DE MINIMIS CONTENT DISCRIMINATION:
THE VEXING MATTER OF SIGN-ORDINANCE EXEMPTIONS

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I. INTRODUCTION

An attorney is allowed to place a sign on her property (located in a commercial zone) identifying her as an attorney but is barred from placing a sign on that same property that urges support for her candidacy for a state judgeship; that sign is permitted only on residential property. An accountant is barred from displaying noncommercial messages (such as “Choose Life”) by the use of a flashing or blinking electronic sign in his office window, whereas the city allows flashing signs that display time and temperature readings. A congressional candidate is not allowed to place campaign signs on private property within twenty-five feet of a state highway, whereas “for sale” signs on such property are permitted. Are any or all of these results consistent with the protection afforded to freedom of speech by the First Amendment?

Ordinances regulating the location, size, and content of signs, or requiring permits as a condition of their placement, are commonplace. Some ordinances apply only to commercial “billboards,” but most of the regulations that one encounters in judicial decisions are not so limited. Some ordinances, whether limited to commercial

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1 Beaulieu v. City of Alabaster, 454 F.3d 1219 (11th Cir. 2006) (holding ordinance unconstitutional).
2 La Tour v. City of Fayetteville, Ark., 442 F.3d 1094 (8th Cir. 2006) (holding ordinance unconstitutional).
signs or not, distinguish between “onsite” and “offsite” signs. Quite typical, and most potentially problematic, are those sign regulations that contain noncommercial exemptions—which may or may not be deemed “content-based” for analytical purposes—from otherwise general prohibitions. Not uncommonly, such exemptions include not only innocuous “directional” and “identification” signs, but also “for sale” signs and signs with political content. Quite often these regulations have been challenged, both by commercial advertisers and ordinary homeowners, as violative of freedom of speech. The results have been mixed, and depend primarily on the challenger’s ability to persuade a court that the ordinance contains impermissible content-based exemptions. In recent years, federal appellate courts have been strikingly divided in their approach to resolving that threshold question, which is the primary focus of this article.

If an ordinance applies only to commercial advertising, its constitutionality will, of course, be assessed according to the unique version of intermediate judicial scrutiny set forth by the Supreme Court in its 1980 *Central Hudson* decision. While the government interests repeatedly cited in support of sign ordinances—traffic safety and aesthetics—

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8 See, e.g., Granite State Outdoor Adver., Inc. v. City of St. Petersburg, Fla., 348 F.3d 1278 (11th Cir. 2003) (involving a constitutional challenge to a sign ordinance brought by a commercial advertiser); Lombardo v. Warner, 353 F.3d 774 (9th Cir. 2003) (invoking a constitutional challenge to a sign ordinance brought by an ordinary homeowner).

9 See Christina Chloe Orlando, *Art or Signage?: The Regulation of Outdoor Murals and the First Amendment*, 35 Cardozo L. Rev. 867, 872–74 (2013) (“Regulations within a sign ordinance are characterized as either content-neutral or content-based. This characterization is the single most crucial issue in evaluating the constitutionality of a sign ordinance.”).

10 This article will not address a different issue that often arises in challenges to sign ordinances, namely the delegation of unbridled discretion to officials responsible for granting or denying required permits. Cases in which such an argument was made include: *Wag More Dogs, LLC v. Cozart*, 680 F.3d 359, 370, 372 (4th Cir. 2012); *Riel v. City of Bradford*, 485 F.3d 756, 755 (3d Cir. 2007); and *Lombardo*, 353 F.3d at 775, 778 (9th Cir. 2003).

are always deemed to satisfy Central Hudson’s requirement of a “substantial” government interest, there remains the possibility that such a regulation will be found to be an invalid regulation of commercial speech nonetheless, either because it fails to “directly advance” one of those government interests, or because it regulates more than is necessary to do so. Case law suggests, however, that sign ordinances are highly unlikely to be struck down when subjected only to the Central Hudson analysis.

More problematic by far are ordinances that place limits on some, but not all, noncommercial signs. When do such distinctions amount to presumptively unconstitutional content discrimination? The determination is, of course, critical. If such a regulation is seen as content-neutral, the more deferential “time, place and manner” form of intermediate scrutiny applies, and the ordinance will probably be upheld. If it is content-based, then strict scrutiny applies, with the usual consequence: the ordinance is struck down. The key problem, then, is how to determine when such exceptions lead to the conclusion that the ordinance is content-based. While some federal courts take what might be called a “literal” (or “facial”) approach to resolving that

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13 Central Hudson, 447 U.S. at 564.

14 Id.

15 Id.


18 See, e.g., Naser Jewelers, Inc. v. City of Concord, 513 F.3d 27 (1st Cir. 2008); Get Outdoors II, LLC v. City of San Diego, 506 F.3d 886 (9th Cir. 2007); Prime Media, Inc. v. City of Brentwood, Tenn., 398 F.3d 814 (6th Cir. 2005).


20 See, e.g., Neighborhood Enters., Inc. v. City of St. Louis, 644 F.3d 728 (8th Cir. 2011); Solantic, LLC v. City of Neptune Beach, 410 F.3d 1250 (11th Cir. 2005); Café Erotica of Florida, Inc. v. St. Johns Cnty., 360 F.3d 1274 (11th Cir. 2004). The case law suggests that no compelling interest supports these restrictions, see Neighborhood Enters., 644 F.3d at 738; Solantic, 410 F.3d at 1257, but why is the interest in traffic safety not compelling? The more satisfactory conclusion would seem to be that an ordinance making such exemptions likely fails strict scrutiny (assuming that strict scrutiny is indeed the appropriate level of review to employ) because it is under-inclusive as a means of accomplishing the interests in traffic safety and aesthetics; it is thus not narrowly tailored to further the compelling interest, as strict scrutiny requires. See, e.g., Brown, 131 S. Ct. at 2740.
issue,\textsuperscript{21} many others resist treating every distinction that is literally based on what a sign says as content-based.\textsuperscript{22} The Supreme Court’s 2000 decision in \textit{Hill v. Colorado}\textsuperscript{23} has provided major impetus for that resistance. Its 1994 decision in \textit{City of Ladue v. Gilleo},\textsuperscript{24} meanwhile, in which the majority opinion chose to sidestep the question at hand, arguably reflects the unsatisfactory nature of classifying some common “utilitarian” sign ordinance exemptions as either content-based or content-neutral. As one federal appellate court has suggested,\textsuperscript{25} perhaps there is a better, more creative way to address this conundrum.

Part II of this Article addresses the United States Supreme Court decisions that bear on the resolution of the problems posed by sign ordinances. Part III examines the relevant case law at the federal appellate level, focusing most intently on a handful of decisions of particular interest. Part IV then synthesizes and evaluates the pertinent decisional law and makes some potentially helpful suggestions leading toward the articulation of a clear and satisfying set of rules on which courts and municipalities can rely.

\section*{II. Relevant Supreme Court Decisions}

\subsection*{A. “Sign” Cases}

\subsubsection*{1. Metromedia}

Notably, the Supreme Court, in its seminal 1981 \textit{Metromedia} decision,\textsuperscript{26} found no fault with an ordinance that banned “offsite” commercial advertising while allowing “onsite” commercial advertising.\textsuperscript{27} For the plurality, Justice White wrote that there could be no “substantial doubt that the twin goals that the ordinance seeks to further—traffic safety and the appearance of the city—are substantial governmental goals.”\textsuperscript{28} He continued:

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{21} See infra text accompanying notes 205–15.
\item \textsuperscript{22} See infra text accompanying notes 216–309.
\item \textsuperscript{23} 530 U.S. 703 (2000).
\item \textsuperscript{24} 512 U.S. 43 (1994).
\item \textsuperscript{25} Rappa v. New Castle Cnty., 18 F.3d 1043 (3d Cir. 1994); see also infra text accompanying notes 287–309.
\item \textsuperscript{26} Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981).
\item \textsuperscript{27} \textit{Id.} at 511–12. Justice Stevens, oddly described simply as “dissenting in part,” stated that he joined Parts I–IV of the plurality opinion—which included that part of the plurality opinion uphold- ing the ban on off-site commercial signs—and thus might well have been identified as “concurring in part.” \textit{Id.} at 541 (Stevens, J., dissenting in part).
\item \textsuperscript{28} \textit{Id.} at 507–08 (plurality opinion). Because Justice White was here applying the \textit{Central Hudson} test to this regulation of commercial speech, he had no need to decide whether either of these interests might be deemed “compelling.”
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We likewise hesitate to disagree with the accumulated, common-sense judgments of local lawmakers and of the many reviewing courts that billboards are real and substantial hazards to traffic safety. . . .

We reach a similar result with respect to the second asserted justification for the ordinance—advancement of the city’s esthetic interests. It is not speculative to recognize that billboards by their very nature . . . can be perceived as an “esthetic harm.”

But did such an incomplete regulation—banning commercial advertising “offsite” while allowing it “onsite”—“directly advance” these interests, as the *Central Hudson* test requires? White asserted that it did:

In the first place, whether onsite advertising is permitted or not, the prohibition of offsite advertising is directly related to the stated objectives of traffic safety and esthetics. This is not altered by the fact that the ordinance is underinclusive because it permits onsite advertising. Second, the city may believe that offsite advertising, with its periodically changing content, presents a more acute problem than does onsite advertising. Third, San Diego has obviously chosen to value one kind of commercial speech—onsite advertising—more than another kind of commercial speech—offsite advertising. The ordinance reflects a decision by the city that the former interest, but not the latter, is stronger than the city’s interests in traffic and esthetics. . . . We do not reject that judgment.

Justice White’s plurality opinion in *Metromedia* found the ordinance invalid, however, by virtue of its restrictions of noncommercial signs. The plurality—joined now by no other member of the Court—identified two problems in this regard. The first flaw was the fact that, in White’s words, “[t]here is a broad exception for onsite commercial advertisements, but there is no similar exception for non-commercial speech.” He continued:

The city does not explain how or why noncommercial billboards located in places where commercial billboards are permitted would be more threatening to safe driving or would detract more from the beauty of the city. Insofar as the city tolerates billboards at all, it cannot choose to limit their content to commercial messages; the city may not conclude that the communication of commercial information concerning goods or services

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29 *Id.* at 509–10.
30 *Id.* at 511–12.
31 *Id.* at 521.
32 Justices Brennan and Blackmun concurred in the judgment, taking a wholly different view of the ordinance. *Id.* at 521 (Brennan, J., concurring). Justice Stevens, dissenting in part, took a more limited view than did the plurality regarding the appropriate scope of the Court’s decision in this case. *Id.* at 540 (Stevens, J., dissenting in part). Chief Justice Burger dissented, *id.* at 555 (Burger, J., dissenting), as did Justice Rehnquist, *id.* at 569 (Rehnquist, J., dissenting).
33 *Id.* at 513 (plurality opinion).
connected to a particular site is of greater value than the communication of noncommercial messages. 34

The plurality in *Metromedia* found the ordinance infirm in its regulation of noncommercial speech for the additional reason that it contained various content-based exemptions, including identification signs, religious symbols, and temporary political campaign signs. 35 Without focusing on any one of those exemptions, and without even mentioning strict scrutiny, White simply declared that “the city does not have the same range of choice in the area of noncommercial speech to evaluate the strength of, or distinguish between, various communicative interests.” 36 He concluded: “Because some noncommercial messages may be conveyed on billboards throughout the commercial and industrial zones, San Diego must similarly allow billboards conveying other noncommercial messages throughout those zones.” 37

Justice Stevens, dissenting in part, responded to that part of White’s opinion in a way that provokes thought about the proper characterization of many typical sign ordinance exemptions and can be seen, in retrospect, as foreshadowing some of his later opinions:

To the extent that the exceptions relate to subject matter at all, I can find no suggestion on the face of the ordinance that San Diego is attempting to influence public opinion . . . on particular issues. Except for the provision allowing signs to be used for political campaign purposes for limited periods . . . , none of the exceptions even arguably relates to any controversial subject matter. As a whole they allow a greater dissemination of information than could occur under a total ban . . . .

The exception for political campaign signs presents a different question. For I must assume that these signs may be just as unsightly and hazardous as other offsite billboards. Nevertheless, the fact that the community places a special value on allowing additional communication to occur during political campaigns is surely consistent with the interests the First Amendment was designed to protect. 38

Chief Justice Burger, dissenting, sounded very similar themes, concluding: “The plurality today trivializes genuine First Amendment

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34 *Id.*. This conclusion was based, of course, on the oft-repeated assertion that the Constitution “accords a lesser protection to commercial speech than to other constitutionally guaranteed expression.” Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y., 447 U.S. 556, 563 (1980).
36 *Id.* at 514 (plurality opinion).
37 *Id.* at 515.
38 *Id.* at 554–55 (Stevens, J., dissenting in part).
values by hinging its holding on the city’s decision to allow some signs while preventing others that constitute the vast majority of the genre. The other dissenter, Justice Rehnquist, briefly indicated his agreement.

2. Taxpayers for Vincent

In 1984, in the Taxpayers for Vincent case, the Court upheld, as applied to a group that had posted political campaign signs on utility poles, the validity of an ordinance barring the posting of any signs on public property. Justice Stevens wrote for the majority, and reaffirmed Metromedia’s conclusion that a city has a substantial interest in “avoiding ‘visual clutter.’” The ban was seen as content-neutral and analyzed accordingly. Beyond the (unsurprising) fact that such a content-neutral prohibition was upheld, two aspects of Stevens’ opinion are notable for this article’s purposes.

First is his acceptance of the underinclusiveness of the ban, which applied to public but not private property. To the Ninth Circuit Court of Appeals, this underinclusiveness fatally undermined the ordinance, but Stevens deemed that reaction to be unwarranted. Analogizing the situation to that in Metromedia, in which the Court was

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39 Id. at 565 (Burger, J., dissenting).
40 Id. at 570 (Rehnquist, J., dissenting).
42 Id. at 816 (majority opinion). At the end of his opinion, Stevens made reference to the “traffic hazards” potentially caused by the signs, along with the “esthetic interests” on which he had earlier relied, and concluded: “We hold that on this record these interests are sufficiently substantial to justify this content neutral, impartially administered prohibition against the posting of appellees’ temporary signs on public property . . . .” Id. at 817.
43 Id. at 804–05.
44 Oddly, Stevens identified the test set forth in United States v. O’Brien, 391 U.S. 367, 377 (1968)—the seminal “symbolic speech” case—as the applicable test, rather than the semantically different form of intermediate scrutiny already formulated for application to “time, place and manner” regulations in Heffron v. Int’l Soc’y for Krishna Consciousness, Inc., 452 U.S. 640, 647–49 (1981), but the structure of his analysis actually paralleled the Heffron formulation. Id. at 804–07. Later that year, Justice White had occasion to say, in his majority opinion in Clark v. Community for Creative Non-Violence, 468 U.S. 288, 298 (1984), that “the four-factor standard of United States v. O’Brien . . . is little, if any, different from the standard applied to time, place and manner restrictions.”
45 Taxpayers for Vincent, 466 U.S. at 811.
46 Id. at 810.
untroubled by the distinction drawn between “onsite” and “offsite” advertising, Stevens found that here, as well, a city could ban signs in some but not all locations. He made no mention of the fact that this part of the Metromedia decision involved only commercial speech, whereas this case involved a content-neutral ban on speech of any kind.

Second is his response to the argument, made unsuccessfully by the sign-posters, that the city should be constitutionally obliged to make some exceptions to the ban, perhaps including an exception for political campaign signs during political campaigns, he wrote:

Plausible public policy arguments might well be made in support of any such exemption, but it by no means follows that it is therefore constitutionally mandated, . . . nor is it clear that some of the suggested exceptions would even be constitutionally permissible. For example, even though political speech is entitled to the fullest possible measure of constitutional protection, there are a host of other communications that might command the same respect. 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.” . . . To create an exception for appellees’ political speech and not these other types of speech might create a risk of engaging in constitutionally forbidden content discrimination.

The suggestion that an exemption for “political” speech “might” amount to “forbidden” content discrimination was, of course, dictum. But is there any sound basis for doubting that suggestion?

3. Linmark Associates and City of Ladue

Whereas the Metromedia and Taxpayers for Vincent decisions rendered guidelines of general import, two other Supreme Court cases upheld the rights of sign-posters in more narrowly focused contexts and did so in conceptually similar fashion.

The first of these cases, Linmark Associates, Inc. v. Township of Willingboro, invalidated an ordinance that banned the placement of “For Sale” or “Sold” signs on real property in the township. Justice Mar-

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47 Id. at 811 (“So here, the validity of the esthetic interest in the elimination of signs on public property is not compromised by failing to extend the ban to private property. The private citizen’s interest in controlling the use of his own property justifies the disparate treatment.”)

48 Id. at 815–16.

shall, writing for a virtually unanimous Court, described the township’s goal as “to stem what it perceives as the flight of white homeowners from a racially integrated community.” He treated the speech at issue here as commercial speech, despite the distinct possibility—unacknowledged by him—that a sign that says “Sold” should not be so regarded. The Court had a year earlier extended First Amendment protection to commercial speech, but had not yet put forth a test to be used in gauging the validity of a regulation of such speech; that would come three years later, in the Central Hudson case.

In the absence of such a structured analysis, Marshall said this with regard to a ban on real estate “For Sale” signs:

First, serious questions exist as to whether the ordinance “leave[s] open ample alternative channels for communication.” Although in theory sellers remain free to employ a number of different alternatives, in practice realty is not marketed through leaflets, sound trucks, demonstrations, or the like. The options to which sellers are realistically relegated—primarily newspaper advertising and listing with real estate agents—involve more cost and less autonomy than “For Sale” signs . . . and may be less effective media for communicating the message that is conveyed by a “For Sale” sign in front of the house to be sold. The alternatives, then, are far from satisfactory.

Exactly why the existence of adequate alternative channels of communication—a requisite characteristic of a valid “time, place or manner” regulation—was relevant to the analysis of a regulation of commercial speech was not made clear. Marshall went on to observe that this prohibition was based on the content of the signs (generally true in commercial speech cases) and not on place or manner. Could it be justified nonetheless? No, said Marshall, essentially for two reasons. First, the Township had “failed to establish that this ordinance is needed to assure that Willingboro remains an integrated commu-

50 Justice Rehnquist took no part in the decision. Id. at 97.
51 Id. at 86.
52 The prevailing definition of commercial speech continues to be that stated in the seminal case of Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., namely, “speech which does ‘no more than propose a commercial transaction.’” 425 U.S. 748, 762 (1976) (quoting Pittsburgh Press Co. v. Human Relations Comm’n, 413 U.S. 376, 385 (1973)).
53 Id.
55 Linmark, 431 U.S. at 93 (first alteration in original) (citations omitted).
57 Linmark, 431 U.S. at 93–94.
nity.” Second, the Court would simply not allow the Township to try to achieve its goal by blocking the flow of truthful information. The decision thus appears to have recognized a First Amendment right of property owners to place “For Sale” signs on their property.

The Court’s 1994 decision in City of Ladue v. Gilleo sidestepped the challenging question of whether a ban on residential signs should be considered content-based by virtue of its exemptions for “residence identification signs,” “for sale” signs, and signs warning of safety hazards. The case involved the placement of signs bearing political (but not election-related) messages on residential property by the inhabitant thereof. The City’s stated concerns were preventing “visual blight and clutter” and “safety and traffic hazards,” as well as maintaining property values. The Eighth Circuit Court of Appeals deemed the ordinance content-based, and invalidated it accordingly. Justice Stevens, writing for a unanimous Court, rendered a unique analysis that was not explicitly linked to any established First Amendment test. He began the core of this analysis by describing the Linmark decision, and then offered this cryptic comment on the strength of the City’s interest in banning signs: “Ladue’s sign ordinance is supported principally by the City’s interest in minimizing the visual clutter associated with signs, an interest that is concededly valid but certainly no more compelling than the interests at stake in Linmark.”

Here, in contrast, Ladue has almost completely foreclosed a venerable means of communication that is both unique and important. It has totally foreclosed that medium to political, religious, or personal

58 Id. at 95.
59 Id. at 96–97. The Court would probably reach the same result under the later-promulgated Central Hudson test, especially as interpreted in Edenfield v. Fane, in which Justice Kennedy, for the majority, stated that, to justify a regulation of commercial speech, the government “must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.” 507 U.S. 761, 771 (1993).
60 512 U.S. 43 (1994).
61 Id. at 45. Justice Stevens added that “[t]he ordinance permits commercial establishments, churches, and nonprofit organizations to erect signs that are not allowed at residences.” Id.; see also id. at 46 n.6 (setting forth the “full catalog of exceptions”).
62 Ms. Gileo, in 1990, placed a sign on her front lawn that said “Say No to War in the Persian Gulf, Call Congress Now.” Id. at 45. In 1991, she placed a sign in a window of her home that said “For Peace in the Gulf.” Id. at 46.
63 Id. at 47.
64 Id.
65 Id. at 54.
66 Id.
messages. . . . Often placed on lawns or in windows, residential signs play an important part in political campaigns, during which they are displayed to signal the resident’s support for particular candidates, parties, or causes. . . .

Our prior decisions have voiced particular concern with laws that foreclose an entire medium of expression. . . . 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. . . .

. . . [E]ven 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.” . . . In this case, we are not persuaded that adequate substitutes exist for the important medium of speech that Ladue has closed off.

Displaying a sign from one’s own residence often carries a message quite distinct from placing the same sign someplace else, or conveying the same text or picture by other means. Precisely because of their location, such signs provide information about the identity of the “speaker.” . . .

Residential signs are an unusually cheap and convenient form of communication. Especially for persons of modest means or limited mobility, a yard or window sign may have no practical substitute. . . . Furthermore, a person who puts up a sign at her residence often intends to reach neighbors, an audience that could not be reached nearly as well by other means.67

The decision thus appears to hold that, regardless of whether this ordinance should be seen as content-based or content-neutral, a wholesale ban on political signs on residential property placed by a person residing at that location is absolutely at odds with the First Amendment.68

Justice O’Connor, concurring, seemed to suggest that this was probably an instance of content discrimination, and that the Court should have said so.69 But, interestingly, she added that: “[I]t is quite true that regulations are occasionally struck down because of their content-based nature, even though common sense may suggest that they

67 Id. at 54–57.
68 Stevens added: “Our decision . . . by no means leaves the City powerless to address the ills that may be associated with residential signs.” Id. at 58. But he provided scant elaboration of that suggestion in a footnote:

Nor do we hold that every kind of sign must be permitted in residential areas. Different considerations might well apply, however, in the case of signs . . . displayed by residents for a fee, or in the case of off-site commercial advertisements on residential property. We also are not confronted here with mere regulations short of a ban.

Id. at 58 n.17.
69 Id. at 59–60 (O’Connor, J., concurring).
are entirely reasonable. The content distinctions present in this ordinance may, to some, be a good example of this.\footnote{Id. at 60.}

The City of Ladue opinion appears to have had surprisingly little influence on later “sign ordinance” decisions, but it seems safe to assume that it explains the fact that the ordinances at issue in these later cases often contain exemptions for “political” signs, just as Linmark would appear to explain the prevalence of “For Sale” sign exemptions.\footnote{See infra text accompanying notes 198–99.}

\section*{B. Cases Involving the “Content” Inquiry}

More generally, what guidance do other Supreme Court decisions provide with respect to the choice between content discrimination and content neutrality?\footnote{For a comprehensive discussion of the Supreme Court case law relevant to this inquiry, see Barry P. McDonald, \textit{Speech and Distrust: Rethinking the Content Approach to Protecting the Freedom of Expression}, 81 \textit{Notre Dame L. Rev.} 1347 (2006).} What does it mean to say that a law is content-based?\footnote{For an exhaustive exploration of this issue, see Leslie Kendrick, \textit{Content Discrimination Revisited}, 98 Va. L. Rev. 231 (2012).} A brief review of the most instructive Supreme Court decisions will prove helpful to that inquiry.

The Court’s reliance on the distinction appears to be traceable to its 1972 decision in \textit{Police Department of Chicago v. Mosley},\footnote{408 U.S. 92 (1972).} which struck down an ordinance that prohibited picketing within 150 feet of a school while classes are in session as impermissibly content-based but exempted “the peaceful picketing of any school involved in a labor dispute.”\footnote{\textit{Id.} at 93.} The case perfectly exemplifies the key principle that a regulation of speech can be deemed content-based even if the applicability of the regulation is also limited by the time, place, or manner of the proscribed speech. To put it another way, content \textit{neutrality} means (or \textit{should} mean) exactly that—namely, that the applicability of the law has absolutely nothing to do with the nature of the proscribed speech. Here, the critical consideration was the fact that some expression was permitted and some was not—based on its content—despite the fact that presumably all of it was permitted if sufficiently distant from a school in session.
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Consolidated Edison Co. of New York, Inc. v. Public Service Commission of New York\textsuperscript{76} provides a similar example. The Court struck down a Commission order “that prohibits the inclusion in monthly electric bills of inserts discussing controversial issues of public policy” as impermissibly content-based.\textsuperscript{77} The Commission argued that its order was not content-based because it “does not favor either side of a political controversy.”\textsuperscript{78} Justice Powell, writing for the majority, rejected that argument, saying this: “The First Amendment’s hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic.”\textsuperscript{79} Indeed, were that not true, there would be no difference between content discrimination and viewpoint discrimination. (But, of course, there is a difference. Viewpoint discrimination is not subjected to strict scrutiny; it is invalid \textit{per se}.)\textsuperscript{80} And, again, it mattered not that the prohibition applied only to a particular medium of communication.

\textit{Boos v. Barry}\textsuperscript{81} provides yet another example. The Court struck down a federal statute that made it a crime “to display any flag, banner, placard or device designed . . . to . . . bring into public odium any foreign government . . . within 500 feet of any building or premises within the District of Columbia used or occupied by any foreign government or its representative . . . as an embassy” as impermissibly content-based.\textsuperscript{82} For a plurality, Justice O’Connor offered a straightforward rationale for the conclusion that this statute was content-based:

[The statute] is content-based. Whether individuals may picket in front of a foreign embassy depends entirely upon whether their picket signs are critical of the foreign government or not. One category of speech has been completely prohibited within 500 feet of embassies. Other categories of speech, however, such as favorable speech about a foreign government or speech concerning a labor dispute with a foreign government, are permitted.\textsuperscript{83}

These, and other, Supreme Court rulings arguably support a clear and straightforward approach to content analysis. But the Court be-

\begin{itemize}
\item \textsuperscript{76} 447 U.S. 530 (1980).
\item \textsuperscript{77} \textit{Id.} at 532.
\item \textsuperscript{78} \textit{Id.} at 537.
\item \textsuperscript{79} \textit{Id.}
\item \textsuperscript{80} See, e.g., \textit{Good News Club v. Milford Cent. Sch.}, 533 U.S. 98, 107 (2001).
\item \textsuperscript{81} 485 U.S. 312 (1988).
\item \textsuperscript{82} \textit{Id.} at 316.
\item \textsuperscript{83} \textit{Id.} at 318–19. Justices Brennan and Marshall, concurring in the result, did not disagree. \textit{Id.} at 334 (Brennan, J., concurring).
\end{itemize}
gan to complicate the analysis in 1986 in its controversial decision in City of Renton v. Playtime Theatres, Inc. The Court therein, speaking through Justice Rehnquist, turned what appeared to be a content-based zoning law, which essentially limited the locations available within the city for adult movie theaters, into a content-neutral regulation for analytical purposes by virtue of the fact that the proffered legislative goal was to limit the "secondary effects" that such a theater has on the surrounding neighborhood. In the process, Justice Rehnquist made these statements of potentially more general import:

In short, the Renton ordinance is completely consistent with our definition of "content-neutral" speech regulations as those that "are justified without reference to the content of the regulated speech." The ordinance does not contravene the fundamental principle that underlies our concern about "content-based" speech regulations: that "government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views."

As the quotation marks make clear, these were not new pronouncements. But because they had been previously uttered only in cases in which the character of the regulation was undisputed, never before had these words mattered. Now they did matter, but only in cases in which the "secondary effects" theory might plausibly be invoked—which has not been true of cases involving sign ordinances.

But the Court continued to put forth statements that have complicated content analysis, most notably in the case of Ward v. Rock Against Racism, which upheld a New York City law requiring performers at a

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84 475 U.S. 41 (1986).
85 Id. at 51–52.
86 Id. at 48–49 (citations omitted).
88 At least one federal appellate court has used the "secondary effects" theory to justify treating a sign ordinance as content-neutral despite its inclusion of exemptions. Wheeler v. Comm’r of Highways, 822 F.2d 586, 590 (6th Cir. 1987). But the "secondary effects" theory has been limited, at the Supreme Court level, to cases involving commercial land uses of an "adult" nature. E.g., City of Erie v. Pap’s A.M., 529 U.S. 277 (2000); City of L.A. v. Alameda Books, Inc., 535 U.S. 425 (2002). Its use in a sign ordinance case was thus appropriately rejected, in Whitton v. City of Gladstone, 54 F.3d 1400, 1407 n.11 (8th Cir. 1995). See also Rappa v. New Castle Cnty., 18 F.3d 1043, 1069–70 (3d Cir. 1994).
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certain bandshell in Central Park to utilize sound amplification equipment and a sound technician provided by the City. The “principal justification” was “to control noise levels.”90 Another was to ensure “the quality of sound at Bandshell events.”91 For the majority, Justice Kennedy deemed the challenged regulations as content-neutral, a conclusion that (a) the dissenting Justices did not dispute,92 and (b) makes sense, given that the regulations apparently applied to all performances at the Bandshell, regardless of content.93 But Kennedy chose to add this arguably needless—and now much-quoted—language:

The principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys . . . . The government’s purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others. Government regulation of expressive activity is content-neutral so long as it is “justified without reference to the content of the regulated speech.”94

Kennedy made no attempt to harmonize this by-now-familiar language with cases in which it had not been used and in which reliance thereon would surely have been problematic. Was the content-based distinction in Mosley,95 for example, based on the city’s disagreement with the message conveyed by non-labor picketing? (Would it not be more persuasively suggested that the distinction reflected favoritism toward the permitted expression—labor-related picketing—as opposed to opposition to the proscribed expression? And why should such favoritism be deemed any more acceptable than such opposition?) Was the content-based ban on electric bill inserts discussing “controversial issues of public policy” in Consolidated Edison96 reflective of the Commission’s disagreement with such discussions, regardless of viewpoint? Was the content-based distinction in Boos97 indicative of the federal government’s disagreement with all expressions of hostility toward foreign governments? Clearly, those cases involved content-based regulations that were also limited by time, place, or manner, and clearly the govern-

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90 Id. at 792.
91 Id.
92 Justice Marshall, joined by Justices Brennan and Stevens, dissented. Id. at 804 (Marshall, J., dissenting).
93 Id. at 787 n.2 (majority opinion).
94 Id. at 791 (citations omitted).
95 Police Dep’t of Chicago v. Mosley, 408 U.S. 92 (1972).
ment interest, in each case, had everything to do with the time, place, or manner of the speech—along with its content. The language of Ward, taken seriously, would alter the results of those cases and threaten to displace the long-held understanding that a time- or manner-based restriction of speech can also be impermissibly content-based.

But subsequent decisions, at least for a time, displayed no trace of Ward’s influence. In Simon & Schuster, Inc. v. New York State Crime Victims Board,98 a virtually unanimous Court struck down a New York law which required, in Justice O’Connor’s words, “that an accused or convicted criminal’s income from works describing his crime be deposited in an escrow account”99 to be held there for the potential benefit of his victims or creditors. No Justice disagreed with O’Connor’s determination that the law was content-based.100 “A statute is presumptively inconsistent with the First Amendment,” she wrote, “if it imposes a financial burden on speakers because of the content of their speech.”101 Not only did she refrain from making the implausible suggestion that the New York law reflected “disagreement with” works that fell within the reach of the statute, but she added this notable comment: “The Board next argues that discriminatory financial treatment is suspect under the First Amendment only when the legislature intends to suppress certain ideas. This assertion is incorrect; our cases have consistently held that ‘[i]llicit legislative intent is not the sine qua non of a violation of the First Amendment.’”102

Another decision, Burson v. Freeman,103 involved a Tennessee statute that prohibited the solicitation of votes or the display or distribution of campaign materials within 100 feet of the entrance to a polling place on an election day. Writing for a plurality, Justice Blackmun easily found the law to be content-based,104 and the dissenters did not disagree.105 Quite sensibly, their opinions made no reference to the

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99 Id. at 108.
100 Id. at 116; id. at 123 (Blackmun, J., concurring); id. at 124 (Kennedy, J., concurring).
101 Id. at 115 (majority opinion).
102 Id. at 117 (alteration in original) (quoting Minneapolis Star & Tribune Co. v. Minn. Comm’r of Revenue, 460 U.S. 575, 592 (1983)).
104 Id. at 196.
105 Id. at 217 (Stevens, J., dissenting). Justice Scalia, concurring in the judgment on other grounds, provided the fifth vote needed to uphold the statute. Id. at 214 (Scalia, J., concurring).
question of whether the state had enacted this ban based on disagreement with the message of any candidate. 106

Some federal appellate courts 107 have viewed language used in a 1993 case, City of Cincinnati v. Discovery Network, Inc., 108 as essentially neutralizing the language of the Ward decision. For aesthetic reasons, the City of Cincinnati attempted to reduce the number of “newsracks” on public property by eliminating newsracks containing commercial advertising, while allowing newsracks containing newspapers. 109 A majority of the Court, speaking through Justice Stevens, found this to be an invalid restriction of commercial speech; the requisite “reasonable fit” was lacking because the distinction between commercial and non-commercial publications had nothing to do with the City’s aesthetic interest. 110 Somewhat oddly, Stevens considered the City’s argument that its action should be considered a content-neutral time, place, or manner regulation after having reached a conclusion, pursuant to the Central Hudson analysis, that was applicable only because the regulation at issue was seen as burdening commercial speech. 111 (A regulation of commercial speech is, by definition, content-based, but the consequence of that designation is not strict scrutiny. 112) Stevens rejected that argument, saying this:

The Court has held that government may impose reasonable restrictions on the time, place, or manner of engaging in protected speech provided that they are adequately justified “without reference to the content of the regulated speech.” . . . The city contends that its regulation of

106 Justice Kennedy, however, wrote an elusive concurring opinion in which he pondered the general question of when content discrimination can properly be perceived. After quoting the key sentence from his Ward opinion, he added this: In some cases, the fact that a regulation is content-based and invalid . . . will be apparent from its face. In my view that was of the New York statute we considered in Simon & Schuster, and no further inquiry was necessary. To read the statute was sufficient to strike it down as an effort by government to restrict expression because of its content. 107 See id. at 412.
107 E.g., Solantic, LLC v. City of Neptune Beach, 410 F.3d 1250, 1259 n.8 (11th Cir. 2005); Whitton v. City of Gladstone, 54 F.3d 1400, 1406 (8th Cir. 1995).
109 See id. at 412.
110 Id. at 417, 424.
111 See id. at 428–29. It was, moreover, unclear what the city hoped to gain by persuading the Court to shift from one form of intermediate scrutiny to another. Chief Justice Rehnquist, dissenting, observed that “I see no reason to engage in a ‘time, place, or manner’ analysis of the city’s prohibition, which in any event strikes me as duplicative of the Central Hudson analysis.” Id. at 446 (Rehnquist, C.J., dissenting).
112 See id. at 417 n.13 (majority opinion).
newsracks qualifies as such a restriction because the interests in safety and esthetics that it serves are entirely unrelated to the content of respondents’ publications. Thus, the argument goes, the justification for the regulation is content neutral.

The argument is unpersuasive because the very basis for the regulation is the difference in content between ordinary newspapers and commercial speech. True, there is no evidence that the city has acted with animus toward the ideas contained within respondents’ publications, but just last Term we expressly rejected the argument that “discriminatory . . . treatment is suspect under the First Amendment only when the legislature intends to suppress certain ideas.” Regardless of the mens rea of the city, it has enacted a sweeping ban on the use of newsracks that distribute “commercial handbills,” but not “newspapers.” Under the city’s newsrack policy, whether any particular newsrack falls within the ban is determined by the content of the publication resting inside that newsrack. Thus, by any commonsense understanding of the term, the ban in this case is “content-based.”

Lower courts have also derived guidance from Justice Kennedy’s majority opinion in Turner Broadcasting System, Inc. v. FCC, a rare occasion for division on the Court as to whether the federal statute at issue—which required cable television providers to carry local stations—was or was not content-based. The majority held that it was not. In the process, Kennedy delivered these general statements:

Deciding whether a particular regulation is content based or content neutral is not always a simple task. We have said that the “principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys.” . . . But while a content-based purpose may be sufficient in certain circumstances to show that a regulation is content based, it is not necessary to such a showing in all cases. Nor will the mere assertion of a content-neutral purpose be enough to save a law which, on its face, discriminates based on content.

Justice O’Connor’s dissent—joined by Justices Scalia, Thomas, and Ginsburg—did, however, appear to rest on her conclusion that the government’s purposes were content-based. But the majority opinions in the Turner Broadcasting and Discovery Network cases seemed to have restored order in the universe.

113 Id. at 428–29 (first and second alterations in original) (citations omitted).
115 Id. at 652.
116 Id. at 642–43 (citations omitted).
117 Id. at 676 (O’Connor, J., dissenting in part) (“[L]ooking at the statute at issue, I cannot avoid the conclusion that its preference for broadcasters over cable programmers is justified with reference to content.”).
De Minimis Content Discrimination

It was, however, the majority opinion in *Hill v. Colorado*[^118] in 2000, building on the language of *Ward*, that has changed “content analysis” in a way that has enabled many courts to label sign ordinances as content-neutral despite their inclusion of exemptions that seem clearly content-based. *Hill* upheld a Colorado statute that made it illegal to do any of the following within 100 feet of the entrance to any health care facility: “to ‘knowingly approach’ within eight feet of another person, without that person’s consent, ‘for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person’”—but a stationary speaker was not required to move away from anyone passing by.[^119] The interests put forth by the state were “unimpeded access to health care facilities and the avoidance of potential trauma to patients associated with confrontational protests.”[^120] The threshold issue of significance was whether the ban on approaching in order to engage in “oral protest, education, or counseling” was content-based or content-neutral.[^121] By a 6-3 majority, the Court deemed the provision to be content-neutral and upheld it.[^122]

Justice Stevens, writing for the majority, devoted a lengthy portion of his opinion to defending the conclusion that the statute was content-neutral.[^123] He began by quoting the key statement in *Ward* that “the principal inquiry . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys.”[^124] Here, his answer was in the negative; “the State’s interests in protecting access and privacy . . . are unrelated to the content of the demonstrators’ speech.”[^125] He acknowledged the challengers’ argument that the provision was content-based “[b]ecause the content of the oral statements made by an approaching speaker must sometimes be examined to determine whether the knowing approach is covered by the statute,”[^126] but oddly dismissed that argument with the unex-

[^119]: Id. at 707–08 (quoting Colo. Rev. Stat. § 18-9-122(3) (1999)).
[^120]: Id. at 715.
[^121]: Id. at 707.
[^122]: See id. at 725–26.
[^123]: See id. at 719–25.
[^124]: Id. at 719 (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)).
[^125]: Id. at 719–20. Remarkably, Stevens stated, as an additional reason why this statute was content-neutral, that “it is not a ‘regulation of speech.’ Rather, it is a regulation of the places where some speech may occur.” Id. at 719. Justice Scalia, in dissent, called that assertion “simply baffling.” Id. at 748 n.2 (Scalia, J., dissenting).
[^126]: Id. at 720 (majority opinion).
plained conclusion that “it is unlikely that there would often be any need to know exactly what words were spoken in order to determine whether ‘sidewalk counselors’ are engaging in ‘oral protest, education, or counseling’ rather than pure social or random conversation.”

He then emphasized that the statute places no restrictions on . . . either a particular viewpoint or any subject matter that may be discussed by a speaker. Rather, it simply establishes a minor place restriction on an extremely broad category of communications with unwilling listeners. Instead of drawing distinctions based on the subject that the approaching speaker may wish to address, the statute applies equally to used car salesmen, animal rights activists, fundraisers, environmentalists, and missionaries.

Finally (among his arguments that warrant particular emphasis here), he set forth a list of the undesirable behaviors that the statute was designed to eliminate and stated that “[t]he statutory phrases ‘oral protest, education, or counseling’ distinguish speech activities likely to have those consequences from speech activities . . . that are most unlikely to have those consequences.”

Justice Souter wrote a concurring opinion that was joined by three other Justices (which meant that only two Justices, including Stevens, were content to rely on the rationale put forth by Stevens), in which he lent his hand to the defense of the treatment of the Colorado statute as content-neutral. Mainly, he echoed Stevens’ argument that no particular subject or viewpoint had been singled out, coupling that with an emphasis on the (undisputedly) content-neutral nature of the other statutory limitations. Thus, he pointed out, the statute simply does not forbid the statement of any position on any subject. It does not declare any view as unfit for expression within the 100-foot zone or beyond it. What it forbids, and all it forbids, is approaching another person closer than eight feet (absent permission) to deliver the message. Anyone (let him be called protester, counselor, or educator) may take a stationary position within the regulated area and address any message to any person within sight or hearing . . . .

. . . The fact that speech by a stationary speaker is untouched by this statute shows that the reason for its restriction on approaches goes to the approaches, not to the content of the speech of those approaching. What is prohibited is a close encounter when the person addressed does not want to be approached.

127 Id. at 721.
128 Id. at 723.
129 Id. at 724.
130 Id. at 735–41 (Souter, J., concurring).
131 Id. at 736.
not want to get close. . . . But the content of the message will survive on any sign readable at eight feet and in any statement audible from that slight distance. Hence the implausibility of any claim that an anti-abortion message, not the behavior of the protesters, is what is being singled out. 132

Justices Scalia, Thomas, and Kennedy dissented. 133 Scalia wrote a dissenting opinion, which Thomas joined, and Kennedy wrote a separate dissent. 134 Scalia’s argument was straightforward: “[T]he prohibition here is content-based: those who wish to speak for purposes other than protest, counsel, or education may do so at close range without the listener’s consent, while those who wish to speak for other purposes may not.” 135 He offered a hypothetical comparison to “a law restricting the . . . recitation of poetry—neither viewpoint based nor limited to any particular subject matter. Surely this Court would consider such regulations to be ‘content based’ . . . .” 136 He then offered a general critique of Stevens’ approach:

Finally, the Court is not correct in its assertion that the restriction here is content neutral because it is “justified without reference to the content of regulated speech” . . . . That is not an accurate statement of our law. The Court makes too much of the statement in Ward v. Rock Against Racism . . . that “[t]he principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys.” . . . That is indeed “the principal inquiry” . . . but it is not the only inquiry. Even a law that has as its purpose something unrelated to the suppression of particular content cannot irrationally single out that content for its prohibition. . . . Our very first use of the “justified by reference to content” language made clear that it is a prohibition in addition to, rather than in place of, the prohibition of facially content-based restrictions. 137

He added that this statute was not only facially content-based, but “justified by reference to content” as well—because “protest, counseling, and education” had been singled out “out of an apparent belief that only speech with this content is sufficiently likely to be annoying or upsetting as to require consent before it may be engaged in at close range.” 138

132 Id. at 737–38.
133 Id. at 741 (Scalia, J., dissenting); id. at 765 (Kennedy, J., dissenting).
134 Id. at 741 (Scalia, J., dissenting); id. at 765 (Kennedy, J., dissenting).
135 Id. at 746 (Scalia, J., dissenting).
136 Id. at 743.
137 Id. at 746–47 (citing Police Dept. of Chi. v. Mosley, 408 U.S. 92, 96 (1972)).
138 Id. at 747.
Justice Kennedy, the author of the Ward majority opinion, called the Colorado statute “a textbook example of a law which is content-based.” Like Scalia, his approach to this issue was remarkably uncomplicated. “To say that one citizen can approach another to ask the time or the weather forecast or the directions to Main Street but not to initiate discussion on one of the most basic moral and political issues in all of contemporary discourse,” he wrote, “is an astonishing view of the First Amendment.” He bolstered his conclusion with this observation:

Under the Colorado enactment, . . . the State must review content to determine whether a person has engaged in criminal “protest, education, or counseling.” When a citizen approaches another on the sidewalk in a disfavored-speech zone, an officer of the State must listen to what the speaker says. If, in the officer’s judgment, the speaker’s words stray too far toward “protest, education, or counseling”—the boundaries of which are far from clear—the officer may decide the speech has moved from the permissible to the criminal.

The astute reader may already have surmised that, in the opinion of your humble author, Hill was wrongly decided, and that it has left the law of content discrimination in an unclear and unpredictable state. As the hypothetical examples offered by the dissenters make clear, the phrase “protest, counseling, and education” does not encompass the entire universe of speech—but did it attain a sufficiently high degree of generality, in the eyes of the majority, such that the law did not raise the concerns usually associated with content-based distinctions? Or is the result better explained by the reasoning of Justice

139 Id. at 766 (Kennedy, J., dissenting).
140 Id. at 768.
141 Id. at 766–67.
142 Professor McDonald has criticized the decision more pointedly. Although he believes that the result in Hill “made complete sense,” he nonetheless opined that the Court’s determination that this restriction was “unrelated” to the content of that speech rivaled Lewis Carroll’s efforts in Alice in Wonderland. Here, it seemed beyond peradventure that the government was concerned about the primary effects of the restricted speech on the patient, in combination with a physical approach. Thus, to ignore the content concern and focus solely on the physical concern to determine that the restriction was unrelated to the content of the regulated speech defied common sense.

McDonald, supra note 72, at 1407. He added: “This case is the poster child, then, for a deeply flawed free speech doctrine . . . .” Id. Professor Kendrick, on the other hand, does not appear to find the decision troubling. See Kendrick, supra note 74, at 272–74 (discussing the Court’s holding in Hill and the dissents before ultimately concluding that “Hill may seem wrong, and it may be disingenuous, but it is consistent with the Court’s preexisting approach to facially message-related regulations”).

143 Hill, 530 U.S. at 742–43 (Scalia, J., dissenting).
Souter’s concurrence (which, again, spoke for four of the six Justices in the majority), which emphasized the very limited impact of the only aspect of this statute that was arguably content-based.\footnote{Id. at 738 (Souter, J., concurring).} Given the particular nature of the Colorado statute, it is at least arguable that the sweeping language of \textit{Hill} (much of which was handed down from \textit{Ward}) should be regarded with caution. It may also be worth noting that, while \textit{Hill} continues as governing precedent, all three of the dissenters therein remain on the Court, along with only two Justices who were in the majority in one of the very few cases in which the Justices disagreed on this threshold issue.\footnote{Later decisions in which every member of the Court perceived content discrimination include \textit{Brown v. Entertainment Merchants Ass’n}, 564 U.S. \_\_\_, 131 S. Ct. 2729 (2011) and \textit{Ashcroft v. ACLU}, 542 U.S. 656 (2004). \textit{But see Sorrell v. IMS Health Inc.}, 562 U.S. \_\_\_, 131 S. Ct. 2653 (2011). The Court did split in its recent decision in \textit{McCullen v. Coakley}, 573 U.S. \_\_, 134 S. Ct. 2518 (2014) on the question of whether a Massachusetts statute discriminated on the basis of content, with the majority holding that it did not, \textit{id.} at 2534, but neither the opinion of the majority nor that of Justice Scalia, concurring in the judgment, \textit{id.} at 2541 (Scalia, J., concurring), implicated the questionable reasoning of \textit{Hill}. (In its grant of certiorari in \textit{McCullen}, 133 S. Ct. 2857 (2013), the Court had indicated the possibility of reconsidering its decision in \textit{Hill}, but the majority apparently saw no reason to do so.).}

Finally, one year after \textit{Hill} in \textit{Bartnicki v. Vopper},\footnote{532 U.S. 514 (2001).} a case involving a statute which both the majority and the dissent deemed content-neutral,\footnote{Id. at 526; \textit{id.} at 544 (Rehnquist, C.J., dissenting).} Justice Stevens began his majority opinion with a mix of quotations\footnote{Id. at 526 \& n.9 (majority opinion).} from the \textit{Ward} decision and \textit{Turner Broadcasting System} decisions that Professor McDonald has properly characterized as “cryptic.”\footnote{\textit{See supra} text accompanying note 94.} The Court has thus left us with inconsistent pronouncements and rulings with regard to content analysis. Professor McDonald has summed the situation up well:

[T]he many facially discriminatory content regulations the Court has determined to be content-neutral under a government purpose analysis, and the many regulations it has determined to be content-based solely because of that facial discrimination . . . make[ ] it vital to come up with a principled and logical method of determining when the Court will look solely to the discriminatory nature of a regulation and when it will alternatively or additionally examine the asserted purpose for it. To search the Court’s decisions for such a standard, however, is to search in vain.\footnote{\textit{See supra} text accompanying note 116.}
As will soon be demonstrated, the same inconsistency is manifest in lower court decisions involving the constitutionality of sign ordinance exemptions.

III. SIGN ORDINANCES IN THE LOWER COURTS

A. Pure Commercial Speech Regulations

As has already been noted, sign ordinances that are directed only at commercial advertising generally survive constitutional challenges. But Justice Kennedy’s oft-quoted majority opinion in *Edenfield v. Fane*, coming twelve years after *Metromedia*, would seem to allow for a potentially winning argument via his insistence therein that the government prove “that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.” The case law, however, provides relatively little evidence that *Edenfield* has made much of a dent in *Metromedia*’s tolerance of regulation of commercial billboards. The few federal appellate courts that have expressly considered the *Edenfield* argument have rejected it, holding that *Metromedia*, as the Supreme Court decision most on point, “continues to control the regulation of billboards.”

B. Distinctions Between Commercial and Noncommercial Speech

As has been seen, the *Metromedia* plurality deemed the San Diego ordinance invalid because it gave commercial advertising more favorable treatment than noncommercial speech, but no other Jus-

154 See, e.g., Interstate Outdoor Adver., L.P. v. Zoning Bd. of Mt. Laurel, 706 F.3d 527 (3d Cir. 2013); World Wide Rush, LLC v. City of Los Angeles, 606 F.3d 676 (9th Cir. 2010); Clear Channel Outdoor, Inc. v. City of New York, 594 F.3d 94 (2d Cir. 2010); Advantage Media, LLC v. City of Eden Prairie, 456 F.3d 793 (8th Cir. 2006); Lavey v. City of Two Rivers, 171 F.3d 1110 (7th Cir. 1999). But see Ballen v. City of Redmond, 463 F.3d 1020 (9th Cir. 2006); Passions Video, Inc. v. Nixon, 458 F.3d 837 (8th Cir. 2006).
tice indicated agreement with that reasoning. Consequently, and reasonably, some lower courts have concluded that this component of the Metromedia plurality opinion does not constitute binding precedent, while others have seemingly overlooked that detail and regarded Metromedia as controlling on this point. Regardless, the principle has taken hold, and the distinction appears to have been met with unanimous approval. (On this basis, the scenario described in the first sentence of this article was resolved by the invalidation of the ordinance at issue.) But, although the Metromedia plurality set forth this principle as a rule of per se invalidity, some courts have treated favoritism for commercial over noncommercial speech as a springboard for the application of strict scrutiny (followed, inevitably, by invalidation of the ordinance).

Meanwhile, the decision in Discovery Network has called into question the ability of cities to favor noncommercial over commercial speech. As Justice Stevens observed therein:

>[S]even Justices in the Metromedia case were of the view that San Diego could completely ban offsite commercial billboards . . . . Those seven justices did not say, however, that San Diego could distinguish between commercial and noncommercial offsite billboards that cause the same esthetic and safety concerns. That question was not presented in Metromedia . . . .

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161 See id. at 541–42 (Stevens, J., dissenting).
162 Solantic, LLC v. City of Neptune Beach, 410 F.3d 1250, 1261–62 (11th Cir. 2005); Rappa v. New Castle Cnty., 18 F.3d 1043, 1056–60 (3d Cir. 1994). In the latter case, the Court also suggested that the Metromedia plurality’s predicate belief that commercial speech can be restricted more readily than noncommercial speech was called into question by the Supreme Court’s subsequent decision in Discovery Network—a suggestion that this author would reject. Rappa, 18 F.3d at 1056 n.20; see supra text accompanying notes 107–13 for a description of Discovery Network.
163 Whitton v. City of Gladstone, 54 F.3d 1400, 1404 (8th Cir. 1995); Nat’l Adver. Co. v. Town of Babylon, 900 F.2d 551, 556–57 (2d Cir. 1990); Nat’l Adver. Co. v. City of Orange, 861 F.2d 246, 248 (9th Cir. 1988); Matthews v. Town of Needham, 764 F.2d 58, 61 (1st Cir. 1985).
164 See Outdoor Media Grp, Inc. v. City of Beaumont, 506 F.3d 895, 902 (9th Cir. 2007); KH Outdoor, LLC v. City of Trussville, 458 F.3d 1261, 1269 (11th Cir. 2006); Café Erotica of Fla., Inc. v. St. Johns Cnty., 360 F.3d 1274, 1291 (11th Cir. 2004).
165 See supra text accompanying notes 107–13.
166 ld. at 1234; KH Outdoor, 458 F.3d at 1270.
167 See supra text accompanying notes 107–113.
C. “Onsite” vs. “Offsite” Distinctions

As we have seen, the Court in Metromedia upheld a distinction between “onsite” and “offsite” commercial signs, allowing San Diego to ban “offsite” commercial signs while allowing such signs “onsite.”\textsuperscript{169} Combining this ruling with the part of the Metromedia plurality opinion just discussed (the requirement that noncommercial signs must be allowed “onsite” if commercial signs are allowed “onsite”), coupled with a common and understandable willingness to allow “onsite” commercial signs, would seem to explain why sign ordinances often allow all “onsite” signs, while limiting some or all “offsite” signs.\textsuperscript{170}

If definitions of these terms are necessary, the down-to-earth descriptions provided by one court may prove adequate: “An onsite sign carries a message that bears some relationship to the activities conducted on the premises where the sign is located. . . . An offsite sign . . . carries a message unrelated to its particular location.”\textsuperscript{171}

But may municipalities allow “onsite” noncommercial signs while banning them “offsite”? While presumptively such a distinction is simply location-based, and thus content-neutral, at least one federal appellate court has reached a contrary conclusion. In Ackerley Communications of Massachusetts, Inc. v. City of Cambridge,\textsuperscript{172} the court found a First Amendment violation based on the following reasoning:

> While not facially preferring commercial messages to noncommercial ones—a preference barred by Metromedia—the Cambridge scheme does draw a line between two types of noncommercial speech—onsite and offsite messages. This line has the effect of disadvantaging the category of noncommercial speech that is probably the most highly protected: the expression of ideas. The only signs containing noncommercial messages that are exempted [from the ban] are those relating to the premises on

\textsuperscript{169} See supra text accompanying notes 26–30.
\textsuperscript{170} See cases cited infra note 178.
\textsuperscript{171} Ackerley Commc’ns of Mass. v. City of Somerville, 878 F.2d 513, 513 n.1 (1st Cir. 1989). Typical statutory definitions of “on-site” and “off-site” read as follows:

*Off-premise advertising sign:* A sign which directs attention to a building, profession, product, service, activity, or entertainment not conducted, sold, or offered on the property upon which the sign is located.

*On-premise sign:* A sign which directs attention to a building, profession, product, service, activity, or entertainment conducted, sold, or offered on the property upon which the sign is located.

\textsuperscript{172} 88 F.3d 33 (1st Cir. 1996).
which they stand, which inevitably will mean signs identifying nonprofit institutions.\footnote{173 Id. at 37. The Court went on to conclude that the City had provided no justification for the distinction—on the basis of message—between on-site and off-site noncommercial messages. Id. at 38.}

Another court, in dictum, wondered about what it meant to speak of “onsite” noncommercial speech:

Locating the site of noncommercial speech, however, is fraught with ambiguity. The ordinance prohibits signs which seek to attract attention to any person, place, subject, or thing \textit{not} located on the premises where the person, place, subject, or thing is found. Noncommercial speech usually expresses an idea, an aim, an aspiration, a purpose, or a viewpoint. Where is such an idea located? What is the site upon which the aspiration is found?

In interpreting similar ordinances, many courts have assumed that the address of identifiable groups or associations formed around an idea, aim, philosophy or viewpoint defines the location of the idea. . . . Thus, speech advocating racial bigotry is onsite at a Klavern of the Klan; “Save the Whales” is onsite where Greenpeace has an office; and “Jesus Saves” is displayed onsite only where a Christian religious organization is operating.

. . . .

There is, however, no logical reason to interpret the ordinance as locating the expression of ideas, aspirations, and beliefs in this way. An idea, unlike a product, may be viewed as located wherever the idea is expressed, \textit{i.e.}, wherever the speaker is located. Under this alternative view, all noncommercial speech is onsite. A sign bearing a noncommercial message is onsite wherever the speaker places it.\footnote{174 Southlake Prop. Assocs. v. City of Morrow, Ga., 112 F.3d 1114, 1118 (11th Cir. 1997).}

(Would Ms. Gilleo’s residential yard sign opposing American intervention in the Persian Gulf in \textit{City of Ladue}\footnote{175 See supra note 62.} be properly deemed “onsite,” then?) The Court ultimately interpreted the ordinance at issue as not prohibiting any noncommercial signs,\footnote{176 Southlake, 112 F.3d at 1119.} but its provocative musings raise potentially significant questions concerning the meaning of “on-site” noncommercial speech and arguably support the argument that an “onsite–offsite” distinction applied to noncommercial speech may disproportionately disfavor such speech.\footnote{177 See Mark Cordes, \textit{Sign Regulation After Ladue: Examining the Evolving Limits of First Amendment Protection}, 74 Neb. L. Rev. 36, 79–81 (1995).}
Most courts that have considered this distinction, however, have found it completely unproblematic, \(^{178}\) “even if billboard regulations have a greater negative impact on non-commercial than commercial messages.” \(^{179}\) In the words of another court:

Contrary to Messer’s argument, there is simply no basis for equating on-premise signs with commercial speech, and off-premise signs with non-commercial speech. A noncommercial enterprise would be able to put up a sign bearing a noncommercial message as long as it relates to any activity on the premises. Similarly, a commercial enterprise would be able to put up a sign bearing a noncommercial message which related to any activity on the premises. For example, an auto mechanic’s garage would be able to put up a noncommercial message relating to the recycling of motor oil. \(^{180}\)

Moreover, the argument that an “onsite–offsite” distinction is content-based because one must read a sign to know which of those categories it falls into has also been expressly (and sensibly) rejected. \(^{181}\)

Finally, can a municipality allow “offsite” noncommercial signs while banning “offsite” commercial signs? One would think so, but the argument has been made—and taken seriously, it seems—that to do so violates the principle, emanating from the Supreme Court’s decision in the \textit{Discovery Network} case, \(^{182}\) that a municipality may not favor non-commercial over commercial speech for reasons having nothing to do with the distinction between them. In \textit{RTM Media, LLC v. City of Houston}, \(^{183}\) the Court upheld just such an ordinance, but took pains to distinguish \textit{Discovery Network}, primarily on the basis of Justice Stevens’ observation that the commercial newsracks in \textit{Discovery Network} were “no more harmful than the permitted [noncommercial] newsracks, and ha[d] only a minimal impact on the overall number of newsracks

\(^{178}\) E.g., Covenant Media of S.C., LLC v. City of N. Charleston, 493 F.3d 421, 432 (4th Cir. 2007); Lombardo v. Warner, 353 F.3d 774, 777–78 (9th Cir. 2003); Messer v. City of Douglasville, Ga., 975 F.2d 1505, 1509 (11th Cir. 1992); Wheeler v. Comm’r of Highways, 822 F.2d 586, 591 (6th Cir. 1987); Major Media of the Se., Inc. v. City of Raleigh, 792 F.2d 1269, 1273 (4th Cir. 1986); see also Rappa v. New Castle Cnty., 18 F.3d 1043, 1056 n.19 (3d Cir. 1994) (“Favoring onsite over off-site speech probably leads to the effect of favoring commercial speech over non-commercial speech as most conspicuous onsite speech is probably commercial, but this effect is too attenuated for us to take into account.”).

\(^{179}\) Lombardo, 353 F.3d at 777. Judge Fletcher dissented on this point. \textit{Id.} at 779–80 (Fletcher, J., dissenting).

\(^{180}\) Messer, 975 F.2d at 1509.

\(^{181}\) Wheeler, 822 F.2d at 591.

\(^{182}\) See supra text accompanying notes 107–13.

\(^{183}\) 584 F.3d 220 (5th Cir. 2009).
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on the city’s sidewalks.” In *RTM Media*, in contrast, “[c]ommercial billboards ma[d]e up the vast majority of signs targeted by the ordinance, so the benefit from the ordinance [wa]s not ‘paltry’ or ‘minute.’” Thus, Houston had demonstrated that “commercial billboards pose a greater nuisance than do noncommercial ones,” thereby establishing the “reasonable fit” between problem and solution that was found lacking in *Discovery Network*.

### D. Exemptions for Some Kinds of Noncommercial Signs

#### 1. Types of Exemptions

Exemptions in sign ordinances for some—but not all—noncommercial signs may take the form of exemptions from offsite restrictions, otherwise applicable permit requirements, size limitations, time limits, or prohibitions of miscellaneous sign features, such as external illumination or the illusion of internal movement. (First Amendment issues may also spring from the statutory definition of a

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184 *RTM Media*, 584 F.3d at 226.
185 Id. at 227.
186 Accord *Riel v. City of Bradford*, 485 F.3d 736, 753 (3d Cir. 2007) (“Thus, all that the City has burdened is the category of signs that has enjoyed the least amount of First Amendment protection: off-site commercial signs.”)
187 E.g., Lombardo v. Warner, 353 F.3d 774, 775–76 (9th Cir. 2003); Desert Outdoor Adver., Inc. v. City of Moreno Valley, 103 F.3d 814, 821 (9th Cir. 1996); Messer v. City of Douglasville, 975 F.2d 1505, 1508 (11th Cir. 1992).
188 E.g., Reed v. Town of Gilbert, Ariz., 707 F.3d 1057, 1061 (9th Cir. 2013); Wag More Dogs, LLC v. Coxart, 680 F.3d 359, 373 (4th Cir. 2012); G.K. Ltd. Travel v. City of Lake Oswego, 436 F.3d 1064, 1069 (9th Cir. 2006). Oddly, the Eleventh Circuit, on two occasions suggested that, for purposes of content analysis, exemptions from a general ban might be treated differently than exemptions from permit requirements. *Messer*, 975 F.2d at 1513; *Coral Springs St. Sys., Inc. v. City of Sunrise*, 371 F.3d 1320, 1345 (11th Cir. 2004). But that court later stated, correctly, that “[r]ead the exemptions as applicable only to the sign code’s permit requirements would render them no less content based than if they applied to all of the sign code’s regulations.” *Solantic*, LLC v. City of Neptune Beach, 410 F.3d 1250, 1256 n.6 (11th Cir. 2005).
190 E.g., Whitton v. City of Gladstone, 54 F.3d 1400, 1405 (8th Cir. 1995) (durational limit on political campaign signs).
191 E.g., id. at 1409 (external illumination of political signs prohibited).
192 The ordinance in *Solantic* exempted some signs from the following general prohibition: “they may not contain any visible movement . . . ; they may not create the optical illusion of movement . . . ; and they may not contain lights or illuminations that flash, move, rotate, scintillate, blink, flicker, or vary in intensity or color . . . .” *Solantic*, 410 F.3d at 1255. See also *La Tour v. City of Fayetteville*, Ark., 442 F.3d 1094, 1095 (8th Cir. 2006) (evaluating the prohibition of any “sign which flashes, blinks, or is animated” as having been selectively enforced).
“sign”, as opposed to a designated “exemption”; when only “signs” require permits, the effect is the same.\(^{191}\) Categories of exempt signs that commonly show up in reported judicial decisions include official governmental notices;\(^{195}\) “public warning signs”;\(^{196}\) “directional signs”;\(^{197}\) temporary political campaign signs;\(^{198}\) real estate signs;\(^{199}\) and “memorial signs or tablets.”\(^{200}\) Exemptions from otherwise applicable restrictions have also been extended to, \textit{inter alia}, flags;\(^{201}\) religious displays;\(^{202}\) and signs identifying civic, fraternal, or religious organizations located in the municipality.\(^{203}\)

Should some or all of these exemptions be deemed content-based, or not?

2. Decisions Finding Content Discrimination

As we have seen, the plurality in the \textit{Metromedia} case deemed a comparable set of exemptions to amount to impermissible content discrimination.\(^{204}\) Despite the fact that this represented the view of only a plurality of the Court, some federal appellate courts held that similar ordinances were content-based, implying that \textit{Metromedia} dictated these results.\(^{205}\) Later courts reaching that conclusion were less likely

\(^{191}\) E.g., Neighborhood Enters., Inc. v. City of St. Louis, 644 F.3d 728, 736–37 (8th Cir. 2011).

\(^{195}\) E.g., Reed v. Town of Gilbert, Ariz., 707 F.3d 1057, 1061 (9th Cir. 2013); Desert Outdoor Adver., Inc. v. City of Moreno Valley, 103 F.3d 814, 817 (9th Cir. 1996); Dimmitt v. City of Clearwater, 985 F.2d 1565, 1568 n.1 (11th Cir. 1993).

\(^{196}\) E.g., Solantic, 410 F.3d at 1257; Rappa v. New Castle Cnty., 18 F.3d 1043, 1051 (3rd Cir. 1994).

\(^{197}\) E.g., Solantic, 410 F.3d at 1257; Dimmitt, 985 F.2d at 1568 n.1; Messer v. City of Douglassville, 975 F.2d 1505, 1511 (11th Cir. 1992).

\(^{198}\) E.g., Reed, 707 F.3d at 1061; Solantic, 410 F.3d at 1258; Nat’l Adver. Co. v. Town of Babylon, 900 F.2d 551, 554 (2d Cir. 1990).

\(^{199}\) E.g., Reed, 707 F.3d at 1061; Solantic, 410 F.3d at 1257; Rappa, 18 F.3d at 1051.

\(^{200}\) E.g., Solantic, 410 F.3d at 1257; Dimmitt, 985 F.2d 1568 n.1; \textit{Town of Babylon}, 900 F.2d at 554.

\(^{201}\) E.g., Solantic, 410 F.3d at 1257; Nat’l Adver. Co. v. City of Orange, 861 F.2d 246, 248 (9th Cir. 1988).

\(^{202}\) E.g., Solantic, 410 F.3d at 1257.

\(^{203}\) E.g., Desert Outdoor Adver., Inc. v. City of Moreno Valley, 103 F.3d 814, 817 (9th Cir. 1996).

\(^{204}\) See supra text accompanying notes 35–37.

\(^{205}\) \textit{Town of Babylon}, 900 F.2d at 557; \textit{City of Orange}, 861 F.2d at 249; see also Dimmitt, 985 F.2d. at 1569 (finding impermissible content discrimination because an exemption for flags was limited to governmental flags and “[t]hus, the display of the American flag or that of the state of Florida would be exempted from the permit process while a flag displaying the Greenpeace logo or a union affiliation would require a permit”).
to focus on Metromedia and more likely to draw upon general statements made in the 1993 Discovery Network decision, at times explicitly relying on Discovery Network’s apparent implicit repudiation of Justice Kennedy’s language in the Ward case.

Thus, for example, in Whitton v. City of Gladstone, Missouri, a candidate for public office successfully challenged a sign ordinance that limited the placement of political campaign signs to a time period extending from thirty days prior to the election until seven days thereafter, a limitation that apparently applied to no other kind of sign. Relying on Discovery Network, the Court said this:

Simply stated, [the provision] is content-based because it makes impermissible distinctions based solely on the content or message conveyed by the sign. The words on a sign define whether it is subject to the durational limitations . . . . For instance, in some residentially-zoned areas of Gladstone, . . . a permanent year around ground sign expressing support for a particular sports team would not be subject to the durational limitations while an identical sign made of the same material, with the same dimensions and the same colors, and erected on the same spot advocating a particular candidate for political office would be.

The City’s reliance on Ward was brushed aside: “Thus, even if we agree with the City of Gladstone that its restriction is ‘justified’ by its interest in maintaining traffic safety and preserving aesthetic beauty, we still must ask whether the regulation accomplishes the stated purpose in a content-neutral manner.”

Judge Marcus engaged in a comparable analysis in Solantic, LLC v. City of Neptune Beach, a 2005 decision which, oddly, did little more than cite the Supreme Court’s more recent explication of content neutrality in Hill v. Colorado. Judge Marcus then proceeded to consider

207 See supra text accompanying notes 89–94.
208 54 F.3d 1400 (8th Cir. 1995).
209 Id. at 1404.
210 Id. at 1406. Interestingly, the Court indicated that it deemed City of Ladue v. Gilleo to be of no real relevance to the disposition of this case. Id. at 1404 n.7. Judge Fagg, dissenting, would have utilized the Ward approach to determine content neutrality. Id. at 1411 (Fagg, J., dissenting). He also indicated his receptiveness to the argument that “the unique nature of election signs, including their fragility, brief relevance, and sheer numbers, poses a special threat to the ordinance’s stated neutral goals of promoting aesthetics and traffic safety,” id. at 1412, an argument that the majority rejected, id. at 1407 (majority opinion).
211 410 F.3d 1250, 1258–62 (11th Cir. 2005).
212 Id. at 1259. In this opinion, too, little guidance was drawn from City of Ladue v. Gilleo. See id. at 1260 n.9.
the statutory exemptions at issue one by one, concluding that all of the following exemptions were content-based: “flags and insignia of any government, religious, charitable, fraternal, or other organization”; “signs erected by . . . a governmental body”; “signs on private premises directing and guiding traffic and parking on private property”; “holiday lights and decorations”; “memorial signs or tablets”; “public warning signs”; “religion displays”; temporary “on-site for sale/rent/lease signs”; and temporary “election or political campaign related signs.”

Another, more recent federal appellate decision, which also relied on *Discovery Network* in finding a sign ordinance to be content-based, did not even cite *Hill v. Colorado*.

Finally, with regard to these decisions, note this oft-stated maxim: “Because the exemptions require City officials to examine the content of noncommercial offsite structures and signs to determine whether the exemption applies, the City’s regulation of non-commercial speech is content-based.”

### 3. Decisions Finding Content Neutrality

More recent federal appellate decisions concerning sign ordinance exemptions have rejected content discrimination arguments, reflecting greater attention to the teaching of *Hill*. Decisions by the Fourth Circuit Court of Appeals have been most prominent in this respect. While virtually all of these decisions address facial challenges to the ordinances at issue, and thus do not turn on the facts that gave rise to the litigation, the facts of the two most recent Fourth Circuit cases are striking and worthy of note.

The first of those cases, *Wag More Dogs, LLC v. Cozart*, involved a 960-square-foot painting on the rear of the building used by the challenger for its “doggy daycare” business. The building was adjacent to the Shirlington Dog Park. The painting “incorporated some of the cartoon dogs in Wag More Dogs’ logo,” and the challenger “described

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213 *Id.* at 1257–58, 1264–65. Judge Marcus also found that some of the exemptions discriminated on the basis of *speaker*, and that this also amounted to impermissible content discrimination. *Id.* at 1266–67. For further consideration of this point, see infra text accompanying notes 254–57.

214 Neighborhood Enters., Inc. v. City of St. Louis, 644 F.3d 728 (8th Cir. 2011).

215 Desert Outdoor Adver., Inc. v. City of Moreno Valley, 103 F.3d 814, 820 (9th Cir. 1996); accord *Foti* v. City of Menlo Park, 146 F.3d 629, 636 (9th Cir. 1998).

216 680 F.3d 359 (4th Cir. 2012).

217 *Id.* at 363.
it as including ‘happy cartoon dogs, bones, and paw prints.’” The problem was that the painting exceeded the size limitations set forth in the Arlington County sign ordinance. Wag More Dogs filed suit to challenge the validity of the ordinance but failed. The key problem for Wag More Dogs, arguably, was the Court’s acceptance of the County’s characterization of the mural as a “sign” and as commercial speech. The county zoning administrator had informed Wag More Dogs that, “[f]or the mural to NOT be considered a sign, it may depict anything you like EXCEPT something to do with dogs . . . . In other word [sic], the mural can not [sic] show anything that has any relationship with your business. If it does, then it becomes a sign.” The Court had little difficulty concluding that the ordinance satisfied intermediate scrutiny, however formulated.

But “[t]he heart of Wag More Dogs’ complaint,” in Judge Diaz’s words, “is that the Sign Ordinance is an impermissible content-based restriction on speech . . . that cannot survive strict scrutiny.” This contention was apparently based on the fact, reported by the Court rather summarily, that “a list of signs permitted in all zoning districts without permits[ ] includes fifteen types of signs and covers such rudimentary postings as official notices required by law, ‘no trespassing’ signs, and directional signs.” As a “business sign,” Wag More Dogs’ mural was apparently subject to both the permit requirement and size limitations.

Rejecting the content-discrimination argument, Judge Diaz engaged in a relatively lengthy discussion of governing case law, influenced most heavily by Hill v. Colorado and by the Fourth Circuit’s earlier decision in Covenant Media of South Carolina v. City of North

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218 Id.
219 Id.
220 Id. at 364.
222 Id. at 363. Perhaps inconsistently, Wag More Dogs was later advised that painting the words “Welcome to Shirlington Park’s Community Canine Area” above the artwork would suffice “to convert the painting from an impermissible sign into an informational sign not requiring a permit under the Sign Ordinance.” Id. at 364.
223 Id. at 369–70.
224 Id. at 365.
225 Id. at 362.
226 Id.
Charleston,\textsuperscript{227} in which a procedural issue necessitated a determination of the nature of the ordinance at issue. After quoting liberally from each of those decisions, Judge Diaz reached a predictable conclusion:

Applying \textit{Hill} and \textit{Covenant Media} to the Sign Ordinance, we have no trouble concluding that it is a content-neutral regulation. As an initial matter, Wag More Dogs has not alleged—nor could it—that Arlington has regulated speech through the Sign Ordinance “because of disagreement with the message it conveys,” which is the “principal inquiry in determining content neutrality” . . . . Arlington adopted the Sign Ordinance to regulate land use, not to stymie a particular disfavored message.

. . . [W]e acknowledge that Arlington has differentiated between types of speech. For instance, the regulation imposes size requirements on “business signs” that do not similarly apply to noncommercial signs, and it exempts fifteen types of signs from its coverage. But this varying treatment is not sufficient to convert the Sign Ordinance into a content-based restriction on speech. Arlington enacted the ordinance to, among other aims, promote traffic safety and the County’s aesthetics, interests unrelated to messages displayed.\textsuperscript{228}

Responding to the oft-stated argument that an ordinance is content-based if one must read a sign in order to determine whether the ordinance applies, Judge Diaz said this:

That Arlington officials must superficially evaluate a sign’s content to determine the extent of applicable restrictions is not an augur of constitutional doom. “For a regulation with a clear content-neutral purpose to be content based, there must be a more searching inquiry into the content.” [T]he Sign Ordinance’s objectives . . . mitigate any concern that the “kind of cursory examination” brought about by “looking generally at what type of message a sign carries to determine where it can be located” renders the regulation content based.\textsuperscript{229}

In the second of the Fourth Circuit cases, \textit{Brown v. Town of Cary},\textsuperscript{230} the “sign” that triggered the controversy actually consisted of words—“Screwed by the Town of Cary” (pertaining to a wholly independent dispute)—painted “across a fifteen foot swath of the facade of his home,” by one Bowden, in “bright fluorescent orange paint.”\textsuperscript{231} The Town deemed this expression to be a “wall sign” that violated the size and color restrictions applicable thereto.\textsuperscript{232} Several categories of signs were exempt from regulation, but the court chose to specifically men-

\textsuperscript{227} 493 F.3d 421 (4th Cir. 2007).
\textsuperscript{228} \textit{Wag More Dogs}, 680 F.3d at 368.
\textsuperscript{229} \textit{Id.} at 368–69 (citations omitted).
\textsuperscript{230} 706 F.3d 294 (4th Cir. 2013).
\textsuperscript{231} \textit{Id.} at 298.
\textsuperscript{232} \textit{Id.}
tion and consider only two: “holiday decorations” and “public art.”\(^{233}\) (One may be forgiven for wondering why those categories of expression would even be thought to be included within any sensible definition of a “sign” and thus why it would be thought necessary to specify the inapplicability of a sign ordinance thereto. It might also be asked whether any issue of content discrimination should arise if—as is probably common—a sign ordinance says nothing with regard to “art,” or holiday decorations, which are therefore freely permitted.)

Judge Diaz, the author of the *Wag More Dogs* opinion, again wrote for the court, again at some length, and again relied most heavily on *Hill v. Colorado*—supplemented now by his earlier ruling in *Wag More Dogs*.\(^{234}\) But this time he expressly recognized the existence of contrary judicial authority. Asserting that “we reject any absolutist reading of content neutrality,”\(^{235}\) he “acknowledge[d] that several of our sister circuits hew to an absolutist reading of content neutrality,”\(^{236}\) citing here, *inter alia*, the Eleventh Circuit’s *Solantic* decision and the ruling of the Eighth Circuit in the *Neighborhood Enterprises* case.\(^{237}\) He continued:

In our view, however, such an approach imputes a censorial purpose to every content distinction, and thereby applies the highest judicial scrutiny to laws that do not always imperil the preeminent First Amendment values that such scrutiny serves to safeguard. As we did in *Wag More Dogs*, we again join those circuits that have interpreted *Hill* as supporting a more practical test for assessing content neutrality.\(^{238}\)

Weaving in a description of *Metromedia*, Judge Diaz somehow worked his way toward a requirement—as a condition of finding content neutrality—that the town “must demonstrate a ‘reasonable fit between its legitimate interests in [traffic] safety and esthetics’ and its exemptions for public art and holiday decorations.”\(^{239}\) He found it, because

\(^{233}\) *Id.*
\(^{234}\) *Id.* at 301–05.
\(^{235}\) *Id.* at 301.
\(^{236}\) *Id.* at 302.
\(^{237}\) *See supra* text accompanying notes 212–15.
\(^{238}\) *Town of Cary*, 706 F.3d at 302. The *Solantic* decision was also criticized in a Sixth Circuit opinion, *H.D.V.-Greektown, LLC v. City of Detroit*: “Indeed, we doubt that there are many municipal sign ordinances around the country that would not be classified as content-based prior restraints under *Solantic*.” 568 F.3d 609, 623 (6th Cir. 2009).
\(^{239}\) *Town of Cary*, 706 F.3d at 305 (quoting City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 416 (1993)).
we think it reasonable to presume that public art and holiday decorations enhance rather than harm aesthetic appeal, and that seasonal holiday displays have a temporary, and therefore less significant, impact on traffic safety.

We recognize . . . that a nativity scene or an elaborate work of art may implicate traffic safety no less than an ordinary residential sign. Similarly, a sign erected for a “Town-recognized event” or on behalf of a government agency may impair rather than promote aesthetic appeal. But the content neutrality inquiry is whether the Sign Ordinance’s exemptions have a reasonable, not optimal, relationship to those asserted interests.240

This part of Judge Diaz’s opinion—which, as of this writing, appears to be a unique component of this analysis—is puzzling for at least two reasons: (1) it arguably collapses the inquiry as to content neutrality and the conceptually subsequent inquiry as to whether the ordinance satisfies intermediate scrutiny; and (2) it arguably ventures, unnecessarily, beyond the point to which Hill would lead. Moreover, supposedly content-neutral justifications for statutory distinctions become harder to perceive as content-neutral when they take into account the relative aesthetic appeal of different forms of expression.

In the end, however, Judge Diaz, citing Hill, emphasized that “we focus our attention on whether the restriction was adopted because of a disagreement with the message conveyed.”241 Here, of course, the answer to that question was “no,” so the regulatory scheme was content-neutral, and unsurprisingly, it survived intermediate scrutiny.242

That inquiry governed the disposition of the case described in the second sentence of this article, La Tour v. City of Fayetteville, Arkansas.243 The ordinance at issue was, in the court’s words, “clearly content neutral on its face as it does not allow any flashing, blinking or animated signs, regardless of their content.”244 But the plaintiff argued that the ordinance was content-based “as applied,” because city officials did not enforce it against flashing signs that display time and temperature readings.245 The court, quoting Ward and Hill and distinguishing its earlier holding in Whitton v. City of Gladstone246 (which struck down time limits applicable only to political campaign signs), saw no content discrimination here:

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240 Id. at 304.
241 Id.
242 Id. at 305.
243 442 F.3d 1094 (8th Cir. 2006).
244 Id. at 1096.
245 Id.
246 See supra text accompanying notes 208–10.
[A]lthough one technically has to examine the content of the signs in each case to see if the sign is prohibited, the inquiry is much more searching in *Whitton*. It takes some analysis to determine if a sign is “political,” but one can tell at a glance whether a sign is displaying the time or temperature. . . . Here, the ubiquitous time and temperature signs allowed by the City do not pose identical concerns as signs that function similarly but that display messages that are more distracting. . . .

. . . Here, the City’s desire to promote traffic safety is in no way tied to the content of the flashing signs it seeks to regulate. 247

Judge Colloton, concurring in the judgment, added:

The City’s exemption for time-and-temperature signs without advertising matter does not offend the First Amendment principles with which scrutiny of underinclusive regulation of speech is typically concerned. . . . It merely allows the display of a traditional, alternating public service message that poses a negligible threat to the interests that justify the general ban. 248

Judge Hansen, dissenting, would have found content discrimination. 249

The Ninth Circuit Court of Appeals has produced two opinions in recent years that stand in contrast to the earlier string of decisions that uniformly found sign ordinance exemptions to be content-based. 250

The first of those recent decisions, *G.K. Limited Travel v. City of Lake Oswego*, 251 involved a challenge (brought by an entity that was subject to a general ban on “pole signs”) to a sign ordinance on the basis of its allegedly content-based exemptions, described as follows:

> [P]laintiffs do identify a few potentially suspect portions of the Code . . . . These possibly content-based provisions are: . . . An exemption from the permit requirement for public signs, hospital or emergency signs, legal notices, railroad signs and danger signs, . . . and for temporary signs during enumerated events, like elections. 252

The court analyzed these exemptions under two headings: “speaker-based exemptions” and “event-based exemptions,” finding each to be

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247 *La Tour*, 442 F.3d at 1096–97.
248 Id. at 1100.
249 Id. As has already been noted, see *supra* text accompanying note 215, a later Eighth Circuit decision found that a sign ordinance was content-based, with no mention of *Hill* and no reliance on *Ward*. *Neighborhood Enters., Inc. v. City of St. Louis*, 644 F.3d 728, 736–37 (8th Cir. 2011).
250 See *supra* notes 205 and 215.
251 436 F.3d 1064 (9th Cir. 2006).
252 Id. at 1076. Interestingly, the District Court had found exemptions for “danger signs, official notices and ‘no solicitation’ signs,” as well as temporary signs for charitable fundraising events, to be content-based, and held all of those exemptions invalid—but the City did not appeal those rulings. *Id.* at 1070, 1076 n.10.
content-neutral.253 The “speaker-based” exemptions consisted of signs for hospital or emergency services and “railroad signs.”254 As to these, the court looked to the Supreme Court’s seminal pronouncement on speaker-based discrimination in its 1994 decision in *Turner Broadcasting System, Inc. v. FCC*,255 that

speaker-based laws demand strict scrutiny when they reflect the Government’s preference for the substance of what the favored speakers have to say (or aversion to what the disfavored speakers have to say) . . . . [L]aws favoring some speakers over others demand strict scrutiny when the legislature’s speaker preference reflects a content preference.256

Here, concluded Judge Fisher, the “speaker” distinction, reflecting “the City’s preference for not subjecting certain entities—public agencies, hospitals and railroad companies—to the requirements of the permitting and fee scheme,” did not signify a preference for the substance of those speakers’ messages.257

The Court found the “event-based” exemption to be content-neutral as well, because homeowners were permitted to erect temporary signs (for defined periods of time) “concerning any topic whatsoever.”258 “Such exemptions,” Judge Fisher went on to say, “indicate the

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253 *Id.* at 1076–78.
254 *Id.* at 1076.
255 512 U.S. 622 (1994); see supra text accompanying notes 115-18 for brief description.
256 *G.K. Limited*, 436 F.3d at 1076–77 (quoting *Turner Broadcasting*, 512 U.S. at 658). But see *Sorrell v. IMS Health Inc.*, 562 U.S. __, __, 131 S. Ct. 2653, 2663–65 (2011), (characterizing the Vermont law at issue as “content- and speaker-based,” with no discussion of the independent consequence (if any) of the “speaker-based” label). The significance of “speaker discrimination” has also been rendered less certain by the decision in *Citizens United v. FEC*, which invalidated a regulation that was both content- and speaker-based and in which Justice Kennedy, for the majority, made these statements:

Prohibited, too, are restrictions distinguishing among different speakers, allowing speech by some but not others. As instruments to censor, these categories are interrelated: Speech restrictions based on the identity of the speaker are all too often simply a means to control content.

Quite apart from the purpose or effect of regulating content, moreover, the Government may commit a constitutional wrong when by law it identifies certain preferred speakers.

558 U.S. 310, 340 (2010). But, again, he did not explicitly link speaker discrimination to strict scrutiny. Justice Stevens, dissenting, may or may not have disagreed. *Id.* at 420 (Stevens, J., dissenting) (“[W]e have held that speech can be regulated differentially on account of the speaker’s identity . . . .”).

257 *G.K. Limited*, 436 F.3d at 1077. Compare the Court’s equation of speaker-based discrimination with content discrimination in *Solantic, LLC v. City of Neptune Beach*, in which Judge Marcus interpreted an exemption for “[o]fficial signs of a noncommercial nature erected by public utilities” as allowing, for example, a public utility to post a sign proclaiming “Choose Electric Power.” 410 F.3d 1250, 1265–66 (11th Cir. 2005).

258 *G.K. Limited*, 436 F.3d at 1077.
City’s recognition that during certain times, more speech is demanded by the citizenry because of the event (e.g., a real estate transaction or election) but the City does not limit the substance of this speech in any way. Thus, this exemption was content-neutral as well. (The judge said nothing about the fact that this exemption applied only when the sign said something concerning an event.)

The court in *G.K. Limited* quoted the key language from *Ward* (but not *Hill*), but that language played no overt role in the resolution of the case. Finally, Judge Fisher also took the opportunity to reject the argument that an ordinance is content-based simply because an official must read a sign in order to determine whether it is prohibited.

The second recent Ninth Circuit decision, *Reed v. Town of Gilbert, Arizona* arose from the placement around the Town of Gilbert, by the Good News Community Church, of temporary directional signs announcing the location and time of Sunday church services and including "an indicator directing people to the service." Among the many categories of signs exempted from the Town’s permit requirement were “Temporary Directional Signs Relating to a Qualifying Event.” The Church’s signs apparently fell within that exemption, but they ran afoul of applicable time and place restrictions. Consequently, the Church challenged the so-called “Qualifying Event” provision as impermissibly content-based. That provision read as follows:

> In the Glossary of the amended Code, Temporary Directional Signs Relating to a Qualifying Event are defined as temporary signs intended to direct passersby to a “Qualifying Event,” which, in turn, means: any assembly, gathering, activity, or meeting sponsored, arranged, or promoted by a religious, charitable, community service, educational or other similar non-profit organization.

Rejecting the Church’s argument, Judge McKeown looked to Ninth Circuit precedent, especially the *G.K. Limited* decision. The defini-

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259 Id. at 1077–78.
260 Id. at 1078.
261 Id. at 1071.
262 Id. at 1078.
263 (Reed I), 587 F.3d 966 (9th Cir. 2009).
264 Id. at 971.
265 Id. at 972.
266 Id.
267 Id.
268 Id. at 977.
269 Id.
tion at issue, he stated, “merely encompasses the elements of ‘who’ is speaking and ‘what event’ is occurring. These two criteria invoke the speaker-based and event-based characteristics approved in *G.K. Limited.*"270 The fact that only some, but not all, events “qualified” occasioned no comment.271

The argument that a sign was content-based because it must be read in order to be properly categorized was again rebuffed, because “an officer can . . . determine whether a ‘religious, charitable, community service, educational or other similar non-profit organization’ is ‘speaking through the sign’ without assessing the substance of the sign’s contents.”272 Judge McKeown held forth generally on this ongoing point of contention, saying this:

This case . . . highlights the absurdity of construing the “officer must read it” test as a bellwether of content. If applied without common sense, this principle would mean that every sign, except a blank sign, would be content based. While a Gilbert officer needs to briefly take in what is written on the Qualifying Event Sign to note who is speaking and the timing of the listed event, this “kind of cursory examination” is not akin to an officer synthesizing the expressive content of the sign.273

The Church had also argued that the Town’s Sign Code was impermissibly content-based by virtue of the nineteen categories of signs exempted from the code’s permit requirement, but the District Court had not addressed that issue, so the Court of Appeals remanded for consideration thereof.274 The case—and that issue—came back to the appellate court a few years later.275 Judge Callahan wrote for the court, rejecting the church’s challenge, and this time there was a dissent.276 For reasons not made clear, the court focused on the exemptions for “Political” and “Ideological” signs, along with the “Temporary Directional Signs” already described.277 Although all were exempt from

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270 *Id.*
271 *Id.* at 976–77.
272 *Id.* at 978.
273 *Id.* What Judge McKeown meant, of course, is that “the ‘officer must read it’ test” would render any sign ordinance content-based if it distinguished in any way between signs conveying different verbal messages.
274 *Id.* at 983.
275 Reed v. Town of Gilbert, Ariz. (Reed II), 707 F.3d 1057 (9th Cir. 2013). The Supreme Court will soon have the occasion to consider this issue, as the Court granted certiorari in July 2014. *See* Reed v. Town of Gilbert, Ariz., 134 S. Ct. 2900 (2014).
276 *Id.* at 1077–81 (Watford, J., dissenting).
277 *Id.* at 1061 (majority opinion).
permit requirements, they were subject to differing size limitations and, in the case of “Political” and “Directional” signs, differing time limitations.278 Here is the core of Judge Callahan’s reasoning in finding the regulatory scheme to be content-neutral:

The thrust of Good News’ challenge to the Sign Code is that its different restrictions for different types of noncommercial speech are inherently content-based and thus unconstitutional. However, we rejected this general argument in Reed [I] when we held that distinctions based on the speaker or the event are permissible where there is no discrimination among similar events or speakers. Thus, under Reed [I], the distinctions between Temporary Directional Signs, Ideological Signs, and Political Signs are content-neutral. That is to say, each classification and its restrictions are based on objective factors relevant to Gilbert’s creation of the specific exemption from the permit requirement and do not otherwise consider the substance of the sign. The Political Signs exemption responds to the need for communication about elections. The Ideological Sign exemption recognizes that an individual’s right to express his or her opinion is at the core of the First Amendment. The Temporary Directional Sign exemption allows the sponsor of an event to put up temporary directional signs immediately before the event. Each exemption is based on objective criteria and none draws distinctions based on the particular content of the sign. It makes no difference which candidate is supported, who sponsors the event, or what ideological perspective is asserted.279

That analysis was preceded by a review of pertinent Ninth Circuit rulings; only after reaching her conclusion did Judge Callahan describe Hill v. Colorado and conclude that Gilbert’s regulatory regime “is content-neutral as that term is defined by the Supreme Court in Hill. Gilbert did not adopt its regulation of speech because it disagreed with the message conveyed.”280 At a later point in her opinion, Judge Callahan added that, “unlike political, ideological, and religious speech which are clearly entitled to First Amendment protection, there does not appear to be a constitutional right to an exemption for Temporary Directional Signs”—so “how can [the Church] suffer a cognizable harm” when the town creates such an exemption, even if those signs are treated less favorably than political or ideological signs?281 There then followed a brief and highly deferential application of intermediate scrutiny,282 which never really explained why the different categories of signs could be subject to different size limitations.

278 Id.
279 Id. at 1069 (internal citations omitted).
280 Id. at 1071.
281 Id. at 1074.
282 Id. at 1074–75.
Judge Watford, dissenting, did address that disparate treatment.283 Interestingly, he suggested that Hill v. Colorado “did not modify or refine the core principle underlying Mosley, Carey [v. Brown], and Metromedia”284—a statement seemingly equivalent to saying that Hill did nothing to change the law of content discrimination. At the same time, he purported to distinguish Hill, arguing that the Colorado statute upheld in Hill “regulated a particular mode of communication . . . without regard to the subject of the speaker’s message,” while here the ordinance “does draw distinctions based on the subject the speaker wishes to address.”285 He posed the problem in this case perfectly in the following passage from his dissent:

But to sustain the distinctions it has drawn, Gilbert must explain why (for example) a 20-square-foot sign displayed indefinitely at a particular location poses an acceptable threat to traffic safety and aesthetics if it bears an ideological message, but would pose an unacceptable threat if the sign’s message instead invited people to attend Sunday church services.

Gilbert has not offered any such explanation, and I doubt it could come up with one if it tried. What we are left with, then, is Gilbert’s apparent determination that “ideological” and “political” speech is categorically more valuable, and therefore entitled to greater protection from regulation, than speech promoting events sponsored by non-profit organizations.286

4. A Creative Approach

One federal appellate court, the Third Circuit Court of Appeals, has been unusually thoughtful and creative in its response to the challenge of deciding whether typical sign-ordinance exemptions should lead to a finding of content discrimination. Its seminal (and lengthy) opinion on that point, promulgated just over twenty years ago, is Rappa v. New Castle County.287 The plaintiff had placed political campaign signs on private property (other than his own) too close to certain roadways, thereby placing them in locations in which they were not permitted by Delaware law (“Chapter 11”)—though several other kinds of signs (including “directional or warning signs,” for sale signs, and “beautification/landscape planting sponsorship signs”288) were. Judge Becker wrote for a majority of a three-judge panel that included

283 Id. at 1079–80 (Watford, J., dissenting).
284 Id. at 1079.
285 Id.
286 Id. at 1080.
287 18 F.3d 1043 (3d Cir. 1994).
288 Id. at 1048, 1051–52.
then-Judge Samuel Alito, who wrote a brief concurring opinion. Judge Garth dissented in part. Judge Becker began, essentially, with this recognition: “Chapter 11 indisputably distinguishes between, and allows the posting of certain signs based on the subject matter the sign conveys (for example, ‘for sale’ signs and directional signs). Under a literal understanding of ‘content-based,’ that fact makes the statute content-based.”

But, writing prior to the Supreme Court decisions in City of Ladue and Hill v. Colorado, Judge Becker perceived the unsatisfying simplicity of that conclusion. His analysis deserves extensive quotation here:

[The exceptions . . . at issue in the Delaware ordinance do not raise many of the concerns that mandate limiting government’s ability to discriminate based on content. The exceptions are quite small; they are not for particular subjects likely to generate much debate and so are not likely to focus debate on that subject matter at the expense of other subject matter; and they do not discriminate by viewpoint. Thus, they do not appear to be motivated by a desire to suppress certain speech, and they do not eliminate certain issues from discussion in a way that makes it likely that the government is aiming to shape the public agenda or is in fact significantly affecting the shape of that agenda.]

He was unwilling, however, to accept the suggestion “that whenever content-based discrimination is de minimis, it is permissible[,]” a position that would “undermin[e] many of the advantages of what has been largely a per se rule against content discrimination.” He continued:

[When government has a significant interest in limiting speech that is unrelated to the content of that speech, government should not be left

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289 Id. at 1079 (Alito, J., concurring).
290 Id. at 1080 (Garth, J., dissenting).
291 Id. at 1054 (majority opinion).
292 Judge Becker may be said to have anticipated Justice Stevens’ analysis in City of Ladue when he said this:

We also note that the restrictions at issue implicate not only the First Amendment rights of political candidates, but of residents of roadside property . . . as well. Even if a person in Rappa’s position has alternatives available, the average homeowner may have few, if any, viable alternative avenues by which to communicate. Posting a sign on one’s own property may not only be easier and less expensive than alternative means of communication, but may be a unique means of self-expression for the property owner for whom the sign says not only that Rappa should be a Congressman but also that “I, John Doe, owner of this piece of property, support Rappa for Congress.”

Id. at 1076–77 (internal citations omitted).
293 Id. at 1063.
294 Id. at 1063–64.
with a choice of enacting a regulation banning all signs in a particular geographic area or none. Some signs are more important than others not because of a determination that they are generally more important than other signs, but because they are more related to the particular location than are other signs. Allowing such “context-sensitive” signs while banning others is not discriminating in favor of the content of these signs; rather, it is accommodating the special nature of such signs so that the messages they contain have an equal chance to be communicated.295

He explained further, using examples:

A sign that says “Speed Limit 55” or “Rest Stop” is more important on a highway than is a sign that says “Rappa for Congress.” A sign identifying a commercial establishment is more important on its premises than is a sign advertising an unrelated product. If the former signs are banned from the highway or the place of business, there is no other means of communication that can provide equivalent information. In contrast, placing a sign that says “Rappa for Congress” or “Drink Pepsi” on a highway, while it may be an important means of communication because of the number of travellers on the highway, has no relationship to the property on which it is placed or to the fact that it is next to a highway. Banning these signs potentially leaves many alternative means of communicating the same information.296

His solution:

Thus, we conclude that when there is a significant relationship between the content of particular speech and a specific location or its use, the state can exempt from a general ban speech having that content so long as the state did not make the distinction in an attempt to censor certain viewpoints or to control what issues are appropriate for public debate and so long as the exception also survives the test proposed by the Metromedia concurrence: i.e., the state must show that the exception is substantially related to advancing an important state interest that is at least as important as the interests advanced by the underlying regulation, that the exception is no broader than necessary to advance the special goal, and that the exception is narrowly drawn so as to impinge as little as possible on the overall goal.297

Applying this test, Judge Becker concluded that the exemption for “[d]irectional or warning signs and official signs or notices” were “directly related to the functioning of the roads and property on which

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295 Id. at 1064.
296 Id.
297 Id. at 1065. “[T]he Metromedia concurrence” is a reference to Justice Brennan’s opinion in Metromedia, joined by Justice Blackmun, concurring in the judgment. See Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 521 (1981) (Brennan, J., concurring). The text adopted by Judge Becker in Rappa was proposed by Brennan in his concurrence, based on no precedent. Id. at 532 n.10 (Brennan, J., concurring). Why Judge Becker chose to adopt it is unclear.
they are located”\(^{298}\) and therefore passed the test. (Indeed, he stated that “most of these signs are important enough that they probably could survive even a compelling state interest test.”\(^{299}\) Real estate signs probably would as well, but remand was deemed necessary on this point,\(^{300}\) and the same was true in the case of “beautification/landscape planting sponsorship signs.”\(^{301}\) Signs “directing people to local towns, historical sites, or attractions would probably be acceptable,”\(^{302}\) but signs “advertising a local city or industry or meeting are not related to the land on which they are placed nor to the function of the highway.”\(^{303}\)

Judge Garth, dissenting in part, scolded the majority for “concoct[ing] its own property-compatibility formulation, . . . in disregard of firmly-entrenched First Amendment jurisprudential standards.”\(^{304}\) In his view, the regulatory scheme at issue was content-based, and so was the majority’s new analytical approach:

> By the majority’s standard, whether or not a sign may be maintained on a particular property depends upon the kind of message the sign seeks to convey. Only if the sign conveys the right message (\textit{i.e.}, “significantly related to the particular area”) is it permissibly posted. If the function of the property is to sell liquor, then a “Reckless Eddie’s Packaged Goods” sign would be permissible, while a “Don’t Drink and Drive” sign would be impermissible. Although such distinctions may appear benign, I agree with the First Circuit that the “preference for the ‘functions’ of certain signs over those of other (\textit{e.g.}, political) signs is really nothing more than a preference based on content.”\(^{305}\)

He argued, furthermore, that the distinctions made in the Delaware regulatory scheme bore no relationship to the state’s interests in aesthetics and traffic safety, contending that a “for sale” sign “is no less an

\(^{298}\) \textit{Rappa}, 18 F.3d at 1066.

\(^{299}\) \textit{Id.} Judge Alito, concurring, made the same point. \textit{Id.} at 1079–80 (Alito, J., concurring), as did Judge Garth in dissent, \textit{Id.} at 1080 n.1 (Garth, J., dissenting).

\(^{300}\) \textit{Id.} at 1067 (majority opinion). Curiously, no mention was made of \textit{Linmark Associates.} See supra text accompanying notes 49–59 for a discussion of \textit{Linmark.}

\(^{301}\) \textit{Id.} at 1067–68.

\(^{302}\) \textit{Id.} at 1068. Somewhat cryptically, Judge Alito, concurring, stated without elaboration that he viewed these “beautification” and “local attraction” signs as “truly \textit{de minimis}.” \textit{Id.} at 1080 (Alito, J., concurring).

\(^{303}\) \textit{Id.} at 1068 (majority opinion).

\(^{304}\) \textit{Id.} at 1086 (Garth, J., dissenting).

\(^{305}\) \textit{Id.} at 1084–85. Judge Garth was quoting from \textit{Matthews v. Needham}, 764 F.2d 58, 60 (1st Cir. 1985), in which the Court rejected the argument that a sign ordinance loaded with exemptions “does not discriminate on the basis of ‘content,’ but rather on the basis of ‘function.’” (Then-Judge Breyer was a member of the panel that decided that case.)
eyesore than a ‘Rappa for Congress’ sign.’ He added: “The majority of this panel turns the First Amendment on its head when it suggests that a ‘For Sale’ sign is entitled to greater protection . . . than a ‘Rappa for Congress’ sign, merely because of the coincidence of location.” (But, again, that statement ignored the holding of Linmark Associates, and it pre-dated the ruling in City of Ladue.)

The Third Circuit has applied its Rappa analysis on at least two other occasions, but its approach appears to have received scant attention from other federal appellate courts.

IV. SYNTHESIS: TENTATIVE CONCLUSIONS, QUESTIONS, AND SUGGESTIONS

A. Offsite vs. Onsite Restrictions

What appears clearest, in the muddled jurisprudence of sign ordinances, is the holding of Metromedia that offsite commercial speech can be completely banned—unless courts revisit that conclusion in light of the Supreme Court’s more rigorous scrutiny of commercial speech regulations beginning approximately two decades ago. That possibility aside, banning offsite commercial billboards is thus the easiest form of sign regulation in which a municipality can engage.

Barring all “offsite” signs, including noncommercial signs, might be permissible, as a content-neutral time, place, and manner regulation, but doing so could be deemed excessive in relation to the city’s interests and thus fail even under intermediate scrutiny. (To allow some such signs but not others, of course, is to risk entering the realm of content discrimination.)

B. Commercial vs. Noncommercial Signs

Favoring noncommercial over commercial speech is apparently permissible (at least sometimes), while the converse approach is presumptively not. But how unyielding is the principle, seemingly ac-

306 Rappa, 18 F.3d at 1082.
307 Id. at 1087.
308 Melrose, Inc. v. City of Pittsburgh, 613 F.3d 380 (3d Cir. 2010); Riel v. City of Bradford, 485 F.3d 736 (3d Cir. 2007).
309 But see Solantic, LLC v. City of Neptune Beach, 410 F.3d 1250, 1262 n.11 (11th Cir. 2005) (declining to follow Rappa).
311 See supra text accompanying notes 167–69, 183–87.
cepted by most courts, that commercial speech cannot be treated more favorably than noncommercial speech. If a “for sale” sign is allowed (as it apparently must be, on residential property), must all noncommercial signs be allowed as well? Must a commercial enterprise that is permitted to have onsite commercial advertising (which is inevitable, and only fair, as a practical matter) be permitted to post any noncommercial message at that location as well, even if doing so creates a cacophony of distracting signs? Such results seem questionable—but of course the legal analysis would almost certainly hinge on the level of scrutiny applied to whatever distinctions an ordinance makes.

C. The Effects of Linmark and City of Ladue

With regard to residential signs, the Supreme Court appears to have established, in the Linmark Associates and City of Ladue cases, that “for sale” signs and signs of a political nature (for want of a better characterization) must be allowed. The absence of explicit acknowledgment of these rulings in subsequent federal appellate opinions is striking because their implications—for the present analysis are potentially enormous.

First of all, if one does have a First Amendment right to post these particular kinds of signs, should not the conclusions follow that (a) government has a compelling interest in complying with its constitutional obligations, so that (b) content-based exemptions for those categories of signs cannot render an ordinance impermissibly content-based? Thus, signs of this type should not “count” for purposes of finding content discrimination because a municipality cannot reasonably be said to be impermissibly discriminating on the basis of content when it allows a sign that it must allow; furthermore, it satisfies strict scrutiny when it does so.

312 See supra text accompanying notes 160–68. One court raised the question of whether “the Metromedia plurality meant to indicate that a statute that allowed any commercial speech could not prohibit any noncommercial speech,” but chose to “interpret the Metromedia plurality to be concerned with the fact that the San Diego ordinance allowed a broad type of commercial speech (onsite speech) while not allowing noncommercial speech even of the same type.” Rappa v. New Castle Cnty., 18 F.3d 1043, 1056 (3d Cir. 1994).


314 See, e.g., Widmar v. Vincent, 454 U.S. 263, 271 (1981) (“We agree that the interest of the University in complying with its constitutional obligations may be characterized as compelling.”).
D. The Reach, and Limits, of City of Ladue

Second, how far does the City of Ladue ruling extend? The Court did not pin any label on the signs at issue in that case (one of which said, in part, “Say No to War in the Persian Gulf”), but they might be labeled “political,” or perhaps “ideological.” Political campaign signs would seem to deserve equal treatment, so the decision would certainly seem to apply to all “political” signs. But, beyond “political” (and real estate “for sale” signs, per Linmark Associates), what other kinds of signs, if any, does one have a First Amendment right to place on one’s residential property? Within the realm of protected noncommercial speech, is there any permissible boundary, or must every noncommercial sign embodying protected speech be permitted on residential property? Would not the Town of Cary have had to allow the disgruntled homeowner to post a sign saying “Screwed by the Town of Cary” had it not been painted on his house? Or could a sign be prohibited by virtue of its use of offensive language, despite the fact that such a ban would presumably be a form of content discrimination? Is there a First Amendment right to post a residential sign that conveys the precise message that adorned Paul Cohen’s infamous jacket? What about an anti-Obama sign incorporating a racial epithet? (Might a “captive audience” rationale, focusing on the signposter’s neighbors, carry greater weight here than in most public set-

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315 “True” threats, advocacy of imminent crime, obscene messages, and actionable defamatory statements—all of which are unprotected forms of speech—could of course be prohibited. As to commercial speech, recall Justice Stevens’ statement, in City of Ladue, quoted supra note 68, that “[d]ifferent considerations might well apply . . . in the case of signs . . . displayed by residents for a fee, or in the case of off-site commercial advertisements on residential property.” City of Ladue, 512 U.S. 43, 58 n.17.

316 “Based on the Court’s decision in Ladue to give homeowners the absolute First Amendment right to post signs on their residential property, residents may claim the right to post signs concerning any conceivable topic or issue that is of interest to those living on the property,” Jordan B. Cherrick, Do Communities Have the Right to Protect Homeowners from Sign Pollution? The Supreme Court Says No in City of Ladue v. Gilleo, 14 St. Louis U. Pub. L. Rev. 399, 434 (1995). Recall as well Justice Stevens’ equation of political campaign signs with ideological signs in his majority opinion in Taxpayers for Vincent, quoted supra in text accompanying note 48.


318 Support for a First Amendment argument opposing such a restriction may be drawn from Solomon v. City of Gainesville, 763 F.2d 1212, 1213–14 (11th Cir. 1985), but the opinion therein provides little analytical guidance.

319 Cohen v. California, 403 U.S. 15, 26 (1971) (upholding the right to carry a jacket bearing the words “Fuck the Draft” in a courthouse corridor).
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tings? What if the idea, but not the choice of words, is deemed offensive—like, for example, the message consistently expressed by the Westboro Baptist Church as part of its demonstrations at military funerals? As to “for sale” signs, can it be confidently assumed that the right recognized in *Linmark Associates* applies only to offers to sell the residential property on which the sign is placed, and not automobiles, furniture, or other real property?

Assuming that residential signs embodying protected noncommercial speech may not be disallowed on the basis of content, are other limitations permissible? May the number of such signs in any one location be limited? Despite the content neutrality of such a restriction, at least one court found that a two-sign limit failed the “narrow tailoring” prong of intermediate scrutiny—a result that does not seem inevitable. Are selective temporal limitations permissible—i.e., may political campaign (or other “event-related”) signs be confined, as they typically are, to defined time periods preceding and following elections (or other events)? Such provisions have been upheld, but they have also been struck down as impermissibly content-based, which seems to this author to be the presumptively correct result. (Even if permitted, could not such a restriction be circumvented by the use of language not explicitly tied to an election—e.g., “Support

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320 See id. at 21 (“The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it, is . . . dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner.”); see also Hill v. Colorado, 530 U.S. 703, 716–17 (2000) (“But the protection afforded to offensive messages does not always embrace offensive speech that is so intrusive that the unwilling audience cannot avoid it. . . . The right to avoid unwelcome speech has special force in the privacy of the home, and its immediate surroundings . . . .”).


322 See Cherrick, supra note 316, at 433–35.

323 See Coles, supra note 177, at 88–89.


325 Consider this excerpt from *Reed v. Town of Gilbert, Ariz.*, 707 F.3d 1057, 1074 (9th Cir. 2013):

> The differences as to duration are based on the natures of the types of speech involved. Thus, under Arizona law political signs are allowed for an extended time before an election. Ideological signs, not being tied to any event, have no time limit. However, the purpose of a Temporary Directional Sign inherently contemplates a limit on duration.

326 Whitton v. City of Gladstone, 54 F.3d 1400, 1404 (8th Cir. 1995), discussed supra in text accompanying notes 208–10; see also McFadden v. City of Bridgeport, 422 F. Supp. 2d 659, 673–74 (N.D.W. Va. 2006).
Obama”) And may different kinds of signs be subject to different size limitations, as they sometimes are? If so, why? The answers to these questions are far from clear, beyond the fairly safe prediction that such distinctions could not survive the conventional application of strict scrutiny. (But should they have to do so?)

Finally, in this regard, might the City of Ladue holding have any applicability to property other than residential property? Justice Stevens, in that majority opinion, spoke only of “residential signs,” but might it be plausibly argued that his rationale—i.e., the absence of sufficient alternative channels of communication—applies nearly as forcefully to signs placed outside commercial establishments? If so, an alternative basis would exist for the holding in Beaulieu v. City of Alabaster, the case described in the first sentence of this article, that an attorney who is allowed to place a business identification sign outside her office must also be permitted to post a sign promoting her candidacy for a judgeship. But the greater likelihood is that City of Ladue speaks only to residential signs.

E. Selective Noncommercial-Sign Exemptions

Given the potentially broad sweep of the holding in City of Ladue, augmented by Linmark Associates and by the rule—still presumptively a rule—that commercial signs may not be given more favorable treatment in any location than noncommercial signs, the problem of deciding when the availability of exemptions (for some categories of noncommercial signs) amounts to content discrimination is considerably less likely to arise, as a practical matter, in the “onsite” than in the “offsite” setting. But, when it does, the major question addressed in this article—namely, whether to deem such exemptions content-based or content-neutral—must be confronted. Clearly, federal courts differ in their approaches to this key issue. What is the proper approach?

Start with the familiar exemptions that were highlighted (but ultimately ignored) in the City of Ladue case—namely, exemptions for “res-

327 See, for example, Reed v. Town of Gilbert, Ariz., 707 F.3d 1057, 1061 (9th Cir. 2013); Wag More Dogs, LLC v. Cozart, 680 F.3d 359, 362–63 (4th Cir. 2012); and H.D.V.-Greek-town, LLC v. City of Detroit, 568 F.3d 609, 615–16 (6th Cir. 2009), all of which upheld such regulations. A size limitation applicable to all residential signs would almost certainly be deemed content-neutral and survive intermediate scrutiny.

328 See Cordes, supra note 177.


330 Beaulieu v. City of Alabaster, 454 F.3d 1219, 1233 (11th Cir. 2006).
idence identification signs” and signs warning of safety hazards. These exemptions, along with those for onsite directional signs, should not lead to strict scrutiny—but that conclusion should not be reached via reliance on the language of the Ward and Hill decisions. Rather, these signs—literally identified by their content, but whose singling out poses no real threat to First Amendment values—exemplify the concept of “de minimis content discrimination” from which the title of this article is derived. That Justice Stevens chose to sidestep the content-discrimination inquiry in City of Ladue and that many courts have labeled such exemptions “content-neutral” (generally by relying on Ward and Hill) is understandable, because these are innocuous instances of (literal) content discrimination that should count for nothing.

With respect to exemptions of this kind, this author would submit, the Third Circuit in Rappa basically got it right. Judge Becker’s key assertion, in his opinion for the court in that case, is worth restating: “Some signs are more important than others . . . because they are more related to the particular location than are other signs.” The rule to which he was led, again, was this:

Thus, we conclude that when there is a significant relationship between the content of particular speech and a specific location or its use, the state can exempt from a general ban speech having that content so long as the state did not make the distinction in an attempt to censor certain viewpoints or to control what issues are appropriate for public debate.

As has already been noted, Judge Becker found this test satisfied with regard to “directional or warning signs,” and so would this author. Signs of this kind should be deemed “location-related,” and thus ex-

331 City of Ladue, 512 U.S. at 46 n.6.
332 Furthermore, judicial rejection of the argument that an exemption is content-based if one must read a sign in order to determine its legality is totally appropriate. One would have to read a sign in order to determine whether it fits into the “onsite” or “offsite” category, and that distinction is content-neutral.
334 Id. at 1064.
335 Id. at 1065. Judge Becker’s sentence went on to say “and so long as the exception also survives the test proposed by the Metromedia concurrence,” but this author finds that language to be completely unnecessary.
336 See supra text accompanying note 298.
pressly given special treatment, as instances of untroubling and sensible \textit{de minimis} content discrimination.\textsuperscript{337}

Support for such a pragmatic approach can be drawn from the opinions of Justices Kennedy and Souter in \textit{City of Los Angeles v. Alameda Books, Inc.}\textsuperscript{338} \textit{Alameda Books} was a sequel of sorts to the \textit{City of Renton} case,\textsuperscript{339} in which \textit{Renton}'s controversial “secondary effects” theory (pursuant to which a literally content-based regulation would be treated as content-neutral) was retained and applied.\textsuperscript{340}

But Justice Kennedy, concurring in the judgment, observed that the characterization of the \textit{Renton} ordinance as “content neutral” “was something of a fiction . . . . After all, whether a statute is content neutral or content based is something that can be determined on the face of it; if the statute describes speech by content then it is content based.”\textsuperscript{341} Nevertheless, he continued, the \textit{Renton} holding was sound, because an ordinance directed at combating the “secondary effects” of land use “is not so suspect that we must employ the usual rigorous analysis that content-based laws demand in other instances.”\textsuperscript{342} Justice

\textsuperscript{337} This proposed approach bears some relation to the more sweeping revamping of content analysis that Professor McDonald has proposed, see generally McDonald, supra note 72, at 1412–30, as this statement reveals:

\begin{quote}
[T]here would appear to be little reason for subjecting regulations that pose seemingly minor threats to the societal or individual goals of the First Amendment . . . , and seek to achieve legitimate government objectives . . . , to almost certain invalidation just because they make a distinction based on content. Thus, selective content regulations that seem to place a minor burden on expressive freedoms . . . would seem to be poor candidates for the per se invalidation usually accorded them under existing doctrine . . . .
\end{quote}

\textit{Id.} at 1385–86; see also Cordes, supra note 177, at 87 (“[E]xceptions should be permitted based upon the unique relationship of the sign to the property. . . . [A]s a practical matter the site-specific nature of the sign provides a content-neutral justification for an exemption. It makes little sense to require municipalities to take an ‘all or nothing’ approach in such cases. Moreover, limited exemptions of this type pose little threat to the concerns supporting content neutrality.”); R. George Wright, \textit{Content-Based and Content-Neutral Regulation of Speech: The Limitations of a Common Distinction}, 60 U. Miami L. Rev. 333, 363 (2006) (“[T]he CB-CN distinction has accrued increasing complexity without becoming a reliable guide to the risk to free speech values in any given case. . . . [J]udges should . . . attempt . . . to assess the regulation’s realistic potential over time for speech-repressive effects.”).

\textsuperscript{338} 535 U.S. 425 (2002).
\textsuperscript{339} See supra text accompanying notes 84–86.
\textsuperscript{340} \textit{Alameda Books}, 535 U.S. at 438–41.
\textsuperscript{341} \textit{Id.} at 448 (Kennedy, J., concurring). The reader may be forgiven for wondering whether this statement is consistent with what Kennedy wrote in \textit{Ward}. See supra text accompanying note 95.
\textsuperscript{342} \textit{Id.} at 447.
Souter, joined by Justices Stevens and Ginsburg in dissent, opined that “[i]t would in fact make sense to give this kind of zoning regulation a First Amendment label of its own,” and his suggestion was that it be called “content correlated.”\footnote{Id. at 457 (Souter, J., dissenting).} The point, of course, is that Supreme Court Justices have demonstrated an openness to creative tweaking of First Amendment rules when common sense demands it.\footnote{Justice Breyer, in particular, has often revealed an inclination to avoid rigid adherence to established rules. \textit{See}, e.g., \textit{Brown v. Entm’t Merchs. Ass’n}, 564 U.S. __, __, 131 S. Ct. 2729, 2765–66 (2011) (Breyer, J., dissenting) (“I would not apply this strict standard ‘mechanically.’ Rather, . . . I would evaluate . . . whether, overall, ‘the statute works speech-related harm . . . out of proportion to the benefits that the statute seeks to provide.’”); \textit{see also} \textit{United States v. Alvarez}, 567 U.S. __, __, 132 S. Ct. 2537, 2551–52 (2012) (Breyer, J., concurring) (“Ultimately the Court has had to determine whether the statute works speech-related harm that is out of proportion with its justifications. . . . \text{[S]}ome such approach is necessary if the First Amendment is to offer proper protection in the many instances in which a statute adversely affects constitutional interests but warrants neither near-automatic condemnation (as ‘strict scrutiny’ implies) nor near-automatic approval . . . .”).}

The question arises, however, as to whether the concept of a “location-related” sign, the allowance of which will not lead to strict scrutiny, should be confined to signs situated on the property to which it makes reference. The Court in \textit{Rappa} imposed no such limitation,\footnote{See supra text accompanying notes 298–303.} but, in the interest of maintaining a workable bright line, this author would. (If not, the concept could extend, for example, to the temporary offsite directional sign at issue in \textit{Reed v. Town of Gilbert, Arizona}.\footnote{See supra text accompanying notes 263–68.})

What then of differing numerical or size limitations applicable to some or all of such “location-related” signs? Though the question is a close one, a municipality given the power to allow such signs without having to pass strict judicial scrutiny should likewise be able to restrict them, even selectively, by size or number as long as intermediate scrutiny is satisfied.

“Offsite” exemptions, then, unaffected by \textit{City of Ladue} or the above proposed recognition of “location-related” signs, will most often raise the content-discrimination issue. Two additional suggestions can help in this context.

First, exemptions for governmental signs also should not “count” toward a finding of invidious content discrimination. Government
speech is not subject to any First Amendment limitations, so why should it be part of the calculus? Indeed, it might be reasonably asked why governmental signs even need to be mentioned in a sign ordinance; could not any such ordinance explicitly refer only to the posting of signs by private actors, thereby obviating the need to create “exemptions” for governmental speech, and would that not be constitutional?

Second, exemptions for signs posted by specifically identified non-governmental entities, such as utilities and railroads, may be permissible as forms of speaker-based discrimination that in no way imply content discrimination.

There are, however, some kinds of signs that are not infrequently exempt from regulation but which do not fit into any of the hitherto alluded-to categories. Exemptions for offsite signs identifying civic or fraternal organizations (but not, for example, political clubs) come to mind, as do offsite signs announcing religious services. Exemptions of this sort, this author would argue, reflect pure favoritism toward selected kinds of organizations and are therefore not only speaker-based but content-based; they should be subjected to strict scrutiny, which they almost certainly cannot survive.

In so concluding, I am necessarily arguing against application of the standards for determining the existence of content discrimination articulated in *Ward* and *Hill*—standards that concededly simplify life (by effectively allowing almost all sign-ordinance exemptions), but do

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347 Pleasant Grove City, Utah v. Summum, 555 U.S. 460, 467 (2009) (“The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech. . . . A government entity has the right to ‘speak for itself. ’ [I]t is entitled to say what it wishes . . . .” (internal citations omitted)).

348 The contrary conclusion has, however, been reached, albeit arguably without sufficient consideration of the argument made herein. *E.g.*, Nichols Media Grp., LLC v. Town of Babylon, 365 F. Supp. 2d 295, 315–17 (E.D.N.Y. 2005); see also *Foti v. City of Menlo Park, 146 F.3d 629, 637 (9th Cir. 1998)* (“[W]e are troubled by the wholesale exemption for government speech.”). *But see Lavey v. City of Two Rivers, 171 F.3d 1110, 1116 (7th Cir. 1999).*

349 See *supra* text accompanying notes 254–57.

350 *E.g.*, Desert Outdoor Adver., Inc. v. City of Moreno Valley, 103 F.3d 814, 817 (9th Cir. 1996).

351 *E.g.*, Reed v. Town of Gilbert, Ariz., 587 F.3d 966 (9th Cir. 2009).

352 But a governmentally sponsored sign that lists all civic organizations in the city and/or all religious organizations therein should be permitted as government speech.
so at the serious risk of distorting First Amendment doctrine. Viewing the most common sign ordinance exemptions as instances of *de minimis* content discrimination which do not warrant strict scrutiny, however, is a more candid and doctrinally satisfying approach, and one that will allow many, if not most, of these ordinances to be upheld.

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353 To quote Professor McDonald once again: “[T]o call a facially content-based restriction ‘content-neutral’ flies in the face of common sense and is counterintuitive to one not steeped in the complexities and nuances of free speech law.” McDonald, *supra* note 72, at 1405.