermissible content or viewpoint discrimination.”<sup>106</sup>

Justice Stevens observed that “residential signs have long been an important and distinct medium of expression.”<sup>107</sup> He commented upon the important role that residential lawn and window signs play in political campaigns,<sup>108</sup> and stated that “[s]igns that react to a local happening or express a view on a controversial issue both reflect and animate change in the life of a community.”<sup>109</sup> Noting the broad reach of Ladue’s sign ban, which extended to all political, religious, and personal messages, Justice Stevens concluded that “Ladue has almost completely foreclosed a venerable means of communication that is both unique and important.”<sup>110</sup>

---

<sup>101</sup> *Id.* at 2044. “Exemptions from an otherwise legitimate regulation of a medium of speech . . . may diminish the credibility of the government’s rationale for restricting speech in the first place.” *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Ladue*, 114 S. Ct. at 2044. The Court also noted that Gilleo’s primary concern was not within the scope of exemptions available at other locations, but within her right to display a sign at her own home. *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Ladue*, 114 S. Ct. at 2044.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 2045. The notion of maintaining a sign at one’s residence expressing an occupant’s beliefs is no modern invention. The concept dates back at least to biblical times. In Deuteronomy, 6:6-9, it is written: “Keep these words that I am commanding you today in your heart . . . and write them on the doorposts of your house and on your gates.” *Deuteronomy*, 6:6; 6:9 (NRSV Harper Study Bible).

<sup>108</sup> *Ladue*, 114 S. Ct. at 2045.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* The Supreme Court previously has commented upon the significance of signs as a mode of expression. *See City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 818-19 (1984) (Brennan, J., dissenting) (“The posting of signs is . . . a time-honored means of communicating a broad range of ideas and information, particularly in our cities and towns.”); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 501 (1981) (plurality opinion), quoting lower court opinion, *Metromedia, Inc. v.*

The Court noted that its “prior decisions have voiced particular concern with laws that foreclose an entire medium of expression.”<sup>111</sup> It observed that “prohibitions foreclosing entire media” may pose a danger to freedom of speech even in the absence of content or viewpoint discrimination.”<sup>112</sup> “[B]y eliminating a common means of speaking, such measures can suppress too much speech.”<sup>113</sup>

Ladue argued that its ordinance did not foreclose an entire medium of expression but merely regulated the time, place, and manner of speech.”<sup>114</sup> The Court stated, however, that time, place, and manner regulations “must ‘leave open ample alternative channels for communication,’”<sup>115</sup> and “we are not persuaded that adequate substitutes exist for the important medium of speech that Ladue has closed off.”<sup>116</sup>

Justice Stevens observed that displaying a sign at one’s residence is a distinct form of expression because the sign’s location provides information about the speaker, and the identity of the speaker may be an important component of the message.<sup>117</sup> He noted, as an example, that “[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 the bumper sticker of a passing automobile.”<sup>118</sup>

The Court also observed that “[r]esidential signs are an unusually cheap and convenient form of communication” and “for persons of modest means or limited mobility, a yard or window sign may have no practical substitute.”<sup>119</sup> Moreover, residential signs were deemed important not just to persons of limited means or mobility, because “[e]ven for the affluent, the added costs in money or time of taking out a newspaper advertisement, handing out leaflets on

---

City of San Diego, 610 P.2d 407, 430-31 (Cal. 1980) (Clark, J., dissenting) (‘[O]utdoor signs have placed [sic] a prominent role throughout American history, rallying support for political and social causes.’).

Small signs represent a unique and valuable mode of communication for several reasons. A sign “entails a relatively small expense in reaching a wide audience, allows flexibility in accommodating various formats, typographies, and graphics, and conveys its message in a manner that is easily read and understood by its reader or viewer. . . . The message on a posted sign remains to be seen by passersby as long as it is posted, while a handbill is typically read by a single reader and discarded,” *Vincent*, 466 U.S. at 819-20 (Brennan, J., dissenting).

<sup>111</sup> *Ladue*, 114 S. Ct. at 2045.

<sup>112</sup> *Ladue*, 114 S. Ct. at 2045.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 2046. The basis of Ladue’s argument was that “residents remain free to convey their desired messages by other means, such as *hand-held* signs, ‘letters, handbills, flyers, telephone calls, newspaper advertisements, bumper stickers, speeches, and neighborhood or community meetings.’” *Id.* (emphasis added) (quoting Petitioner’s Brief at 41, *Ladue* (No. 92-1886)).

<sup>115</sup> *Ladue*, 114 S. Ct. at 2046 (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

<sup>116</sup> *Ladue*, 114 S. Ct. at 2046.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

the street, or standing in front of one’s house with a handheld sign may make the difference between participating and not participating in some public debate.”<sup>120</sup>

Justice Stevens also noted that “special respect for individual liberty in the home has long been part of our culture and our law.”<sup>121</sup> He said that “[m]ost Americans would be understandably dismayed, given that tradition, to learn that it was illegal to display from their window an 8 by 11-inch sign expressing their political views.”<sup>122</sup>

Finally, the Court observed that its decision “by no means leaves the City powerless to address the ills that may be associated with residential signs.”<sup>123</sup> The Court noted that it was addressing the right of residents to display signs on their own property, not on land owned by others or on public property; that residents “have strong incentives to keep their own property values up and to prevent ‘visual clutter’ in their own yards and neighborhoods”; and that this “self interest diminishes the danger of the ‘unlimited’ proliferation of residential signs that concerns the City of Ladue.”<sup>124</sup> The Court expressed confidence that “more temperate measures,” i.e., regulations stopping short of a ban, could largely address Ladue’s stated concerns without abridging First Amendment rights.<sup>125</sup> The Court noted, too, that its decision did not mean that every kind of sign must be permitted in residential areas, and that different considerations might apply to signs displayed for a fee or off-site commercial advertisements on residential property.<sup>126</sup>

In her concurring opinion, Justice O’Connor observed that “[i]t is unusual for us, 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.’”<sup>127</sup> She said that “[t]he normal inquiry that our doctrine dictates 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.”<sup>128</sup>

Justice O’Connor acknowledged that this approach has been the target of “some cogent criticisms;” that it occasionally has led to regulations being invalidated “because of their content-based nature, even though common sense may suggest that they are entirely reasonable;” and that “[t]he content distinctions present in this ordinance may, to some, be a good example of this.”<sup>129</sup> She said, however, that “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

---

<sup>120</sup> *Id.*

<sup>121</sup> *Ladue*, 114 S. Ct. at 2047.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Ladue*, 114 S. Ct. at 2047.

<sup>127</sup> *Id.* (quoting the majority opinion in *Ladue*, at 2044).

<sup>128</sup> *Id.* Justice O’Connor noted, too, that “[w]ith 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.*

<sup>129</sup> *Ladue*, 114 S. Ct. at 2047-48.

balancing tests.”<sup>130</sup> She said that “no better alternative has yet come to light.”<sup>131</sup>

Justice O’Connor continued:

I would have preferred to apply our normal analytical structure in this case, which may well have required us to examine this law with the scrutiny appropriate to content-based regulations. Perhaps this would have forced us to confront some of the difficulties with the existing doctrine; perhaps it would have shown weaknesses in the rule, and led us to modify it to take into account the special factors this case presents. But such reexamination is part of the process by which our rules evolve and improve.<sup>132</sup>

Justice O’Connor nevertheless joined the opinion of the Court because she agreed that Ladue’s ordinance would be invalid even if it were content-neutral, and she did not believe that the Court’s opinion “casts any doubt on the propriety of our normal content discrimination inquiry.”<sup>133</sup>

## V. THE SIGNIFICANCE OF THE *LADUE* DECISION

The *Ladue* decision sends a strong pro-free speech message in several respects. First, the Court made clear that a government may not entirely ban small residential signs of a political nature.

Further, the Court premised its decision on broader First Amendment underpinnings than it might have. The Court could have resolved the *Ladue* case on narrow grounds of overbreadth – that whatever else might be said about Ladue’s ordinance, it is unconstitutional as applied to an eight and one-half by eleven inch sign taped inside a second-floor window of a person’s home. Alternatively, the Court might have adopted the reasoning of the lower courts – that the ordinance is content-discriminatory because it permits some signs while banning others.

Instead, the Court held, in sweeping terms, that the mode of expression utilized by Gilleo – displaying a small sign at one’s own home – is simply too important a means of communication to be banned. The Court thus made clear that a sign ban like Ladue’s runs afoul of the First Amendment regardless of whether the ban is selective or total. Accordingly, the *Ladue* decision is an extension of the line of cases in which the Court has considered and struck down bans against other modes of expression, such as handbilling, door-to-door distribution of literature, and live entertainment.<sup>134</sup>

It is both unusual and significant that the Supreme Court invalidated Ladue’s ordinance while assuming, without deciding, that it was content-neutral. Justice O’Connor was correct that the Court’s usual approach was first to determine whether the challenged speech restriction was

---

<sup>130</sup> *Id.* at 2048.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *See supra* notes 84-87.

content-based or content-neutral. The answer to that inquiry then dictated the level of First Amendment scrutiny to be applied. Content-based speech restrictions are subjected to strict scrutiny,<sup>135</sup> and rarely survive that test.<sup>136</sup> Content-neutral speech restrictions often are subjected to a lesser degree of scrutiny,<sup>137</sup> and are frequently upheld.<sup>138</sup>

The First Amendment's antipathy to content-discriminatory speech restrictions stems from the risk that such restrictions may distort public debate. An obvious example of a regulation posing this concern would be one allowing speech on a public issue only by proponents of a particular viewpoint.<sup>139</sup> The risk that public debate may be skewed similarly arises where the government attempts to select which issues may be discussed in public, even where it refrains from favoring any particular viewpoints. "To allow a government the choice of permissible subjects for public debate would be to allow that government control over the search for political truth."<sup>140</sup>

In contrast, content-neutral speech restrictions may not jeopardize the quality of public debate in the same manner or degree. The principal impact of content-neutral speech restrictions is to limit the *quantity* of public debate.<sup>141</sup>

To be sure, it cannot be said that content-neutral limitations on the quantity of public debate raise no First Amendment concerns. As Justice Marshall has noted, "[t]he consistent imposition of silence upon all may fulfill the dictates of an even-handed content-neutrality. But it offends our 'profound national commitment to the principle that debate on public issues should

---

<sup>135</sup> To pass muster under strict scrutiny, a speech restriction must be necessary to further a compelling state interest and be narrowly drawn, i.e., the least restrictive means of achieving its purpose. *See, e.g.,* *Boos v. Barry*, 485 U.S. 312, 321-29 (1988).

<sup>136</sup> *See* *Burson v. Freeman*, 112 S. Ct. 1846, 1852 (1992).

<sup>137</sup> The level of scrutiny applied to a content-neutral speech restriction generally turns upon the extent of the restriction. Where a speech restriction is content-neutral but operates to ban a particular mode of expression, it may be assessed under a level of scrutiny closely akin to strict scrutiny. *See, e.g.,* *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68 (1981) (ban on live entertainment can be upheld only if it is necessary to "further a sufficiently substantial government interest" and is "narrowly drawn"). In contrast, a restriction which merely limits the permissible time, place, and manner of speech will be deemed constitutional if it is "narrowly tailored to serve a significant government interest, and leave[s] open ample alternative channels of communication." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983); *see* *Ward v. Rock Against Racism*, 491 U.S. 781, 789 (1989). Under the time, place, and manner analysis, the test for whether a regulation is "narrowly tailored" is not as stringent as narrow tailoring in the context of strict scrutiny. *Id.* at 798-99. As to the relationship between the extent of a speech restriction and the level of scrutiny to be applied, *see generally*, Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46 (1987).

<sup>138</sup> *See* Stone, *supra* note 137, at 50-53.

<sup>139</sup> *See, e.g.,* *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 96 (1972) ("[G]overnment must afford all points of view an equal opportunity to be heard.").

<sup>140</sup> *Consolidated Edison Co. v. Public Sew. Comm'n*, 447 U.S. 530, 538 (1980).

<sup>141</sup> *See, e.g.,* *Buckley v. Valeo*, 424 U.S. 1, 18-19 (1976) ("[C]ontribution and expenditure limitations impose direct quantity restrictions on political communication and association. . . .").

be uninhibited, robust, and wide-open.”<sup>142</sup>

Indeed, it is not necessarily true that content-neutral speech restrictions do nothing to skew the *quality* of public debate. As Justice Marshall stated, “content-neutral regulation does not necessarily fall with random or equal force upon different groups or different points of view. 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.”<sup>143</sup> On these points, however, Justice Marshall often has been a lonely voice in the wilderness.

In assuming *Ladue*’s ordinance to be content-neutral but nevertheless invalidating it, the Supreme Court has evinced a fresh concern over the anti-free speech impact of content-neutral speech restrictions, and a renewed willingness to invalidate such restrictions. These attitudes, while not entirely new to First Amendment jurisprudence, have been largely absent from the Supreme Court’s decisions in recent years.

It is especially noteworthy that the Court said what it did in *Ladue* unanimously.<sup>144</sup> Justice Marshall likely would be pleased with the Court’s decision in *Ladue*.

Justice Marshall might be especially pleased with the Court’s stated concern for preserving a mode of expression which is inexpensive but highly effective, and therefore of particular value to persons of limited means. The Court previously has addressed the importance of protecting the expressive rights of the less well-to-do. For instance, in *Martin v. City of Struthers*,<sup>145</sup> the Court invalidated a ban against door-to-door distribution of literature, in part, because that mode of communication was deemed “essential to the poorly financed causes of little people.”<sup>146</sup> However, that concern, too, has been largely absent from the Court’s decisions in recent years.

The decision in *Ladue* also is significant for what it says about the rights citizens enjoy to do what they wish in and about their own homes. The Court previously has indicated that a person’s home is his or her castle, in the context of it being a sanctuary from the tribulations of daily life,<sup>147</sup> and a place where one can read what one wants without governmental approval.<sup>148</sup> In *Ladue*, the Court has signified that a person’s home also is an appropriate platform for expressive activity.<sup>149</sup>

---

<sup>142</sup> *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 313-14 (1984) (Marshall, J., dissenting) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

<sup>143</sup> *Id.* at 313 n.14 (Marshall, J., dissenting).

<sup>144</sup> *Ladue*, 114 S. Ct. at 2040.

<sup>145</sup> 319 U.S. 141 (1943).

<sup>146</sup> *Id.* at 146; see generally William E. Lee, *Lonely Pamphleteers, Link People, and the Supreme Court: The Doctrine of Time, Place, and Manner Regulations of Expression*, 54 GEO. WASH. L. REV. 757 (1986).

<sup>147</sup> *Carey v. Brown*, 447 U.S. 455, 470-71 (1980).

<sup>148</sup> *Stanley v. Georgia*, 394 U.S. 557, 565 (1969).

<sup>149</sup> *Ladue*, 114 S. Ct. at 2045-47.

Beyond what the Court said in the above respects, the decision in *Ladue* is significant for what it does not address. As Justice O'Connor pointed out, the Court's approach in *Ladue* – skipping the traditional threshold inquiry of whether the challenged speech restriction is content-based, and proceeding directly to inquire whether the restriction is valid under any level of scrutiny – is a substantial departure from standard First Amendment doctrine.<sup>150</sup>

The Court's approach in *Ladue* might be viewed as simple expediency. Where the question of which of two tests applies to a particular regulation is difficult, but it is clear that the regulation is invalid under either test, there certainly is logic to pretermittting the issue of which test applies. However, if expediency is the sole answer, one has to wonder why the Court took *Ladue* in the first place. Inquiring at the outset whether a speech restriction possibly can be sustained under any arguably applicable level of scrutiny may make sense in cases like *Ladue*, where the proper resolution of the case seems clear. However, it is not very useful in the more typical case, where the level of scrutiny to be applied may well dictate whether the challenged restriction stands or falls.

The approach taken in *Ladue* seems indicative of something more than mere expediency. This is particularly so when one takes into account the Court's decision to grant certiorari, the indications that the Court contemplated using the case as a vehicle to revisit what constitutes content-discrimination in the context of sign regulation, and the fact that the Court's traditional approach of first inquiring whether a regulation is content-based is deeply ingrained in First Amendment jurisprudence. What the Court's approach in *Ladue* suggests is that there remains a serious lack of consensus as to a new post-*Metromedia* framework for what constitutes content-discrimination.

A continuing lack of consensus in this area is not surprising. The various approaches and opinions in *Metromedia* reflect the difficulty of the issues involved.<sup>151</sup> Nevertheless, it seems doubtful that the *Metromedia* plurality approach can endure indefinitely. The decision in *Ladue* suggests that the Supreme Court is growing increasingly uncomfortable with an analytic framework that regards as content-discriminatory any regulatory scheme permitting exceptions to a general sign ban, irrespective of whether the scheme jeopardizes core First Amendment values. Thus, the *Ladue* decision has not obviated the need to revisit the question of what constitutes content-discrimination in the context of sign regulation. The Court, by its approach in *Ladue*, simply has postponed consideration of those issues.

---

<sup>150</sup> *Id.* at 2047.

<sup>151</sup> Further illustrative of the difficulties in achieving consensus in this area is a recent decision of a three-judge panel of the Third Circuit in *Rappa v. New Castle County*, 18 F.3d 1043 (3d Cir. 1994). In *Rappa*, each member of the panel wrote separately, advocating a different approach.

## VI. POSSIBLE ALTERNATIVE TESTS FOR CONTENT DISCRIMINATION

In what direction might the Court go when it tackles these questions in the future? The challenge is to devise a framework that avoids making governments choose between an all or nothing approach – allowing all signs, or none. What is needed is a principled means of allowing some types of signs and prohibiting others which does not do violence to First Amendment principles.

At least two different approaches seem possible: (1) a test that allows *de minimis* exceptions to an overall sign ban, unless the exceptions pose a significant threat of viewpoint or subject matter discrimination; or (2) an approach which regulates signs based on their relationship to the property on which they are situated, i.e., allows on-site signs but prohibits off-site signs.

The first approach entails a functional analysis of whether the regulatory scheme places the government in the position of doing the types of things that implicate core First Amendment concerns. The relevant inquiry would be whether the government is picking and choosing permissible topics for public discussion, or engaging in viewpoint discrimination. Assuming the answers to both these questions were no, the fact that a regulation permitted *de minimis* exceptions to a general sign ban would not invalidate it. For instance, a sign ordinance that permitted street signs, traffic signs, and house numbers, but banned all other signs, likely would pass muster under this analysis.

In contrast to the *Metromedia* plurality approach, the test suggested above moves away from what is arguably an overly wooden approach to determining content-discrimination, and towards an analysis which more directly assesses whether the challenged restriction impinges upon important First Amendment concerns. A disadvantage, however, is that it injects subjective balancing tests into an area of the law that previously has been governed by fairly precise rules. This could have the effect of making the boundaries of permissible speech regulation less clear, thus inviting governments to more frequently overstep them.

A further disadvantage is that subjective balancing tests in this area are not so easily applied. The question of when exceptions to a general sign ban cease to be *de minimis* and become substantial is a difficult one. Nor is it simple to determine when a government is distinguishing between categories of signs in a manner which is perfectly benign, and when it is engaging in more pernicious subject matter or viewpoint discrimination.

Further, a subjective balancing approach inevitably places governments and the courts in the position of having to make value judgments as to the relative worth of various types of speech. For example, some might argue that traffic signs are more essential than political yard signs. However, it can be argued with equal force that a sign in a citizen's yard urging that a war be stopped to prevent loss of human life is more important than a "No Parking" sign.

The second alternative approach posited above is a regulatory framework that accords different treatment to signs based on whether they are deemed on-site – those bearing a

substantive connection to the property on which they are located, or off-site – those whose subject matter is not site-related. The on-site/off-site distinction comprises part of the regulatory scheme embodied in the Federal Highway Beautification Act<sup>152</sup> and other state and local laws regulating billboards.<sup>153</sup> To date, this distinction largely has been used to justify allowing some types of commercial signs while banning others.<sup>154</sup> The on-site/off-site distinction allows signs displayed at the site of a business advertising that business, while prohibiting signs displaying messages that are not site-related, e.g., commercial billboards available for lease.

Arguably, according different treatment to on-site and off-site signs is content-discriminatory, because one has to read the content of a sign to determine the category into which it fits. However, it also can be argued that on-site and off-site signs constitute different modes of expression, with on-site signs largely serving to guide persons to their intended destinations, and off-site signs serving as a forum for periodically changing messages. Indeed, the Supreme Court indicated support for this view in *City of Cincinnati v. Discovery Network*.<sup>155</sup> Viewing on-site and off-site signs as different modes of expression would obviate the content-discrimination problem.

Further, it can be argued that the on-site/off-site distinction does not operate as a ban against categories of signs. Rather, this distinction restricts certain kinds of signs to particular sites, and is therefore a locational, not content-based distinction. The argument that permitting on-site signs while banning off-site signs can be viewed as locational rather than content-based seems sound, at least where the on-site concept is defined broadly enough so that there is some place within a political subdivision where most types of signs can be displayed.<sup>156</sup>

Under an on-site/off-site approach, street signs, traffic signs and house numbers would be on-site and permitted. Also permitted as on-site would be signs like Gilleo's, which express an occupant's beliefs. At the same time, commercial signs which bear no substantive relationship to the property on which they are located would fall within the off-site category, and could be prohibited.

To be sure, refining the on-site/off-site concept into a comprehensive regulatory scheme that strikes an appropriate balance between the free speech and other relevant considerations would be no small task. Numerous questions would abound. For example, should a commercial billboard constructed on a site owned by the billboard company be deemed on-site simply

---

<sup>152</sup> 23 U.S.C. § 131 (1988 & Supp. 1993).

<sup>153</sup> See, e.g., *Rappa v. New Castle County*, 18 F.3d 1043 (3d Cir. 1994); *Messer v. City of Douglasville, Ga.*, 975 F.2d 1505 (11th Cir. 1992), *cert. denied*, 113 S. Ct. 2395 (1993); *National Advertising Co. v. Town of Niagara*, 942 F.2d 145 (2d Cir. 1991); *Wheeler v. Commissioner of Highways*, 822 F.2d 586 (6th Cir. 1987), *cert. denied*, 484 U.S. 1007 (1988).

<sup>154</sup> See *supra* note 153.

<sup>155</sup> 113 S. Ct. 1505, 1514 n.20 (1993).

<sup>156</sup> In *Ladue*, the City argued that Gilleo's signs were not on-site signs because they did not pertain to *activities* carried on at Gilleo's home. The argument posited above, however, rests on a broader view of what constitutes on-site than the position advanced by the City. Under the rationale put forth above, Gilleo's signs constitute on-site signs because they reflect and express the political views of an occupant of the property at which they are displayed.

because it rests on land owned by the billboard company? (The suggested answer is “No.”) Should an “I love Coca-Cola” sign displayed in the yard of a residence be deemed on-site where (1) a resident has been paid to display it, or (2) it reflects a resident’s unsuppressed desire to tell the world of his genuine affection for the product? (The suggested answer is “No” as to (1) and “Yes” as to (2)).<sup>157</sup> Despite these questions, the on-site/off-site distinction may be the most promising avenue for devising a new, principled, and workable framework for analyzing content-discrimination in the context of sign regulation.

## VII. CONCLUSION

The Supreme Court likely granted certiorari in *Ladue* in contemplation of using the case as a vehicle for revisiting what constitutes content-discrimination in the context of sign regulation. Ultimately the Court did not address that issue in its decision. Rather, it sent a strong pro-free speech message evincing a fresh willingness to invalidate pervasive speech restrictions, even where they are viewed as content-neutral.

In retreating from the issue of content-discrimination, the Court has not obviated the need to speak on that point. Rather, the Court’s approach in *Ladue* suggests that it merely has postponed further consideration of the issue of content-discrimination in the context of sign regulation, most likely because there is no clear consensus on a new analytic framework to supplant the *Metromedia* plurality approach.

When the Court ultimately does address that issue, the most promising avenue for fashioning a new, principled, and workable test for content-discrimination may be to build upon the previously recognized on-site/off-site distinction, which provides a justification for allowing on-site signs while prohibiting those deemed to be off-site.

---

<sup>157</sup> Of course, governmental prohibitions are not the sole limiting force against a proliferation of unsightly signs. As Justice Stevens observed in *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 811 (1984), “private property owners aesthetic concerns will keep the posting of signs on their property within reasonable bounds.”