RECENT DEVELOPMENTS

DOLAN AND THE "ROUGH PROPORTIONALITY" STANDARD: TAKING ITS TOLL ON LORETTO'S BRIGHT LINE: *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994).

When the Supreme Court decided *Nollan v. California Coastal Commission*,[1] it attempted to define the scope of a government agency's power to regulate land use. *Nollan* held that, to escape the reach of the Takings Clause,[2] government agencies must demonstrate an "essential nexus"[3] between the public interests impaired by the proposed project and any conditions attached to the project's approval. Though the Court decided that a nexus must *exist*, it did not reach the question of how *tight* the nexus must be.[4] Some state courts have required a very exacting correspondence[5] while others have made only generalized statements "as to the necessary connection between the required dedication and the proposed development . . . ."[6] Last Term, in *Dolan v. City of Tigard*,[7] the Court considered various state court decisions in this area and held that the term "rough proportionality"[8] best described the actual federal constitutional norm. *Dolan*'s "rough proportionality" inquiry sets the degree to which *Nollan*'s nexus requirement must be met, by directing government agencies to make "individualized determination[s]" that the permit conditions are related both in nature and extent to the impact of the proposed development."[9]

Though this holding represents an attempt to flesh-out *Nollan*'s skeletal "essential nexus" test, it only complicates an already

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1. 483 U.S. 825 (1987).

2. *See* U.S. CONST. amend. V. (". . . nor shall private property be taken for public use without just compensation.").

3. *Nollan*, 483 U.S. at 837.

4. *Id.* at 838 (stating that the Court need not determine how close a "fit" between the condition and the public burden is required because "this case does not meet even the most untailored standards.").

5. *See, e.g.*, Pioneer Trust & Sav. Bank v. Mount Prospect, 176 N.E.2d 799, 802 (Ill. 1961); J.E.D. Assocs. v. Atkinson, 432 A.2d 12, 15 (N.H. 1981); Divian Builders, Inc. v. Planning Bd. of Twp. of Wayne, 334 A.2d 30, 40 (N.J. 1975); McKain v. Toledo City Planning Comm'n, 270 N.E.2d 370, 374 (Ohio Ct. App. 1971); Frank Ansuini, Inc. v. Cranston, 264 A.2d 910, 913 (R.I. 1970).

6. Dolan v. City of Tigard, 114 S. Ct. 2309, 2318 (1994). *See, e.g.*, Billings Properties, Inc. v. Yellowstone County, 394 P.2d 182 (Mont. 1964); Jenad, Inc. v. Scarsdale, 218 N.E.2d 673 (N.Y. 1966).

7. 114 S. Ct. 2309.

8. *Id.* at 2319.

9. *Id.* at 2319-20.

puzzling area of the law. Over the past two decades, the Supreme Court has blurred the distinctions between its takings tests.[10] Each new test seems reasonable when examined in isolation, but when considered together, the tests are extremely difficult to decipher and apply. The *Dolan* decision augmented this confusion by creating a new test in a case that could have been resolved under existing precedent. A more fully developed "bright line" rule, such as the *Loretto* "physical occupation" test,[11] would have provided a more sensible solution to *Dolan* and avoided any blurred distinctions created by the new test. Without a "rationalizing principle or set of principles," however, to "impos[e] an intelligible order upon judicial [takings] decisions," lower courts will lack sufficient guidance to determine which test to apply to particular facts.[12]

Florence Dolan owns a plumbing and electric supply store in Tigard's central business district.[13] Fanno Creek, which flows through the city, crosses the southwestern corner of petitioner's property and continues along its western boundary.[14] Seeking to remove the existing store and construct a building nearly twice the size of the original, Dolan applied to the city for a permit to redevelop the cite.[15]

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10. *See, e.g.*, Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978) (establishing a two part test for regulatory takings which examines the character of the governmental action and the economic impact of the governmental action on the plaintiff, measured by the extent to which the action interferes with the claimants reasonable, investment-backed expectations); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (holding that a permanent physical occupation of property constitutes a taking per se); Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) (holding that government agencies must demonstrate an essential nexus between a project's impacts and any dedication requirements); Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992) (holding that denial of all economically viable use of one's property always constitutes a taking).

11. 458 U.S. at 435.

12. Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV L. REV. 1165, 1171 (1967). Though Professor Michelman wrote this article almost thirty years ago, his argument still is compelling today.

13. *Dolan*, 114 S. Ct. at 2313.

14. *Id.*

15. Dolan v. City of Tigard, 854 P.2d 437, 438 (Or. 1993). "The size of the new building meant that the owners would have to go through the city's site development review process, which is triggered whenever an existing commercial business wants to expand its floor area by more than 50 percent, or when a new commercial, industrial, or multifamily project is proposed." Robin Franzen, *Oregon's Takings Tangle: The Planning World Awaits the Supreme Court's Decision in Dolan v. Tigard*, PLAN., June 1994, at 13.

Pursuant to Tigard's Community Development Code (CDC),[16] enacted in compliance with Oregon's recently enacted Comprehensive Land Use Statute,[17] the City Planning Commission ("Commission") approved Dolan's application on two conditions: she would have to dedicate a percentage of her land for (1) a public greenway along Fanno Creek to minimize flooding associated with her development, and (2) a pedestrian-bicycle pathway intended to relieve traffic congestion in the city's Central Business District.[18]

Arguing that her proposed development would not conflict with the CDC's policies, Dolan requested variances from the conditions.[19] In a twenty-seven page final order the Commission denied the request.[20] On Dolan's appeal, the Tigard City Council approved the Commission's final order.[21]

After exhausting the available administrative remedies,[22] Dolan energized the judicial system. The Oregon Supreme Court, upholding the decision of the Oregon Court of Appeals,[23] determined that "an exaction is reasonably related to an impact if the exaction serves the same purpose that a denial of the permit would serve"[24] and held that an essential nexus existed between the proposed development and the conditions placed on Dolan's building permit.[25]

16. *See Dolan*, 114 S. Ct. at 2313. Tigard's CDC contained three requirements relevant to the instant case. First, it required property owners in the area zoned Central Business District to comply with a 15% open space requirement. Second, pursuant to a transportation study that identified congestion in the Central Business District as a particular problem, the CDC required that new developments dedicate land for pedestrian pathways. Finally, to combat risks of flooding along Fanno Creek, the CDC required that the Creek's floodplain remain free of buildings and that the area be preserved as greenways to minimize flood damage to structures.

17. OR. REV. STAT. §§ 197.005-197.860 (1991) (requiring all Oregon cities and counties to adopt new comprehensive land use plans).

18. *Dolan*, 114 S. Ct. at 2314.

19. *Id.*

20. *Dolan*, 854 P.2d at 439-40.

21. *Id.* at 440.

22. The City Planning Commission, City Council, and the Land Use Board of Appeals (LUBA).

23. Dolan v. City of Tigard, 832 P.2d 853, 856 (Or. Ct. App. 1992) (rejecting Dolan's contention that the *Nollan* decision abandoned the reasonable relation test in favor of the stricter essential nexus test and holding that there was a "direct and reasonable relationship between conditions that [the] city attached" to Dolan's building permit and "public needs" to which her development would give rise).

24. *Dolan*, 854 P.2d at 443.

25. *Id.* at 443-44.

In a 5-4 decision the Supreme Court reversed.[26] Writing for the majority,[27] Chief Justice Rehnquist argued that the burden should be on the city to prove it needs the land, not on Dolan to prove that she should not have to give it up.[28] The Chief Justice supported his argument by stating that a dedication for *public* use would "deprive petitioner of the right to exclude others, 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.' "[29]

To balance the discussion, Chief Justice Rehnquist argued "[o]n the other side of the ledger" and defended the government's right to further legitimate state interests.[30] He explained that the "authority of state and local governments to engage in land use planning has been sustained against constitutional challenge as long ago as our 1926 decision in Euclid v. Ambler Realty Co. . . . . "[31] The Chief Justice also cited *Pennsylvania Coal Co. v. Mahon*[32] noting that "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."[33] Chief Justice Rehnquist concluded his defense of the government's right to engage in land use planning by citing *Agins v. City of Tiburon*,[34] which held that a land use regulation does not effect a taking if it "substantially advance[s] legitimate state interests [and does not deny] an owner economically viable use of his land."[35]

Chief Justice Rehnquist distinguished these three cases from the instant case[36] and applied the "essential nexus" test to each condition on Dolan's building permit. The Chief Justice first noted that "the prevention of flooding along Fanno Creek and the reduction of traffic congestion in the Central Business Dis-

26. Justice Stevens filed a dissenting opinion in which Justices Blackmun and Ginsberg joined. Justice Souter filed a separate dissenting opinion.

27. The Chief Justice was joined by Justices O'Connor, Scalia, Kennedy, and Thomas.

28. *Dolan*, 114 S. Ct. at 2320 n.8; *see* Joan Biskupic, *Justices Broaden Property Rights; Land Use Requirements may be "Taking"*, WASH. POST, June 25, 1994, at A1.

29. *Dolan*, 114 S. Ct. at 2316 (quoting Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979)).

30. *Id.*

31. *Id.* (discussing *Euclid*, 272 U.S. 365).

32. 260 U.S. 393 (1922).

33. *Dolan*, 114 S. Ct. at 2316.

34. 447 U.S. 255 (1980).

35. *Dolan*, 114 S. Ct. at 2316 (citing *Agins*, 447 U.S. at 260).

36. *See id.* (stating that Tigard, rather than classifying a sizable area of the city or imposing a limitation on the petitioner, took action with respect to an individual parcel and demanded that petitioner deed a portion of her property to the city).

trict [are] legitimate public purposes."[37] Chief Justice Rehnquist then asserted that a clear nexus existed between the first of these purposes and the land dedication requirement because the condition would limit impervious surfaces "within the creek's 100-year floodplain . . . "[38] and preserve drainage by preventing flooding. The Chief Justice also concluded that an essential nexus existed between the second purpose and the pedestrian-bicycle pathway condition because the condition would "[provide] for alternative means of transportation"[39] and decrease traffic congestion.

The Chief Justice then embarked on a new, second, level of inquiry which he labeled "rough proportionality." The new test enabled the Court to determine whether "the degree of the exactions demanded by the city's permit conditions bear[ed] the required relationship to the projected impact of petitioner's proposed development."[40] No "precise mathematical calculation [was] required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development."[41] The Oregon Supreme Court had deferred to the city's own findings on this matter,[42] but the Chief Justice questioned whether those findings were constitutionally sufficient.[43]

Scrutinizing the first condition on Dolan's building permit, Chief Justice Rehnquist agreed that keeping the floodplain "open and free from development would likely confine the pressures on Fanno Creek created by petitioner's development."[44] The city not only wanted Dolan to refrain from building in the floodplain, however, but also demanded her property along

37. *Id.* at 2317-18.
38. *Id.* at 2318.
39. *Id.*
40. *Dolan*, 114 S. Ct. at 2318.
41. *Id.* at 2319-20.
42. *Dolan*, 854 P.2d at 443.
43. The city relied on the Commission's rather tentative findings that "increased stormwater flow from petitioner's property 'can only add to the public need to manage the [floodplain] for drainage purposes' " to support its conclusion that the "requirement of dedication of the floodplain area on the site is related to the applicant's plan to intensify development on the site." The city also made the following specific findings relevant to the pedestrian-bicycle pathway: "In addition, the proposed expanded use of this site is anticipated to generate additional vehicular traffic thereby increasing congestion on nearby collector and arterial streets. Creation of a convenient, safe pedestrian/bicycle pathway system as an alternative means of transportation could offset some of the traffic demand on these nearby streets and lessen the increase in traffic congestion." *Dolan*, 114 S. Ct. at 2318.
44. *Id.* at 2320.

Fanno Creek for its greenway system. Chief Justice Rehnquist expressed some concern that the city had never said why a "public greenway, as opposed to a private one, was required in the interest of flood control."[45] It was difficult to see, the Chief Justice noted, "why recreational visitors trampling along petitioner's floodplain easement [were] sufficiently related to the city's legitimate interest in reducing flooding problems along Fanno Creek . . . ."[46] The Chief Justice argued that petitioner should "be able to control the time and manner in which [people] enter."[47] If the Court upheld the conditions on Dolan's permit, her "right to exclude would not be regulated, it would be eviscerated."[48] Chief Justice Rehnquist therefore concluded that "the findings upon which the city relies do not show the required reasonable relationship between the floodplain easement and the petitioner's proposed new building."[49]

Chief Justice Rehnquist next focused on the city's second condition, the pedestrian-bicycle pathway. The Chief Justice agreed with the city's findings that a larger store would increase the traffic flow in the Central Business District and that a pathway *could* offset it, but felt that the city had "not met its burden of demonstrating that the additional number of vehicle and bicycle trips generated by the petitioner's development reasonably relate[d] to the city's requirement for a dedication of the pedestrian/bicycle pathway easement."[50] According to the Chief Justice, findings which stated that a pathway *could* offset the increased traffic flow were too conclusory to pass "rough proportionality" muster, but findings showing that a pathway *would* offset some of the increased traffic demand would be sufficient.[51] While the Chief Justice explained that no mathematical calculation is required, the city must make some effort to quantify its findings beyond a mere "conclusory" statement.[52]

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45. *Id.*

46. *Id.*

47. *Id.* at 2321.

48. *Dolan*, 114 S. Ct. at 2321; *cf.* PruneYard Shopping Center v. Robbins, 447 U.S. 74, 82-84 (1980) (explaining that restrictions on the right to exclude alone do not in themselves constitute a taking, and do not do so in any event unless they "unreasonably impair the value or use" of the property).

49. *Dolan*, 114 S. Ct. at 2321.

50. *Id.* at 2321.

51. *See id.* at 2322.

52. *Id.*

Writing in dissent, Justice Stevens, joined by Justices Blackmun and Ginsberg, decried the new "rough proportionality" test, warning against a return to the Lochner era's heightened level of scrutiny.[53] "[B]y elevating property rights," Stevens argued, "the majority opinion allows federal judges to interfere with state and local regulations that may be in citizens' best interests."[54]

Justice Stevens also criticized the majority's focus on only part of Dolan's property. Citing *Penn Central*, Stevens argued that takings jurisprudence "does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated."[55] In the instant case, Stevens observed, the Court should have focused "both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole."[56] Stevens cited a series of other "entire parcel" cases[57] concluding that restrictions on the right to exclude alone, without a violation of rights in the entire parcel as a whole, do not constitute takings in themselves, and do not do so in any event unless they "unreasonably impair the value or use" of the property.[58]

Dissenting separately, Justice Souter argued that the Court did not need to look beyond *Nollan* to resolve the instant case.[59] The greenway exaction, Souter explained, is not sufficiently related to the city's legitimate flooding concerns, not because of a "lack of proportionality between permit condition and adverse effect," but because of a "lack of any rational connection at all between exaction of a public recreational area and the governmental in-

53. *Id.* at 2329.

54. Biskupic, *supra* note 28, at A1 (referring to *id.* at 2327).

55. Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 130 (1978).

56. *Dolan*, 114 S. Ct. at 2324 (citing *id.* at 130-31).

57. *See, e.g.*, Concrete Pipe & Products, Inc. v. Construction Laborers Pension Trust, 113 S. Ct. 2264, 2290 (1993) (explaining that "a claimant's parcel of property [cannot] first be divided into what was taken and what was left" to demonstrate a compensable taking.); PruneYard Shopping Center v. Robbins, 447 U.S. 74, 82-84 (explaining that restrictions on the right to exclude alone do not in themselves constitute a taking, and do not do so in any event unless they "unreasonably impair the value or use" of the property); Keystone Bituminous Coal Ass'n. v. DeBenedictis, 480 U.S. 470, 498-99 (1987) (concluding that "27 million tons of coal do not constitute a separate segment of property for takings law purposes" and that "[t]here is no basis for treating the less than 2% of petitioners' coal as a separate parcel of property."); Andrus v. Allard, 441 U.S. 51, 65-66 (1979) (stating that "[a]t least where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety."). *But see* Kaiser Aetna v. United States, 444 U.S. 164, 179-180 (1979) (explaining that the limitation of the right to exclude others undoubtedly constitutes a significant infringement on property).

58. *Dolan*, 114 S. Ct. at 2325 (citing *PruneYard*, 447 U.S. at 82-84).

59. *Id.* at 2330.

terest in providing for the effect of increased water runoff."[60] Thus, application of *Nollan*'s nexus test, without further embellishment, would invalidate the greenway condition. As to the bicycle pathway, Justice Souter stated that the Court "faults the city for saying that the bicycle path 'could' rather than 'would' offset the increased traffic from the store."[61] Souter contended that the Court again merely applied the *Nollan* nexus test because the relationship between the exaction and the impact, implied by the words "could offset," simply is too tenuous to qualify as an essential nexus.[62] Souter therefore concluded that the Court erred in using this case to go beyond *Nollan*'s essential nexus requirement; in any event he found the Court's application of *Nollan* unsound by virtue of the burden shift onto the city.

Dolan represents a valiant attempt to crystallize takings doctrine, but has not brought the Court any closer to achieving that goal. Observers on both sides of the *Dolan* debate hoped that the Court would clarify two fundamental points: "[h]ow much latitude does a government have in requiring the dedication of private property for public use?" and "how close a fit must there be between a project's adverse impacts and government restrictions imposed upon it?"[63] Though *Dolan* seemed to answer these questions, the Court has merely muddled the distinction between the *Nollan* - *Dolan* inquiry and the *Loretto* per se physical occupation rule.

This decision "is almost certain to prompt further litigation in the area of takings law . . .",[64] but when it does, lower courts will be unsure as to which test they ultimately should apply. *Dolan*'s holding is unnecessary and superfluous in light of existing precedent and ultimately will force courts to create more lines of inquiry to solve future problems, further complicating contemporary takings jurisprudence. To avoid excessive muddling of modern takings doctrine and to hone the tools already at the Court's disposal, the *Dolan* Court should have applied the more lucid *Loretto* "physical occupation" test, finding a per se taking by the City of Tigard.

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60. *Id.*

61. *Id.*

62. *Id.*

63. Frauzeu, *supra* note 15, at 13.

64. Jeff Bleich, *The Term that Wasn't?*, THE SAN FRANCISCO ATT'Y MAG., August/September 1994, at 13, 17.

In his seminal article on takings jurisprudence, Professor Michelman observed the Court's mantra-like compulsion to develop new takings tests.[65] In trying to solve various takings dilemmas, Michelman explained, there is a "felt need of courts for doctrinal principles which can be stated generally and . . . incisively . . .", but "attempt[s] to formulate rules of decision for compensability cases ha[ve], with suggestive consistency, yielded rules which are . . . unsatisfying."[66] Due to courts' shortcomings in compensation jurisprudence, most scholarly writing in the field has been concerned with locating a "rationalizing principle or set of principles which will . . . govern judicial decision of such cases."[67] Even the Court's three most recent takings decisions, however, *Nollan*, *Lucas v. South Carolina Coastal Council*,[68] and *Dolan*, have not provided such a governing principle.

The *Loretto* per se rule could have provided the Court with a rationalizing takings principle, but the Court's blinding need to formulate new doctrine precluded this result.[69] The existing *Loretto* precedent would have been more preferable because it is less confusing, already has established meaning, and already has put both the citizenry and the government on notice.

In *Loretto v. Teleprompter Manhattan CATV Corp.*,[70] the Court adopted a per se rule that any permanent physical occupation of private property authorized by the government constitutes a taking.[71] In *Nollan*, the Court explained that the "physical occupation" cases "uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner."[72] The *Loretto* Court further stated that in cases where

65. *See generally* Michelman, *supra* note 12 (analyzing courts' impulsive tendencies toward developing new tests to solve most legal problems).

66. *Id.* at 1170, 1171.

67. *Id.* at 1171.

68. 112 S. Ct. 2886 (1992). In *Lucas*, South Carolina, to protect its coastline from erosion, enacted a beachfront management act, which defined critical areas in danger of erosion and bars any owner from building a permanent habitable structure in those areas. At the time petitioner purchased his parcels, he was allowed to build homes on them. When the regulation took effect it prevented him from building any permanent structure on either of his lots. The State conceded that the regulation deprived him of all economically viable use of his property. The Court held for petitioner.

69. In his *Dolan* dissent, Justice Stevens claimed that "all the tools needed to resolve the questions presented by this case can be garnered from our existing case law." *Dolan*, 114 S. Ct. at 2326.

70. 458 U.S. 419 (1982).

71. In *Loretto*, the Court held that a law requiring landlords to permit the installation of cable facilities on their buildings effected a taking.

72. *Nollan*, 483 U.S. at 831-32 (quoting *Loretto*, 458 U.S. at 434-35).

a physical occupation has occurred, the "government does not simply take a single 'strand' from the 'bundle' of property rights; it chops through the bundle, taking a slice of every strand."[73]

Though the *Dolan* Court actually focuses on only one strand, the right to exclude others,[74] modern takings decisions, specifically the *Nollan* majority opinion, dictate that the City of Tigard's actions constituted a permanent physical occupation, calling for the *Loretto* per se takings doctrine. The *Nollan* Court stated that where an easement is granted "where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed," a "permanent physical occupation" has occurred.[75] This language indicates that a permanent physical occupation occurred in *Dolan* because the people of Tigard would have been given the right to pass to and fro across the greenway and the bicycle-pedestrian pathway.

Applying *Loretto*, the *Dolan* Court should have immediately held for Dolan[76] because "[a]fter *Nollan*, . . . laws that give individuals a 'permanent and continuous right to pass to and fro' are per se takings . . . ."[77] The Court instead asked if "requiring [an easement] to be conveyed as a condition for issuing a land use permit alters the outcome."[78] Answering its own question, the *Nollan* Court explained that, under *Agins v. City of Tiburon*, land use regulation which leaves some economically viable use does

73. *Loretto*, 458 U.S. at 435; *cf.* Andrus v. Allard, 444 U.S. 51, 65-66 (1979).

74. *See Dolan*, 114 S. Ct. at 2316; *see also* Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979).

75. *Nollan*, 483 U.S. at 832; *See The Supreme Court, 1986 Term—Leading Cases*, 101 HARV. L. REV. 240, 247 (1987) (explaining that the *Nollan* Court expanded the category of "permanent physical occupations [and] ignored the stricter analysis that is normally applied to claims of regulatory takings and articulated a broader and more absolute conception of where protected property rights begin and end."); *see also* Note, *Municipal Development Exactions, the Rational Nexus Test, and the Federal Constitution*, 102 HARV. L. REV. 992, 997-98 (1989) [hereinafter *Exactions Note*] (explaining that the "*Loretto* Court had asserted in dictum that an easement of passage was not a permanent occupation of land . . ." but that "*Nollan*'s finding that the right-of-way easement across the beach constituted a permanent physical occupation effectively reversed the *Loretto* dicta."). *But see* Note, *Taking a Step Back: A Reconsideration of the Takings Test of* Nollan v. California Coastal Commission, 102 HARV. L. REV. 448, 448-50 (1988) [hereinafter *Step Back Note*] (arguing that, though *Nollan* could easily have been justified under *Loretto's* physical occupation rule, the holding established an exception to *Loretto's* per se takings rule for physical occupations.").

76. *But see* Douglas W. Kimec, *Clarifying the Supreme Court's Taking Cases—An Irreverent but Otherwise Unassailable Draft Opinion in* Dolan v. City of Tigard, 71 DENV. U. L. REV. 325, 325 (1994) (arguing that while the physical invasion in *Dolan* might suggest application of the per se rule, *PruneYard* and *Nollan* suggest that certain permanent physical invasions are not compensable).

77. EXACTIONS NOTE, *supra* note 75, at 997.

78. *Nollan*, 483 U.S. at 834.

not effect a taking if it "substantially advance[s] legitimate state interests . . . ."[79] This analysis conflicts directly with *Loretto* which stated specifically that a permanent physical occupation authorized by the government constitutes a taking "*without regard* to whether the action achieves an *important public benefit*. . . ."[80] In *Loretto,* the Court focused "not on the government's justification for its action, but exclusively on what the government had done to the claimant."[81]

The *Nollan* and *Dolan* Courts failed to explain why *Loretto* does not apply to these two obvious physical occupations. While attempting to clarify takings doctrine by extending and modifying *Nollan*'s "essential nexus" test, the *Dolan* Court instead blurred the "one area of takings law where the Court has attempted to provide a bright-line rule[:] . . . where the government has physically invaded the claimant's land . . . or has authorized third parties to do so."[82] Without a better explanation of why *Loretto* did not apply to these facts, lower courts will not know when to use permanent physical occupation analysis, or when to employ the two-part *Nollan-Dolan* test.[83] The *Dolan* Court could have prevented all this confusion simply by applying *Loretto,* but the *Loretto* and the *Nollan-Dolan* tests now "have become so intertwined that it is difficult to distinguish between them."[84]

The *Dolan* Court may not have looked to the *Loretto* test because it wished to draw a distinction between an *unconditional regulation* authorizing a permanent physical occupation, as in *Loretto,* and a *condition* on a land use permit authorizing the same, as in *Dolan.*[85] The only practical difference between these two scenarios is that in the case of direct regulation, the government authorizes a physical occupation without bestowing any benefit at all upon the property owner, whereas in the case of a

79. *Id.* (quoting Agins v. City of Tiburon, 447 U.S. 255, 260 (1980)).

80. *Loretto,* 458 U.S. at 434-35(emphasis added). Note that *Loretto* was also decided more recently than *Agins.*

81. Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles Part I-A Critique of Current Takings Clause Doctrine,* 77 CAL. L. REV. 1299, 1333 (1989).

82. *Id.*

83. Essential nexus and rough proportionality.

84. Ross A. Macfarlane, *Testing the Constitutional Validity of Land Use Regulations: Substantive Due Process as a Superior Alternative to Takings Analysis,* 57 WASH. L. REV. 715, 726 (1982).

85. *See* STEP BACK NOTE, *supra* note 75, at 466 (explaining that the "*Nollan* Court recognized that the easement would have been a taking if it had been requisitioned by a direct regulation . . . [but] because the easement in *Nollan* was imposed as a permit condition, the Court determined that the per se rule did not necessarily apply.").

condition, the physical occupation occurs only when the property owner decides to pursue a land use permit, ultimately incurring the benefit of being able to develop her land. This distinction is meaningless for two reasons.

First, in one scenario the Court is dealing with an immediate occupation, under the regulation, and in the other the Court faces a potential future occupation, under the permit condition. This distinction is similar to what Justice Stevens refers to in his dissent as a "play on words."[86] Everyone would agree that, if the condition were upheld, it eventually *would* create a permanent physical occupation, although not immediately, so there is no reason to treat it any differently from the regulation in *Loretto.*

Second, basing the distinction upon government bestowal of a benefit merely is an exercise in semantics. It is true that Dolan is receiving the benefit of being able to develop her own property, but the building owner in *Loretto* is receiving the similar benefit of being able to own and rent out a building. The only practical difference between these scenarios is that in one case the benefit predates the regulation (*Loretto*) whereas in the other the condition came first (*Dolan*). It would make little sense to grant per se protection to a property owner merely because the regulation in question postdates the relevant benefit. The *Dolan* decision, however, will facilitate the above result.

With takings analysis in its current disjointed state, courts would have been better off had the *Dolan* Court clarified existing takings precedents. Had the Court applied *Loretto,* lower courts, lawyers and scholars may have been afforded a reason why *Nollan* did not fall under the *Loretto* rubric. The Court potentially could have dispensed with *Nollan* entirely in favor of the more refined, bright-line physical occupation test, but it did not. All that *Dolan* represents is the Court's tendency to approach complicated problems in ad hoc style, rather than trying to develop universal governing principles.

If the Court continues to follow the *Nollan* and *Dolan* trail, distinctions between existing takings tests will blur to the point of unmanageability. In the future, the Court needs to refine its takings doctrine and develop general principles to guide lower

86. *Dolan,* 114 S. Ct. at 2326. *But see* Nollan v. California Coastal Commission, 107 S. Ct. 3141, 3147-48 (1987) (reasoning that because the Commission could deny legitimately a permit to the Nollans, it logically ought to be able to take the less drastic step of conditioning the grant of a permit on fulfillment of certain requirements).

courts as takings litigation becomes more complex. There have been too many decisions providing scant instruction in how to apply takings inquiry generally. The difference between physical occupation cases and situations requiring an "essential nexus"-"rough proportionality" analysis has never been enunciated clearly, and the Court has forgone its most recent opportunity to do so. The Court has had many chances to take positive steps toward consolidating and clarifying takings doctrine, and, barring a radical change in the Court's composition, it seems doubtful that it will take advantage of such opportunities in the future.

Damon Christian Watson

IMPLIED LIABILITY UNDER § 10(b) OF THE SECURITIES ACT OF 1934: *Central Bank v. First Interstate Bank*, 114 S. Ct. 1439 (1994).

On two separate occasions the Supreme Court has reserved the question of whether or not § 10(b)[1] of the Securities Exchange Act of 1934 imposes private civil liability on those who aid or abet the commission of a manipulative or deceptive act in connection with the purchase or sale of securities.[2] Every Court of Appeals to have considered the issue, however, has applied common law

1. Section 10(b) provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange— . . . .
>
> "(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [SEC] may prescribe. . . ."

15 U.S.C.A. § 78j(b)(1981). Rule 10b-5 provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
>
> (a) to employ any device, scheme, or artifice to defraud,
>
> (b) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make statements made, in the light of the circumstances in which they were made, not misleading, or
>
> (c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

17 C.F.R. § 240.10b-5 (1990).

2. *Cf.* Herman & MacLean v. Huddleston, 459 U.S. 375, 379, n. 5 (1983); *see* Ernst & Ernst v. Hochfelder, 425 U.S. 185, 191-192, n. 7 (1976). For a general discussion of aiding and abetting doctrine prior to Central Bank v. First Interstate Bank, 114 S. Ct. 1439 (1994), *see* Alan R. Bromberg & Lewis D. Lowenfels, *Aiding and Abetting Securities Fraud: A Critical Examination*, 52 ALB. L. REV. 637 (1988).

principles[3] to conclude that such liability exists under the Act.[4] Last term, in *Central Bank v. First Interstate Bank*,[5] the Court, relying heavily on the statutory text of § 10(b), determined that a private plaintiff may not recover from an aider and abettor of a § 10(b) violation. The Court's heavy reliance upon the statutory language to determine conduct actionable under § 10(b) significantly jeopardizes the existence of at least two other forms of secondary liability under the securities laws and may portend the eventual elimination of all private civil liability under § 10(b).

In 1986 and 1988, the Colorado Springs-Stetson Hills Public Building Authority (the "Authority") issued bonds secured by landowner assessment liens to finance public improvements at Stetson hills, a planned residential and commercial development in Colorado Springs. In 1988, petitioner Central Bank, serving as indenture trustee for the bond issues, agreed with the developer (AmWest) to delay independent review of the 1988 appraisal of the land subject to the liens until after the closing on the 1988 bond issue, although the bond covenant required that the land subject to the liens be worth at least 160% of the bonds' outstanding principal and interest at all times. Before the independent review was complete, the Authority had defaulted on the 1988 bonds.[6]

Respondent First Interstate sued, *inter alia*, Central Bank as an aider and abettor of violations of § 10(b) of the Securities Ex-

3. Daniel Fischel, *Secondary Liability Under Section 10(b) of the Securities Act of 1934*, 69 CAL. L. REV. 80, 94 (1981).

4. Eleven Courts of Appeals had addressed the issue; *see, e.g.*, Farlow v. Peat, Marwick, Mitchell & Co., 956 F.2d 982, 986 (10th Cir. 1992); Levine v. Diamanthuset, Inc., 950 F.2d 1478, 1483 (9th Cir. 1991); K & S Partnership v. Continental Bank, 952 F.2d 971, 977 (8th Cir. 1991); Schatz v. Rosenberg, 943 F.2d 485, 496 (4th Cir. 1991); Fine v. American Solar King Corp., 919 F.2d 290, 300 (5th Cir. 1990); Schlifke v. Seafirst Corp., 866 F.2d 935, 947 (7th Cir. 1989); Schneberger v. Wheeler, 859 F.2d 1477, 1480 (11th Cir. 1988); Moore v. Fenex, Inc., 809 F.2d 297, 303 (6th Cir.), *cert. denied sub nom.* Moore v. Frost, 483 U.S. 1006 (1987); Cleary v. Perfectune, Inc., 700 F.2d 774, 777 (1st Cir. 1983); IIT v. Cornfeld, 619 F.2d 909, 922 (2d Cir. 1980); Monsen v. Consolidated Dressed Beef Co., 579 F.2d 793, 799-800 (3d Cir. 1978). The first and leading case to impose aiding and abetting liability was Brennan v. Midwestern United Life Ins. Co., 259 F. Supp. 673 (N.D. Ind. 1966). Some courts of appeals, however, have questioned the appropriateness of such liability. *See* Latigo Ventures v. Laventhol & Horwath, 876 F.2d 1322, 1327 (7th Cir. 1989) (questioning the appropriateness of "judicial creativity in borrowing that criminal-law concept [of aiding and abetting] for use in securities law."). The Seventh Circuit, one commentator notes, "has formulated an extremely stringent aiding and abetting standard that effectively insulates accountants from liability under that theory." Timothy M. Metzger, Comment, *Abandoning Accountants' Liability for Aiding and Abetting 10b-5 Securities Fraud*, 87 Nw. U. L. REV. 1374, 1393 (1993).

5. 114 S.Ct. 1439 (1994).

6. *Id.* at 1443.

change Act of 1934 by the Authority. The United States District Court for the District of Colorado granted summary judgment for Central Bank on the ground that First Interstate had failed to raise a genuine issue of material fact as to the element of Central Bank's scienter.[7] On appeal, the Tenth Circuit reversed. Although the Tenth Circuit agreed with the lower court that First Interstate had not established that Central Bank had a duty to disclose under the terms of the indenture,[8] the appeals court held that recklessness was sufficient scienter for aiding and abetting liability under § 10(b)[9] when the alleged aider and abettor takes affirmative action to assist the primary violation.[10] Finding that First Interstate had established a genuine element of material fact as to Central Bank's recklessness, the Tenth Circuit remanded the case to the district court.[11]

The Supreme Court reversed. Writing for the Court, Justice Kennedy[12] held that a private plaintiff is not entitled to seek relief for the aiding and abetting of a § 10(b) violation. He explained that, whereas, when determining the *elements* of a private cause of action under § 10(b), the Court must "infer how the 1934 Congress would have addressed the issue,"[13] the text of the statute itself controls the determination of the *scope* of conduct prohibited by § 10(b).[14] This reliance on the text of the statute,

7. *See* First Interstate Bank of Denver v. Pring, 969 F.2d 891, 900 (10th Cir. 1992). First Interstate had argued that Central Bank had been reckless in its agreeing to postpone the review of the appraisal. The district court determined that without a duty to disclose, recklessness does not satisfy the scienter requirement for aider and abettor liability under § 10(b) where the accusation is of fraudulent non-disclosure. *Id.*

8. *Id.* The Trust Indenture Act of 1939 provides that the indenture "may provide that, prior to default" of the issuer, the trustee shall not be liable except for those duties "specifically set out" in the indenture. 15 U.S.C.A. 77ooo(a)(1)(1981).

9. 969 F.2d at 901. *See* Hackbart v. Holmes, 675 F.2d 1114, 1117 (10th Cir. 1982); Van Dyke v. Coburn Enterprises, Inc., 873 F.2d 1094, 1100 (8th Cir. 1989) ("The majority rule in the Courts of Appeals is that recklessness satisfies this scienter requirement").

10. *First Interstate Bank*, 969 F.2d at 903.

11. *Id.* at 905. The Tenth Circuit set out, as it interpreted it, the three elements of a § 10(b) aiding and abetting cause of action: (1) a primary violation of § 10(b) by another; (2) knowledge by the aider and abettor as to the existence of the primary violation; and (3) substantial assistance given to the primary violator by the aider and abettor. *Id.* at 898. The court also found that a trier of fact reasonably could have found that Central Bank's agreement to delay the updated appraisal substantially assisted the § 10(b) violation by the developer. *Id.* at 904. For a general description of the elements of aiding and abetting actions under § 10(b) in the circuit courts, see John T. Vangel, Note, *A Complicity-Doctrine Approach to Section 10(b) Aiding and Abetting Civil Damages Actions*, 89 COLUM. L. REV. 180 (1989).

12. Justice Kennedy was joined by Chief Justice Rehnquist and Justices O'Connor, Scalia, and Thomas.

13. 114 S. Ct. 1439, 1446 (1994) (internal quotations and citations omitted).

14. *Id.*

he noted, was consistent both with previous decisions identifying the types of behavior prohibited by the provision[15] and with decisions interpreting other provisions of the securities acts.[16]

Justice Kennedy rejected the argument that although "the language of Section 10(b) does not in terms mention aiding and abetting,"[17] the "directly or indirectly" language of § 10(b) is broad enough to cover aiding and abetting liability.[18] He explained that "Congress knew how to impose aiding and abetting liability when it chose to do so," and had it intended to impose such liability under § 10(b), the Court "presume[d] it would have used the words 'aid' and 'abet' in the statutory text."[19] Accordingly, Justice Kennedy concluded that the text of the 1934 Act does not reach those who aid and abet a § 10(b) violation, a conclusion that "resolves the case."[20]

As an alternative grounds for decision, Justice Kennedy explained that if the statute itself did not provides a means of resolution the Court would employ a means of statutory interpretation first developed in *Musick, Peeler & Garrett v. Employers Ins. of Wausau*[21] and attempt to infer "how the 1934 Congress would have addressed the issue[s] had the 10b-5 action been included as an express provision in the 1934 Act."[22] The Court turned to the express private causes of action in the securities Acts as the primary model for the § 10(b) private action on

15. *See Ernst & Ernst*, 425 U.S. at 197 (quoting Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 756 (1975) (Powell, J., concurring)); Chiarella v. United States, 445 U.S. 222, 226 (1980); Santa Fe Industries Inc. v. Green, 430 U.S. 462, 472 (1977).

16. *See* Pinter v. Dahl, 486 U.S. 622 (1988) (defining "seller" in § 12(l) of the 1934 Act by reference to the language of the section).

17. *Central Bank*, 114 S.Ct. at 1447 (internal quotations and citations omitted).

18. *Id.*

19. *Id.* at 1448. The Court also reasoned that aiding and abetting liability "extends beyond persons who engage, even indirectly, in a proscribed activity. . . ." *Id.* at 1447. Moreover, other provisions of the 1934 Act use that language in a way that does not impose aiding and abetting liability. *Id.* at 1447-48 (citing provisions).

20. *Id.* at 1448.

21. 113 S. Ct. 2085, 2090 (1993). The attempt to infer the intent of the 1934 Congress was originally developed as a means of determining the *elements* of a private cause of action under § 10(b) rather than the *scope* of conduct prohibited by that section. *Central Bank*, 114 S. Ct. at 1446. The majority's use of that methodology in *Central Bank* to determine the scope of conduct prohibited by § 10(b) is unprecedented.

22. *Central Bank*, 114 S. Ct. at 1446 (internal quotations and citation omitted). Notwithstanding the absence of statutory language to that effect, the first court to recognize a private cause of action under Rule 10b-5 was Kardon v. National Gypsum Co., 69 F. Supp. 512 (E.D. Pa. 1946). The Supreme Court has noted that "[a]lthough § 10(b) does not by its terms create an express civil remedy for its violation, and there is no indication that Congress, or the Commission when adopting Rule 10b-5, contemplated such a remedy, the existence of a private cause of action for violations of the statute and the rule is now well established." *Ernst & Ernst*, 425 U.S. at 196 (internal citations omitted).

the assumption that if the 73d Congress had enacted a private § 10(b) right of action, "it likely would have designed it in a manner similar to the other private rights of action in the securities Acts."[23] Examining Sections 11 and 12 of the 1933 Act, and Sections 9, 16, 18, and 20A of the 1934 Act, the Court concluded that "[f]rom the fact that Congress did not attach private aiding and abetting liability to any of the express causes of action in the securities Acts, we can infer that Congress likely would not have attached aiding and abetting liability to § 10(b) had it provided a private § 10(b) cause of action."[24]

The Court proceeded to dismiss the respondents' remaining arguments as well. First, the Court rejected the argument that Congress legislated against a background of general tort law imposition of aiding and abetting liability for both civil and criminal actions and thus implicitly intended aiding and abetting liability under § 10(b), observing rather that Congress has taken a "statute by statute approach to civil aiding and abetting liability."[25] Although aiding and abetting is an ancient criminal law doctrine,[26] its application to civil tort law has been "uncertain", such that it is unlikely that Congress intended to impose such liability absent statutory language to that effect.[27] That some pro-

23. *Central Bank*, 114 S. Ct. at 1448 (citing Musick, Peeler & Garrett v. Employers Ins. of Wausau, 113 S. Ct. 2085, 2089-92 (1993)).

24. *Id.* at 1449. In support of this conclusion the Court cited *Musick, Peeler*, 113 S. Ct. at 2091 ("[C]onsistency requires us to adopt a like contribution rule for the right of action existing under rule 10b-5") (internal quotations omitted). The majority in *Central Bank* also explained that allowing the imposition of aiding and abetting liability would "circumvent the reliance requirement" for recovery under rule 10b-5, and thus would "disregard the careful limits on 10b-5 recovery mandated by . . . earlier cases." *Central Bank*, 114 S. Ct. at 1450.

25. *Central Bank*, 114 S. Ct. at 1451 (citing, *inter alia*, the Internal Revenue Code, 26 U.S.C. § 6701 (1988 ed. and Supp. IV); the Commodity Exchange Act, 7 U.S.C. § 25(a); the National Bank Act, 12 U.S.C. § 93(b)(8) (1988 ed. and Supp. IV); the Federal Reserve Act, 12 U.S.C. § 504(h) (1988 ed. and Supp. IV); and the Packers and Stockards Act, 1921, ch. 64, § 202, 42 Stat. 161, 7 U.S.C. § 192(g)).

26. Respondent had argued that Congress's implicit intent was reflected in 18 U.S.C. § 2, which extends aiding and abetting liability to all federal criminal offenses. 18 U.S.C.A. § 2 (1981). Much later in the opinion, the Court explained that it had historically been "quite reluctant to infer a private right of action from a criminal prohibition alone." *Central Bank*, 114 S. Ct. at 1455. Though technically a violation of § 10(b) is a criminal violation, the Court refused to recognize the availability of an aiding and abetting action under 18 U.S.C. § 2 because to do so would require that a civil aiding and abetting cause of action be available for every other provision of the act. From that point, "[e]very criminal statute passed for the benefit of some particular class of persons would carry with it a concomitant civil damages cause of action . . . [which] would work a significant shift in settled interpretative principles regarding implied causes of action" that the Court was not willing to undertake. *Id.*

27. *Central Bank*, 114 S. Ct. at 1450-51.

visions of the Securities laws explicitly impose secondary liability[28] while others do not "indicates a deliberate congressional choice with which the courts should not interfere. . . .it is not plausible to interpret the statutory silence as tantamount to an implicit congressional intent to impose § 10(b) aiding and abetting liability."[29]

Secondly, respondents argued that Congress has amended the securities laws on various occasions since lower courts began imposing § 10(b) aiding and abetting liability without amending those laws to foreclose such liability.[30] Refusing to apply acquiescence doctrine as a means of extracting implicit congressional intent, the Court stated that these arguments "deserve little weight in the interpretative process . . . . Congress has acknowledged the 10b-5 action without any further attempt to define it. We find our role limited when the issue is the scope of conduct prohibited . . . and we adhere to the statutory text in resolving it."[31]

Finally, the Court rejected both as inapposite and substantively unpersuasive the petitioner's policy arguments regarding the desirability of aiding and abetting liability under § 10(b). Outlining the social costs of such liability (with fleeting reference to the possibility of arguments in favor of it), the Court explained that the policy arguments advanced failed to demonstrate that the 1934 Congress would have decided that the statutory purposes of § 10(b) would have been furthered by the imposition of aiding and abetting liability.[32]

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28. Secondary liability in this context embraces two meanings. First, the term is used to describe liability placed upon those who have not violated the express prohibition of the security statute but who have some relationship with the primary wrongdoer. Prior to this decision, courts had imposed this type of secondary liability on defendants who aid and abet, conspire with, or employ someone who does violate the express prohibition of a statute. The second usage is that imposed under Section 20 of the 1934 Act upon persons who "contro[l] any person liable under any provision of this chapter or of any rule or regulation thereunder." *Id.* at 1451-52 (internal quotations omitted). *See* Fischel, *supra* note 3, at 80 n.4. The majority's opinion follows closely Professor Fischel's criticism of aiding and abetting liability. Professor Fischel concludes that the language and legislative history of § 10(b) do not support the imposition of secondary liability under § 10(b) or other sections of the securities statutes where not expressly provided for. Fischel, *supra* note 3, at 111.

29. *Central Bank*, 114 S. Ct. at 1452.

30. *Id.*

31. *Id.* at 1453 (citations omitted). For the same reason, the Court also rejected petitioners' arguments that implicit congressional intent could be inferred from failed attempts in 1957, 1959, and 1960 by Congress to amend the securities Acts to explicitly forbid aiding and abetting a violation of the 1934 Act. *Id.*

32. *Id.* at 1453-54.

Writing in dissent, Justice Stevens[33] sharply criticized the Court for disregarding a significant body of case law[34] and, in the process, threatening other established forms of secondary liability not expressly addressed in the securities laws. Noting that the early aiding and abetting decisions relied upon principles borrowed from tort law, Justice Stevens explained that "in those cases judges closer to the times and climate of the 73d Congress . . . concluded that holding aiders and abettors liable was consonant with the 1934 Act's purpose to strengthen the antifraud remedies of the common law."[35] Furthermore, Justice Stevens reminded the Court of the backdrop of the liberal construction of remedial statutes and judicial favor towards implied rights of action against which § 10(b) was enacted.[36] He criticized the Court for risking "anachronistic error" by applying its strictly textual, modern approach to statutory interpretation to a statute enacted in a period where courts read remedial statutes broadly and "regularly approved rights to sue despite statutory silence."[37]

Justice Stevens also criticized the majority for disturbing a settled construction of an important federal statute. The longstanding failure of Congress to prohibit aider and abettor liability, he warned, should mandate hesitation from a court asked to make that decision.[38] Moreover, Congress left "untouched" the extensive body of case law approving such liability in its 1975 revision of the Exchange Act.[39] The legislature, rather than the Court, should be left the task of limiting the established scope of conduct prohibited by § 10(b).[40]

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33. Justice Stevens was joined by Justices Blackmun, Souter, and Ginsberg.

34. *Central Bank*, 114 S. Ct. at 1456 (Stevens, J., dissenting) ("In *hundreds* of judicial and administrative proceedings in every circuit in the federal system, the courts and the SEC have concluded that aiders and abettors are subject to liability under § 10(b) and Rule 10b-5.").

35. *Id.* at 1457. Brennan v. Midwestern United Life Insurance, 259 F. Supp. 673 (N.D. Ind. 1966), described the aiding and abetting theory as a " 'logical and natural complement' to the private § 10(b) action . . . ." *Central Bank*, 114 S. Ct. at 1456.

36. *Central Bank*, 114 S. Ct. at 1457.

37. *Id.*

38. *Id.* at 1458.

39. *Id.* He also reminded the Court that those amendments "emerged from the most searching reexamination of the competitive, statutory, and economic issues . . . since the 1930's." *Id.* at 1458 n.8 (internal quotations and citations omitted).

40. *Id.* at 1459. The extent of the Court's unwillingness to look beyond the text of the statute to infer Congressional intent from legislative acquiescence is highlighted by Justice Stevens' observation that the majority's rationale would forbid even the SEC from pursuing aiders and abettors in civil enforcement actions, although a criminal aiding and abetting prosecution would still presumably be available under 18 U.S.C. § 2. *Id.* at 1460.

Justice Stevens suggested that the Court would have made a more persuasive argument had it shown that aider and abettor liability was inconsistent with the purpose and effective operation of the securities laws.[41] Without such a showing, he cautioned against using a rigid textual reading of the statute to eliminate rights of action that had been recognized for decades. Moreover, he felt that the majority's method has greater implications, shedding doubt on the availability of other forms of secondary liability long recognized by the SEC and the courts but not specifically provided for in the language of the relevant statute.[42]

The dissent in *Central Bank* warned that the availability of "other" forms of secondary liability under § 10(b) long recognized by lower courts and the SEC are now cast in "serious doubt" by the rationale of the Court.[43] In the process of eliminating aiding and abetting liability, the Court has endorsed a theory of interpretation of the securities laws that, if followed in the future, would eliminate both conspiracy liability under § 10(b) and respondeat superior liability under section 15 of the Securities Act of 1933 and section 20(a) of the Securities Exchange Act of 1934.[44]

Conspiracy liability has been applied occasionally in sale of control cases where aggrieved shareholders have alleged in a derivative action that the officers and directors of the corporation had conspired to defraud the corporation.[45] Although the published opinions of such suits are not common, the few lower courts to have found such liability to exist have, like *Kardon*, relied upon tort and common law concepts as the basis for such liability.[46] Similarly, the common law principle of respondeat superior has been applied to overcome the good faith defense of controlling persons to liability under sections 15 and 20.

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41. *Central Bank*, 114 S. Ct. at 1459.

42. *Id.* at 1460.

43. *Id.*

44. Fischel, *supra* note 3, at 84-87. Not all private actions previously brought as aiding and abetting actions are necessarily precluded, however, after *Central Bank*. Timothy M. Metzger argues that many of the cases previously brought as aiding and abetting claims for securities fraud under § 10(b) actually constitute primary violations of the statute under the "in connection with" language. Metzger, *supra* note 4, at 1402-14.

45. Fischel, *supra* note 3, at 85. The first case in which an implied private right of action was recognized involved an action alleging conspiracy. Kardon v. National Gypsum Co., 69 F. Supp. 512 (E.D. Pa. 1946).

46. Fischel, *supra* note 3, at 85.

"Controlling" persons[47] of primary wrongdoers are liable for violations of section 15 of the Securities Act of 1933 and section 20(a) of the Securities Exchange Act of 1934.[48] Both sections, however, provide a good faith defense to such liability if the controlling person can show that he exercised reasonable internal supervision over the primary violator against securities violations.[49] Although some have disagreed, the majority of courts of appeals have allowed private plaintiffs to sue "controlling" defendants under the theory of respondeat superior in § 10(b) actions, thereby precluding the use of the good faith defense.[50]

The Court's willingness to rely on the statutory text of § 10(b) to determine the scope of conduct prohibited by the securities acts may jeopardize the existence of § 10(b) private civil liability altogether. Although the Court has repeatedly recognized the availability of a private civil action under § 10(b),[51] the Court's heavy reliance in *Central Bank* on the statutory text of § 10(b) to overturn decades of lower court decisions suggests that it will narrowly interpret the scope of implied liability under § 10(b) in the future.[52] Moreover, the Court in *Central Bank* was willing to decide the case on the basis of the statutory text alone, text that also does not explicitly provide for private civil liability. Alternatively, the Court may employ the *Musick, Peeler* rationale to infer the intent of the 1934 Congress. In *Central Bank*, the Court inferred such congressional intent from the absence of statutory language in § 10(b) imposing private civil aiding and abetting liability as compared to other express private causes of action imposing aiding and abetting liability in the securities acts. Either method of statutory interpretation suggests that the future of pri-

47. The Securities and Exchange regulations provide that "control" is "the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise." 17 C.F.R. 230.405 (1994).

48. Fischel, *supra* note 3, at 86. Section 15 of the 1933 Act, 15 U.S.C. § 77o (1976) provides that a controlling person shall be liable "unless the controlling person had no knowledge of or reasonable ground to believe in the existence of the facts by reason of which the liability of the controlled person is alleged to exist." Section 20(a) of the 1934 Exchange Act, 15 U.S.C. § 78t(a) (1976), provides that a controlling person shall be liable "unless the person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action."

49. Fischel, *supra* note 3, at 86 (citing Zweig v. Hearst Corp., 521 F.2d 1129, 1134-35 (9th Cir.), *cert. denied*, 423 U.S. 1025 (1975)).

50. Fischel, *supra* note 3, at 86 (citing cases).

51. *See, e.g.*, Superintendent of Ins. v. Bankers Life & Cas. Co., 404 U.S. 6, 13 n.9 (1971); Affiliated Ute Citizens v. United States, 406 U.S. 128, 150-54 (1972).

52. *See* Jonathan Eisenberg, *Supreme Court Overturns Aiding and Abetting Liability*, C938 A.L.I.-A.B.A. 581, 590 (June 17, 1994).

vate civil liability for even a primary violation of § 10(b) may be in jeopardy.

Given the absence of express statutory language confirming a congressional desire for conspiracy or respondeat superior liability under the relevant sections of the securities laws, the principle espoused by the majority for precluding aiding and abetting liability jeopardizes the existence of these other forms of secondary liability for a primary violation of 10b-5.[53] The emphasis on the statutory text implicitly rejects the tort law origin of the private right of action for 10b-5 violations originally established in *Kardon v. National Gypsum Co.*[54] and jeopardizes the existence of private civil liability under § 10(b) for even primary violations. Future consideration of the identity of § 10(b) private civil liability will test the Court's commitment to its two methods of statutory interpretation in the securities context, and the availability of a private civil remedy under § 10(b) will be a function of the Court's willingness to overlook inconsistency.

James P. Berklas, Jr.

COMMUNITY AESTHETICS AND SPEECH REGULATION: *City of Ladue v. Gilleo*, 114 S. Ct. 2038 (1994).

The First Amendment to the United States Constitution declares that "Congress shall make no law . . . abridging the free-

53. The "directly or indirectly" language of § 10(b) may provide statutory authorization for conspiracy and respondeat superior liability in this context. However, no court has of yet imposed such liability on this basis. *See* Fischel, *supra* note 3, at 94 n.83.

54. 69 F. Supp. 512 (E.D. Pa. 1946). In that case the court relied upon section 286 of the Restatement of Torts in rejecting the argument that the failure of Congress to expressly provide for a private remedy meant that Congress did not intend for one to exist. *Id.* at 513. Fischel goes so far as to say that "[o]nly by reliance upon tort law principles, rather than congressional intent, did the court imply a private remedy under section 10(b) and rule 10b-5." Fischel, *supra* note 3, at 90. *See, e.g.*, Ernst & Ernst v. Hochfelder, 425 U.S. at 197-201 (using the common law concept of scienter to establish a liability threshold); *see also* Vangel, *supra* note 11, at 191-92 (noting that "[c]ourts historically have incorporated common-law principles to define the substance of the judicially implied private cause of action under § 10(b)). Along with this practice, 10(b) aiding and abetting liability was originally adopted from, and shaped by, common-law complicity theory. This reliance on complicity theory was presumptively consistent with legislative intent to promote certain substantive policies behind 10(b) because of the well-established role that the complicity-liability construct had played in other legal settings."). *See also* SEC v. Coffey, 493 F.2d 1304 (6th Cir. 1974), *cert. denied*, 420 U.S. 908 (1975).

dom of speech . . . ."[1] Yet experience has shown this protection of individual liberty to be something less than absolute[2]—at times it must be limited or even sacrificed altogether in favor of other social priorities which are held to be superior.[3] Tracing Supreme Court precedent in the area of speech restriction is far from a simple task; over the years a plethora of tests have been applied to regulations on speech.[4] Last Term, in *City of Ladue v. Gilleo*,[5] the Supreme Court held unconstitutional a statute prohibiting the display of most signs at private homes. Although the case presented an opportunity to clarify a confused area of the law, the Court instead opted for a vaguely-defined approach which is likely to make the law of speech regulation even more murky than before.

Respondent Margaret P. Gilleo, a resident of the city of Ladue,[6] placed on her front lawn in December 1990 a 24- by 36-inch sign reading "Say No to War in the Persian Gulf, Call Congress Now."[7] The sign was stolen and a replacement sign erected by Gilleo was knocked to the ground.[8] When Gilleo reported these events to the police, she was informed that such signs were prohibited by a Ladue ordinance which banned nearly all signs in residential areas.[9] After the city council denied her a variance

1. U.S. CONST. amend. I. The First Amendment is made applicable to the States through the Fourteenth Amendment, *see* Gitlow v. New York, 268 U.S. 652 (1925).

2. *See* William J. Brennan, Jr., *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1, 4-5 (1965).

3. For categories of speech receiving less than full protection, *see, e.g.*, Roth v. United States, 354 U.S. 476 (1957) (obscenity); Beauharnais v. Illinois, 343 U.S. 250 (1952) (libel); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) ("fighting words"). For discussion of these categories, *see* ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 19-21 (1960); Brennan, *supra* note 2, at 5-9.

4. *See, e.g.*, City of Renton v. Playtime Theaters, Inc., 475 U.S. 41 (1986) ("secondary effects" test); Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984) (expressive conduct); Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981) (plurality opinion) (commercial vs. noncommercial speech); Brandenburg v. Ohio, 395 U.S. 444 (1969) (content-based restrictions); Cox v. New Hampshire, 312 U.S. 569 (1941) (content-neutral restrictions). *See generally* LAURENCE H. TRIBE, CONSTITUTIONAL CHOICES 218 (1985) (arguing that the Court's "pigeonholing" method of dealing with First Amendment cases can lead to ridiculous results); Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 47-54 (1987) (describing various approaches taken by the Supreme Court in speech regulation cases and arguing that many of these tests are duplicative in practice).

5. 114 S. Ct. 2038 (1994).

6. Ladue is a suburb of St. Louis, Missouri.

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

8. *Id.*

9. *See id.* Ninety-seven percent of the City of Ladue is zoned for residential use. *See id.* at 2040 n.2. The term "sign" is defined expansively by both the original ordinance and its replacement. *See infra* note 12.

to display her sign, Gilleo filed suit under 42 U.S.C. § 1983 against the City of Ladue, its mayor, and members of its city council, alleging that the ordinance violated her First Amendment right to free speech. The District Court issued a preliminary injunction against the enforcement of the Ladue statute.[10]

Subsequently, Gilleo placed an 8.5- by 11-inch sign in a second story window of her home. This new sign read "For Peace in the Gulf."[11] The city council responded by repealing its original sign prohibition and enacting a new ordinance which banned all signs, including window signs,[12] which did not fall under one of ten delineated exemptions.[13] The stated purpose of the new law was to preserve community aesthetics.[14] Gilleo amended her complaint to challenge the new ordinance, and the District Court granted a permanent injunction.[15]

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10. Gilleo v. City of Ladue, 774 F. Supp. 1559 (E.D. Mo. 1991).

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

12. *See id.* at 2040-41. Section 35-1 of the second Ladue ordinance defines "sign" broadly as:

> A name, word, letter, writing, identification, description, or illustration which is erected, placed upon, affixed to, painted or represented upon a building or structure, or any part thereof, or any manner upon a parcel of land or lot, and which publicizes an object, product, place, activity, opinion, person, institution, organization or place of business, or which is used to advertise or promote the interests of any person. The word "sign" shall also include "banners", "pennants", "insignia", "bulletins [sic] boards", "ground signs", "billboard[s]", "poster billboards", "illuminated signs", "projecting signs", "temporary signs", "marquees", "roof signs", "yard signs", "electric signs", "wall signs", and "window signs", wherever placed out of doors in view of the general public or wherever placed indoors as a window sign.

Id. at 2040 n.5.

13. *See id.* at 2041. The exemptions, listed in Sec. 35-4 of the statute, include:

> "[M]unicipal signs"; "[s]ubdivision and residence identification" signs; "[r]oad signs and driveway signs for danger, direction, or identification"; "[h]ealth inspection signs"; "[s]igns for churches, religious institutions, and schools" (subject to restrictions set forth in the statute); "identification signs" for not-for-profit organizations; signs "identifying the location of public transportation stops"; "[g]round signs advertising the sale or rental of real property" (subject to conditions set forth in the statute); "[c]ommercial signs in commercially zoned or industrially zoned districts" (subject to restrictions set forth in the statute); and signs that "identif[y] safety hazards."

Id. at 2041 n.6.

14. The second ordinance contains a "Declaration of Findings, Policies, Interests, and Purposes," which states in part:

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

Id. at 2041.

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

On appeal, the Eighth Circuit Court of Appeals affirmed.[16] Relying heavily on *Metromedia, Inc. v. City of San Diego,*[17] the Court of Appeals found Ladue's ordinance to be a "content-based" restriction on speech, since it favored commercial speech over noncommercial speech and discriminated among types of noncommercial speech.[18] Accordingly, the court subjected the statute to strict scrutiny, requiring the city of Ladue to show that the restriction was "necessary to serve a compelling state interest" and "narrowly drawn to achieve that end."[19] Although Ladue's interest in preserving community aesthetics was found to be "substantial," it was "not sufficiently 'compelling' to support a content-based restriction."[20] The Court of Appeals also had "no trouble concluding that Ladue's ordinance is not the least restrictive alternative" by which to advance the desired end. Therefore, the law was not narrowly tailored and the court held it unconstitutional.[21]

The Supreme Court affirmed.[22] Writing for a unanimous Court, Justice Stevens identified "two analytically distinct grounds for challenging the constitutionality of a municipal ordinance regulating the display of signs."[23] An ordinance may "in effect restrict[ ] too little speech because its exemptions discriminate on the basis of the signs' messages,"[24] or it may be void "on the ground that [it] simply prohibit[s] too much protected speech."[25] Eschewing the usual approach of first determining the content-based or content-neutral nature of the statute at issue, the Court "assume[d], *arguendo,* the validity of the City's submission that the various exemptions are free of impermissible content or viewpoint discrimination."[26]

Justice Stevens argued that while Ladue's interest in "minimizing . . . visual clutter" is "concededly valid," the ordinance "has almost completely foreclosed a venerable means of communica-

16. Gilleo v. City of Ladue, 986 F.2d 1180 (8th Cir. 1993).
17. 453 U.S. 490 (1981) (plurality opinion).
18. *Gilleo,* 986 F.2d at 1182.
19. *Id.* at 1183.
20. *Id.* at 1183-84.
21. *Id.* at 1184.
22. *See* City of Ladue v. Gilleo, 114 S. Ct. 2038 (1994).
23. *Id.* at 2043.
24. *Id. See* Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 512-17 (1981) (plurality opinion).
25. *Gilleo,* 114 S. Ct. at 2043. *See Metromedia,* 453 U.S. at 525-34 (Brennan, J., concurring in the judgment).
26. *Gilleo,* 114 S. Ct. at 2044.

tion that is both unique and important."[27] The Court acknowledged the nature of the ordinance as a "time, place, or manner" restriction on speech, but because no adequate substitute was available for the prohibited means of expression, the ban was impermissible.[28] A handheld sign might not convey the desired message as effectively as the method Gilleo chose, and "persons of modest means or limited mobility" might have no practical alternative to this "unusually cheap and convenient form of communication."[29] Justice Stevens also emphasized that "[d]isplaying a sign from one's own residence often carries a message quite distinct from placing the same sign somewhere else."[30] The Court concluded that the statute prohibited too much protected speech and therefore could not stand.

Although she joined the majority opinion, Justice O'Connor also wrote a separate concurrence.[31] Expressing surprise at the Court's willingness to presume the absence of a discriminatory motive behind Ladue's enactment of the statute,[32] she questioned the Court's departure from the traditional method of analyzing speech-restricting statutes, under which a court first determines whether the statute is "content-based" or "content-neutral" and then applies the proper level of scrutiny.[33] Justice O'Connor argued that while this approach has met with some criticism, "no better alternative has yet come to light."[34] In her

27. *Id.* at 2045.

28. *Id.* at 2046. *Cf.* Schneider v. State, 308 U.S. 147, 163 (1939) ("[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.")

29. *Gilleo*, 114 S. Ct. at 2046. *Cf.* Martin v. Struthers, 319 U.S. 141, 146 (1943) ("Door to door distribution of circulars is essential to the poorly financed causes of little people."). *Cf.* TRIBE, *supra* note 4, at 188-220 (arguing that the supposedly "neutral" principles applied by the Court in First Amendment cases tend to favor the rich and powerful at the expense of the rest of society).

30. *Gilleo*, 114 S. Ct. at 2046. Justice Stevens argued, for example, that:

> A sign advocating "Peace in the Gulf" in the front lawn of a retired general or decorated war veteran may provoke a different reaction than the same sign in a 10-year-old child's bedroom window or the same message on a bumper sticker of a passing automobile. An espousal of socialism may carry different implications when displayed on the grounds of a stately mansion than when pasted on a factory wall or an ambulatory sandwich board.

Id.

31. *See id.* at 2047 (O'Connor, J., concurring).

32. *See id.* Justice O'Connor asserted that the Ladue ordinance "on its face draws content distinctions" and that "[w]ith rare exceptions, content discrimination in regulations of the speech of private citizens on private property or in a traditional public forum is presumptively impermissible, and this presumption is a very strong one." *Id.*

33. *See id.*.

34. *Id.* at 2047-48.

view, speech regulation is an area of the law "where fairly precise rules are better than more discretionary and more subjective balancing tests"[35]; the predictability of the traditional rule made it superior to Justice Stevens' approach. Nonetheless, she joined the Court's opinion because she felt its reasoning did not "cast[ ] any doubt on the propriety of our normal content discrimination inquiry" and because she believed the Ladue ordinance would be invalid even if found to be content-neutral.[36]

Although the *Gilleo* Court reached the proper result, it chose an ill-advised path by which to get there. Instead of relying on the objective and well-recognized content-based/content-neutral distinction to determine the proper level of scrutiny, the Court applied a potpourri analysis combining references to elements of the traditional content test with a more ad hoc balancing of private and governmental interests. In line with Justice O'Connor's concerns, this new approach will raise more questions than it answers. The scattered reasoning behind the Court's sound result opens the door for arbitrary decisionmaking and leaves governments and private citizens alike in a state of uncertainty over what types of speech restrictions are and are not permissible.

The classification of a challenged restriction as content-based[37] or content-neutral[38] plays a vital role in determining the statute's validity. A content-based restriction faces the strictest scrutiny—it must be "necessary to serve a compelling substantial state interest and . . . narrowly drawn to achieve that end."[39] A content-neutral

35. *Id.* at 2048. *See generally* Laurent B. Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424 (1962) (arguing that ad hoc balancing does not adequately define or protect the right to free speech); Stone, *supra* note 4, at 72-73 (arguing that balancing tests are inherently uncertain).

36. *Gilleo*, 114 S. Ct. at 2048 (O'Connor, J., concurring).

37. I.e., a restriction which discriminates on the basis of the subject matter of speech by prohibiting some uses of a means of expression but not others. *See, e.g.*, Consolidated Edison Co. v. Public Service Comm'n, 447 U.S. 530 (1980) (striking down a law preventing public utilities from mailing bill inserts advocating nuclear energy); Linmark Associates v. Willingboro, 431 U.S. 85 (1977) (striking down a ban on "For Sale" signs in front of homes); Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972) (striking down a ban on non-labor picketing within 150 feet of a school). *See also* Stone, *supra* note 4, at 47-48 (defining a content-based restriction).

38. I.e., a restriction which falls equally on all who make use of a means of expression, regardless of the subject of that expression. *See, e.g.*, City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789 (1984) (upholding a statute prohibiting the posting of all signs on public utility poles); Kovacs v. Cooper, 336 U.S. 77 (1949) (upholding a total ban on the use of sound trucks); Schneider v. State, 308 U.S. 147 (1939) (striking down a total ban on leafletting). *See also* Stone, *supra* note 4, at 48 (defining a content-neutral restriction).

39. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983) (citing Carey v. Brown, 447 U.S. 455, 461-62 (1980)). This is the so-called "strict scrutiny" test.

regulation faces a lesser level of scrutiny, but still must "serve a significant governmental interest and leave ample alternative channels of communication."[40] Other than restrictions on "low-value" speech such as obscenity, nearly all content-based regulations considered by the Court have been invalidated.[41]

Under the traditional analysis, a finding of content discrimination in the Ladue statute is probable.[42] The challenged ordinance in Gilleo is similar to that struck down in *Linmark Associates v. Willingboro*,[43] a case cited heavily by Justice Stevens in his opinion. In *Linmark*, the Supreme Court held unconstitutional a statute which banned the display of "For Sale" or "Sold" signs in front of residences. The Court found that the challenged regulation was content-based and, therefore, subject to strict scrutiny.[44] The ordinance challenged in *Gilleo*, which also allows residential signs for the display of some messages but not others, would appear to fall into the same category of a content-based regulation.[45] But the Court, while not tackling the content issue directly,[46] never refutes Ladue's assertion that its statute is content-neutral; instead, the Court merely "assume[s], *arguendo*" the absence of content or subject matter discrimination in the statute's application.[47] Justice Stevens stated that looking for discriminatory enforcement was unnecessary since the Court was asked only if the ban on Gilleo's sign, not the concurrent permis-

40. *Consolidated Edison Co.*, 447 U.S. at 535.

41. *See* Geoffrey R. Stone, *Restrictions of Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. CHI. L. REV. 81, 82 & n.5 (1978).

42. *See* City of Ladue v. Gilleo, 114 S. Ct. 2038, 2048 (1994) (O'Connor, J., concurring) ("[O]ur normal analytical structure in this case . . . may well have required us to examine this law with the scrutiny appropriate to content-based regulations."). The Court of Appeals reached just this conclusion in adopting the strict scrutiny approach. *See* Gilleo v. City of Ladue, 986 F.2d 1180, 1182 (8th Cir. 1993).

43. 431 U.S. 85 (1977). Perhaps it is more accurate to call *Linmark* the "mirror image" of *Gilleo*, as did Justice Stevens, since the *Linmark* statute banned only "For Sale" signs while the Ladue ordinance allows these signs but bans nearly all others. *See Gilleo*, 114 S. Ct. at 2042. Justice Marshall's opinion in *Linmark* was joined by all eight participating Justices (Justice Rehnquist took no part in the case).

44. *See Linmark*, 431 U.S. at 93-94. The town's asserted desire to preserve property values and prevent "white flight" was deemed insufficient justification for so powerfully restricting the "free flow of truthful information" to potential home buyers. *See id.* at 94-97.

45. *See* Consolidated Edison Co. v. Public Service Comm'n, 447 U.S. 530, 536 (1980) ("[A] constitutionally permissible time, place, or manner restriction may not be based upon either the content or subject matter of speech."); Police Dep't of Chicago v. Mosley, 408 U.S. 92, 99 (1972) (stating that a regulation based on subject matter "slip[s] from the neutrality of time, place, and circumstance into a concern about conduct") (citation omitted) (alteration in original).

46. Justice Stevens raises the issue of content, but leaves the analysis unfinished, preferring to move on to the overinclusiveness analysis. *See Gilleo*, 114 S. Ct. at 2043-44.

47. *Id.* at 2044.

sibility of other signs, was constitutional.[48] However, this view glosses over the full impact of content-based restrictions on speech. A restriction on one form of speech may be impermissibly content-based regardless of the level of regulation of other forms of speech. In an area as constitutionally important as the protection of free speech, the Court should more closely scrutinize the motivation behind a purportedly neutral ban which operates to exclude the communication of an unpopular point of view.[49]

Even if the law in *Gilleo* were explicitly found to be content-neutral, a finding of unconstitutionality would still be likely under the traditional analysis.[50] The only state interest advanced by the city of Ladue is an aesthetic one—the desire to preserve the residential character of the town against the encroachment of "visual clutter."[51] While the Supreme Court has characterized the aesthetic interest as substantial on several occasions,[52] the ability of aesthetics to outweigh the right to free speech—one of the most basic and fundamental rights of our society—should meet with skepticism.[53] "Community aesthetics" is an inherently subjective standard; any court reviewing such a justification must either use its own views as to what is aesthetically pleasing, or rely on the views of a majority of the community, a stance which once

48. *See id.* at n.11.

49. *See Consolidated Edison Co.*, 447 U.S. at 536; Stone, *supra* note 41, at 103-04; *see also* Stone, *supra* note 4, at 79 ("[T]he Court should be more skeptical of the claimed governmental interests and more sensitive to the interests of free speech.").

50. *See Gilleo*, 114 S. Ct. at 2048 (O'Connor, J., concurring) ("[E]ven if the restriction were content-neutral, it would still be invalid . . . .").

51. *See* "Declaration of Findings, Policies, Interests, and Purposes," *supra* note 14.

52. *See Gilleo*, 114 S. Ct. at 2044-45; City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 806-07 (1984); Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 507-08 (1981). *But see* Schneider v. State, 308 U.S. 147, 162 (1939) ("[T]he purpose to keep the streets clean and of good appearance is insufficient to justify an ordinance which prohibits a person rightfully on a public street from handing literature to one willing to receive it."). As these precedents illustrate, the Court's concern with community aesthetics is a fairly recent development, and the change has met with some criticism. *See* Harold L. Quadres, *Content-Neutral Public Forum Regulations: The Rise of the Aesthetic State Interest, the Fall of Judicial Scrutiny*, 37 HASTINGS L.J. 439, 466-68 (1986).

53. The substantiality or insubstantiality of the asserted state interest is often cited by the Court as a basis for its ultimate decision on the statute's validity. *Compare, e.g.*, Ward v. Rock Against Racism, 491 U.S. 781 (1989) (upholding a sound-amplification guideline for outdoor concerts) *and* Cox v. New Hampshire, 312 U.S. 569 (1941) (upholding a restriction on parades) *with* Martin v. Struthers, 319 U.S. 141 (1943) (striking down a ban on door-to-door leafletting) *and* Schneider v. State, 308 U.S. 147 (1939) (striking down a ban on public leafletting). Sustainable state interests seem generally to be partial restrictions on a particular mode of communication, rather than total bans. The Ladue ordinance seems especially similar to that struck down in *Spence*—it completely prohibits the expression by the use of window display of potentially controversial points of view.

again discriminates against unpopular views.[54] As such, the aesthetic interest appears to pale in comparison with the constitutionally protected right to free speech.

If the aesthetic interest were deemed substantial, conventional strict scrutiny would still lead the Court to require the city to demonstrate clearly that its regulation will advance the aesthetic interest, or apply the less restrictive alternative test in a manner that practically reviews the quality and availability of other modes of communication.[55] These approaches would strengthen the scrutiny of the Court's analysis of aesthetic justifications and encourage cities to enact laws that truly advance aesthetic goals. However, even if the Ladue regulation were allowable in public areas, Gilleo's yard is her own private property, and any government regulation of the views she may or may not express is more troublesome there than in any other location.[56]

The "captive audience" argument, which is sometimes used to sustain restrictions on speech,[57] is inapplicable in the present case. Gilleo's sign may be visible from the street, but certainly no obligation exists on the part of passersby to read it. Because the sign is in the front window, facing the street and not other homes,[58] neighbors will not be forced to see it every time they open their curtains. Any person who wishes to avoid Gilleo's message can simply look away.[59] The Ladue ordinance is surely not the "least restrictive alternative" in this setting[60]—a regula-

54. *See* Quadres, *supra* note 52, at 462-63.

55. These approaches were suggested by Quadres, *supra* note 52, at 468-74. The Court appeared to share this concern with the city's asserted aesthetic justification during oral argument, in which Justices Scalia and Ginsburg questioned why Gilleo's sign would have a greater impact on the beauty of the community than flags or "For Sale" signs would. *See* Joan Biskupic, *Justices Skeptical of Sign Ban*, WASH. POST, February 24, 1994, at A3.

56. *See Gilleo*, 114 S. Ct. at 2047 ("A special respect for individual liberty in the home has long been a part of our culture and our law . . .; that principle has special resonance when the government seeks to constrain a person's ability to *speak* there.") (citations omitted) (emphasis in original).

57. *See, e.g.*, Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) (upholding a law which permitted the leasing of advertising space on public transit vehicles for commercial but not political messages); Kovacs v. Cooper, 336 U.S. 77 (1949) (upholding a total ban on sound trucks).

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

59. *See* Quarles, *supra* note 52, at 464-65. *Cf.* Consolidated Edison Co. v. Public Service Comm'n, 447 U.S. 503, 542 (1980) (holding that utility bill inserts did not create a captive audience because recipients could simply throw the inserts away); Spence v. Washington, 418 U.S. 405, 412 (1974) (per curiam) (holding that the flying of an upside-down flag outside a window did not create a captive audience because the display could be easily avoided).

60. *Gilleo*, 986 F.2d at 1184. *See also* Frantz, *supra* note 35, at 1439 ("[T]here would seem to be no justification for putting the government's objective on one side of the scales

tion on the size of signs displayed in residential areas, for example, would counteract "visual clutter" while still protecting the individual right to freedom of expression. And the requisite "reasonable fit" between the city's aesthetic interest and the means chosen to enforce it[61] appears to be missing. Ladue's asserted concern with adverse aesthetic impact in the instant case of a second-floor window sign no larger than an ordinary piece of paper is difficult to comprehend.[62]

As shown by the lucid and well-reasoned opinion of the Eighth Circuit,[63] the Supreme Court could easily have embraced the traditional content doctrine in *Gilleo.* Justice Stevens runs through the content-based, content-neutral, least restrictive alternative, and balancing approaches in the course of his opinion for the Court. Nowhere, however, does he explicitly make clear which one or more of these tests he is relying on and which he is rejecting. In contrast, the Court of Appeals noted that the Ladue ordinance "favor[ed] commercial speech over noncommercial speech, and . . . certain types of noncommercial speech over others" and quickly categorized the ordinance as content-based.[64] As the Eighth Circuit's opinion demonstrates, *Gilleo* is not a difficult or confusing case by any means—Justice Stevens's opinion only makes it appear so.

The Supreme Court in *Gilleo* would have done better to follow an "if it ain't broke, don't fix it" approach in choosing the method for analysis of the Ladue statute. Since the Court reached the same result it would have under the traditional con-

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without first requiring a demonstration that it cannot be obtained by less restrictive methods. Surely the end cannot justify the means unless it at least requires them."); Quadres, *supra* note 52, at 454-68.

61. *See* City of Cincinnati v. Discovery Network, 113 S. Ct. 1505, 1510 (1993).

62. The content-based categorization seems especially appropriate in light of Ladue's amendment to its ordinance, specifically adding a ban on window signs after Gilleo began displaying such a sign. *See* Boos v. Barry, 485 U.S. 312, 319 (1988) (plurality opinion) (stating that "determin[ing] which viewpoint is acceptable in a neutral fashion . . . does not render the statute content neutral"); Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 516-17 (1981) (plurality opinion) (stating that distinctions based on content "take [a] regulation out of the domain of time, place, and manner restrictions"); *Gilleo,* 986 F.2d at 1182 n.5 ("[V]iewpoint neutrality does not render the statute content-neutral."). An ordinary piece of paper in a second-story window can hardly be seen from the street below, much less contribute to visual clutter in the community. At this point it appears that Gilleo's message, not her medium, is what the city wishes to foreclose. *See* Consolidated Edison Co. v. Public Service Comm'n, 447 U.S. 530, 537 (1980) ("The First Amendment's hostility to content-based regulations extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic.").

63. 986 F.2d 1180 (8th Cir. 1993).

64. *Id.* at 1182.

tent analysis, there was no need to develop a new formula to attain the desired outcome. If the Court feels that the traditional method is flawed, it should say so directly.[65] Combining bits and pieces of balancing and content analysis, without ever openly acknowledging or disavowing the use of any of the established standards, however, leaves the continued validity of all these tests in doubt.[66] Perhaps the Court on this occasion sought to avoid another occurrence of the fragmented opinions which so often have categorized rulings on speech regulation in the past. But in sacrificing clarity of analysis, the Court's opinion leaves citizens and members of government in doubt as to the proper standards for speech restrictions. The right to free speech is too important to allow such uncertainty about how much expression is protected.

Jennifer A. Shields

65. *See* City of Ladue v. Gilleo, 114 S. Ct. 2038, 2048 (O'Connor, J., concurring) (stating that use of the traditional formula may have forced the Court to confront the weaknesses of the rule and perhaps modify it). *Cf.* Stone, *supra* note 4, at 80 ("it is time for the Court to make explicit what is already implicit in its decisions.").

66. *But see Gilleo,* 114 S. Ct. at 2048 (O'Connor, J., concurring) (claiming that the Court's approach does not "cast[ ] any doubt on the propriety of our normal content discrimination inquiry").