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Telling the Neighbors What You Think: *City of Ladue v. Gilleo*

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On June 13, 1994, the United States Supreme Court unanimously struck down a local ordinance that prohibited a resident of Ladue, Missouri, from displaying an antiwar sign in a window of her home.[1] Some of the earlier Supreme Court rulings on sign ordinances, and the lower courts' rulings in *Gilleo*, had been based on whether the ordinance restrictions were content-based or content neutral. If restrictions were content-based, they had to pass a two-part strict-scrutiny test if they were to stand. In *Gilleo*, however, the Court held that the city of Ladue, in its sign ordinance, was simply too broad in its restrictions; content analysis was not the basis of the Court's decision. This bulletin summarizes *Gilleo* and discusses its possible implications for local governments wishing to regulate the display of signs on residential property.

Facts and Lower Court Holdings

Margaret P. Gilleo is the owner of a single-family home in a small subdivision of Ladue, Missouri. On December 8, 1990, she placed in her front yard a 24-inch by 36-inch sign with the words SAY NO TO WAR IN THE PERSIAN GULF, CALL CONGRESS NOW. The sign disappeared, and she replaced it with another, which was taken down and thrown on the ground. When she reported this apparent vandalism to city officials, she was given a copy of a city ordinance concerning placement of signs within the city. The ordinance prohibited all signs except those specifically exempted; the type of sign she had displayed was not exempted.

Ms. Gilleo petitioned the Ladue City Council for a variation in the application of the ordinance, under an ordinance provision allowing variations "where there are practical difficulties or unnecessary hardships, or where the public interest will be best served by permitting such variations." Her request was denied by a unanimous vote.[2] Ms. Gilleo then filed an action in federal district court (under Title 42, Section 1983, of the U.S. Code) against the city, the mayor, and members of the city council, alleging that the sign ordinance violated her right of free speech under the First Amendment to the United States Constitution.[3] She moved for a temporary restraining order, which was denied, and for a preliminary injunction.

The district court made a preliminary finding that the ordinance was unconstitutional on its face because the exemptions from the ordinance's prohibition were not "content-neutral." Instead, they discriminated among various types of signs based on what the signs said.[4] The court issued the requested preliminary injunction.[5]

Following this decision, Ms. Gilleo and the city council each took further action. Ms. Gilleo placed an 8.5-inch by 11-inch sign, FOR PEACE IN THE GULF, in her home's second-story window, and the city council repealed its ordinance and enacted a new one.[6]

The new ordinance also contained a general prohibition of "signs," and defined that term broadly. The ordinance

1. 62 U.S.L.W. 4477 (1994).

2. Gilleo v. City of Ladue, 774 F. Supp. 1559, 1561 (E.D. Mo. Jan. 1991) (first opinion in federal district court).

3. As noted in the Supreme Court's opinion, "The First Amendment provides: 'Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ' The Fourteenth Amendment makes this limitation applicable to the States, see *Gitlow v. New York*, 268 U.S. 652 (1925), and to their political subdivisions, see *Lovell v. Griffin*, 303 U.S. 444 (1938)." City of Ladue v. Gilleo, 62 U.S.L.W. at 4478.

4. Gilleo v. City of Ladue, 774 F. Supp. at 1562–63.

5. *Id.* at 1564.

6. City of Ladue v. Gilleo, 62 U.S.L.W. 4477, 4478 (1994).

explicitly prohibited window signs like Ms. Gilleo's.[7] Included in the new ordinance were ten exemptions,[8] as well as a lengthy "Declaration of Findings, Policies, Interests, and Purposes." Part of this declaration explained that the

> proliferation of an unlimited number of signs in private, residential, commercial, industrial, and public areas of the City of Ladue would create ugliness, visual blight and clutter, tarnish the natural beauty of the landscape as well as the residential and commercial architecture, impair property values, substantially impinge upon the privacy and special ambience of the community, and may cause safety and traffic hazards to motorists, pedestrians, and children[.][9]

The new ordinance reiterated the city's interests in privacy, aesthetics, safety, and maintenance of property values, and declared that "the City of Ladue opposes discrimination based upon the content of any lawful speech or expression and that the provisions of this chapter are not intended and shall not be interpreted so as to permit any such discrimination."[10] It also included a severability clause.[11]

Ms. Gilleo was informed that her new sign violated the new ordinance.[12] She amended her complaint to seek a permanent injunction against the new ordinance's enforcement, and the city and its officials filed a counterclaim seeking a declaratory judgment that the new ordinance was valid and enforceable under the Constitution. Both parties sought summary judgment.[13]

The main issue examined by the district court in its second involvement in the case was whether or not the restrictions in Ladue's ordinance were based on the content of the signs being regulated. In general, regulation of most types of speech based on its content is permitted only if the provision in question passes a difficult two-part strict-scrutiny test. The regulation must be (1) necessary to serve a compelling state interest and (2) narrowly drawn to achieve that end.[14] The city's defense of its ordinance would have precluded use of the strict-scrutiny test. The city argued that its ordinance was content neutral, based on the 1989 case *Ward v. Rock Against Racism.*[15] In *Ward*, the Supreme Court stated that the main inquiry in determining whether a regulation of speech is content-based or content neutral is whether the regulation was adopted by the government because of disagreement with the message. A regulation is content neutral so long as it is justified without reference to the content of the regulated speech.[16] The city apparently contended that its declaration of nonspeech-related purposes for the new ordinance and its statement in the ordinance in opposition to discrimination based on the content of lawful speech was enough to make the ordinance content neutral under *Ward.*

The district court disagreed:

> While the declarations of purpose may list recognized government interests for regulation, the regulations themselves are explicit content-based exceptions to a general prohibition of signs. Unlike the regulation in *Ward* that sought only to regulate the volume of the

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7. *Id.*

8. The exemption provision permitted the following types of signs:

> 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 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 [another section of the ordinance].
> 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 [another section of the ordinance].
> 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.

Gilleo v. City of Ladue, 774 F. Supp. 1564, 1566–67 (E.D. Mo. Oct. 1991) (second opinion in federal district court) (quoting § 35-4 of the city of Ladue's new sign ordinance).

9. City of Ladue v. Gilleo, 62 U.S.L.W. at 4478 (quoting from App. to Pet. for Cert. 36a).

10. Gilleo v. City of Ladue, 774 F. Supp. 1564, 1567 (E.D. Mo. Oct. 1991) (quoting from Article I of the city's new sign ordinance).

11. *Id.* at 1567.

12. Gilleo v. City of Ladue, 986 F.2d 1180, 1182 (8th Cir. 1993).

13. Gilleo v. City of Ladue, 774 F. Supp. 1564, 1565 (E.D. Mo. Oct. 1991).

14. *See, e.g.,* Simon & Schuster, Inc. v. New York Crime Victims Bd., 502 U.S. ___, 112 S. Ct. 501, 509, 116 L. Ed.2d 476, 488 (1991); Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 231 (1986); and Perry Education Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

15. 491 U.S. 781 (1989).

16. Gilleo v. City of Ladue, 774 F. Supp. 1564, 1567 (E.D. Mo. Oct. 1991) [citing and quoting from *Ward* (citation omitted)].

> protected speech, not the content or even the specific technical mix of the music, [Ladue's new ordinance] specifically looks to the content to identify exceptions to a general prohibition of all signs. [The new ordinance] suffers the same infirmities as [the old ordinance] in that it prefers some protected speech to other speech based on content.[17]

Adopting the reasoning from its earlier opinion, the court found several provisions of the ordinance unconstitutional on their face and enjoined their enforcement.[18]

The city appealed to the Eighth Circuit Court of Appeals, which also analyzed whether the ordinance was content-based or content neutral. The appeals court relied for guidance on the Supreme Court's plurality opinion in *Metromedia, Inc. v. City of San Diego*,[19] which dealt with a prohibition by the City of San Diego, California, of certain billboards but not others for reasons of safety and appearance. The Eighth Circuit noted that the plurality had raised two concerns in *Metromedia*, both of which were also present in the case before it. First, the Ladue ordinance favored commercial speech over noncommercial speech by, for example, permitting commercial signs but forbidding most noncommercial signs in commercially or industrially zoned districts. Second, it favored certain types of noncommercial speech over others, by exempting some types of noncommercial signs from the ordinance's general ban. The court of appeals concluded that Ladue's ordinance was a content-based regulation and thus it required strict scrutiny (the ordinance must serve a compelling state interest and must be narrowly drawn).[20]

The ordinance failed both parts of the strict-scrutiny test. The appeals court found that while the city's interests in enacting its ordinance were substantial, they were not sufficiently compelling to support a content-based restriction. The ordinance failed the "narrowly drawn" part of the test as well, because it was not the "least restrictive alternative" for achieving the city's objectives.[21]

The court of appeals also addressed an argument by the city that was similar to one made in the district court—that the ordinance was content neutral because it was justified by a desire to eliminate "secondary effects" unrelated to the content or communicative impact of the speech being regulated.[22] The effects Ladue identified included visual blight, unsafe conditions, and decreased property values. Assuming without deciding that this secondary-effects doctrine applied to cases involving the prohibition of political signs on private property, the court found that the city had failed to show that the signs it prohibited caused more aesthetic, safety, and property-value problems than the ones it permitted. This lack of correlation undermined the city's secondary-effects justification for its ordinance.[23]

The court of appeals affirmed the district court's permanent injunction,[24] and the city appealed to the Supreme Court.

The Supreme Court's Opinion

In a unanimous decision, the Supreme Court affirmed the court of appeals' judgment striking down the ordinance. The Court's opinion is important, however, not so much because of what was decided but because of the basis for its holding. Rather than relying on the distinction between content-based and content-neutral regulations that was the main subject of discussion and concern in the lower courts, the Court used a different rationale.

Writing for the Court, Justice Stevens recognized that municipalities have an interest in regulating signs, even though they are a form of expression protected by the free speech clause:

> 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. It is common ground that governments may regulate the physical characteristics of signs—just as they can, within reasonable bounds and absent censorial purpose, regulate audible expression in its capacity as noise.[25]

Examining three earlier Supreme Court decisions involving sign regulation,[26] Justice Stevens identified "two analytically distinct grounds for challenging the constitutionality of a municipal ordinance regulating the display of signs."[27]

17. Gilleo v. City of Ladue, 774 F. Supp. at 1567 (citation omitted).

18. *Id.* at 1567–68.

19. 453 U.S. 490 (1981).

20. Gilleo v. City of Ladue, 986 F.2d 1180, 1182 (8th Cir. 1993).

21. *Id.* at 1183–84.

22. The secondary-effects doctrine is discussed in City of Renton v. Playtime Theaters, Inc., 475 U.S. 41 (1986). *See also* Ward v. Rock Against Racism, 491 U.S. 781 (1989).

23. Gilleo v. City of Ladue, 986 F.2d 1180 at 1183.

24. *Id.* at 1184. The appeals court also resolved a separate issue involving the district court's award of attorneys' fees to Ms. Gilleo's lawyers.

25. City of Ladue v. Gilleo, 62 U.S.L.W. 4477, 4478–79 (1994) (citations omitted).

26. Linmark Associates, Inc. v. Township of Willingboro, 431 U.S. 85 (1977); Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981); and City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789 (1984).

27. City of Ladue v. Gilleo, 62 U.S.L.W. at 4479.

First, one may claim that a regulation "in effect restricts too little speech because its exemptions discriminate on the basis of the signs' messages."[28] Such exemptions are of concern because they may be used by the government to attempt " 'to give one side of a debatable public question an advantage in expressing its views to the people.' " They may also be used by the government "to select the 'permissible subjects for public debate' and thereby to 'control . . . the search for political truth.' "[29]

But apart from this ground, which was relied on by the lower courts in reaching their decisions, speech regulations may also be attacked "on the ground that they simply prohibit too much protected speech."[30] This issue remains to be addressed even if it is assumed for the sake of argument that particular exemptions do not pose too great a risk of viewpoint or content discrimination, or even if all of the exemptions are repealed. "Moreover," explained Justice Stevens,

> if the prohibitions in Ladue's ordinance are impermissible, resting our decision on its exemptions would afford scant relief for respondent Gilleo. She is primarily concerned not with the scope of the exemptions available in other locations, such as commercial areas and on church property. She asserts a constitutional right to display an antiwar sign at her own home. *Therefore, we 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.*[31]

The Court assumed, arguendo, that the various ordinance exemptions were free of impermissible content or viewpoint discrimination, and proceeded to examine the city's prohibition of Gilleo's sign.

The Court conceded that the city had a valid interest "in minimizing the visual clutter associated with signs." However, it found that this concern was "certainly no more compelling"[32] than a municipal interest the Court had found insufficient to justify a sign restriction in an earlier case, *Linmark Associates, Inc. v. Willingboro*.[33] In that case, the Court held that a city's interest in maintaining a stable, racially integrated neighborhood was insufficient to support a prohibition of residential FOR SALE signs. The *Ladue* Court also noted that the ordinance at issue in *Linmark* applied only to a form of commercial speech (which is generally entitled to a lesser amount of First Amendment protection), while the Ladue ordinance covered "even such absolutely pivotal speech as a sign protesting an imminent governmental decision to go to war."[34]

The Court also noted the important role that ordinance exemptions can play in determining the importance of a city's interest. Exemptions

> may diminish the credibility of the government's rationale for restricting speech in the first place. In 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.[35]

Not only did the Court find the city's interest less than compelling, it also found that the sweep of the regulation was too broad, affecting free communication far more than did the ordinance in *Linmark*. Ladue's ordinance prohibited city residents from displaying virtually any sign, broadly defined, on their property. The city thereby "almost completely foreclosed a venerable means of communication that is both unique and important." Residential signs are important, said the Court, both in political campaigns and in "reflect[ing] and animat[ing] change in the life of a community."[36]

In a number of prior cases, noted Justice Stevens, the Supreme Court had been particularly concerned about laws that prevented an entire "medium of expression." He wrote, "Although prohibitions foreclosing entire media may be completely free of content or viewpoint discrimination, the danger they pose to the freedom of speech is readily apparent—by eliminating a common means of speaking, such measures can suppress too much speech."[37]

Furthermore, "even regulations that do not foreclose an entire medium of expression, but merely shift the time, place, or manner of its use must 'leave open ample alternative channels for communication,' " and the Court was not persuaded that adequate substitutes for residential signs exist. Such signs convey a distinctive message precisely because they are located at a residence and provide information about the identity of the speaker. They are an "unusually cheap and convenient form of communication" that may have no practical substitute, especially if one is poor or has limited mobility.[38]

The Court also noted that American culture and law have long included "[a] special respect for individual liberty in the home," a principle that "has special resonance" when the government tries to limit one's ability to speak there. The

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28. *Id.* (citation omitted).
29. *Id.* at 4479–80 (citations omitted).
30. City of Ladue v. Gilleo, 62 U.S.L.W. 4477, 4479 (1994) (citation omitted).
31. *Id.* at 4480 (italics added).
32. *Id.*
33. 431 U.S. 85 (1977).
34. City of Ladue v. Gilleo, 62 U.S.L.W. 4477, 4480 (1994) (citing *Linmark*, citation omitted).
35. *Id.* at 4480 (citation omitted).
36. *Id.*
37. *Id.* at 4480–81 (citations omitted).
38. *Id.* at 4481 (citations omitted).

government's "need to regulate temperate speech from the home is surely much less pressing" than its need to mediate competing uses (expressive and otherwise) of public streets and facilities.[39]

The City of Ladue was not left powerless by the Court's decision, said Justice Stevens. He expressed confidence that "more temperate measures" could meet most of the city's regulatory needs without harming its citizens' First Amendment rights, and he noted that individual residents of an area have strong incentives to keep up their own property values and to prevent visual clutter, reducing "the danger of the 'unlimited' proliferation of residential signs" that concerned the city.[40]

The Concurring Opinion

Justice O'Connor joined the Court's opinion, but she also wrote separately to note that she would have preferred to follow the court's usual approach of first determining whether the ordinance was content-based or content neutral, and then applying the proper level of scrutiny. Nevertheless, she agreed that Ladue's restriction would still be invalid even if it was content neutral. She did not think that the Court's approach in this case "casts any doubt on the propriety of [the Court's] normal content discrimination inquiry."[41]

Implications of the Decision

This case holds that a local government may not ban nearly all signs from residential property within its jurisdiction. Beyond this rule, what does the decision suggest?

First, the Court makes clear that local government regulation of signs for aesthetic purposes is still permitted under the First Amendment. None of the prior decisions in this area are overruled. Instead, the Court carefully distinguishes the regulation of residential signs on one's own property from other types of sign regulations.

Second, the fact that the city of Ladue went too far does not mean that no restrictions on residential signs are allowed. Reasonable "time, place, or manner" rules concerning such things as the size, number, or type of signs in one's yard might well be permissible,[42] as long as they make no distinctions based on the messages carried by the signs.

Any ordinance that bans an entire communication method, on the other hand, is highly suspect, especially if the method banned is viewed as important, unique, and longstanding. The Supreme Court has in the past, for example, "held invalid ordinances that completely banned the distribution of pamphlets within the municipality, handbills on the public streets, the door-to-door distribution of literature, and live entertainment."[43] The Court has also noted the distinction between "more generally directed means of communication that may not be completely banned in residential areas" and picketing focused on individual residences.[44] An important part of the inquiry concerning both "time, place, or manner" regulations and total bans will continue to revolve around what alternative communication methods remain available.

Finally, Justice O'Connor's concurring comments suggest that the Court will probably continue to ask in most cases whether a regulation discriminates among types of speech or speakers based on the content or viewpoint of the message.[45] If it does, strict scrutiny will be applied. Only where such an inquiry would be pointless because the regulation prohibits so much speech that it is invalid even if content neutral will the alternative method of *Gilleo* likely be used.

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39. City of Ladue v. Gilleo, 62 U.S.L.W. 4477, 4481 (1994) (citations omitted).

40. *Id.* at 4481–82.

41. *Id.* at 4482.

42. *See, e.g., id.* at 4481 n. 16.

43. *Id.* at 4480–81 (citations omitted).

44. *Id.* at 4481, [citing and quoting from Frisby v. Schultz, 487 U.S. 474, 486 (1988)].

45. For example, *see generally* the inquiry about content neutrality in Madsen v. Women's Health Center, Inc., 62 U.S.L.W. 4686, 4687–89 (1994), decided less than three weeks after *City of Ladue v. Gilleo*.

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