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Chapter 13

# Municipal Regulation of Political Signs: Balancing First Amendment Rights Against Aesthetic Concerns*

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## § 13.01 Introduction

Every two years brings another general election and with it a proliferation of campaign signs in yards and other places visible to the public. This explosion of signs presents problems for city officials concerned about preserving the aesthetic beauty of their community or reducing the safety hazards caused when motorists have their attention diverted from the road. The question of what action those city officials can take to address these problems is not always clear.

Can a city simply ban all signs? Can it enact a general ban on signs with some specific exceptions? Can a city limit the number, size, and duration of signs? Does a city's ability to regulate signs extend equally to public and private property? These are some of the questions cities must address as they draft ordinances that attempt to balance legitimate concerns about aesthetics and safety with the First Amendment rights of political candidates and homeowners expressing their views on issues of public concern. These questions have been the subject of numerous rulings from the United States Supreme Court;[1] unfortunately, those rulings have left municipalities with "a collection of mixed and ambiguous signals."[2]

This Note examines the development of First Amendment analysis as applied to noncommercial sign regulation. Part II (§ 13.02)

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[1] *See, e.g.*, City of Ladue v. Gilleo, 114 S. Ct. 2038 (1994); Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984); Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981); Linmark Assocs., Inc. v. Township of Willingboro, 431 U.S. 85 (1977); Lehman v. City of Shaker Heights, 418 U.S. 298 (1974).

[2] Jules B. Gerard, A Bad Sign for Municipalities, St. Louis Post-Dispatch, June 19, 1994, at 3B.

of this Note focuses on the ability of the government to regulate signs on public property. Part III (§ 13.03) studies government regulation of signs on private property. Part IV (§ 13.04) examines how the courts have treated ordinances that enact a total ban on signs and those that enact only a partial ban. Part V (§ 13.05) discusses the ability of cities to regulate the physical aspects of signs, such as size, shape, and duration. Finally, Part VI (§ 13.06) of this Note attempts to suggest what types of regulations concerning noncommercial signs may be acceptable under the Supreme Court's most recent rulings.

## § 13.02 Regulating Signs On Public Property: The Diminishing Concept of the Public Forum

The concept of the public forum originated as a method of protecting freedom of speech but has evolved into a speech-restrictive methodology.[3] This development occurred as the determining factor for protecting speech on public property shifted away from the nature of the property and toward the intent of the government officials who manage that location.[4] Using that standard, the Supreme Court ruled that several publicly-accessible locales do not constitute a public forum for First Amendment purposes.[5] Once public property is found to be a nonpublic forum, government restrictions on speech at that property will receive a highly deferential judicial review.[6]

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[3] David S. Day, The End of the Public Forum Doctrine, 78 Iowa L. Rev. 143, 145 (1992).

[4] *Id.* at 186.

[5] *See, e.g.*, International Soc'y for Krishna Consciousness, Inc. v. Lee, 112 S. Ct. 2701, 2706 (1992) (finding an airport terminal is not a public forum); United States v. Kokinda, 497 U.S. 720, 727 (1990) (finding a sidewalk near post office entrance is not a public forum); Members of the City Council v. Taxpayers for Vincent, 466 U.S. at 814 (stating municipally owned utility poles are not a public forum); Lehman v. City of Shaker Heights, 418 U.S. at 303 (finding advertising space on city bus is not a public forum).

[6] William E. Lee, Lonely Pamphleteers, Little People, and the Supreme Court: The Doctrine of Time, Place, and Manner Regulations of Expression, 54 Geo. Wash. L. Rev. 757, 760 (1986).

### [1] The Perry Categorization Approach: Setting the Standard of Review

The Supreme Court defined the modern public forum doctrine in Perry Education Ass'n v. Perry Local Educators' Ass'n.[7] The Court identified three types of public forums for speech and set out analytical standards for each type of forum.[8] The three categories are the traditional forum, the designated forum, and the nonforum.[9]

The significance of the Perry categorization approach is how it deter-mines the standard of review to be applied to government regulations restricting speaker access to a particular forum.[10] Any content-based government action restricting speaker access to a traditional or designated public forum will be subject to strict judicial scrutiny.[11] Content-neutral regulations aimed at public forum property will be subject to heightened scrutiny.[12] If a particular location is found to be a nonpublic forum, then the government regulation need pass only a reasonableness standard to be upheld.[13] The Supreme Court has narrowly defined the traditional public forum[14] and has made the existence of a nontraditional forum turn on whether the government intended the property to be open for public speech.[15] As a result, local governments have been able to regulate or ban signs in areas that might otherwise be expected to be open to the public.

### [2] Narrowing the Definition of a Public Forum

The Court describes traditional forums as places "which by long tradition or by government fiat have been devoted to assembly and

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[7] Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983).

[8] *Id.* at 45–46.

[9] *Id.*

[10] G. Sidney Buchanan, The Case of the Vanishing Public Forum, 1991 U. Ill. L. Rev. 949, 953.

[11] *Id.*

[12] *Id.* at 953–54.

[13] *Id.* at 954.

[14] *Id.* at 951 ("[N]o case exists in which a Court majority has extended the traditional public forum concept beyond the public streets, parks, and sidewalks of a community.").

[15] Day, *supra* note 3, at 183.

debate . . .."[16] Streets and parks are the most commonly cited examples of traditional public forums.[17] In order to enforce a content-based regulation in a traditional public forum, the governmental body must show the regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that interest.[18] Time, place, and manner regulations that are content-neutral must be narrowly tailored to serve a significant governmental interest and must leave open ample alternative channels of communication.[19]

The second category of public forums is public property that the state has opened to public expression.[20] Even if the state was not required to create the forum, once it does so it is bound by the same standards used for the traditional public forum.[21] Reasonable time, place, and manner regulations can be applied, but content-based prohibitions must be narrowly drawn to achieve a compelling state interest.[22]

The final category consists of public property that is not by tradition or designation a forum for public communication.[23] In addition to time, place, and manner regulations, the state can also impose reasonable restrictions that preserve this forum for its intended purposes—so long as those restrictions are not designed to repress an unpopular viewpoint.[24]

One of the cases that most clearly demonstrates the narrowing definition of the public forum is the Supreme Court's opinion in

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[16] Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

[17] *See* Hague v. Committee for Industrial Organization, 307 U.S. 496, 515 (1939) ("Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.").

[18] Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. at 45.

[19] *Id.*

[20] *Id.*

[21] *Id.* at 45–46.

[22] *Id.* at 46.

[23] *Id.*; *see, e.g.*, United States v. Kokinda, 497 U.S. 720, 729 (1990) (involving a sidewalk outside a post office entrance); United States Postal Serv. v. Greenburgh Civic Ass'n, 453 U.S. 114, 128 (1981) (involving a mail box attached to a private residence); Greer v. Spock, 424 U.S. 828, 838 (1976) (involving a military base); Adderley v. Florida, 385 U.S. 39, 41 (1966) (involving a county jail).

[24] Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983).

Members of the City Council v. Taxpayers for Vincent.[25] The Court upheld a Los Angeles ordinance prohibiting the posting of signs on public property.[26] The ordinance was challenged by a candidate for city council who posted campaign signs on utility poles, only to have them removed by city workers.[27] In its appeal, Taxpayers for Vincent argued the utility poles were a public forum, or should be treated as a public forum because they were located on public sidewalks.[28] The Court found that Taxpayers' reliance on the public forum doctrine was "misplaced."[29]

Justice Stevens, writing for the majority, found that a traditional right of access to utility poles for communication did not exist,[30] and that the mere fact that government property can be used as a vehicle for communication does not mean that that use is required.[31] In dicta, Justice Stevens wrote that the government's ability to regulate its property is virtually identical to that of private property owners.[32]

While the Vincent decision has been criticized for its finding that utility poles do not have an historical basis as a medium for political communication,[33] the Court moved further toward restricting the definition of what constitutes a public forum.[34] The case that some commentators believe greatly weakened the public forum doctrine,[35] however, was the Supreme Court's plurality opinion in United States v. Kokinda.[36] Marsha Kokinda and Kevin Pearl were volunteers for the National Democratic Policy Committee, who set up tables on the sidewalk near the entrance to a

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[25] Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984).

[26] *Id.* at 817.

[27] *Id.* at 792–93.

[28] *Id.* at 813.

[29] *Id.* at 814.

[30] *Id.*

[31] *Id.*

[32] *Id.* at 814 n.31 (citing Adderley v. Florida, 385 U.S. 39, 47 (1966)).

[33] William H. Freivogel, Court Drew Broad Definition of Liberty, St. Louis Post-Dispatch, June 19, 1994, at 4B (quoting Washington University Law Professor Jules Gerard, who stated that "[t]here were political signs put on lampposts earlier than front yards and more signs are used that way").

[34] Day, *supra* note 3, at 191.

[35] *Id.* at 189.

[36] United States v. Kokinda, 497 U.S. 720 (1990).

Maryland post office to solicit contributions and distribute literature.[37] They were arrested by postal inspectors and convicted under a federal regulation prohibiting solicitation on postal premises.[38]

Although public sidewalks fall squarely within the historic definition of the traditional public forum,[39] the Kokinda Court found that the sidewalk outside of the post office entrance did not have the same characteristics as "public sidewalks traditionally open to expressive activity."[40] The differences cited by the Court were that the sidewalk led only from the parking area to the front door of the post office,[41] and that it was "constructed solely to assist postal patrons to negotiate the space between the parking lot and the front door of the post office, not to facilitate the daily commerce and life of the neighborhood or city."[42] In addition to the physical characteristics of the sidewalk, the Court looked at the intent of the government and found that the Postal Service had never expressly dedicated its sidewalks to expressive activity.[43] As a result, the Court found the sidewalk to be a nonforum, and the regulation prohibiting solicitation was upheld on a reasonableness standard.[44]

The Kokinda opinion is criticized for shifting the presumption in public forum cases from one of openness to one of closure.[45] Allowing government intent to transform a traditional forum into a nonforum is another criticism because free speech rights may not be exercised on publicly owned property unless the government expresses an "affirmative desire to provide an open forum."[46] If the commentators are correct in their assertion that cases like Vincent

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[37] *Id.* at 723.
[38] *Id.* at 723–24; *see also* 39 C.F.R. § 232.1(h)(1) (1996).
[39] *See supra* note 16 and accompanying text.
[40] United States v. Kokinda, 497 U.S. at 727.
[41] *Id.*
[42] *Id.* at 728.
[43] *Id.* at 730.
[44] *Id.*
[45] Day, *supra* note 3, at 189.
[46] *Id.* at 190.

and Kokinda betray a commitment to open public debate[47] and have effectively brought the public forum doctrine to an end,[48] then a city wishing to restrict political signs will have virtually unlimited ability to regulate signs on property owned or controlled by the government.

## § 13.03 Regulating Signs on Private Property: Enhanced Protection for the Homeowner

Although the government intent standard which emerged from modern public forum cases may provide cities with fairly broad powers to regulate signs on public property,[49] local governments have less latitude in regulating political signs placed on private property.[50] In addition to First Amendment rights to free speech, government regulation of signs placed on private property also implicates the Fifth Amendment prohibition against the unlawful taking of private property without just compensation.[51] The Supreme Court has struck down statutes restricting speech by citizens on their own property that is visible to the public.[52] Restricting speech on private property may be permissible in some circumstances, but such regulations require "particular care" when examining state interests in regulation.[53] For a government regulation on private land use to be upheld, it must be beneficial to the public health, safety, and welfare—within the scope of the police power.[54]

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[47] Owen M. Fiss, Silence on the Street Corner, 26 Suffolk U. L. Rev. 1, 20 (1992).

[48] Day, *supra* note 3, at 147.

[49] *See supra* Part II (§ 13.03).

[50] Dwight E. Merriam et al., The First Amendment in Land Use Law, C851 A.L.I.-A.B.A. 1007, 1026–27 (1993).

[51] *Id.* at 1012.

[52] City of Ladue v. Gilleo, 114 S. Ct. 2038, 2041 (1994) (declaring unconstitutional a city ordinance prohibiting homeowners from displaying most types of signs on their property); *cf.* Spence v. Washington, 418 U.S. 405, 409 (1974) (reversing a conviction for displaying an altered American flag from the window of an apartment building on private property).

[53] Spence v. Washington, 418 U.S. at 411.

[54] *Id.*

### [1] Government Interests Justifying Regulation

The Court upheld a city's interest in improving and maintaining its aesthetic environment as a substantial interest justifying the regulation of signs.[55] The Court in Berman v. Parker[56] recognized that the regulation of aesthetics was part of a broad and inclusive concept of public welfare that represents spiritual, as well as physical, values.[57] Because aesthetic judgments are necessarily subjective, regulations based on aesthetics are carefully scrutinized to make sure they are not merely public rationalizations to regulate for impermissible purposes, such as suppression of speech.[58] A critical inquiry in making the determination of the regulation's purpose is whether the limitations on speech are greater than necessary to accomplish the purpose of preserving aesthetics.[59]

Traffic safety is also characterized as a substantial governmental interest justifying sign regulation.[60] Like aesthetic regulations, regulations protecting public safety also cannot be used to abridge speech and other protected forms of expression.[61] Cities can, however, impose time, place, and manner regulations designed to ensure the proper uses of the streets, so long as those regulations are not unfairly discriminatory.[62] These regulations are viewed as

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[55] Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789, 807 (1984); Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 507–08 (1981).

[56] Berman v. Parker, 348 U.S. 26 (1954).

[57] *Id.* at 33 ("It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.").

[58] Metromedia, Inc. v. City of San Diego, 453 U.S. at 510.

[59] Members of the City Council v. Taxpayers for Vincent, 466 U.S. at 805.

[60] Metromedia, Inc. v. City of San Diego, 453 U.S. at 507–08; *see also* Schneider v. New Jersey, 308 U.S. 147, 160 (1939) ("Municipal authorities, as trustees for the public, have the duty to keep their communities' streets open and available for movement of people and property, the primary purpose to which the streets are dedicated.").

[61] Schneider v. New Jersey, 308 U.S. at 160 ("Although a municipality may enact regulations in the interest of the public safety, health, welfare or convenience, these may not abridge the individual liberties secured by the Constitution to those who wish to speak, write, print or circulate information or opinion.").

[62] Cox v. New Hampshire, 312 U.S. 569, 576 (1941).

protecting free speech and other civil liberties by preserving the social order.[63]

### [2] The Scope of Private Property Regulation

The ability of government to regulate political signs on private property depends—to some extent—on the nature of the property involved.[64] Ordinances prohibiting political signs on residential areas have uniformly been held unconstitutional.[65] It is less clear, however, whether the government can enact regulations prohibiting the placing of political signs on private property in nonresidential areas.[66]

#### [a] Regulations Aimed at Residential Areas

The Supreme Court's decision in Vincent upholding a ban on political signs on public property caused regulators and landowners to test whether that decision extended to private property.[67] The Court, however, did not expressly extend its reasoning in Vincent to private property,[68] and as a result municipal ordinances regulating signs on residential property based on the holding in Vincent have been struck down.[69]

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[63] *Id.* at 574. The authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use of the public highways has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend. Id.

[64] R. Douglass Bond, Note, Making Sense of Billboard Law: Justifying Prohibitions and Exemptions, 88 Mich. L. Rev. 2482, 2508 (1990).

[65] *Id.* at 2507.

[66] Compare Rappa v. New Castle County, 18 F.3d 1043, 1047 (3d Cir. 1994) (declaring as unconstitutional a Delaware law barring political signs along highways) with Wheeler v. Commissioner of Highways, 822 F.2d 586, 589–90 (6th Cir. 1987) (upholding a Kentucky Billboard Act and implementing regulations barring off-premises signs in protected areas adjacent to interstate highways).

[67] Merriam et al., *supra* note 50, at 1025.

[68] *Id.* at 1026.

[69] *Id.; see, e.g.*, Arlington County Republican Comm. v. Arlington County, 983 F.2d 587, 595 (4th Cir. 1993) (striking down ordinance restricting residents to two political signs on their property); Matthews v. Town of Needham, 764 F.2d

The right of homeowners to post political signs on their property was bolstered by the Supreme Court's decision in City of Ladue v. Gilleo.[70] The case involved a woman who placed an antiwar sign in a window of her home.[71] She was convicted of violating an ordinance banning all residential signs except those falling within one of ten exemptions.[72] In finding the ordinance unconstitutional, the Court focused on the "special respect for individual liberty in the home [that] has long been part of our culture and our law."[73] The Court also found that the "principle has special resonance when the government seeks to constrain a person's ability to speak there,"[74] and that the government's need to regulate speech from the home is much less pressing than its need to regulate speech taking place on public streets or in public facilities.[75]

The Gilleo decision is described by some experts as the strongest statement the Court has made about individuals' free speech rights at their homes.[76] Justice Stevens distinguished Gilleo from Vincent by noting that signs placed on public property are not a "'uniquely valuable or important mode of communication,'" while residential signs are "a venerable means of communication that is both unique and important."[77] That language is criticized for elevating signs "'to a hallowed level of being venerated'" and for finding a "'unique relationship between an individual and private property which is a rather dramatic change in the law.'"[78] Critics of the decision also say it will make it extremely difficult for municipalities to control the proliferation of all types of signs, not

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58, 61 (1st Cir. 1985) (striking down ordinance prohibiting all political signs within town limits and distinguishing the ordinance from that in Vincent on the basis that it reached private property).

[70] City of Ladue v. Gilleo, 114 S.Ct. 2038 (1994).

[71] *Id.* at 2040.

[72] *Id.* at 2040–41.

[73] *Id.* at 2047.

[74] *Id.*

[75] *Id.*

[76] Freivogel, *supra* note 33, at 4B.

[77] City of Ladue v. Gilleo, 114 S.Ct. at 2045.

[78] Freivogel, *supra* note 33, at 4B (quoting Jordan Cherrick, the attorney who represented Ladue in the unsuccessful effort to uphold the ordinance).

just political signs.[79] Supporters of the decision say that the critics' reactions are overwrought and that the decision recognizes the importance of "preserving a mode of communication that is highly effective but inexpensive and, therefore, of particular value to people of limited means."[80]

In striking down the Ladue ordinance, the Court pointed out that cities are by no means powerless to "address the ills that may be associated with residential signs."[81] Nevertheless, the Court gave cities very little guidance on what types of remedies would be acceptable, focusing instead on the strong incentive individual residents have to maintain their property values and prevent visual clutter in their neighborhoods.[82] Experts disagree on how much leeway the Gilleo decision leaves cities in trying to regulate residential signs.[83] But one result that seems certain is that many municipalities and subdivisions will be reviewing their sign ordinances in light of Gilleo, and many of those ordinances will be revised.[84]

### [b] Regulations Aimed at Nonresidential Private Property

Many of the ordinances regulating signs on nonresidential private property have been aimed at stopping the proliferation of billboards and commercial and noncommercial off-premises

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[79] Gerard, *supra* note 2, at 3B.

[80] Gerald P. Greiman, A Good Sign in Ladue, St. Louis Post-Dispatch, June 19, 1994, at 3B.

[81] City of Ladue v. Gilleo, 114 S.Ct. 2038, 2047 (1994).

[82] *Id.* In dicta, the Court listed certain types of signs that need not necessarily be permitted in residential areas. Id. "Different considerations might well apply, for example, in the case of signs (whether political or otherwise) displayed by residents for a fee, or in the case of off-site commercial advertisements on residential property. We are also not confronted here with mere regulations short of a ban." *Id.* at 2047 n.17.

[83] Freivogel, *supra* note 33, at 4B.

[84] *Id.* Gerald P. Greiman, the attorney who represented Margaret Gilleo in her challenge to the Ladue ordinance, claimed that the Gilleo decision may have rendered unconstitutional ordinances in several communities which restricted the time during which people could post a political sign on their lawn. *Id.*

signs.[85] The seminal case for analyzing such regulations[86] is the Supreme Court's plurality decision in Metromedia, Inc. v. City of San Diego.[87] This case involved a San Diego ordinance that generally prohibited "outdoor advertising display signs."[88] The ordinance provided exceptions for on-site signs and off-site signs falling within twelve specified categories.[89] The plurality found the ordinance unconstitutional because by allowing on-site commercial signs while prohibiting on-site noncommercial signs, the city was impermissibly valuing commercial speech over noncommercial speech.[90]

### [c] Application of the On-Site, Off-Site Distinction

The Metromedia decision led to mixed results in the way lower

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[85] *See, e.g.*, Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981); Rappa v. New Castle County, 18 F.3d 1043 (3d Cir. 1994); Outdoor Systems, Inc. v. City of Mesa, 997 F.2d 604 (9th Cir. 1993); Messer v. City of Douglasville, 975 F.2d 1505 (11th Cir. 1992); National Advertising Co. v. Town of Niagara, 942 F.2d 145 (2d Cir. 1991); National Advertising Co. v. City & County of Denver, 912 F.2d 405 (10th Cir. 1990); National Advertising Co. v. Town of Babylon, 900 F.2d 551 (2d Cir. 1990); Ackerley Communications, Inc. v. City of Somerville, 878 F.2d 513 (1st Cir. 1989); National Advertising Co. v. City of Orange, 861 F.2d 246 (9th Cir. 1988); Rzadkowolski v. Village of Lake Orion, 845 F.2d 653 (6th Cir. 1988); Wheeler v. Commissioner of Highways, 822 F.2d 586 (6th Cir. 1987); Lindsay v. City of San Antonio, 821 F.2d 1103 (5th Cir. 1987); Major Media of the Southeast, Inc. v. City of Raleigh, 792 F.2d 1269 (4th Cir. 1986); John Donnelly & Sons v. Campbell, 639 F.2d 6 (1st Cir. 1980).

[86] Merriam et al., *supra* note 50, at 1015.

[87] Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981).

[88] *Id.* at 493.

[89] *Id.* at 494. On-site signs are defined as those "designating the name of the owner or occupant of the premises upon which such signs are placed, or identifying such premises; or signs advertising goods manufactured or produced or services rendered on the premises upon which such signs are placed." The specific categories exempted from the prohibition [of off-site signs] include: 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.

[90] *Id.* at 513.

courts have looked at city ordinances that distinguish between on-site and off-site signs.[91] The fate of those ordinances has generally hinged on whether the distinction between on-site and off-site signs was judged to be content-based or content-neutral.[92] Content-based restrictions on speech will almost always be struck down.[93] Since Metromedia, several municipal ordinances that distinguish between on-site and off-site signs have been found content-based by favoring commercial speech over noncommercial speech.[94] Ordinances that generally prohibit all off-premises signs while permitting all on-premises signs, both commercial and noncommercial, have also been found to be content-based.[95] Meanwhile, other courts have held that cities can discriminate between on-site and off-site signs, as long as all signs that are allowed to carry commercial messages are also permitted to carry noncommercial messages.[96] Statutes permitting on-site signs while banning off-site signs are also permitted under the theory that an ap-

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[91] Anne E. Swenson, Comment, A Sign of the Times: Billboard Regulation and the First Amendment, 15 St. Mary's L.J. 635, 659 (1984).

[92] *Id.* at 659–60.

[93] Geoffrey R. Stone, Content-Neutral Restrictions, 54 U. Chi. L. Rev. 46, 48 (1987) (stating that the Supreme Court will give virtually absolute protection to all but "low value" speech, which is generally limited to such things as fighting words, obscenity, libel and some commercial speech); *see also* Police Dep't v. Mosley, 408 U.S. 92, 95 (1972) ("[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its contents.").

[94] *See, e.g.*, National Advertising Co. v. Town of Niagara, 942 F.2d 145, 149–50 (2d Cir. 1991) (striking down an ordinance that permitted signs containing on-site advertising, but provided exemptions for certain types of noncommercial speech); National Advertising Co. v. Town of Babylon, 900 F.2d 551, 556 (2d Cir. 1990) (declaring unconstitutional an ordinance that effectively limited the content of a sign to a business name and basic information concerning the nature of the business, while allowing certain exceptions); Ackerley Communications, Inc. v. City of Somerville, 878 F.2d 513, 518 (1st Cir. 1989) (invalidating a grandfather clause exempting only signs that carried no off-site commercial speech during the year prior to enactment of the new ordinance).

[95] National Advertising Co. v. City of Orange, 861 F.2d 246, 247–48 (9th Cir. 1988).

[96] Outdoor Systems, Inc. v. City of Mesa, 997 F.2d 604, 611 (9th Cir. 1993); Messer v. City of Douglasville, 975 F.2d 1505, 1509 (11th Cir. 1992); Rzadkowolski v. Village of Lake Orion, 845 F.2d 653, 655 (6th Cir. 1988); Wheeler v. Commissioner of Highways, 822 F.2d 586, 591 (6th Cir. 1987).

propriate relationship exists between the location and the use of the sign.[97]

## § 13.04 Regulating Signs by Enacting a Total Ban or a Partial Ban: Mixed Signals from the Courts to the Cities

In addition to regulating signs according to their location, many cities have also enacted ordinances that distinguish between various types of signs.[98] Many ordinances exempt certain categories of signs from their general ban.[99] Several ordinances contain exemp-

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[97] Rappa v. New Castle County, 18 F.3d 1043, 1067 (3d Cir. 1994); *see also* Bond, *supra* note 64, at 2504.

[98] *See, e.g.*, National Advertising Co. v. City & County of Denver, 912 F.2d 405, 408 (10th Cir. 1990) (prohibiting off-site commercial signs within 660 feet of freeway, while permitting on-site commercial and noncommercial signs); Major Media of the Southeast, Inc. v. City of Raleigh, 792 F.2d 1269, 1270 (4th Cir. 1986) (allowing on-premise signs and permitted off-premise signs and special category signs, including political signs, in certain areas of the city).

[99] The ordinance adopted by Ladue contained exceptions for:

> "municipal signs"; "[s]ubdivision and residence identification" signs; "[r]oad signs and driveway signs for danger, direction, or identification"; "[h]ealth inspection signs"; "[s]igns for churches, religious institutions, and schools"; "identification signs" for other not-for-profit organizations; signs "identifying the location of public transportation stops"; "[g]round signs advertising the sale or rental or real property," . . . "[c]ommercial signs in commercially zoned or industrial zoned districts," . . . and signs that "identif[y] safety hazards."

City of Ladue v. Gilleo, 114 S.Ct. 2038, 2041 n.6 (1994) (citations omitted).

The San Diego ordinance contained exemptions for the following types of signs:

> (1) Any sign erected and maintained pursuant to and in discharge of any governmental function or required by any law, ordinance or governmental regulation.
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> (2) Bench signs located at designated public transit bus stops . . ..
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> (3) Signs being manufactured, transported and/or stored within the City limits of the City of San Diego shall be exempt; provided, however, that such signs are not used, in any manner or form, for purposes of advertising at the place or places of manufacture and storage.
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> (4) Commemorative plaques of recognized historical societies and organizations.
>
> (5) Religious symbols, legal holiday decorations and identification emblems of religious orders or historical societies.

tions allowing noncommercial signs in areas where commercial

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(6) Signs located within malls, courts, arcades, porches, patios and similar areas where such signs are not visible from any point on the boundary of the premises.
(7) Signs designating the premises for sale, rent or lease . . ..
(8) Public service signs limited to the depiction of time, temperature or news . . ..
(9) Signs on vehicles regulated by the City that provide public transportation including, but not limited to, buses and taxicabs.
(10) Signs on licensed commercial vehicles, including trailers; provided, however, that such vehicles shall not be utilized as parked or stationary outdoor display signs.
(11) Temporary off-premise subdivision directional signs . . ..
(12) Temporary political campaign signs, including their supporting structures, which are erected or maintained for no longer than 90 days and which are removed within 10 days after election to which they pertain.

Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 495 (1981).

A Delaware ordinance provided exemptions for:

(1) Directional and other official signs and notices, which signs and notices shall include, but not be limited to, signs and notices pertaining to natural wonders, scenic and historic attractions as authorized or required by the laws of this State;
(2) Signs, displays and devices advertising the sale or lease of the real property upon which they are located;
(3) Signs, displays and devices advertising activities conducted on the real property upon which they are located;
(4) Signs, displays and devices located either (i) in controlled areas adjacent to the interstate system and within the boundaries of incorporated municipalities, as such boundaries existed on September 21, 1959, wherein the use of real property is subject to municipal regulation and control, which are zoned industrial or commercial, or (ii) in other controlled areas adjacent to the interstate system zoned industrial or commercial which were zoned industrial or commercial as of September 21, 1959;
(5) Signs, displays and devices located in unzoned commercial and industrial controlled areas adjacent to highways of the primary system which are zoned industrial or commercial;
(6) Signs, displays and devices located in unzoned commercial and industrial controlled areas adjacent to highways of the primary system and defined by regulations to be promulgated by the Department;
(7) Any school bus waiting shelter displaying a sign provided such sign does not exceed 32 square feet in area and with a limit of 2 signs per shelter.. . .

signs are banned.[100] Some exemptions are tied to the location of the sign, such as permitting directional and informational signs, or off-site signs carrying messages having some relation to the property, such as "for sale" or construction signs.[101] Other exemptions are based on the content of the sign and may include such things as temporary political signs, time and temperature signs, and signs for religious and civic organizations.[102] The Supreme Court's decisions on whether such exemptions are permissible are filled with ambiguities, and leave many city officials confused as to what type of ordinance is constitutional.[103]

As is the case with ordinances that distinguish between on-and off-site signs,[104] the key to whether a regulation will be upheld that imposes either a total or partial ban is whether the court views the restriction as content-based or content-neutral.[105] As noted in Part III of this Note, regulations that seek to restrict speech based on its content will rarely be upheld.[106] Content-neutral regulations that restrict the time, place, and manner of otherwise protected speech are, on the other hand, permitted.[107] Time, place, and manner regulations must be "justified without reference to the content

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Rappa v. New Castle County, 18 F.3d 1043, 1052–53 (3d Cir. 1994) (citations omitted).

[100] *See generally* Merriam et al., *supra* note 50.

[101] *See, e.g.*, Rappa v. New Castle County, 18 F.3d at 1043; Outdoor Systems, Inc. v. City of Mesa, 997 F.2d 604 (9th Cir. 1993); Messer v. City of Douglasville, 975 F.2d 1505 (11th Cir. 1992); Rzadkowolski v. Village of Lake Orion, 845 F.2d 653 (6th Cir. 1988); Wheeler v. Commissioner of Highways, 822 F.2d 586 (6th Cir. 1987).

[102] *See, e.g.*, City of Ladue v. Gilleo, 114 S.Ct. at 2038; Metromedia, Inc. v. City of San Diego, 453 U.S. at 490; Rappa v. New Castle County, 18 F.3d at 1043; Messer v. City of Douglasville, 975 F.2d at 1505.

[103] Gerard, *supra* note 2, at 3B.

[104] *See supra* note 89.

[105] Merriam et al., *supra* note 50, at 1010.

[106] *See* Stone, *supra* note 93 and accompanying text.

[107] Erznoznik v. City of Jacksonville, 422 U.S. 205, 209 (1975) ("A State or municipality may protect individual privacy by enacting reasonable time, place and manner regulations applicable to all speech irrespective of content."); *see also* Grayned v. City of Rockford, 408 U.S. 104, 116 (1972) (identifying the crucial question in determining time, place, and manner restrictions as "whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time"); Cox v. New Hampshire, 312 U.S. 569, 576

of the regulated speech, . . . serve a significant governmental interest, and . . . leave open alternative channels for communication of the information."[108]

The San Diego ordinance struck down in Metromedia contained exemptions for only certain specified kinds of noncommercial signs, including temporary political signs.[109] The exemptions had been put in the ordinance after a lower court declared the ordi-

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(1941) ("[A] municipality . . . cannot be denied authority to give consideration, without unfair discrimination, to time, place and manner [regulations].").

[108] Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 516 (1981) (quoting Virginia Pharmacy Board v. Virginia Citizens Consumer Council, 425 U.S. 748, 771 (1976)); *see also* Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984). After finding the Los Angeles sign ordinance content-neutral, the Court then used the four-part test from United States v. O'Brien, 391 U.S. 367 (1968), to determine whether the ordinance placed too great of an incidental restriction on speech. Members of the City Council v. Taxpayers for Vincent, 466 U.S. at 804. Under the O'Brien test:

> [A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. United States v. O'Brien, 391 U.S. at 377. Although the O'Brien test was formulated to define the government's power to restrict symbolic speech, it is generally considered to be equivalent to the time, place and manner test used in Metromedia. Harold L. Quadres, Content-Neutral Public Forum Regulations: The Rise of the Aesthetic State Interest, the Fall of Judicial Scrutiny, 37 HASTINGS L.J. 439, 449 n.51 (1986). Professor Quadres states that both tests require the government to demonstrate that its regulation serves an important governmental interest and that the regulation is content-neutral. Id. He also concludes that the Vincent Court seems to equate the O'Brien requirement that the restriction be no greater than essential with the "narrowly tailored" element of the time, place and manner test. Id. Professor Quadres concludes, however, that the time, place and manner test as a whole is more speech-protective than the O'Brien test because it also requires that the speaker have alternative access for disseminating his speech. *Id.*

[109] Metromedia, Inc. v. City of San Diego, 453 U.S. at 514.Any piece of property may carry or display religious symbols, commemorative plaques of recognized historical societies and organizations, signs carrying news items or telling the time or temperature, signs erected in discharge of any governmental function, or temporary political campaign signs. *Id.* No other non-commercial signs were allowed. *Id.*

nance unconstitutional because its total ban included political signs and did not exempt them.[110] But the Supreme Court found the distinction between political signs and other noncommercial types of signs effected governmental control over public ideas and opinions.[111] Because content-based restrictions on speech are greatly disfavored,[112] a content-based regulation will be struck down unless it is found to be necessary to serve a compelling state interest and narrowly drawn to achieve that interest.[113] Because San Diego allowed certain types of signs, the Court found that the city did not have a compelling interest in barring other types of signs.[114] As a result, the San Diego statute was unconstitutional.[115] The Metromedia decision led some lower courts to similarly strike down ordinances that included exemptions for political signs.[116] Courts have likewise invalidated ordinances that prohibit political signs, while allowing other types of noncommercial signs.[117]

### [1] An Evolution in Favor of a Total Ban on Signs

While the Metromedia Court found the San Diego ordinance flawed for containing content-based exemptions, the plurality left unanswered the question of whether a total ban on noncommercial, as well as commercial, speech was unconstitutional.[118] In dicta, the Court indicated that a total prohibition of a particular expressive forum could pose constitutional problems.[119] However, the

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[110] Gerard, *supra* note 2, at 3B.

[111] Metromedia, Inc. v. City of San Diego, 453 U.S. at 514.

[112] *See* Stone, *supra* note 93, at 48.

[113] Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

[114] Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 520 (1981).

[115] *Id.*

[116] *See, e.g.,* National Advertising Co. v. Town of Niagara, 942 F.2d 145, 148 (2d Cir. 1991); National Advertising Co. v. Town of Babylon, 900 F.2d 551, 557 (2d Cir. 1990); National Advertising Co. v. City of Orange, 861 F.2d 246, 249 (9th Cir. 1988).

[117] Matthews v. Town of Needham, 764 F.2d 58, 60 (1st Cir. 1985).

[118] Angela M. Liuzzi, Comment, 11 Hosftra L. Rev. 371, 384 (1982).

[119] Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 515 n.20 (1981) (citing Schad v. Mount Ephraim, 452 U.S. 61 (1981) (finding that an ordinance prohibiting all live entertainment violates the First Amendment guarantee of free

Court reached a different conclusion just a few years later in Vincent.[120] The majority opinion in Vincent was written by Justice Stevens, who first signaled his support for the idea of a total ban in

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expression)); *see also* Linmark Assoc., Inc. v. Township of Willingboro, 431 U.S. 85, 87 (1977) (striking down an ordinance prohibiting the posting of "For Sale" or "Sold" signs on residential property). The Court in Linmark did not decide the question of whether a total ban on signs could survive constitutional scrutiny if it were unrelated to the suppression of free expression. *Id.* at 94 n.7. The Court did, however, seem to indicate that a total ban could run into problems by failing to leave open ample and alternative channels of communication. *Id.* at 93. The Court adopted a restrictive view of what would constitute ample and alternative means of communication by stating that those alternative means could not be more costly, less effective, and less likely to reach the intended audience than the form of communication being restricted. *Id.* Linmark puts the burden of proof on the party seeking to restrict speech to show that any possible alternative means of communication is feasible. Liuzzi, *supra* note 118, at 403.

Professor Stone believes the Court generally recognizes that substantial or total bans on particular means of expression pose significant dangers, and generally tests such restrictions under an intermediate standard of review. Stone, *supra* note 93, at 65–66. Some of the considerations that Professor Stone cites in support of his conclusion are that while speakers often can shift to alternative means of communication, the fact that the speaker prefers the prohibited means of communication means something is lost in the transition. *Id.* at 65. Second, to the extent that certain means of expression are used disproportionately by certain types of speakers (such as yard signs by political candidates) the potential distorting effect of laws limiting that means of expression is more serious. *Id.* at 65–66. Third, despite the advent of radio, television, and cable as means of communication, "it remains important to preserve the more traditional and less expensive means of communication, which are most often the subject of prohibition." *Id.* at 66. "Finally, although the elimination of any one of those means of communication may not significantly reduce the total quantity of public debate . . . a deferential standard of review" could cumulatively lead to a serious reduction or elimination of certain means of expression. *Id.*

Professor Lee notes that while alternative modes of communication are always available in theory, some modes will be inadequate for poorly financed communicators. Lee, *supra* note 6, at 806. He contends that the adequacy of alternatives cannot be assumed. *Id.* Rather, he states courts need to engage in a detailed analysis of factors such as cost and the ability to reach the intended audience. *Id.* Professor Lee is critical of the Supreme Court for frequently ignoring those considerations. *Id.*

[120] Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789, 816 (1984).

his dissenting opinion in Metromedia.[121] In deciding whether a total ban could withstand constitutional scrutiny, Justice Stevens identified two questions that needed to be addressed.[122] The first was whether there was any reason to believe that the regulation was biased toward a particular point of view, or whether it was a subtle method for regulating controversial subjects of public debate.[123] The second question was whether there remained an ample market for the communication of both popular and unpopular ideas, and whether that market appeared to be threatened with gradually increasing restraints.[124]

In his Metromedia dissent, Justice Stevens stated that a total ban would be permissible so long as it is wholly impartial and not an attempt by the government to choose the subjects permissible for public debate.[125] Justice Stevens reaffirmed that view in Vincent, and seemed to take his position a step further by indicating that allowing exemptions from a total ban could create constitutional problems.[126]

While acknowledging that political speech is entitled to the fullest measure of constitutional protection, Justice Stevens noted there are many other communications entitled to an equal level of protection.[127] He then noted that creating exceptions for one type of political speech—such as campaign signs—and not for other kinds of protected speech would run the risk of impermissible content discrimination.[128] While he did not go so far as to say a total ban with some exceptions could never be acceptable, Justice Stevens seemed to indicate that a city might find it easier to defend

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[121] Metromedia, Inc. v. City of San Diego, 453 U.S. at 553 (Stevens, J., dissenting).

[122] *Id.* at 552.

[123] *Id.*

[124] *Id.*

[125] *Id.*

[126] *See* Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789, 816 (1984).

[127] *Id.* ("An assertion that 'Jesus Saves,' that 'Abortion is Murder,' that every woman has the 'Right to Choose,' or that 'Alcohol Kills,' may have a claim to a constitutional exemption from the ordinance that is just as strong as 'Roland Vincent—City Council.'").

[128] *Id.*

a total ban than to defend an ordinance that enacts a general ban with some exceptions.[129]

### [2] City of Ladue v. Gilleo: Linking the Appropriateness of a Total or Partial Ban to the Relationship Between the Type of Sign and Its Location

The result in Metromedia and the subsequent language in Vincent regarding possible constitutional problems with exemptions in a general sign ban[130] indicate that the safest route for a city to take is to remove any exemptions from its ordinance. The decision in Gilleo indicates, however, that that type of action may not be sufficient in some circumstances.[131]

Justice Stevens also wrote the majority opinion in Gilleo, and in that opinion, he seemed to modify his earlier holdings on the permissibility of a total ban.[132] The ordinance in Gilleo fell short of a total ban, but Justice Stevens nevertheless found it unconstitutional for suppressing too much speech.[133] While not abandoning his previous position that a sign ordinance could be found unconstitutional because of content-based exemptions, Justice Stevens also found support in Metromedia for the proposition that a sign ordinance could prohibit too much protected speech.[134]

Justice Stevens used Metromedia and Vincent to "identify two analytically distinct grounds for challenging the constitutionality of a municipal ordinance regulating the display of signs."[135] The first is that the ordinance in effect restricts too little speech because the exemptions discriminate based on the signs' message.[136] Justice Stevens found an exemption from an otherwise permissible regula-

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[129] Patricia K. Smoots, Note, Members of the City Council v. Taxpayers for Vincent: The Constitutionality of Prohibiting Temporary Sign Posting on Public Property to Advance Aesthetic Concerns, 34 DePaul L. Rev. 197, 236 (1984).

[130] *See supra* notes 119, 126 and accompanying text.

[131] *See* City of Ladue v. Gilleo, 114 S.Ct. 2038, 2044 (1994).

[132] *See* id. at 2045.

[133] *Id.*

[134] *Id.* at 2043 (citing Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 525–34 (1981)).

[135] *Id.* at 2043.

[136] *Id.*

tion of speech could fit that definition if it represents a governmental attempt to give an advantage to one side of an issue of public debate, or to select the topics for public debate.[137] That language mirrors the traditional definition of content-based discrimination, but Justice Stevens stated that simply removing the exemptions would not necessarily cure the defects in the regulation.[138]

The reasoning behind that conclusion relates to the second analytical basis identified in the opinion: that an ordinance could restrict too much protected speech.[139] Justice Stevens found that even if the exemptions in the Ladue ordinance were free of viewpoint discrimination, the ordinance still restricted too much speech by almost completely banning signs from residential property.[140] The broad sign prohibition struck down in Gilleo was distinguished from the broad sign prohibition approved in Vincent on the basis that residential signs, unlike signs placed on public property, are a unique and important means of communication.[141]

The Gilleo decision appears to add a new wrinkle to the analysis of total sign bans, by looking not only at whether the regulation

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[137] *Id.*

[138] *Id.* at 2043–44.

[139] *Id.* at 2043.

[140] *Id.* at 2045.

[141] *Id.* at 2045; *see also supra* notes 70–80 and accompanying text. The view of residential signs as a unique and important means of communication affected the way Justice Stevens evaluated the availability of alternative means of communication. *See* Freivogel, *supra* note 33, at 4B. In Vincent, when signs placed on utility poles were not found to be unique or valuable, Justice Stevens concluded that ample, alternative means existed. Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789, 812 (1984). In contrast, Justice Stevens noted in Gilleo that the mere existence of an equally affordable and legible means of communication (such as flags) did not alter the fact that the Ladue ordinance "banned a distinct and traditionally important means of expression." City of Ladue v. Gilleo, 114 S.Ct. 2038, 2046 n.16 (1994).

Professor Fiss is critical of the way Justice Stevens evaluated alternative means in Vincent. Fiss, *supra* note 47, at 11. "Rather than asking whether posting signs on utility poles is a sensible and effective method of communicating with the public . . . Stevens seems to place the burden on the speaker to demonstrate that the means of communication is 'uniquely valuable.'" *Id.* Professor Fiss contends it will be very difficult for any single mode of communication to meet the "uniquely valuable" requirement, and implies that restrictive regulations will more easily withstand scrutiny on the basis that alternative means are available. *Id.*

discriminates between different types of speech, but also at the relationship between the type of speech being regulated and the location of that speech.[142] The ruling is viewed by some commentators as an indication that the Court is even willing to examine carefully—and sometimes invalidate—content-neutral speech restrictions.[143] Other experts think the reach of the decision will be limited to residential property and will not affect the ability of cities to enact content-neutral exemptions for signs on public or nonresidential private property.[144]

One other court recently used a similar analysis as a basis for allowing exemptions for certain types of noncommercial signs.[145] Under this theory, a state or local government can exempt from a general ban signs whose content has some significant relationship to the property on which it is displayed.[146] This significant relationship can be met in one of two ways.[147] The state can show a sign is particularly important to travelers on a nearby road,[148] or the state can show a sign better conveys its information in that particular location than it could anywhere else.[149] Under such a standard, a state or local government could conceivably bar political signs in certain areas, such as along highways, while granting exemptions allowing other types of noncommercial signs in those same areas.[150]

## § 13.05 Regulating Signs by Size, Shape, Number, and Duration

Another option for cities that wish to limit the aesthetic prob-

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[142] City of Ladue v. Gilleo, 114 S.Ct. at 2045; *see also* Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 565 (1981) (Burger, C.J., dissenting). In his dissent, Chief Justice Burger expressed support for the idea that exemptions to a sign ordinance might be justified when there is a "unique connection between the medium and the message conveyed." *Id.*

[143] *See* Greiman, *supra* note 80, at 3B.

[144] *See* Freivogel, *supra* note 33, at 4B.

[145] Rappa v. New Castle County, 18 F.3d 1043, 1065 (3d Cir. 1994).

[146] *Id.*

[147] *Id.*

[148] *Id.*

[149] *Id.*

[150] *Id.* at 1064.

lems caused by signs is to enact regulations limiting the size, shape, number, and duration of those signs. The Supreme Court found that signs combine communicative and noncommunicative aspects, and that the government has legitimate interests in regulating those noncommunicative aspects.[151] When, however, regulation of the noncommunicative aspects of signs impinges on communicative aspects, the government's regulatory interests will be balanced against the individual's right to expression.[152] Thus, ordinances regulating the physical attributes of signs on public and nonresidential private property have generally been upheld—so long as the regulations are applied without regard to the content of the signs.[153]

Regulations aimed at limiting the number or duration of political signs prior to an election are more likely to be declared unconstitutional.[154] Because many signs are placed on residential property, it would seem that those types of regulations would be under

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[151] Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 502 (1981).

[152] *Id.*

[153] Swenson, *supra* note 91, at 660; Merriam et al., *supra* note 50, at 1034; *see also* Outdoor Sys., Inc. v. City of Mesa, 997 F.2d 604, 615 (9th Cir. 1993) (finding regulation of signs by size and location equally burden both commercial and noncommercial speech); Chicago Observer, Inc. v. City of Chicago, 929 F.2d 325, 328 (7th Cir. 1991) (finding size limits on newsracks are neutral with respect to content and viewpoint); Ackerley Communications, Inc. v. City of Somerville, 878 F.2d 513, 522 (1st Cir. 1989) (noting that a city can correct content discrimination in a sign ordinance by basing exemptions solely on height requirements); National Advertising Co. v. City of Orange, 861 F.2d 246, 249 (9th Cir. 1988) (reasoning that a city can redraft an ordinance to avoid content-based distinctions by regulating noncommunicative aspects such as size, spacing, and design); Rzadkowolski v. Village of Lake Orion, 845 F.2d 653, 654 (6th Cir. 1988) (finding ordinance limiting number of billboards carrying commercial or noncommercial messages does not regulate content); *cf.* City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 429–31 (1993) (asserting city's aesthetic and safety interests in limiting the total number of newsracks is not served by ordinance banning all commercial newsracks, but not placing any limits on the number of noncommercial newsracks).

[154] Alison E. Gerencser, Removal of Billboards: Some Alternatives for Local Governments, 21 Stetson L. Rev. 899, 905 n.28 (1992) ("Temporary political signs offer special advantages to a candidate or ideology, for means of political communication are not entirely fungible."); *see also* Whitton v. City of Gladstone, 54 F.3d 1400, 1404 (8th Cir. 1995). The court found an ordinance prohibiting commercial or residential property owners from placing political signs on their prop-

even closer scrutiny in light of the Gilleo decision, which some

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erty more than 30 days before an election amounted to an impermissible content-based distinction. *Id.* The court noted that in some residentially-zoned areas, a permanent year-round ground sign expressing support for a particular sports team would not be subject to the durational limits, while the limits would apply to a political campaign sign made of the same material, with the same dimensions and colors, and erected on the same spot. *Id.* The Fourth Circuit found that an ordinance limiting the number of temporary signs that could be placed on residential property to two infringed on residents' free speech rights by preventing them from expressing support for more than two candidates in an election with numerous contested races, and by significantly restricting the ability of two voters living within the same household to use sign posting to express their support for opposing candidates. Arlington County Republican Comm. v. Arlington County, 983 F.2d 587, 594 (4th Cir. 1993). A New Jersey community's ordinance which limited signs advertising political events or viewpoints to 10 days before the event was also found to be content-based. McCormack v. Township of Clinton, 872 F.Supp. 1320, 1323 (D.N.J. 1994). The court noted that signs advertising yard sales, town festivities, or athletic events could presumably be posted at any time within 30 days before the actual event. *Id.* at 1323–24. A Tacoma, Washington, ordinance that prohibited the posting of political signs more than 60 days before an election was also struck down on the basis that it failed to adequately provide for free speech rights. Collier v. City of Tacoma, 854 P.2d 1046, 1057 (Wash. 1993). *But see* Messer v. City of Douglasville, 975 F.2d 1505, 1513 (11th Cir. 1992). The Messer decision upheld an ordinance requiring permits for temporary signs as a content-neutral regulation. The ordinance required that applicants for a temporary permit for political signs also post a $500 bond to ensure the signs are removed within 10 days following the election. *Id.* The Eleventh Circuit rejected the argument that the ordinance limited political speech by placing a financial requirement on political candidates that did not apply to others. *Id.* The court noted the bond requirement burdened all signs of a temporary nature, not just political signs. *Id.* An ordinance allowing one noncommercial opinion sign to be posted year-round and additional campaign or noncommercial opinion signs during the election season was upheld by a Minnesota court. Brayton v. City of New Brighton, 519 N.W.2d 243, 248 (Minn. Ct. App. 1994). The court found the ordinance was content neutral because it did not allow a greater number of campaign signs than opinion signs, thus treating both identically at all times. *Id.* at 246. While pre-election restrictions are looked on unfavorably, postelection removal requirements create fewer problems for courts. While striking down the New Jersey ordinance putting a 10 day restriction on political signs prior to the election, the district court found the city's interests in safety and aesthetics were adequately served by a provision requiring removal of all temporary signs within 10 days after termination of the special event. McCormack v. Township of Clinton, 872 F.Supp. at 1326. The same court in Washington that rejected a preelection restriction on the posting of campaign signs upheld a provision requiring the

experts believe renders unconstitutional several municipal ordinances restricting the time during which political signs can be posted on a lawn.[155] The Gilleo Court noted more temperate measures than Ladue's total ban on political signs might withstand constitutional scrutiny,[156] but the Court was divided on how much leeway it should leave to cities to reasonably regulate the size, number, and location of signs in residential areas.[157]

## § 13.06 Conclusion

Although the Supreme Court is criticized for complicating the task of city officials in drafting constitutional sign ordinances,[158] some general conclusions can be drawn concerning what kinds of restrictions will or will not be allowed. First, it appears that regulations of signs on public property will almost always be upheld, while restrictions of signs on residential property will almost

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removal of campaign signs within 10 days following the election. Collier v. City of Tacoma, 854 P.2d at 1058–59. The court reasoned that pre-election political speech interests that may outweigh a municipality's regulatory interests are not present following the event and may be outweighed by a municipality's demonstrated interests in aesthetics and traffic safety. *Id.* It thus appears that the safest methods for imposing durational requirements on political campaign signs is to aim the requirement at special event signs generally, rather than political signs in particular, and to target the limitation to the postevent, or postelection period. *See* Merriam et al., *supra* note 50, at 1034.

[155] *See supra* note 84 and accompanying text. However, two courts which have reviewed such ordinances subsequent to the Gilleo decision found that it did not control. The Eighth Circuit noted that Gilleo did not address the issue of content-neutrality, which was the controlling issue in the case at bar. Whitton v. City of Gladstone, 54 F.3d 1400, 1404 n.7 (8th Cir. 1995). The Minnesota Court of Appeals found the Ladue ordinance favored certain residential signs over others, while the ordinance before it treated political signs and other opinion signs the same. Brayton v. City of New Brighton, 519 N.W.2d at 246 n.2.

[156] City of Ladue v. Gilleo, 114 S.Ct. 2038, 2047 (1994).

[157] Compare Greiman, *supra* note 80, at 3B ("The court made clear, and [Margaret] Gilleo always has acknowledged, that cities retain the right to regulate reasonably the size, number and location of signs.") with Gerard, *supra* note 2, at 3B (arguing that the same interests that protect a homeowner's interest in supporting one political candidate protects the homeowner's interest in supporting as many candidates as the homeowner chooses).

[158] Gerard, *supra* note 2, at 3B.

always be struck down. Cities should also be able to draft ordinances that distinguish between on-site and off-site signs, so long as commercial speech is not favored over noncommercial speech.

A total ban on signs on nonresidential property would probably be permitted. The question of whether exceptions can be made for certain types of noncommercial signs is less clear. Exemptions for temporary political signs will probably be allowed, but an ordinance that bans political signs while allowing types of noncommercial signs will likely face greater challenges. Although there are some indications a city may constitutionally prohibit political signs by limiting exemptions to those signs bearing a relationship to the property on which they are displayed, that theory has not been widely tested in the lower courts.

Finally, cities should be able to limit the size and shape of signs. The number of temporary political campaign signs can probably be regulated on nonresidential property, but any restrictions aimed at residential property face a good chance of being struck down. Cities probably cannot limit the duration of campaign signs before an election, but should be able to impose removal requirements on the signs after the election.