SUPREME COURT OF THE UNITED STATES

No. 92–1856

CITY OF LADUE, ET AL., PETITIONERS *v.*
MARGARET P. GILLEO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[June 13, 1994]

JUSTICE O'CONNOR, concurring.

It is unusual for us, when faced with a regulation that on its face draws content distinctions, to "assume, *arguendo*, the validity of the City's submission that the various exemptions are free of impermissible content or viewpoint discrimination." *Ante*, at 10. With 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. *Simon & Schuster, Inc.* v. *New York Crime Victims Board*, ___ U. S. ___, ___ [112 S. Ct. 501, 508–509 (1991)]. The normal inquiry that our doctrine dictates is, first, to determine whether a regulation is content-based or content-neutral, and then, based on the answer to that question, to apply the proper level of scrutiny. See, *e.g.*, *Burson* v. *Freeman*, ___ U. S. ___, ___ [112 S. Ct. 1846, 1850–1851] (1992) (plurality opinion); *Forsyth County, Ga.* v. *Nationalist Movement*, ___ U. S. ___, ___ [112 S. Ct. 2395, 2403–2404] (1992); *Simon & Schuster*, *supra*, at ___–___ [508–509]; *Boos* v. *Barry*, 485 U. S. 312, 318–321 (1988) (plurality opinion); *Arkansas Writers' Project, Inc.* v. *Ragland*, 481 U. S. 221, 229–231 (1987); *Carey* v. *Brown*, 447 U. S. 455, 461–463 (1980); *Police Department of Chicago* v. *Mosley*, 408 U. S. 92, 95, 98–99 (1972).

Over the years, some cogent criticisms have been leveled at our approach. See, *e.g.*, *R. A. V.* v. *City of St. Paul*, ___ U. S. ___, ___ [112 S. Ct. 2538, 2563] (1992) (STEVENS, J., concurring in the judgment); *Consolidated Edison Co. of N.Y.* v. *Public Service Comm'n of N.Y.*, 447 U. S. 530, 544–548 (1980) (STEVENS, J., concurring in the judgment); Farber, Content Regulation and the First Amendment: A Revisionist View, 68 Geo. L. J. 727 (1980); Stephan, The First Amendment and Content Discrimination, 68 Va. L. Rev. 203 (1982). And it is quite true that regulations are occasionally struck down because of their content-based nature, even though common sense may suggest that they are entirely reasonable. The content distinctions present in this ordinance may, to some, be a good example of this.

But though our rule has flaws, it has substantial merit as well. It is a rule, in an area where fairly precise rules are better than more discretionary and more subjective balancing tests. See *Hustler Magazine* v. *Falwell*, 485 U. S. 46, 52–53 (1988). On a theoretical level, it reflects important insights into the meaning of the free speech principle—for instance, that content-based speech restrictions are especially likely to be improper attempts to value some forms of speech over others, or are particularly susceptible to being used by the government to distort public debate. See, *e.g.*, *ante*, at 8–9; *Mosley*, *supra*, at 95; Stone, Content Regulation and the First Amendment, 25 Wm. & Mary L. Rev. 189 (1983). On a practical level, it has in application generally led to seemingly sensible results. And, perhaps most importantly, no better alternative has yet come to light.

I would have preferred to apply our normal analytical structure in this case, which may well have required us to examine this law with the scrutiny appropriate to content-based regulations. Perhaps this would have forced us to confront some of the difficulties with the existing doctrine; perhaps it would

have shown weaknesses in the rule, and led us to modify it to take into account the special factors this case presents. But such reexamination is part of the process by which our rules evolve and improve.

Nonetheless, I join the Court's opinion, because I agree with its conclusion in Part IV that even if the restriction were content-neutral, it would still be invalid, and because I do not think Part III casts any doubt on the propriety of our normal content discrimination inquiry.